

**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)**

Case No: 12755/2011

In the matter between:

MARIUS KLEYNHANS

First Applicant

In his capacity as Trustee for the time
being of the Kleynhans Family Trust

HEATHER KLEYNHANS

Second Applicant

In her capacity as Trustee for the time
being of the Kleynhans Family Trust

CORNERCADE (PTY) LTD

Third Applicant

SHIRLEY MILLICENT KOSTER

Fourth Applicant

TIELMAN NIEUWOUDT AGGENBACH

Fifth Applicant

and

OVERSTRAND MUNICIPALITY

Respondent

I N D E X

ITEM	DATE	DESCRIPTION	PAGE
1.	27/06/11	Notice of Motion	1-3
	19/06/11	Founding Affidavit-Marius Kleynhans	4-23
		Annexure "A" Map of Fernkloof Estate	24
		Annexure "B" Brochure of Estate	25-42
		Annexure "C" Agreement of Sale	43-207

		Annexure "D" Letter to Hermanus Golf Club	208-213
		Annexure "E" Minutes of meeting	214-221
		Annexure "F" Memorandum of Understanding	222-223
		Annexure "G" Advertisement in the "Times of Hermanus"	224
		Annexure "H" Advertisement in "Die Burger"	225
		Annexure "I" Fernkloof Estate Newsletter	226
		Annexure "J" Contractor's report	227
		Annexure "K" Memorandum of Settlement Agreement	228-233
		Annexure "L" Memorandum of Agreement	234-244
		Annexure "M" Letter to Trustees	245-247
		Annexure "N" Record of Break-inns	248
		Annexure "O" Notice in terms of s 3 of Act 40 of 2002	249-251
2.	23/06/11	Supporting Affidavit – Heather Kleynhans	252-254
3.	22/06/11	Supporting Affidavit – Minette Kleynhans	255-257
4.	23/06/11	Supporting Affidavit – Shirley Koster	258-260
5.	21/06/11	Supporting Affidavit – Tielman Agenbag	261-263
6.	28/06/11	Return of Service – Notice of Motion	264
7.	28/07/11	Court order – matter postponed to 13 May 2012	265-266
8.	08/07/11	Notice to oppose	267-268
9.	09/12/11	Filing Notice – Respondent's answering affidavit	269-270
10.	09/12/11	Answering Affidavit-Alfred Kuchar	271-323
		Annexure "ARK1" Development Plan (8 June 2011)	324
		Annexure "ARK2" Development Plan (undated)	325
		Annexure "ARK3" Plan 7209/2005	326
		Annexure "ARK4" Diagram of surrounding properties	327
		Annexure "ARK5" Schedule of affected owners of properties	328-329
		Annexure "ARK6" Amendment of Zoning Scheme	330

Annexure "ARK7" Boundary Structures Key Plan	331
Annexure "ARK8" Letter to the Chairman: Development Committee of the Hermanus Golf Club (31 January 2008)	332
Annexure "ARK9" Letter to Committee (25 February 2008)	333
Annexure "ARK10" Record of decision (11 July 2002)	334-342
Annexure "ARK11" Approval by the Department	343-347
Annexure "ARK12" Site development plan	348
Annexure "ARK13" Extract from Companies and Intellectual Property Commission	349-352
Annexure "ARK14" Deeds search report	353
Annexure "ARK15" Letter to Mr Kleynhans (18 February 2004)	354
Annexure "ARK16" List of marketing agents	355
Annexure "ARK17" Letter to Mr Kleynhans (24 November 2004)	356-357
Annexure "ARK18" Photograph of gate (Main Road)	358
Annexure "ARK19" Photograph of gate (Precinct 2)	359
Annexure "ARK20" Photograph of pedestrian gate	360
Annexure "ARK21" Terms and conditions to issuing of discs	361
Annexure "ARK22" Photograph of pedestrian gate and washing troughs	362
Annexure "ARK23" Minutes taken by Committee	363-369
Annexure "ARK24" Minutes taken by Rabcav	370-373
Annexure "ARK25" Letter from Chairman (8 June 2009)	374
Annexure "ARK26" Response to letter	375

(10 June 2009)

11.	09/12/11	Confirming Affidavit - Roydon Pybus	376-380
12.	09/12/11	Confirming Declaration – Magaretha Chin	381-382
13.	14/12/11	Filing Notice – confirming affidavit of Colin Green	383-384
14.	12/12/11	Confirming Affidavit – Colin Green	385-387
15.	15/03/12	Notice in terms of Rule 35(14)	388-394
16.	16/04/12	Respondent's reply to Applicant's Notice in terms of Rule 35(14)	395-402
17.	14/05/12	Court order – matter postponed to 7 June 2012	403-404
18.	23/05/12	Notice of Application – Motion to Strike out	405-409
19.	24/05/12	Filing Notice – Respondent's heads of argument	410-411
20.	24/05/12	Respondent's heads of argument – motion to strike out	412-421
21.	25/05/12	Filing notice – 1 st Applicant's replying affidavit	422-423
22.	07/05/12	1 st Applicant's replying affidavit	424-460
23.	28/05/12	Filing Notice – Applicant's affidavit regarding interlocutory applications and joinder	461-462
24.	28/05/12	Applicant's affidavit regarding interlocutory applications and joinder	463-477
25.	29/05/12	Notice of Application – motion to strike out	478-483
26.	04/06/12	Filing Notice – Affidavit A R Kuchar	484-485
27.	04/06/12	Affidavit – A R Kuchar	486-561
28.	05/05/12	Filing Notice – Affidavits Roydon Pybus (564-567) and Colin Green (568-569)	562-569
29.	05/06/12	Filing Notice – Affidavit Tracey Quincey	570-575
30.	05/06/12	Applicant's Heads of Argument	576-608
31.	05/06/12	Filing Notice: Respondent's Heads of Argument	609-617
32.	05/06/12	Respondent's Notice of Motion	618-620
33.	18/08/12	Court Order	621-622
34.	13/08/12	Notice of Court Order – Annexure "A"	623-628

DATED at CAPE TOWN this 13th day of August 2012

MICHAEL RANGE & ASSOCIATES



Per M Range
Attorney for the Applicant/Plaintiff
101 Warrington Place
Hermanus
7200

c/o **STRAUSS DALY ATTORNEYS**
15th Floor, The Terraces
34 Bree Street
CAPE TOWN
Tel: 021 410 2200
Ref.: LM/iv/MIC16/0001

TO: **THE REGISTRAR
HIGH COURT
CAPE TOWN**

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NO:

12755/11

In the matter between:

MARIUS KLEYNHANS
in his capacity as Trustee for the
time being of The Kleynhans Family Trust)

FIRST APPLICANT

HEATHER KLEYNHANS
in her capacity as Trustee for the
time being of the Kleynhans Family Trust

SECOND APPLICANT

CORNERCADE (PTY) LTD

THIRD APPLICANT

SHIRLEY MILLICENT KOSTER

FOURTH APPLICANT

TIELMAN NIEUWOUDT AGENBAG

FIFTH APPLICANT

AND

OVERSTRAND MUNICIPALITY

RESPONDENT

NOTICE OF MOTION

BE PLEASED TO TAKE NOTICE that MARIUS KLEYNHANS in his capacity as Trustee for the time being of The Kleynhans Family Trust, HEATHER KLEYNHANS in her capacity as Trustee for the time being of the Kleynhans Family Trust, CORNERCADE (PTY) LTD, SHIRLEY MILLICENT KOSTER, and TIELMAN NIEUWOUDT AGENBAG, (hereinafter referred to as "the Applicants") intend to make application to this Honourable Court on 27th of July 2011 or as soon after as Counsel may be heard for an order: -

1. that the Respondent be ordered to ensure that the Fernkloof Estate is fully protected by electrified fencing that is designed to prevent unauthorised access to the estate, within a period of 90 days from the date of this order, alternatively within such a period of time and in such a manner as the Court deems appropriate;

2. that condonation be granted, should it be necessary, and directing that Applicants have provided Respondent with sufficient notice in terms of Section 3 of Act 40 of 2002, for the instituting of these proceedings;
3. that the Respondent be ordered to pay the costs of this Application, only in the event of it giving notice that it intends to oppose this Application; and
4. granting such further and/or alternative relief as the Court deems appropriate.

TAKE FURTHER NOTICE that the accompanying Affidavits of **MARIUS JAKOBUS KLEYNHANS, HEATHER KLEYNHANS, MINETTE KLEYNHANS, SHIRLEY MILLICENT KOSTER AND TIELMAN NIEUWOUDT AGENBAG** will be used in support of this Application.

TAKE FURTHER NOTICE that the Applicants have appointed the offices of **Michael Range & Associates, c/o Strauss Daly Inc Attorneys, 15th Floor, The Terraces, 34 Bree Street, Cape Town**, as the address at which they will accept notice and/or service in these proceedings.

TAKE FURTHER NOTICE that if you intend opposing this Application you are required:

- (a) to notify Applicants or Applicants attorneys in writing on or before the **8th JULY 2011**; and
- (b) within 15 (Fifteen) days after you have given such notice of your intention to oppose the Application, to file your Answering Affidavits, if any.

TAKE FURTHER NOTICE that you are required to appoint in such notification an address referred in Rule 6(5)(b) at which you will accept notice and service of all documents in these proceedings.

Should no such Notice of Intention to Oppose be given, the Application will be made on the 27 JULY 2011 at 10H00 or as soon as Counsel for the Applicants may be heard.

DATED at CAPE TOWN on this 27th day of JUNE 2011.



MICHAEL RANGE & ASSOCIATES
Attorneys for Applicants
101 Warrington Arcade
4 Harbour Road
HERMANUS

c/o

STRAUSS DALY INC
15TH FLOOR
THE TERRACES
34 BREE STREET
CAPE TOWN
Ref: L Malherbe

**TO: THE REGISTRAR
HIGH COURT
CAPE TOWN**

**AND TO: OVERSTRAND MUNICIPALITY
THE RESPONDENT
MAGNOLIA STREET
HERMANUS**

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NO:

In the matter between:

MARIUS JAKOBUS KLEYNHANS
in his capacity as Trustee for the
time being of The Kleynhans Family Trust

FIRST APPLICANT

and

HEATHER KLEYNHANS
in her capacity as Trustee for the
time being of the Kleynhans Family Trust

SECOND APPLICANT

CORNERCADE (PTY) LTD

THIRD APPLICANT

SHIRLEY MILLICENT KOSTER

FOURTH APPLICANT

TIELMAN NIEUWOUTD AGENBAG

FIFTH APPLICANT

AND

OVERSTRAND MUNICIPALITY

RESPONDENT

FOUNDING AFFIDAVIT

I, the undersigned,

MARIUS JAKOBUS KLEYNHANS

do hereby make oath and say:



1 I am an adult male, businessman residing at 14 Innesbrook Village, Fernkloof Estate, Hermanus.

2 I am a Trustee for the time being of the Kleynhans Family Trust together with my wife, Heather Kleynhans. I am duly authorised to depose to this affidavit on behalf of the Trust.

3 The facts disposed to herein are within my own personal knowledge, unless the context indicates otherwise, and are, to the best of my knowledge and belief, true and correct.

4 To the extent that legal submissions are advanced, they are made on the basis of advice received from my legal representatives, which advice I believe to be true and correct.

THE PARTIES

5 I am the First Applicant in this matter acting *nomine officio* in my capacity as a Trustee for the time being of the Kleynhans Family Trust, the registered owner of erf 9967, Fernkloof Estate, Hermanus, which is located in precinct 2 of the Fernkloof Estate and is also known as No 14 Innesbrook Village, Fernkloof Estate.

6 Second Applicant is **HEATHER KLEYNHANS** an adult female of No 14 Innesbrook Villiage, Fernkloof Estate, who also acts herein *nomine officio* in her capacity as a Trustee for the time being of the Kleynhans Family Trust; the registered owner of erf 9967, Fernkloof Estate, Hermanus, which is located in



precinct 2 of the Fernkloof Estate and is also known as No 14 Innesbrook Village, Fernkloof Estate.

7 Third Applicant is **CORNERCADE (PTY) LTD** a Company duly registered in terms of the laws of the Republic of South Africa with registration number 1988/004458/07 and registered offices at 20 Hope street, Hermanus 7200 and the registered owner of erf 10131, which is located in precinct 6 of the Fernkloof Estate and also known as 60 Lakewood Village, Fernkloof Estate.

8 Fourth Applicant is **SHIRLEY MILLICENT KOSTER** an adult female of 58 Fernkloof Village, Fernkloof Estate, who acts herein in her personal capacity as registered co-owner of erf 10237, Fernkloof Estate, which is located in precinct 2 of the Fernkloof Estate and also known as 12 Innesbrook Village, Fernkloof Estate and also *nomine officio* in her capacity as a Trustee for the time being of the **E W KOSTER Family Trust**; and the registered co-owner of erf 10237, Fernkloof Estate, which is located in precinct 2 of the Fernkloof Estate and also known as 12 Innesbrook Village, Fernkloof Estate.

9 Fifth Applicant is **TIELMAN NIEUWOUDT AGENBAG** an adult male residing at 1 Lobelia street, Berghof, Onrusriver 7201 and the registered owner of erf 9977, which is located in precinct 2 of the Fernkloof Estate and also known as 1 Innesbrook Village, Fernkloof Estate.

10 The Respondent is the **OVERSTRAND MUNICIPALITY**, a municipality with legal personality in terms of the provisions of the Local Municipal Systems Act 32 of 2000, with its head office and domicilium citandi et executandi for purposes hereof situate at Magnolia Street, Hermanus, within the area of jurisdiction of the above Honourable Court ("the Municipality").

JURISDICTION

- 11 This Honourable Court has jurisdiction to hear this matter by virtue of the following:
- 11.1 The whole cause of action herein arose within the Court's area of jurisdiction; and
- 11.2 The Municipality is located within the Court's area of jurisdiction.

RELIEF CLAIMED

- 12 In this matter the Applicants seek to enforce contractual rights against the Municipality arising out of deeds of sale that they entered into with the Municipality and pursuant where to they purchased erven from the Municipality in the Fernkloof Estate.
- 13 In terms of the Deeds of Sale the Municipality is obliged to ensure that the Fernkloof Estate (and in which the applicants erven are located) is fully protected by electrified fencing that is designed to prevent unauthorised access to the Estate.
- 14 Although the Municipality has partially performed its above obligation by providing electrified fencing around a substantial part of the Estate it has,



despite demand, not yet complied with its obligation to ensure that the Estate is fully protected by electrified fencing.

- 15 The purpose of this application is to ensure that the Municipality specifically performs its aforementioned obligation and that it takes the necessary steps to protect that section of the Estate that is not yet fully protected.
- 16 Annexed hereto marked, Annexure "A" is a plan of the Fernkloof Estate that indicates the location of the different precincts within the Estate and the portion of the perimeter fencing that has been completed and the portion that has to date not yet been fully protected by electrified fencing is shown in coloured marker.
- 17 It is evident from this plan that the erf that belongs to the Kleynhans Family Trust, and where my family and I reside, is located in the precinct that is the most vulnerable due to the Municipality having failed to perform its aforementioned obligation.

BACKGROUND

- 18 The Overstrand Municipality resolved, during about the year 2000, to develop land in and around the Hermanus Golf Club into a residential estate called Fernkloof Estate.
- 19 The development entailed increasing the size of the golf course and selling erven located in seven precincts that were located in and around the golf course. The Municipality engaged the services of a development facilitator known as Rabcav to assist it in this regard.



20 In order to optimise on the development opportunity and to maximise its income from the sale of vacant erven in the Estate, the Municipality itself and through its development agent (RABCAV) and Pam Golding Estate Agents; marketed the erven as being part of a security development where residents would be ensured of a secure lifestyle in a beautiful country environment adjacent to the Hermanus Golf Club.

21 A central theme of the marketing campaign was to sell the vacant erven on the basis that they were to form part of a secure residential estate where access would be strictly controlled. Each of the precincts would have a separate manned security gate to control access to the precinct, which leads onto the golf course. The entire estate would be surrounded by electrified fencing so as to prevent unauthorised entry to the estate.

22 As explained more fully below the question of security:

22.1 received great prominence when the erven were marketed;

22.2 was highlighted in newspaper articles and in marketing material that was used to induce the public to purchase erven in the estate; and

22.3 was expressly dealt with in documents that formed an integral part of the agreement of sale.

23 One hundred of the erven were offered for sale to members of the Hermanus Golf Club of which I am a member. Prior to the conclusion of the agreement



of sale members of the Club were given very specific assurances as to how the issue of security would be dealt with.

24 The Municipality, recognising its aforementioned obligation, duly proceeded with the construction of a fence around the perimeter of the Fernkloof Estate.

25 Apparently some of the owners of properties located beyond the boundaries of the Fernkloof Estate objected to having a fence adjacent to their properties and threatened the Municipality with court action.

26 The Municipality then sought various ways of ridding itself of its obligation to complete the fence. These included attempts to pass its fencing obligations onto the Hermanus Golf Club and later onto the Fernkloof Estate Property Owners Association (FEMPOA).

27 The Municipality was prepared to pay large sums of money to these bodies in lieu of their obligation to provide the necessary fencing in exchange for indemnities in respect of claims by the owners of erven in the Estate.

28 Neither the Hermanus Golf Club nor FEMPOA were however prepared to assume this responsibility making this application the only means by which the Applicants can now secure the rights that they were promised by the Municipality when they purchased erven in the Fernkloof Estate.

29 It will also appear from what follows that our family has been severely prejudiced by the Municipality's failure to provide the promised security. Not only have we lost assets as a result of break-ins but we also presently live in an environment of constant concern for the safety of our loved ones. An



environment that is very different to the one that was promised when our family trust decided to purchase an erf in the Fernkloof Estate and we decided to live there.

SALE OF ERVEN

30 The sale by the Overstrand Municipality of erven in the Fernkloof Estate was done by way of a special kind of 'auction' held at the premises of the Hermanus Golf Club during December 2004.

31 The 'auction' was preceded by a two-day registration period during which interested parties could register as potential purchasers. Each person that registered was provided with an information brochure, containing a price list of the properties, maps of the estate and precincts and other relevant information. A copy of this brochure is annexed hereto marked Annexure "B".

32 On the day of the auction names were sequentially drawn and announced where after the purchaser concerned was taken to a tent and shown a model of the Fernkloof Estate and asked to select a plot. I duly selected erf 9967 in Precinct 2 on behalf of the Kleynhans Family Trust.

33 Purchasers were then escorted to various attorneys in different sections of the same tent, depending on the precinct in which the plot that they had selected was located.

34 The attorneys then issued the purchasers with a bundle of documents entitled "Agreement of Sale" and that the purchasers were required to sign.



The Agreement of Sale identified the Municipality as the seller of the erven and provided space for the identity of the purchaser to be inserted.

35 A copy of the Agreement of Sale that I signed is annexed hereto and marked Annexure "C".

36 As appears from page 11 of Annexure "C":

36.1 On 1 December 2004 and at Hermanus, I duly signed Annexure "C" as the duly authorised representative of the Kleynhans Family Trust as the purchaser of erf 9967 in precinct 2;

36.2 On 22 November 2005 and also at Hermanus, Annexure "C" was duly signed on behalf of the Overstrand Municipality as the seller of the said erf. I am presently not aware of the identity of the Overstrand Municipality's authorised signatory;

36.3 The purchase price of the erf in question was R1, 100,000 (which the Kleynhans Family Trust has since paid).

TERMS OF AGREEMENT OF SALE

37 Paragraph 1.2 of the Signature Document which forms part of the Agreement of Sale, Annexure "C", records that:

" The sale in terms of this agreement shall be subject to the provisions contained in this signature document, read together with the



information schedule appearing in front of this signature document and the sub-division plan annexed to this signature document as annexure "A", and all terms and conditions contained in the standard conditions of sale including all annexures thereto, which standard conditions of sale form an integral part of this agreement and which the Purchaser acknowledges and agrees to have read and the contents of which the Purchaser fully understands and accepts."

[Emphasis added]

38 The first page of the standard conditions of sale states that:

"The Standard Conditions of Sale and the Annexures hereto form an integral part of the Agreement of Sale."

39 In paragraph 1.4 of the standard conditions of sale the following is recorded under the heading "INTERPRETATION":

"Reference to this agreement shall mean this Agreement of Sale and shall include part 1 and part 2 of the Agreement of Sale and all annexures thereto.

40 Of particular importance for the purposes of this application are:

40.1 Annexure A to the standard conditions of sale, being the "Plan of Land Comprising Fernkloof Estate Development", and that indicates



the perimeter of the Estate in a broken line. It is dated 23 September 2004 and is entitled "*COMBINED PLAN OF SUBDIVISION OF CONSOLIDATED PROPERTY*";

40.2 Clause 8 of Annexure G to the standard conditions of sale, identified in the schedule as "*Estate Rules*", and which provides as follows:

"8.1 A central feature to the quality of life at the Fernkloof Estate is security. The Estate is fully protected by electrified fencing that is designed to prevent unauthorised access to the Estate.

8.2 An important element of a secure lifestyle is that of prevention and deterrence..."

40.3 Paragraph 3.6 (a) (i) of Annexure F which confirmed that "*the development is located in a secure and controlled environment....*" and enjoins contractors to adhere to certain security requirements during the construction of dwellings on the Fernkloof Estate.

41 The aforementioned provisions, which formed an integral part of the Agreement of Sale, makes it clear that the Fernkloof Estate would be fully protected by electrified fencing designed to prevent unauthorised access to the Estate.

42 This provision echoed many representations made by the Municipality and its duly authorised representatives and induced many of the purchasers

A handwritten signature and initials are located in the bottom right corner of the page. The signature is a large, stylized cursive mark, and the initials are a smaller, more legible mark to its right.

including all of the Applicants to acquire erven from the Municipality on the basis that safety and security of person and property would be one of the main benefits to be enjoyed by the purchasers of erven in the Fernkloof Estate.

REPRESENTATIONS MADE PRIOR TO THE CONCLUSION OF THE AGREEMENTS OF SALE

- 43 The earliest communication regarding the fencing of the Fernkloof Estate of which I am aware is contained in an annexure to an undated letter that was sent to the Hermanus Golf Club by CAVCOR, a joint venture partner of RABCAV, a copy of which I annex hereto-marked Annexure "D".

The third paragraph under the heading *Concept* reads:

"To pitch the product at the correct market level and satisfy current demand, the entire estate is to be fenced along the perimeter with controlled entry points, thus ensuring security and correct branding". [Emphasis added]

- 44 On 22 March 2001 a meeting was held between the development facilitator and a community committee of Hermanus at the Fernkloof Botanical Gardens. A copy of the minutes of the meeting is annexed and marked Annexure "E".

Paragraph 9 records:



"A market already exists for the products which are proposed. An unique lifestyle is promoted in a secure environment, which provides for a mix of residential erf sizes." [Emphasis added]

- 45 On 24 November 2003 a Memorandum of Understanding was concluded between RABCAV and the Hermanus Golf Club. As a member of the club I received a copy of thereof. A copy is annexed hereto marked, Annexure "F".

Paragraph 8 records:

"Perimeter wall with palisade fencing around entire golf course estate approximately 7.6 km in length."

- 46 On 19 November 2004 a full page advertisement appeared in the "Times of Hermanus" the local newspaper of Hermanus where the launch of the Fernkloof Estate was advertised and promoted. The introductory paragraph of this advert reads as follows:

"Introducing a one-off opportunity – the chance to buy a plot in the unmatched natural beauty and security of Fernkloof Estate, home of the Hermanus Golf Club." [Emphasis added]

A copy of the aforesaid advertisement is attached hereto and marked Annexure "G".

- 47 On the 20th November 2004 an advertisement appeared in the daily newspaper, Die Burger, where the Fernkloof Estate was similarly marketed



and promoted. A copy of the aforesaid advertisement is attached herewith marked Annexure "H".

The advertisement states:

"Ons stel 'n eenmalige geleentheid bekend – die kans om 'n erf in die unieke, natuurlike skoonheid en sekuriteit van Fernkloof Estate te koop, die tuiste van die Hermanus Golf Klub".

[Emphasis added]

- 48 The bundle of marketing documents that was given to the public when they registered as potential buyers before the sale states in its introduction:

"Introducing a unique opportunity – the chance to live and play in the unmatched natural beauty and security of the Hermanus Golf Course"

[Emphasis added]

- 49 A copy of the aforesaid bundle and the documents contained therein is attached herewith marked Annexure "B".

- 50 One of the items contained in the aforesaid bundle is a map of the Fernkloof Estate, showing a walled perimeter right around the estate in an unbroken line. This confirms that it was always intended for the Fernkloof Estate to be secured around its perimeter.

- 51 This bundle furthermore contains a document titled "Salient Terms and Conditions of Sale". The Honourable Court is respectfully referred to Paragraphs 7.1 and 15.1 thereof which confirms that the FEMPOA and the

Precinct Property Owners Associations (POA) will respectively be responsible for the "management and control" of "external perimeter walls and fences" and "perimeter fences" which obviously pre-supposes that such security measures will be constructed as part of the development.

STEPS TAKEN BY MUNICIPALITY TO SECURE THE FERNKLOOF ESTATE

- 52 In the first Fernkloof Estate Newsletter, published by RABCAV in February 2006, and annexed hereto marked, Annexure "I".

It is recorded that:

"Palisade fencing – Construction of the palisade fencing and walling to secure Fernkloof Estate will start in February with work expected to be completed by the year end."

- 53 The security gates and a portion of the security fence have been constructed along a portion of the perimeter of the estate. Although work in this regard was still being done in late 2010, as indicated on the plan (Annexure A) a portion of the fence remains outstanding and the security of the estate is presently still compromised. In this regard I annex hereto marked, Annexure "J", a copy of a report from an electric fencing contractor that is self-explanatory.
- 54 I have been told and verily believe that construction of the outstanding portions of the fence has been discontinued due to objections by certain



existing owners of land bordering on the golf course and that are not a part of the development.

55 The Overstrand Municipality has tried to prevail upon both the Hermanus Golf Club as well as the Fernkloof Estate Master Property Owners Association to take over its responsibility to complete the fencing of the Fernkloof Estate against payment of substantial sums of money. In this regard I annex hereto marked,

55.1 Annexure "K", which is a copy of a document headed *MEMORANDUM OF SETTLEMENT AGREEMENT* that was signed on behalf of the Overstrand Municipality on 19th May 2009 and sets out the basis on which it tried to reach agreement with the Hermanus Golf Club; and

55.2 Annexure "L", which is a copy of a document headed *MEMORANDUM OF AGREEMENT* that was signed on behalf of the Overstrand Municipality on 19th May 2009 and which sets out the basis on which it tried to reach agreement with FEMPOA.

56 It bears emphasis that in the pre-amble to Annexure "L" the Overstrand Municipality acknowledges its responsibility to fence the entire development and that there are unfenced areas that pose a security risk to the Fernkloof Estate.

57 Neither the Hermanus Golf Club nor FEMPOA are prepared to take responsibility for the Overstrand Municipality's responsibility to erect the rest



of the fencing. They have both declined to sign the agreements on the basis proposed by the Overstrand Municipality.

- 58 During September 2010, the Chairman of FEMPOA, Mr. I Krige wrote a letter to all the Trustees of the various precincts in Femkloof Estate, providing follow-up information of further discussions with the Overstrand Municipality. I received the correspondence as a Trustee of Innesbrook Village. A copy of the aforesaid letter is attached herewith, marked Annexure "M". Other than the work that is referred to in this letter, nothing further has been done by the Overstrand Municipality to secure the perimeter fencing of the Femkloof Estate.

SECURITY BREACHES

- 59 Property owners and/or residents of the Femkloof Estate as well as the Hermanus Golf Club have at various times during this unresolved process to finalise the fencing of the Femkloof Estate, advised the development facilitator and the Overstrand Municipality of various breaches in security which occurred on the estate.
- 60 A record of break-ins on the Estate is being kept by FEMPOA and since July 2009 there have been 14 incidents of security breach on the Estate, of which FEMPOA has knowledge. A copy of the aforesaid record is attached herewith marked Annexure "N".

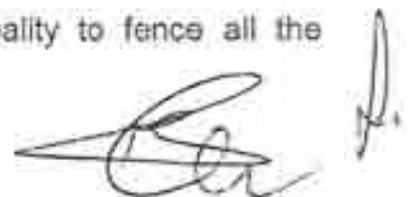


61 As mentioned our family has also been victims of a serious breach of security at Innesbrook Village. On 24 July 2009 a break-in occurred at our residence while my wife, three daughters and I were asleep on the top floor of our double storey residence. Valuables and items on the ground floor were stolen; including my laptop, safety deposit box, sunglasses and other valuables. The police were unsuccessful in making any arrests in the case. The events so traumatised my family that my three minor daughters had to go for counselling.

62 I am a businessman with business interests in South Africa, Namibia and all over the world. As a result, I am often away from home for long periods of time. The security of my home and the neighbourhood where my wife and children live is of the utmost importance and my highest priority. I need my family to be safe and the longer the Overstrand Municipality fails to provide the security it promised, the more chance exists for life threatening crime being committed on the Estate.

63 The Kleynhans Family Trust bought property in the Fernkloof Estate at a premium as it was always marketed and promoted as a safe and secure environment to live in. To be robbed and personal property stolen in this so-called safe and secure environment is totally unacceptable to me and I regard this as a direct result of the un-secure perimeter of the Fernkloof Estate.

64. As a result of the aforesaid, the Kleynhans Family Trust has resolved to institute legal action against the Overstrand Municipality to fence all the



remaining boundaries of the estate by means of electrified fencing in such a way as to ensure that the secure lifestyle, which was promised, is delivered.

NOTICE OF INTENDED LEGAL ACTION

- 65 Notice in terms of Section 3 of Act 40 OF 2002 was duly served on the Municipality on the 23 November 2010 putting it on terms as set out therein. A copy of the notice is attached herewith marked Annexure "O".
- 66 The Applicants' attorneys have not received any response from the Overstrand Municipality, nor an acknowledgement that the aforesaid notice was received or is being considered.

COURT'S DISCRETION

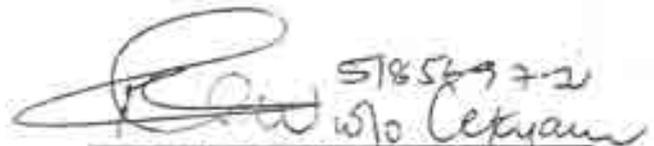
- 67 I have been advised that the Court has discretion to grant specific performance and I request that it do so. There is no other relief that the Kleynhans Family Trust can ask for to secure the safety of our family. A Court order to complete the fence is readily attainable and will ensure that the Respondent complies with his responsibilities.
- 68 I, therefore, humbly request that the Honourable Court grant the relief as set out in the Notice of Motion accompanying this affidavit.

A handwritten signature in black ink, appearing to be 'R. A.', located at the bottom right of the page.

 23

M J KLEYNHANS

I hereby certify that on this 19th day of June 2011 in my presence at Hermanus the Deponent declared that he knew and understood the contents of this affidavit, no objection to taking the oath, and that he considered the oath as binding on his conscience.


51856972
w/o Cetyana
COMMISSIONER OF OATHS

SUID-AFRIKAANSE POLISIEDIENS
GEMEENSKAPDIENSBENTRUM
19 JUN 2011
COMMUNITY SERVICE CENTRE
HERMANUS
SOUTH AFRICAN POLICE SERVICE

FULL NAME: G. Cetyana

RANK: w/o

NUMBER: 51856972

STATION: HERMANUS S.A.P.S.

9 A 24

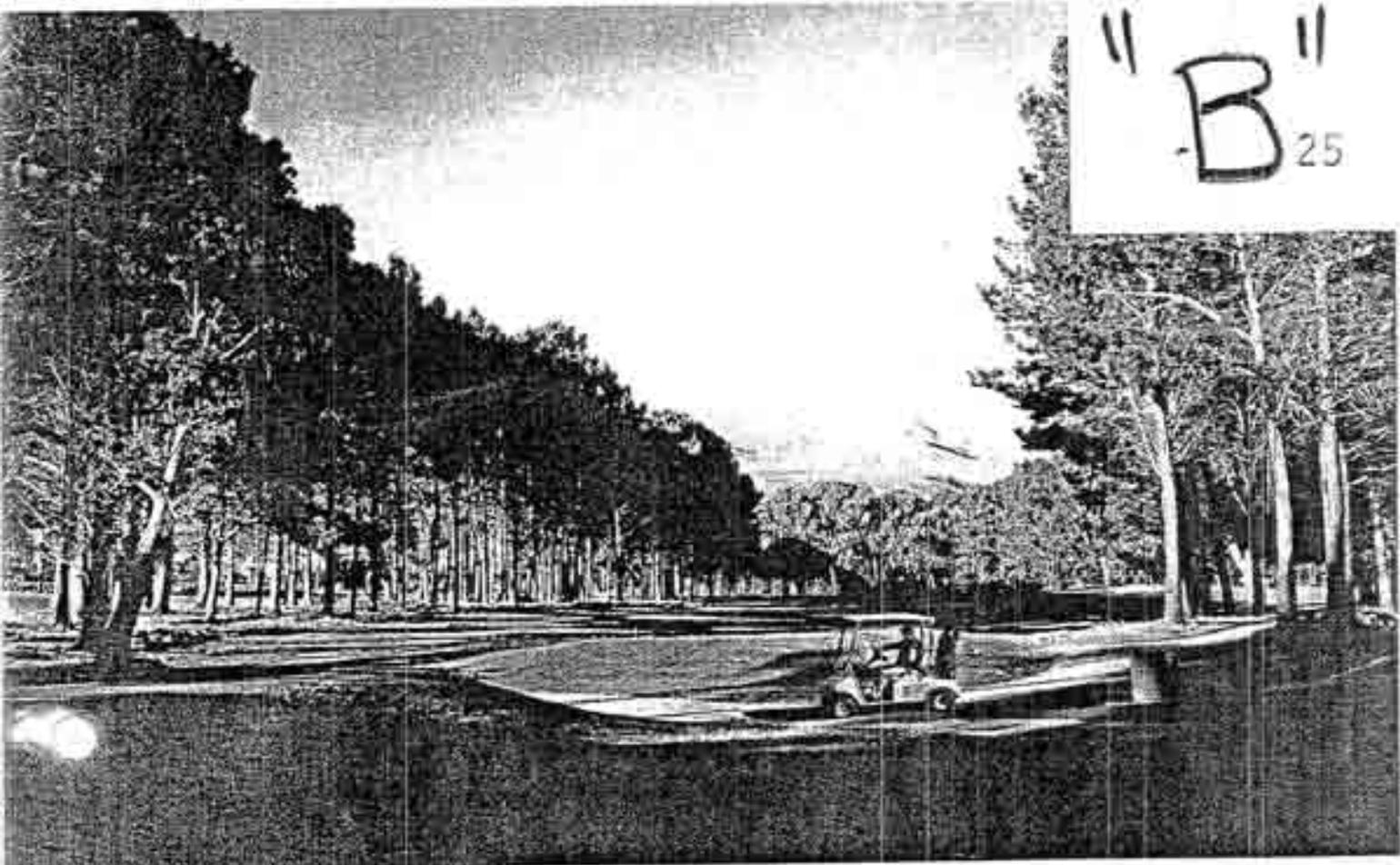
NO ELEZTRIFIED FENCING



2000
SUNSHINE BLVD
SUNSHINE DR
SUNSHINE WAY



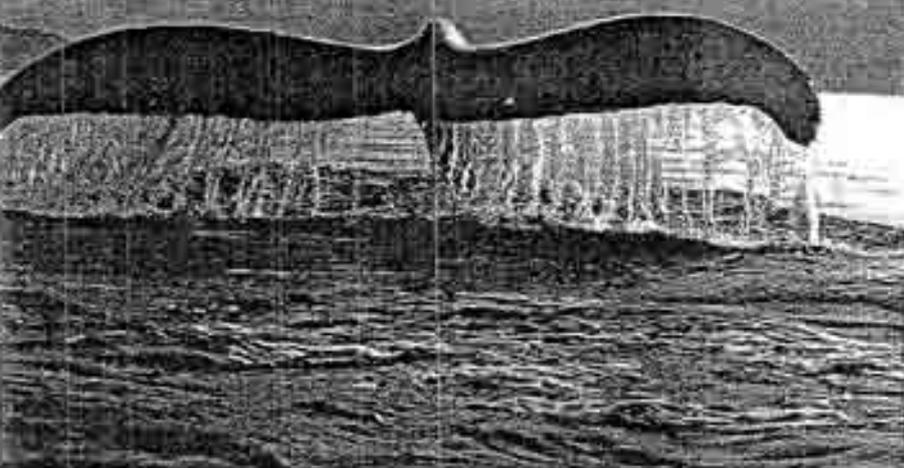
"B"
25



AN
OPPORTUNITY
AS RARE AS
A HOLE IN ONE



[Handwritten signature]



Introducing a one-off opportunity – the chance to buy a plot in the unmatched natural beauty and security of Fernkloof Estate, home of the Hermanus Golf Club



After years of careful planning and environmental research, approval has been granted for the addition of a further nine holes at the Hermanus Golf Course. Golf design gurus Matkovich & Hayes are transforming this much-loved establishment – one of the oldest in the country – into a 27-hole championship course.



At the same time, residential stands ranging in size from 550 to 1500 square metres are being released in six individual precincts, each meticulously integrated into the topography of the area and the layout of the course. A limited number of golf club memberships will also be available for purchase.



Hermanus, voted the cleanest town in South Africa in 2003, offers the best land-based whale-watching in the world. With its warm safe beaches, wonderful walks and great restaurants, it is also one of the country's favourite summer holiday spots.

GOLF ESTATE PLOTS FROM R600 000

(incl VAT)



[Handwritten signature]

[Faint vertical text on the right margin, possibly a title block or index, mostly illegible]

Fernkloof Estate

Precinct 1

Erf 9937

No.	Erf No.	Size (m ²)	Price (ZAR)
1	9947	595	640,000.00
2	9948	595	700,000.00
3	9950	595	730,000.00
4	9951	595	670,000.00
5	9952	595	670,000.00
6	9953	595	790,000.00

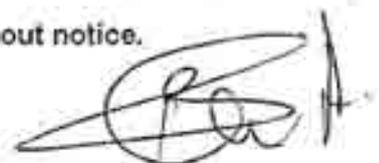
Fernkloof Estate

Precinct 2

Erf 9938

No.	Erf No.	Size (m ²)	Price (ZAR)
1	9977	542	500,000.00
2	9954	556	850,000.00
3	9955	600	930,000.00
4	9956	600	930,000.00
5	9957	600	950,000.00
6	9959	600	950,000.00
7	9960	600	950,000.00
8	9961	600	950,000.00
9	9962	600	950,000.00
10	9963	600	950,000.00
11	9964	600	950,000.00
12	9965	624	1,000,000.00
13	9966	679	1,250,000.00
14	9967	848	1,100,000.00
15	9968	668	590,000.00
16	9969	618	690,000.00
17	9970	631	640,000.00
18	9971	600	640,000.00
19	9972	625	640,000.00
20	9973	568	640,000.00
21	9974	588	640,000.00
22	9975	545	590,000.00

Note: All prices are inclusive of VAT and are subject to change without notice.



Fernkloof Estate

Precinct 5

Erf No. 9939

No	Erf No.	Size (m ²)	Price (ZAR)	No	Erf No.	Size (m ²)	Price (ZAR)
1	9979	1054	630,000.00	51	10020	714	500,000.00
2	9980	1153	500,000.00	52	10021	740	500,000.00
3	9981	1172	600,000.00	53	10022	639	500,000.00
4	9982	927	750,000.00	54	10023	600	500,000.00
5	9983	795	700,000.00	55	10024	600	500,000.00
6	9984	795	700,000.00	56	10025	600	500,000.00
7	9985	795	700,000.00	57	10026	600	500,000.00
8	9986	795	700,000.00	58	10027	600	500,000.00
9	9987	941	700,000.00	59	10028	630	500,000.00
10	9988	785	830,000.00	60	10029	625	500,000.00
11	9989	675	860,000.00	61	10030	640	500,000.00
12	9990	600	880,000.00	62	10031	665	550,000.00
13	9991	600	880,000.00	63	10032	622	550,000.00
14	9992	600	880,000.00	64	10033	817	600,000.00
15	9993	600	880,000.00	65	10034	750	600,000.00
16	9994	638	880,000.00	66	10035	705	600,000.00
17	9995	729	920,000.00	67	10036	634	600,000.00
18	9996	659	880,000.00	68	10037	844	650,000.00
19	9997	793	950,000.00	69	10038	910	650,000.00
20	9998	740	900,000.00	70	10039	716	700,000.00
21	9999	777	880,000.00	71	10040	680	600,000.00
22	10000	601	500,000.00	72	10041	818	600,000.00
23	10001	1052	870,000.00	73	10042	600	550,000.00
24	10002	631	550,000.00	74	10043	600	550,000.00
25	10003	656	580,000.00	75	10044	593	550,000.00
26	10048	602	650,000.00	76	10045	673	570,000.00
27	10047	590	600,000.00	77	10046	702	620,000.00
28	10049	571	580,000.00				
29	10056	575	550,000.00				
30	10050	550	580,000.00				
31	10055	575	550,000.00				
32	10051	550	580,000.00				
33	10054	634	580,000.00				
34	10052	529	550,000.00				
35	10053	694	620,000.00				
36	10004	660	850,000.00				
37	10005	660	870,000.00				
38	10006	625	870,000.00				
39	10007	693	870,000.00				
40	10008	632	650,000.00				
41	10009	573	600,000.00				
42	10011	675	600,000.00				
43	10012	600	650,000.00				
44	10013	690	920,000.00				
45	10014	664	940,000.00				
46	10015	628	940,000.00				
47	10016	815	940,000.00				
48	10017	666	650,000.00				
49	10018	600	500,000.00				
50	10019	600	500,000.00				

Note: All prices are inclusive of VAT and are subject to change without notice.

Handwritten signature and initials in the bottom right corner of the page.

Fernkloof Estate Precinct 6

Erf 9940

30

No	Erf No.	Size (m ²)	Price (ZAR)	No	Erf No.	Size (m ²)	Price (ZAR)
1	10078	647	1,250,000.00	51	10082	651	920,000.00
2	10077	652	1,100,000.00	52	10081	651	920,000.00
3	10076	732	1,250,000.00	53	10080	857	970,000.00
4	10075	715	1,250,000.00	54	10138	672	920,000.00
5	10074	647	980,000.00	55	10139	672	800,000.00
6	10073	647	980,000.00	56	10140	672	800,000.00
7	10072	647	980,000.00	57	10141	672	830,000.00
8	10071	647	980,000.00	58	10142	672	830,000.00
9	10070	647	980,000.00	59	10143	672	800,000.00
10	10069	647	980,000.00	60	10144	728	780,000.00
11	10068	647	1,050,000.00	61	10145	702	800,000.00
12	10066	647	1,050,000.00	62	10146	670	870,000.00
13	10065		980,000.00	63	10147	706	900,000.00
14	10064	647	980,000.00	64	10148	728	900,000.00
15	10063	647	980,000.00	65	10149	665	920,000.00
16	10062	702	980,000.00	66	10150	653	920,000.00
17	10061	651	960,000.00	67	10151	653	970,000.00
18	10060	651	960,000.00	68	10124	672	750,000.00
19	10059	664	960,000.00	69	10125	724	700,000.00
20	10058	790	1,100,000.00	70	10123	1026	1,250,000.00
21	10114	885	1,150,000.00	71	10122	1099	1,250,000.00
22	10113	725	920,000.00	72	10130	798	600,000.00
23	10112	651	920,000.00	73	10129	877	600,000.00
24	10111	651	920,000.00	74	10128	899	700,000.00
25	10110	651	920,000.00	75	10127	758	600,000.00
26	10109	651	920,000.00	76	10128	810	600,000.00
27	10108	651	920,000.00	77	10115	843	700,000.00
28	10107	651	920,000.00	78	10116	668	600,000.00
29	10106	651	920,000.00	79	10117	767	600,000.00
30	10105	651	980,000.00	80	10118	669	600,000.00
31	10103	651	980,000.00	81	10119	672	600,000.00
32	10102	735	920,000.00	82	10120	672	600,000.00
33	10101	777	950,000.00	83	10121	671	750,000.00
34	10100	719	920,000.00	84	10131	672	1,000,000.00
35	10099	649	920,000.00	85	10132	672	950,000.00
36	10098	649	920,000.00	86	10133	672	950,000.00
37	10097	715	880,000.00	87	10134	672	950,000.00
38	10096	809	900,000.00	88	10135	672	950,000.00
39	10095	634	920,000.00	89	10136	901	1,000,000.00
40	10094	635	920,000.00	90	10137	946	1,000,000.00
41	10093	645	920,000.00				
42	10092	664	920,000.00				
43	10091	705	920,000.00				
44	10090	838	970,000.00				
45	10089	754	950,000.00				
46	10088	651	920,000.00				
47	10087	651	920,000.00				
48	10086	651	920,000.00				
49	10085	651	950,000.00				
50	10083	651	950,000.00				

Note: All prices are inclusive of VAT and are subject to change without notice.

Fernkloof Estate precinct 7

Erf 9941

No.	Erf No.	Size (m ²)	Price (ZAR)
1	-	-	-
2	10154	600	750,000.00
3	10155	600	750,000.00
4	10156	600	750,000.00
5	10157	600	800,000.00
6	10158	600	750,000.00
7	10159	600	750,000.00
8	10160	600	750,000.00
9	10161	609	750,000.00
10	10162	609	750,000.00
11	10163	615	800,000.00
12	10164	794	1,100,000.00
13	10165	634	980,000.00
14	10166	613	980,000.00
15	10167	605	980,000.00
16	10168	611	980,000.00
17	10169	616	980,000.00
18	10170	615	980,000.00
19	10171	608	980,000.00
20	10172	628	980,000.00
21	10173	608	980,000.00
22	10174	603	980,000.00
23	10176	645	950,000.00
24	10175	611	580,000.00
25	10177	654	950,000.00
26	10178	615	580,000.00
27	10179	663	650,000.00
28	10180	717	950,000.00
29	10181	608	950,000.00
30	10182	624	950,000.00
31	10183	623	950,000.00
32	10184	610	980,000.00
33	10185	734	1,000,000.00
34	10186	643	750,000.00
35	10187	650	750,000.00
36	10188	696	700,000.00
37	10189	639	650,000.00
38	10190	617	600,000.00
39	10191	614	600,000.00
40	10192	620	700,000.00

Note: All prices are inclusive of VAT and are subject to change with




Fernkloof Estate Precinct 8 & 9

Erf 9943

32

No	Erf No.	Size (m ²)	Price (ZAR)	No	Erf No.	Size (m ²)	Price (ZAR)
1	10207	1509	1,100,000.00	51	10268	773	650,000.00
2	10208	1512	980,000.00	52	10268	648	750,000.00
3	10209	1500	1,100,000.00	53	10265	682	580,000.00
4	10210	1520	1,100,000.00	54	10264	645	670,000.00
5	10211	1500	1,100,000.00	55	10263	655	670,000.00
6	10212	1518	1,100,000.00	56	10262	655	670,000.00
7	10213	1508	1,100,000.00	57	10261	655	670,000.00
8	10214	1512	1,100,000.00	58	10260	655	670,000.00
9	10215	1500	1,100,000.00	59	10259	655	670,000.00
10	10216	1500	1,100,000.00	60	10258	655	670,000.00
11	10217	1530	1,500,000.00	61	10257	665	670,000.00
12	10218	1526	1,300,000.00	62	10256	670	700,000.00
13	10219	1507	1,200,000.00	63	10255	672	850,000.00
14	10220	1513	1,100,000.00	64	10254	663	700,000.00
15	10221	1507	950,000.00	65	10253	668	650,000.00
16	10222	1527	950,000.00	66	10252	650	650,000.00
17	10223	1507	950,000.00	67	10251	650	650,000.00
18	10224	1507	900,000.00	68	10250	656	650,000.00
19	10225	1515	900,000.00	69	10249	650	650,000.00
20	10226	1507	900,000.00	70	10248	650	650,000.00
21	10227	1507	900,000.00	71	10247	650	650,000.00
22	10228	1507	900,000.00	72	10246	650	650,000.00
23	10229	1516	900,000.00	73	10245	650	650,000.00
24	10230	1506	900,000.00	74	10244	650	650,000.00
25	10231	1507	900,000.00	75	10243	670	650,000.00
26	10232	1507	900,000.00	76	10291	671	700,000.00
27	10233	1507	900,000.00	77	10290	722	650,000.00
28	10234	1500	900,000.00	78	10289	722	650,000.00
29	10235	1522	800,000.00	79	10288	722	700,000.00
30	10236	1537	800,000.00	80	10238	822	680,000.00
31	10237	1503	800,000.00	81	10239	840	700,000.00
32	10267	650	700,000.00	82	10240	840	700,000.00
33	10266	650	600,000.00	83	10241	840	700,000.00
34	10265	668	600,000.00	84	10242	740	680,000.00
35	10264	673	650,000.00	85	10193	788	730,000.00
36	10263	650	650,000.00	86	10194	743	780,000.00
37	10262	680	650,000.00	87	10195	758	780,000.00
38	10261	650	650,000.00	88	10196	770	780,000.00
39	10260	650	650,000.00	89	10197	770	780,000.00
40	10279	650	650,000.00	90	10198	770	780,000.00
41	10278	646	650,000.00	91	10199	770	780,000.00
42	10277	650	650,000.00	92	10200	770	780,000.00
43	10276	657	680,000.00	93	10201	770	780,000.00
44	10275	660	650,000.00	94	10202	770	780,000.00
45	10274	653	630,000.00	95	10203	770	780,000.00
46	10273	635	630,000.00	96	10204	770	780,000.00
47	10272	640	630,000.00	97	10205	770	780,000.00
48	10271	650	630,000.00	98	10206	770	780,000.00
49	10270	650	630,000.00				
50	10269	670	630,000.00				

Note: All prices are inclusive of VAT and are subject to change without notice.

SALIENT TERMS AND CONDITIONS OF SALE

The Development Concept

1. Fernkloof Estate is being developed by the Overstrand Municipality who have appointed RABCAV as the development facilitators to manage and oversee the development process.
2. Fernkloof Estate ("the Estate") shall comprise of 8 precincts situated on and around the Hermanus golf course, each of which are to be named at a later stage.
3. Precincts 3 and 4 are envisaged to be sectional title developments and are not available for sale at this stage.
4. Precinct 1 will consist of 6 single residential erven which will each have their own roadside entrances and will accordingly not form their own Precinct Property Owner's Association ("POA"). Owners of these erven will be obliged to become members of the Fernkloof Estate Master Property Owner's Association ("the MPOA") only.
5. Precincts 2, 5, 6, 7, 8 and 9 shall consist of single residential erven each of which shall have their own POA and owners of erven within these precincts shall be obliged to be members of such POA's and also to be members of the MPOA.
6. The MPOA which will have as it's members, each Precinct Property Owner's Association, each of the precinct 3 and 4 body corporates and each of the owners of the erven in precinct 1. The MPOA being the umbrella body responsible for the common interest of the Estate.

The Fernkloof Estate Master Property Owner's Association

7. The MPOA will be responsible for the management and control of :-
 - 7.1 the external perimeter walls and fences and control rooms (excluding walls, fences and control rooms on the perimeter of each POA);
 - 7.2 access to the Estate (excluding access to each precinct);
 - 7.3 the relevant common areas; and
 - 7.4 compliance with the design guidelines.
8. The MPOA will appoint a managing agent to manage the common areas and to collect levies and an estate manager to control and manage all building works in the estate.
9. A levy will be payable by each of the POA's to the MPOA.

Handwritten signature and initials in the bottom right corner of the page.

Building in the Estate

10. All building plans are to comply with the design guidelines and are to be submitted to the trustees of the MPOA for approval prior to submission to the relevant council authority for their approval.
11. Building contractors retained by purchasers will be required to enter into an agreement with the MPOA to regulate the conduct of their works within the estate. Such builders will be required to comply with the provisions of the Contractor's Agreement before entrance to the Estate will be afforded to them. Builders who furthermore contravene any provision of the Contractor's Agreement may be penalized or may be refused further access to the Estate until such time as the contravention has been rectified.
12. Members shall be obliged to complete building their dwellings within three years after registration of transfer of the relevant erf from the Council provided further that building works shall be completed within one year after commencement thereof failing which penalty levies of 4 times the applicable monthly levy shall be charged to the relevant owner.

Estate Rules

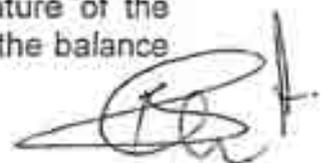
13. The conduct of persons within the Estate will be governed by rules which will be enforced by either the MPOA or the POA's as the case may be in accordance with the provisions of the Estate Rules.

The Precinct Property Owners Associations

14. Precincts 2, 5, 6, 7, 8 and 9 will each have their own POA having as their respective members all owners of erven within such precincts.
15. The relevant POA's shall be responsible for the management and control of :-
 - 15.1 all common buildings, structures, perimeter fences, private open spaces and private roads, landscaping and irrigation of common areas within their relevant precinct and access thereto;
 - 15.2 security within the relevant POA;
 - 15.3 refuse removal; and
 - 15.4 compliance with the design guidelines.
16. Each property owner will pay a monthly levy to the POA to meet the expenses of the POA.

Purchasing erven within the Estate

17. Purchasers will be required to pay a 20% deposit on signature of the Agreement of Sale and to furnish a guarantee for payment of the balance



of the purchase price within 30 days of being requested to do so by the conveyancing attorneys.

18. Although the Agreement of sale will not be subject to a bond being granted to the purchaser, purchasers wishing to finance their purchase of the relevant erf within the Estate will be obliged to submit their application for finance through the development mortgage originator, namely mortgagesa.com.
19. The purchase of erven within the Estate shall be subject to the relevant subdivisional and rezoning approvals being given by the relevant authorities and the Developer being satisfied with the viability of the development both of which conditions are to be complied with within 180 days of signature of the Agreement of Sale by the Purchaser. The Developer shall be entitled to extend this period for an additional 180 days should it be required.
20. Purchasers will not receive automatic membership to the golf club and will be required to apply for membership and comply with the golf club's requirements for admission as members including payment of the relevant entrance fee. The golf club has created 300 memberships for owners of properties within the Estate of which 240 memberships will be available initially for owners within the Estate. If an owner sells his/her property, he/she automatically resigns as a member and the new property owner will be entitled to apply for membership subject to availability.
21. The signature of the Agreement of Sale by the Purchaser shall constitute an offer to purchase by the Purchaser which shall be irrevocable and open for acceptance by the Seller until such time as the conditions mentioned in paragraph 18 above have been complied with.
22. In order to ensure that the requirements of the Local Government: Municipal Finance Management Act, Act No. 58 of 2003, have been met, the Seller has determined that in the event of third persons, who have registered to purchase erven in the development, ("the second Purchaser") offering to purchase an erf within the Estate at a price higher than already achieved, that the Purchaser shall be afforded an opportunity to match or better such offer within seven days of having been notified by the Developer of such offer failing which such erf shall be sold to the second Purchaser and the first Purchaser shall be refunded his deposit.
23. The second Purchaser shall be required to contain his offer in the Agreement of Sale with his deposit cheque attached thereto. Such second offer shall be required to be made within 7 days of signature of the first offer by the first Purchaser, failing which no further offers shall be considered in respect of such erf.

Disclaimer: It is recorded that this document is for information purposes only and does not constitute an offer to purchase or sell any property within the Estate. The sale of property within the Estate is subject to terms and conditions contained in the written deed of sale to be signed by both parties.





RULES RELATING TO THE PURCHASE OF ERVEN IN THE FERNKLOOF GOLF ESTATE

1. Potential purchasers are required to register by completing the duplicate registration form. The original is to be retained by the signatory and presented at the time of purchase.
2. The registration form requires the name and ID/ registration number of the purchaser (individual or entity). It also requires the name and ID number of the authorised signatory if different from the purchaser.
3. When purchasing on behalf of a company, close corporation or trust, the signatory must be duly authorised and provide a resolution to that effect. (The resolution must be available in order to register and sign the Deed of Sale).
4. When purchasing on behalf of an individual, the signatory must provide a valid Power of Attorney. (The Power of Attorney must be available in order to register and sign the Deed of Sale.)
The registration form is not transferable to any other person or entity. The name of the purchaser on the registration form must correspond to the name of the purchaser on the Deed of Sale.
6. No individual under the age of 21 may purchase a property.
7. No nominations are permitted.
8. Any individual or entity that is found to have registered more than once will be disqualified from the process. This applies to individuals who have interests in multiple entities.
9. Any individual may only purchase one property whether purchasing as a natural person, member of a close corporation, shareholder of a company, or beneficiary of a trust. Documentary proof of ownership will be required where the purchaser is a close corporation, company or trust. Copies of CK1, and/or CK2 forms, CM29 form (Directors' details), auditor's certificate certifying shareholders details, trust deeds, as applicable must be provided in order to sign the Deed of Sale. (See details on registration form).
10. Any purchaser found to be involved in the purchase of more than one plot will be immediately disqualified and the offer to purchase set aside.
A purchaser or signatory is required to produce their ID document when completing the Deed of Sale.
12. Numbered discs/balls corresponding to the printed number on the completed registration forms will be drawn at random on the launch date starting at the advertised time. This will determine the order in which the opportunity to purchase takes place (i.e. it replaces the queue).
13. In the event of an individual electing not to use his/her opportunity to purchase, he/she may withdraw and the corresponding number will be put aside and a new number drawn.
14. The signatory must be present at the time of the draw and must be in possession of the original registration form. If the signatory is not present, the corresponding number will be put aside and a new number drawn.
15. A 20 % deposit is payable by cheque on signature of the Deed of Sale. (No cash deposits or electronic transfers will be accepted).
16. The purchase of a property is not subject to bond finance.
17. Rabcorp reserves the right to amend or waive any of the above rules if in its opinion it is necessary to do so.
18. These rules apply to the launch date only.



ERF 9937

NOTATION: (Precinct 1)

ERF NO.	LAND USE	ZONING	RDL	AREA (Pa.)	KEY
1-4	DWELLING HOUSE	SINGLE RESIDENTIAL	4	0,56	
7	PRIVATE OPEN SPACE	PRIVATE OPEN SPACE	1	0,08	
TOTAL			7	0,64	

1:1000 20 X 30m = 600m



HERMANUS
golf estate

PRECINCT 1&2

Proposed subdivision of
erfen 9937 & 9938
Hermanus

(AREAS ONLY APPROX.)



1:1000 20 X 30m = 600m

3.609.000,00 X

5310

NOTATION: (Precinct 2)

ERF NO.	LAND USE	ZONING	RDL	AREA (Pa.)	KEY
1-22	DWELLING HOUSE	SINGLE RESIDENTIAL	20	1,56	
23-24	PRIVATE OPEN SPACE	PRIVATE OPEN SPACE	2	0,08	
25	PRIVATE OPEN SPACE	PRIVATE OPEN SPACE	7	0,40	
TOTAL			29	1,74	

1:1000 20 X 30m = 600m

OVERPLAN

B-ASSOCIATES
MEDUNSWERE
T 082 914 8888

DESIGNED BY	CH. BODIN	DRAWING NO.	2024/001
DRAWING DATE	2024/08/01	SCALE	AS SHOWN
CLIENT	HERMANUS GOLF ESTATE		
SCALE	1:1000	APPROVED FOR CONSTRUCTION	

PLAN CONSULT
CANNABURG

FORM NO. 175
REVISED 2020
B-ASSOCIATES
P.O. BOX 514 8888
T 082 914 8888

57



HERMANUS golf estate

PRECINCT 6

Proposed subdivision of
erf 9940 Hermanus

NOTATION

SYMBOL	LAND USE	EXPLANATION	AREA	AREA	AREA
[Symbol]	RESIDENTIAL	RESIDENTIAL	10	1000	
[Symbol]	OPEN SPACE	OPEN SPACE	5	5000	
[Symbol]	ROAD	ROAD	1	1000	
[Symbol]			10	10000	

1:5000 SCALE
 1:10000 SCALE
 1:20000 SCALE
 1:40000 SCALE
 1:80000 SCALE



(AREAS ONLY APPROX)

OVERPLAN

BY ASSOCIATE
MEASUREMENTS

OWNER	DATE	REVISION NO.	DATE
OWNER	DATE	REVISION NO.	DATE
OWNER	DATE	REVISION NO.	DATE
OWNER	DATE	REVISION NO.	DATE

PLAN CONSULT
 CONSULTANTS

REGISTERED CIVIL ENGINEER
 REGISTERED ARCHITECT
 REGISTERED SURVEYOR
 REGISTERED ELECTRICAL ENGINEER

AGREED BOUNDARY OF FERROLOOF NATURE RESERVE.



NEW ESCOM POWERLINE CORN

50m FROM CENTRE LINE



HERMANUS
golf estate

PRECINCT 7

Proposed subdivision of
erf 9941 Hermanus



NOTATION

NO. OF	TYPE	NO. OF	NO. OF	AREA	NO.
1-20	DRILLING	WELL	NO.	0,54	
41	PAVING	ROAD	1	0,64	
TOTAL			41	1,17	

AREA OF SITE = 44000
AREA OF SITE = 47000

OVERPLAN

& ASSOCIATES
MEDWEGERS

DATE	NO.	DESCRIPTION	BY



PLAN CONSULT
CORPORATION

PO BOX 718
HERMANUS 7200
SOUTH AFRICA
TEL: 021 812 9075
FAX: 021 812 9104

REGISTERED PROFESSIONAL PLANNERS IN SOUTH AFRICA

TERRACE

NOTES

1. System WG 19
2. Coloured info subject to final survey

PROPOSED BULBENTUDE (as supplied by Edcom)

Boundary to be confirmed by Surveyor

Edge of lot

Min. erf size = 630m²
 Even 1.31 min. erf size = 1500m²

NOTATION

(same as above)

ERF No	LAND USE	ZONING	TOTAL	AREA (ha)	KEY
98	DWELLING HOUSE	SINGLE RESIDENTIAL	98	9,54	
99-101	PRIVATE OPEN SPACE	PRIVATE OPEN SPACE	3	0,24	
102	OPEN SPACE CORRIDOR	OPEN SPACE	1	0,60	
103	PRIVATE ROAD	PRIVATE ROAD	1	1,31	
TOTAL			103	11,69	

25 000 00 Y

HERMANUS
golf estate

PRECINCT 8&9

Proposed subdivision of
erf 9943 Hermanus

OVERPLAN

ASSOCIATES
MEDENHOUTE

OWNER/CLIENT	DATE	PROJECT NO.	PROJECT NAME
OFFICE ADDRESS			
CONTACT PERSON	TEL		
PLAN SCALE	1:1000		

PLAN CONSULT

25th FEBRUARY 2014



www.fernkloofestate.co.za

"C" 43

FERNKLOOF ESTATE

AGREEMENT OF SALE

(Part 1)

between

THE OVERSTRAND MUNICIPALITY
("the Seller")

and

the person/s referred to in paragraph 2 of the information schedule
("the Purchaser")

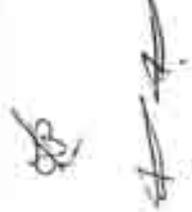
Sale of:
Erf/Portion No 9907/111
Precinct No 2

M
BS *of* *A.*

INFORMATION SCHEDULE

1. SELLER		
1.1.	Full name:	Overstrand Municipality
1.2.	Address:	c/o Robie Property Projects (Pty) Limited, Plum Park, 25 Gabriel Road, Plumstead, 7800
1.3.	Telephone no:	021-762 7080
1.4.	Telefax no:	021-762 7025
2. PURCHASER		
2.1.	Full name	Kleynhans FamilieTrust
2.2.	ID No/date of birth/Registration No:	IT 4011/2004
2.3.	Name and capacity of signatory (if signing in representative capacity):	(Trustee) (ID No. - 650401 5023 083) Marius Jakobus Kleynhans
2.4.	Residential address:	3 Wesend Street Sandbaai Hermanus code 7200

2.5.	Postal address:	PO Box 111 Hermanus code 7200
2.6.	Marital status:	Married (Trustee)
2.7.	In/out of community:	out of community
2.8.	Full name of spouse:	
2.9.	Telephone no:	
	(home)	028 316 3950
	(work)	028 312 2007
	(cell)	083 270 6887
2.10.	Telefax:	028 312 3394
2.11.	E-mail address:	voelklip@hermanus.co.za
3. ESTATE		
3.1.	Name:	_____ Estate
3.2.	Precinct:	No <u>2</u>
4. PROPERTY		
4.1.	Erf/Portion no:	9967/14
4.2.	Approximate extent:	<u>848</u> square metres

4.3.	Estimated Master Property Owners Association levy:	R <u>50</u> per month
4.4.	Estimated levy of Property Owners Association:	R <u>300</u> per month
5. PURCHASE PRICE		
5.1.	Purchase Price (including VAT):	R <u>1,100,000</u>
5.2.	Deposit on signature (20% of the purchase price):	R <u>220,000</u>
5.3.	Balance of purchase price to be paid or guaranteed:	R <u>880,000</u>
6. REQUIRED BOND (if applicable)		
6.1.	Exclusive Mortgage Originator:	mortgagesa.com
6.2.	Amount Required:	R _____
7. ESTIMATED TRANSFER DATE		
Date:	<u>September 2005</u>	
8. AGENT		
Selling Agent:	RABCAV	

[Handwritten signatures and initials]

9. ATTORNEYS	
Firm of Attorneys: <i>(*delete whichever does not apply)</i>	 Guthrie and Theron 7 Main Road P.O. Box 37 Hermanus Hermanus 7200 7200 Tel: 028 - 312 3626 / 7 / 8 Fax: 028 - 312 2732
	Hannes Pretorius, Chin and Block 9 on College P.O. Box 1591 College Road Hermanus Hermanus 7200 7200 Tel: 028 - 313 2450 / 1 / 2 Fax: 028 - 313 2455

SIGNATURE DOCUMENT

INTRODUCTION:

- (a) The Seller is the registered owner of the land comprising the precinct referred to in paragraph 3 of the information schedule ("the land") depicted on the overplan annexed hereto as annexure A, and which land forms part of the Fernkloof Estate development.
- (b) The Rabcov Joint Venture, as the development facilitator, on behalf of the Seller;
 - (i) has procured the approvals by all competent authorities of the rezoning of land;
 - (ii) has applied for the approval of the subdivision of the land in accordance with the proposed land subdivision plan which is annexure B hereto.
- (c) The Seller has agreed to sell to the Purchaser who has agreed to purchase a plot on the land ("the property") as described in paragraph 4 of the information schedule, subject to and upon the terms and conditions contained in this agreement.

NOW THEREFORE THE PARTIES AGREE AS FOLLOWS:

1. SALE OF THE PROPERTY

1.1 The Seller hereby sells and the Purchaser hereby purchases the property subject to and upon the terms and conditions contained in this agreement.

1.2

The sale in terms of this agreement shall be subject to the provisions contained in this signature document, read together with the information schedule appearing in front of this signature document and the subdivision plan annexed to this signature document as annexure A, and all terms and conditions contained in the standard conditions of sale including all annexures thereto, which standard conditions of sale form an integral part of this agreement and which the Purchaser acknowledges and agrees to have read and the content of which the Purchaser fully understands and accepts.

2. PURCHASE PRICE AND PAYMENT

- 2.1 The purchase price of the property including VAT shall be the amount specified in paragraph 5.1 of the information schedule.
- 2.2 The Purchaser shall pay the purchase price as follows:
 - 2.2.1 a deposit of 20% (twenty percent) of the purchase price, being the amount specified in paragraph 5.2 of the information schedule, upon signature of this agreement by the Purchaser, which amount shall be held in trust by the Seller's attorneys and invested in the name of the Purchaser with interest to accrue to the Purchaser and the capital to be paid to the Sellers upon registration of transfer of the property; and
 - 2.2.2 the balance of the purchase price specified in paragraph 5.3 to the Seller's attorneys on the transfer date against registration of transfer of the property into the name of the Purchaser in the deeds office.
- 2.3 All amounts payable by the Purchaser in terms of this agreement shall be paid to the Seller's attorneys free of exchange or bank commission at Cape Town and without deduction or set off by means of a cheque drawn by a recognised commercial bank or a bank guaranteed cheque.

3. TRANSFER OF THE PROPERTY AND TRANSFER COSTS

- 3.1 Transfer of the property shall be passed by the Seller's attorneys and shall be given and taken on the estimated transfer date specified in paragraph 7 of the information schedule or as soon thereafter as the Seller is able to give transfer thereof. Notwithstanding anything contained in this agreement, the Purchaser shall not have any claim/s of whatsoever nature against the Seller as a result of any delay of the date of registration of transfer of the property into the name of the Purchaser.
- 3.2 The Seller shall be entitled to give transfer prior to the estimated transfer date by giving written notice of not less than 30 (thirty) days prior to the transfer date to the Purchaser, provided that the transfer date shall not be earlier than 60 (sixty) days prior to the estimated transfer date specified in paragraph 7 of the information schedule.
- 3.3 Within 5 (five) days of being requested to do so by the Seller's attorneys, the Purchaser shall sign all such documents and furnish

Handwritten signatures and initials are present at the bottom right of the page, including a large signature that appears to be 'G. R.' and several other initials.

the Seller's attorneys with all such documents as may be necessary or requisite for the purposes of the registration of transfer of the property.

- 3.4 The Purchaser shall be liable for and pay upon request of the Seller's attorneys all costs of the registration of transfer of the property (plus VAT on such costs), including transfer costs and stamp duties, bond costs, costs of all necessary affidavits and all other costs which have to be incurred in order to comply with statutes or other enactments or regulations relating to the passing of transfer of the property.
- 3.5 Should the Purchaser in any way cause any delay of the transfer, then notwithstanding any rights which the Seller may have in terms of clause 16 of the standard conditions of sale including the right to claim further damages, the Purchaser shall pay to the Seller interest at the prime rate plus 4% (four percent) on the purchase price of the property calculated from the date on which transfer of the property should reasonably have been registered, as advised by the Seller's attorneys, until the transfer date.
- 3.6 Should the Seller not be able to pass transfer of the property to the Purchaser within 180 (one hundred and eighty) days after the estimated transfer date as specified in paragraph 7 of the information schedule, and provided that the delay (or any portion thereof) of the date of registration of transfer is not attributable to a breach by either party of any of its obligations under this agreement, then and in such event each party shall be entitled to resign from this agreement by giving written notice to such effect to the other party.
- 3.7 Should either party exercise its right to resign from this agreement in terms of the provisions of clause 3.6 above, the Seller shall refund to the Purchaser any amounts paid by the Purchaser, together with interest earned thereon, and neither party shall have any further claims against the other.

4. GUARANTEE

- 4.1 Within 30 (thirty) days after being requested by the Seller's attorneys, the Purchaser shall furnish the Seller's attorneys with an irrevocable guarantee issued by a recognised commercial bank or financial institution for the due payment of the balance of the purchase price specified in paragraph 5.3 of the information schedule against registration of transfer of the property into the name of the Purchaser ("the guarantee").



- 4.2 The guarantee shall be in accordance with the specimen bank guarantee annexed to the standard conditions of sale which is annexure C hereto.
- 4.3 The Purchaser shall not be obliged to furnish the guarantee in terms of clause 4.1 above, if the Purchaser pays to the Seller's attorneys an amount equal to the balance of the purchase price specified in paragraph 5.3 of the information schedule by not later than the date referred to in paragraph 4.1 hereof, which amount shall be held in trust by the Seller's attorneys and invested in the name of the Purchaser with interest to accrue to the Purchaser and the capital to be paid to the Seller upon registration of transfer of the property.

5. MORTGAGE BOND (IF APPLICABLE)

- 5.1 Should the Purchaser require a loan to finance the purchase price (or a portion thereof) ("the loan"), then the Purchaser shall forthwith after signature of this agreement by the Purchaser submit an application for such loan to the exclusive mortgage originator specified in paragraph 6.1 of the information schedule ("the mortgage originator") if being recorded that in the event of the Purchaser requiring a mortgage bond to finance the purchase of the Property, that such mortgage finance is required to be obtained and the details thereof advise to the development facilitator within sixty days after the date of signature hereof by the Purchaser.
- 5.2 The Purchaser shall not make application for the loan to any person other than the mortgage originator specified in paragraph 6 of the information schedule, without the prior written consent of the Seller.
- 5.3 For the purposes of obtaining the loan, the Purchaser hereby authorises the mortgage originator to submit such loan application on the Purchaser's behalf to any financial institution, and agrees and undertakes to furnish the mortgage originator, forthwith upon request, with all such documents duly signed by the Purchaser and to do all such other things which are necessary and/or required for the purposes of such loan application.
- 5.4 The Purchaser shall use its best endeavours to procure that the Seller's attorneys be appointed by the bank or other financial institution granting the loan to the Purchaser for purposes of financing property.

Handwritten signatures and initials at the bottom right of the page, including a large signature and several smaller initials.

5.5 To the avoidance of doubt it is recorded that the obtaining of the loan is not a condition precedent of the sale and, accordingly, this sale shall be and become of full force and effect notwithstanding the Purchaser obtaining such loan.

6. IRREVOCABLE OFFER

6.1 The signature by the Purchaser of this agreement shall constitute an offer by the Purchaser to purchase the property, which offer is irrevocable, subject to clause 6.2 below, and remains open for acceptance by the Seller within the period (or such extended period/s) of fulfilment or waiver (as the case may be) of all conditions precedent in terms of clause 2.3 of the standard conditions of sale.

6.2 The Purchaser acknowledges that the Seller wishes to achieve the best possible price for the property. Should the Seller, prior to the Seller accepting this offer, receive another offer for the property within 7 days after the date of signature of this agreement by the Purchaser upon terms and conditions acceptable to the Seller and the development facilitator and at a price higher than the price offered by the Purchaser in terms of this agreement, then the Seller shall notify the Purchaser of such other offer to enable the Purchaser to better such other offer.

6.3 The Purchaser shall be entitled to furnish the Seller with an offer more favourable to the Seller within 7 days after so being notified by the Seller, in which event:

6.3.1 the new offer shall supercede this offer;

6.3.2 the Seller shall be entitled to retain the deposit paid in terms of clause 2.2.1 as deposit in terms of the new offer.

6.4 Should the Purchaser not furnish the Seller with an offer more favourable to the Seller, in its sole discretion, than the other offer within 7 days after so being notified by the Seller, then this offer, unless accepted by the Seller, shall lapse and be of no further force and effect, in which event the Seller shall refund to the Purchaser the deposit paid in terms of clause 2.2.1, together with all interest earned thereon, if any.

SIGNED at Hermanus on this 22 day of November 2005

AS WITNESSES:

for and on behalf of the Sellers

- 1.  _____
- 2. _____



Authorised signatory - who warrants that he/she is duly authorised hereto

SIGNED at Hermanus on this 1 day of December 2004

AS WITNESSES:

- 1. _____
- 2. _____



Purchaser or his or her duly authorised representative who warrants that he/she is duly authorised hereto

I, the undersigned, being the spouse of the Purchaser, do hereby consent to this transaction as far as needs be in terms of the Matrimonial Property Act 1984.



Overplan

[to be annexed]

Handwritten signature and initials in the bottom right corner of the page.

FERNKLOOF ESTATE

AGREEMENT OF SALE

(Part 2)

STANDARD CONDITIONS OF SALE

The Standard Conditions of Sale and the Annexures thereto form an integral part of the Agreement of Sale.

I hereby acknowledge that I have read the Standard Conditions of Sale and the Annexures thereto and that I fully understand and agree to same.

[Handwritten signature]

PURCHASER

NAME: Kleynhans Familie Trust

PRECINCT NO:

2

ERF/PORION NO:

9967/14

[Handwritten signature]

1.	Interpretation.....	3
2.	Conditions Precedent.....	5
3.	Possession And Occupation.....	6
4.	Proprietary Charges.....	6
5.	Services And Connection Fees.....	7
6.	Design Guidelines.....	7
7.	Obligation To Build.....	7
8.	Fernkloof Master Property Owners Association.....	8
9.	Precinct Property Owners Association.....	9
10.	Golf Club.....	10
11.	Voetstoots And Title Conditions.....	11
12.	Brokerage.....	12
13.	Resale Of The Subject Matter.....	12
14.	Advertising Within The Development.....	13
15.	Joint And Several Liability.....	13
16.	Default Provisions.....	14
17.	Co-Operation.....	15
18.	Domicillum.....	16
19.	General Provisions.....	17

ANNEXURES

- A. Plan of Land Comprising Fernkloof Estate Development
- B. Draft Design Guidelines
- C. Draft Constitution of the Fernkloof Estate Master Property Owners Association
- D. Draft Constitution of the Precinct Property Owners Association
- E. Specimen Bank Guarantee
- F. Specimen Contractors Agreement
- G. Estate Rules

1. INTERPRETATION

1.1 In this agreement, unless the context otherwise indicates:

1.1.1 "architect" means the architect/s appointed by the Seller and/or the development facilitator from time to time for purposes of the development;

1.1.2 "conditions of approval" mean the conditions of approval issued by all competent authorities with the approval of the rezoning of the land comprising the development as well as the conditions to be issued by all competent authorities when issuing final approval for the proposed subdivision of such land in accordance with the plans;

1.1.3 "design guidelines" mean the design guidelines for the Fernkloof Estate development regulating, *inter alia*, the design and construction of all buildings and other improvements within the development, a draft copy of which guidelines is annexure B hereto;

1.1.4 "development" means the proposed development on the precinct specified in paragraph 3.2 of the information schedule, known or to be known under the name specified in paragraph 3.1 of the information schedule;

1.1.5 "development facilitator" means the following parties carrying out a joint venture under the style of "The Rabcav Joint Venture":

1.1.5.1 Cavcor (Proprietary) Ltd (Registration No 1994/006764/07); and

1.1.5.2 Rable Property Projects (Proprietary) Ltd (Registration No 1990/001920/07);

and includes their successor in title or assign as development facilitator;

1.1.6 "development period" means the period from the date of incorporation of the POA until the date of transfer of the last residential plot in the development or until the date of completion of all services within the development, as certified by the relevant authority(ies), whichever is the later date;



- 1.1.7 "Fernkloof Estate development" means collectively the property developments on the land known as the "Fernkloof Estate" situate at the Hermanus golf course;
- 1.1.8 "Fernkloof Estate Master POA" means the Fernkloof Estate Master Property Owners Association established or to be established in respect of the Fernkloof Estate development;
- 1.1.9 "information schedule" means the information schedule which forms part of part 1 of this agreement;
- 1.1.10 "plans" mean the plans attached to the signature document and the standard conditions of sale, which describe and depict:
 - 1.1.10.1 the land comprising the Fernkloof Estate development (per annexure A of the standard conditions of sale); and
 - 1.1.10.2 the proposed subdivision of the development, and the property (per annexure A of the signature document);
- 1.1.11 "POA" means the property owners association established or to be established in respect of the development;
- 1.1.12 "property" means the property specified in clause 4 of the information schedule;
- 1.1.13 "prime rate" means a rate of interest per annum which is equal to the ABSA Bank published minimum lending rate of interest per annum, compounded monthly in arrears, charged by the said bank on the unsecured overdrawn current accounts of its most favourite corporate clients in the private sector from time to time. (In the case of a dispute as to the rate so payable, the rate shall be certified by any manager or assistant manager of any branch of the said bank, which decision shall be final and binding on the parties);
- 1.1.14 "Purchaser" means the party or collectively the parties specified in clause 2 of the information schedule;
- 1.1.15 "Seller" means the Overstrand Municipality;

A handwritten signature in black ink, appearing to be 'B. A.', is located at the bottom right of the page.

- 1.1.16 "Seller's attorneys" mean the firm of attorneys specified in clause 9 of the information schedule or such other firm of attorneys appointed by the Seller to pass transfer of the property;
- 1.1.17 "signature date" means the date upon which this agreement is signed by the last signing party;
- 1.1.18 "signature document" means the document signed by the Seller and the Purchaser, which document forms part 1 of this agreement and contains, *inter alia*, the *essentialia* of this agreement;
- 1.1.19 "standard conditions of sale" mean the standard conditions of sale which form part 2 of this agreement;
- 1.1.20 "surveyors" mean Peter Spronk & Associates or such other registered land surveyor as may be appointed by the development facilitator from time to time;
- 1.1.21 "transfer date" means the date of transfer of the property into the name of the Purchaser.

1.2 The head notes to the paragraphs in this agreement are inserted for reference purposes only and shall not affect the interpretation of any of the provisions to which they relate.

1.3 Words importing the singular shall include the plural, and vice versa, and words importing the masculine gender shall include the feminine and neuter genders, and vice versa, and words importing persons shall include partnerships, trusts and bodies corporate, and vice versa.

1.4 Reference to "this agreement" shall mean this agreement of sale and shall include part 1 and part 2 of this agreement of sale and all annexures thereto.

2. CONDITIONS PRECEDENT

2.1 Save for the provisions of clauses 5 and 6 of the signature document, clause 1 above, this clause 2 and clauses 15 to 19 [both inclusive], which shall be of immediate and lasting force and effect, this agreement is subject to the following conditions precedent:

2.1.1 the Seller obtaining all final approvals of the rezoning and subdivision of the land by the competent authorities and the implementation of all such conditions of

approvals, which approvals and conditions of approvals may be necessary to pass transfer of the property, upon conditions acceptable to the Seller in its sole discretion, and for the purposes hereof, the term "final approvals" means being approved by the relevant competent authorities after the determination of all appeals and/or reviews against such approvals and/or after the period for lodging such appeals and/or any such reviews has expired (as the case may be); and

2.1.2 the Seller being satisfied (which satisfaction shall be reduced to writing), in its sole discretion, with the viability of the development.

2.2 The conditions precedent contained in clause 2.1 above are imposed solely for the benefit of the Seller and may be waived by the Seller in a written notice accordingly to the Purchaser.

2.3 Should any of the conditions precedent not be fulfilled or waived (as the case may be) within 180 days after the date of signature of the signature document by the Purchaser, or such extended period/s as may be stipulated in writing by the Seller (provided that such extended period/s shall not be longer than 12 calendar months after the date of signature of the signature document by the Purchaser), then the Seller and the Purchaser shall each be entitled to resile from this agreement by notifying the other party in writing of his or her intention to do so.

2.4 Should, after the expiry of 7 days after receipt of the said written notice, any of the conditions precedent not be fulfilled or waived (as the case may be), then this agreement shall be of no force or effect and neither party shall have any claim against the other, save that the Purchaser shall be reimbursed the deposit paid by the Purchaser in terms of clause 2.2 of the signature document, together with any interest accrued thereon.

3. POSSESSION AND OCCUPATION

The Seller shall give the Purchaser occupation and possession of the property on the transfer date, from which date all risk and benefit in the property shall pass to the Purchaser.

4. PROPRIETARY CHARGES

4.1 The Purchaser shall be liable for a pro rata share of rates, taxes, levies and other proprietary charges payable in respect of the property with effect from the transfer date.



- 7
61
- 4.2 The Purchaser shall forthwith upon request of the Seller's attorneys discharge the sum so payable under clause 4.1 above.

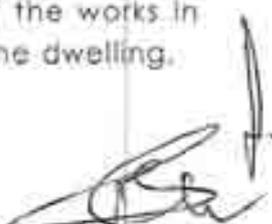
5. SERVICES AND CONNECTION FEES

- 5.1 The development facilitator, on behalf of the Seller, shall be entitled to furnish the competent authorities with guarantees or such other security as may be acceptable to such authorities for the installation of roads and underground services. Upon such guarantees and/or other securities being furnished and the competent authorities issuing a clearance certificate for transfer of the property, the Seller shall be entitled to tender transfer to the Purchaser of the property, who shall be obliged to take transfer thereof, notwithstanding that the roads and underground services to the property may not have been completed, and the Purchaser shall not have any claim against the Seller in respect of such roads and/or underground services not being completed, provided that the Seller shall be obliged to complete such services within 45 days after the date of transfer of the property.
- 5.2 The Purchaser shall connect to the services as installed near to the perimeter of the property and shall pay to the competent authorities any connection fees which may be payable for the connection to such services.

6. DESIGN GUIDELINES

- 6.1 All improvements on the property shall be designed and constructed in accordance with the design guidelines, as amended from time to time, a draft copy of which is annexure C hereto.
- 6.2 The Purchaser shall bind any parties who may acquire from the Purchaser the property or any subdivision thereof to the design guidelines. The Seller shall be entitled to register as a condition of title a recordal binding the owner(s) from time to time of the property or any subdivisions thereof to the design guidelines.

7. OBLIGATION TO BUILD

- 7.1 The Purchaser shall erect a dwelling on the property, which dwelling shall be completed:
- 7.1.1 within 3 years after the transfer date; and
- 7.1.2 within 1 year after the commencement of the works in respect of or incidental to the erection of the dwelling.
- 

- 7.2 Should the Purchaser fail to erect a dwelling within any of the periods stipulated in clause 7.1 above, the Purchaser, as the owner of the property, shall pay in respect of each month of delay of completion of the dwelling, a monthly penalty levy to the POA in an amount of the current monthly levy multiplied by 4, which penalty levy shall be due and payable in addition to the monthly levy contemplated in clause 9.2 below.
- 7.3 The Purchaser shall not be entitled to appoint any contractor for the purpose of the erection and construction of the dwelling unless such contractor and all subcontractors enter into the contractors' agreement with the Fernkloof Estate Master Property's Association and/or the POA (as the case may be), a draft specimen of which is annexure F hereto.

8. FERNKLOOF MASTER PROPERTY OWNERS ASSOCIATION

- 8.1 It is recorded that the Fernkloof Estate has incorporated or is about to incorporate a property owners association known as "The Fernkloof Estate Master Property Owners Association" ("the Fernkloof Estate Master POA") to administer and control all communal aspects relating to the entire Fernkloof Estate development including the security structure in regard hereto.
- 8.2 in terms of the constitution of the Fernkloof Estate Master POA, membership of the Fernkloof Estate Master POA is compulsory for the following persons:
 - 8.2.1 each registered owner of a single residential erf, which owner is not a member of a property owners' association as contemplated in clause 8.2.2 below;
 - 8.2.2 each property owners association constituted in respect of any development (or sub-development) on the land;
 - 8.2.3 each body corporate constituted in terms of the Sectional Titles Act (Act 95 of 1986) in respect of a sectional title scheme on the land (or any portion thereof);
 - 8.2.4 the developer (as defined in the constitution of the Fernkloof Estate Master POA) in its capacity as such, whether it is the owner of the land or any portion thereof or not. Accordingly, the POA shall be obliged to be and become a member of the Fernkloof Estate Master POA and be bound by the constitution thereof (including any rules and regulations made thereunder).



- 8.3 In terms of the constitution of the Fernkloof Estate Master POA, the trustee committee of the Fernkloof Estate Master POA may impose levies on its members for the purposes of meeting the expenses of the Fernkloof Estate Master POA.
- 8.4 The draft constitution of the Fernkloof Estate Master POA and its current draft regulations are included in the contract documents. The draft constitution and the draft regulations may be subject to any such amendments as required by the Seller and/or the development facilitator in their sole discretion prior to the incorporation of the Fernkloof Estate Master POA.
- 8.5 The Purchaser warrants and undertakes that he or she shall take all such steps which are necessary to familiarise himself or herself with the constitution as amended from time to time and any regulations and resolutions passed by the Fernkloof Estate Master POA from time to time.

9. PRECINCT PROPERTY OWNERS ASSOCIATION

- 9.1 The Seller intends to form a property owners association to, *inter alia*, regulate, control and manage the common interests of the owners within the development ("the POA").
- 9.2 In terms of the constitution of the POA, the trustee committee of the POA may impose levies (general and special) upon its members for the purposes of meeting the expenses of the POA, including (but not limited to) any levies (whether general or special) imposed by the Fernkloof Estate Master POA upon the POA.
- 9.3 In terms of the constitution of the POA, if a member sells or transfers his or her property, such member shall be obliged to pay to the POA an endowment levy equal to 0.25% of the purchase price (exclusive of VAT, if any) in terms of such sale. Such endowment levy shall be due and payable by the Purchaser upon registration of transfer of the property into the name of the transferee concerned.
- 9.4 The Purchaser shall become a member of the POA upon transfer of the property into the name of the Purchaser, and agrees to remain a member for as long as the Purchaser is the registered owner of the property.
- 9.5 The Purchaser agrees that a title deed condition shall be registered against the property in terms of which, *inter alia*, the owner for the time being of the property shall not be entitled to



sell and/or transfer the whole or any portion of the property without the prior written consent of the POA in terms of its articles of association.

- 9.6 The draft constitution of the POA and its current draft regulations are included in the contract documents but may be subject to any such amendments as required by the Seller and/or the development facilitator in their sole discretion prior to the incorporation of the POA.
- 9.7 The Purchaser warrants and undertakes that he or she shall take all such steps which are necessary to familiarise himself or herself with the constitution as amended from time to time and any regulations and resolutions passed by the POA from time to time.
- 9.8 The Purchaser shall be liable for the payment of all levies in respect of the property as imposed by the POA as from the first day of the month following that in which transfer is registered in the Purchaser's name. The Purchaser shall furnish an appropriate debit order drawn on the Purchaser's bankers in respect of the payment of all future levies.
- 9.9 The Purchaser shall prior to the transfer date, upon request of the Seller's attorneys, execute an appropriate debit order drawn on the Purchaser's bankers in respect of all amounts including levies payable by the Purchaser to the POA.

10. GOLF CLUB

- 10.1 It is expressly recorded that the Purchaser, by entering into this agreement of sale, shall not automatically be entitled to become a member of the golf club.
- 10.2 The golf club will make available 230 memberships (or such other amount of memberships as the golf club may deem fit) for owners of properties within the Fernkloof Estate development, which will be given on a first come first served basis. Such memberships will be subject to all such requirements as the golf club may deem fit and will expire upon the member concerned ceasing to be an owner of a property within the Fernkloof Estate development.
- 10.3 Should the Purchaser wish to become a member of the golf club, the Purchaser shall submit an application for membership to the golf club, together with the necessary subscription and other fees payable from time to time in terms of the constitution of the golf club.



11. VOETSTOOTS AND TITLE CONDITIONS

- 11.1 Save as is otherwise provided for in this agreement, the property is sold voetstoots and the Seller gives no warranties, express or implied, as to patent or latent defects.
- 11.2 The Purchaser acknowledges and agrees that the Purchaser has satisfied himself or herself as to the condition of the property.
- 11.3 The property is sold subject to:
- 11.3.1 all existing conditions of title;
 - 11.3.2 the conditions of approval;
 - 11.3.3 any further conditions which the competent authorities may impose with the approval of the subdivision of the land comprising the development and/or the subdivision of the property.
- 11.4 It is recorded that the property is furthermore sold subject to the following conditions which the Seller shall be entitled to register against the title deeds of the property;

"The owner of the property shall be required, without compensation-

- (a) to allow gas mains, electricity, telephone and television cables and/or wires, main and/or other water pipes and foul sewers and stormwater pipes, ditches and channels of any other land unit or units to be conveyed across the land unit concerned, and surface installations such as mini-substations, meter kiosks and service pillars to be installed thereon if considered necessary by the Council, in such manner and position as may from time to time be reasonably required; this shall include the right of access to and the land unit at any reasonable time for the purpose of constructing, altering, removing or inspecting any works connected with the above, and
- (b) to receive such material or permit such excavation on the land unit as may be required to allow use of the full width of an abutting street and provide a safe and proper slope to its bank necessitated by differences between the level of the street as finally constructed and the level of the land unit, unless he elects to build retaining walls to the satisfaction of an within a period to be determined by the Council".



- 11.5 The Seller accepts no liability whatsoever for loss or damage of whatever nature directly or indirectly arising from or caused by subsidence's or faults in the property or in the vicinity of the property. The Purchaser shall be responsible for the cost of any special foundation measures required on the purchaser's property in connection with the erection of any improvements thereon.
- 11.6 The Seller shall be entitled to change the location of electrical substations, kiosks and other services/amenities required by the relevant authorities.
- 11.7 The Seller shall carry out a site clearing operation to remove all such trees on the property as the Seller may determine in its sole discretion. The removal of any trees required to be removed by the Purchaser and not removed by the Seller on or before the transfer date, shall be for the account of the Purchaser.

12. BROKERAGE

- 12.1 The parties record that the agent (if any) specified in paragraph 8 of the Information schedule was the effective cause of sale in terms of this agreement.
- 12.2 The Seller shall pay the brokerage to the said agent in accordance with the terms of the mandate granted to the agent by the Seller against registration of transfer of the property.
- 12.3 The Purchaser warrants and undertakes to the Seller that neither the Seller nor the property was introduced to the Purchaser by any party other than the agent (if any) referred to in clause 12.1 above and hereby indemnifies the Seller against any loss, damage or claim in connection with or arising from any breach of this warranty.

13. RESALE OF THE SUBJECT MATTER

- 13.1 The Purchaser shall not be entitled to sell and/or transfer the property prior to the date on which the property is registered into the name of the Purchaser.
- 13.2 During the development period, the Purchaser shall not appoint and/or engage any estate agent or other person to market, advertise and/or sell the property other than the agent appointed by the Seller and/or the development facilitator to market the development from time to time.

A handwritten signature in black ink, possibly reading 'Ba', with a downward-pointing arrow to its right.

- 13.3 The Seller records that it will not enter into a tripartite agreement or similar agreement or arrangement to facilitate the on-sale of the property by the Purchaser prior to the transfer date.

14. ADVERTISING WITHIN THE DEVELOPMENT

- 14.1 The Seller and/or the development facilitator shall be entitled at any time(s) to erect such signage, flagpoles, messages and other form of notices or advertising within the development for the purposes of selling and/or letting any property within the development.
- 14.2 The Purchaser shall not be entitled to display any quote "for sale" and/or "to let" signs and/or any other form of notices or advertising on the property and/or with the development:
- 14.2.1 during the development period, without the prior written consent of the Seller or the development facilitator, which consent shall be in the sole discretion of the Seller or the development facilitator (as the case may be); and thereafter.
- 14.2.2 without the prior written consent of the POA in terms of its constitution and in terms of the estate rules.

15. JOINT AND SEVERAL LIABILITY

- 15.1 Should the Purchaser be a company, close corporation, trust or association of persons, then the person(s) signing this agreement on behalf of the Purchaser (by his/their signature(s) hereto) hereby bind himself or herself as surety and co-principal debtor jointly and severally to the Sellers for the due and proper fulfillment of all obligations of, and for the punctual payment of all sums which are or may become due by the Purchaser in terms of, or in connection with, or arising in any way whatsoever out of this agreement or any amendment or cancellation thereof, under renunciation of the benefits of excussion and division.
- 15.2 In the event of the Purchaser being a company or a close corporation to be formed, the signatory for the Purchaser shall be personally liable for all obligations of the Purchaser as though he or she contracted in his or her capacity if:
- 15.2.1 the company or close corporation (as the case may be) in respect whereof he or she acts as trustee is not incorporated within 45 days of date of signature hereof by such signatory; and/or



- 15.2.2 the company/close corporation having been incorporated, fails to adopt and ratify unconditionally this transaction without modification within 7 days of incorporation.
- 15.3 Upon timeous formation of the said company/close corporation and due and timeous ratification and adoption of this transaction as aforementioned, the said signatory shall become and be liable to the Seller as surety for and co-principal debtor with the company/close corporation for its obligations as Purchaser in terms of this agreement under renunciation of the benefits of excussion and division.
- 15.4 Should the Purchaser be more than one person, then the persons comprising the Purchaser shall be jointly and severally liable to the Sellers for the due and proper fulfilment of all the obligations of, and the punctual payment of all amounts which are or may become due by the Purchaser in terms of, or in connection with or arising in any way whatsoever out of this agreement or any amendment or cancellation thereof.

16. DEFAULT PROVISIONS

- 16.1 Should the Sellers or the Purchaser, as the case may be ("the defaulting party");
- 16.1.1 fail to pay any amount due by the defaulting party in terms of this agreement on due date and remain in default for more than 7 (seven) days after being notified in writing to do so by the other party ("the aggrieved party"); or
- 16.1.2 commit any other breach of any of the provisions of this agreement and fail to commence remedying that breach within a period of 7 (seven) days after the receipt of written notice to that effect by the other party ("the aggrieved party") and complete the remedying of such breach within a reasonable time;
- then and in either such event, the aggrieved party shall forthwith be entitled (but not obliged) without prejudice to any other rights or remedies which the aggrieved party may have in law, including the right to claim damages:
- 16.1.3 to cancel this agreement and in the of the Purchaser being the defaulting party, the defaulting party shall

A handwritten signature in black ink, appearing to be 'ABR', is located at the bottom right of the page. To its right, a hand-drawn arrow points downwards.

forfeit all monies paid to the Sellers, or its attorneys or agent/s in terms of this agreement; or

- 16.1.4 to claim immediate performance and/or payment of all the obligations of the defaulting party in terms of this agreement, including immediate payment of the balance of the purchase price of the subject matter in the event of the Purchaser being the defaulting party.
- 16.2 Should the Purchaser dispute the right of the Sellers to cancel this agreement, then pending the determination of that dispute, the Purchaser shall be obliged to continue payment of all amounts payable by it in terms of this agreement on the due dates thereof and the Sellers shall be entitled to recover and accept those payments without prejudice to the Sellers' claim for cancellation of this agreement or any other rights of the Sellers whatsoever.
- 16.3 All amounts payable by the Purchaser in terms of this agreement and unpaid on due date shall bear interest at prime rate plus 4% (four percent) which shall be calculated from the due date to the date of payment and shall be payable on demand.
- 16.4 Upon cancellation of this agreement for any reason whatsoever, the Purchaser shall forthwith vacate the property.

17. CO-OPERATION

- 17.1 Each of the parties hereby irrevocably undertake to:
- 17.1.1 sign and/or execute all such documents (and without limiting the generality of the foregoing, same shall include the execution of the necessary resolutions, consents and conveyancing documents);
- 17.1.2 do and to procure the doing by other persons, and to refrain and procure that other persons will refrain from doing, all such acts; and
- 17.1.3 pass, and to procure the passing of all such resolutions of directors or shareholders of any company, or members of any close corporation, or trustees of any trust;
- 17.1.4 pass, and to procuring the passing of all such resolutions of the trustees or the granting of such consents of the trustees of the body corporate;



A handwritten signature in black ink, appearing to be 'G. B. ...', is located at the bottom right of the page. To its right is a vertical line with a downward-pointing arrowhead.

17.1.5 to the extent that the same may lie within the power of such party and may be required to give effect to the import or intent of this agreement, and any contract concluded pursuant to the provisions of this agreement.

17.2 Without derogating from the provisions of clause 17.1 above or any other provisions of this agreement, the Purchaser hereby irrevocably appoints the Seller and the development facilitator in rem suam with power of substitution to be his or her lawful attorney or agent (which power of attorney shall be operative from the date of registration of transfer of the property into the name of the Purchaser until the date of termination of the development period, both dates inclusive):

17.2.1 to attend any general meeting of the POA, and to vote at such meeting on behalf of and to the exclusion of the Purchaser for such resolutions as may be required to give effect to the import or intent of this agreement, and any contract concluded pursuant to the provisions of this agreement;

17.2.2 to grant on behalf of the Purchaser such consents as may be required to give effect to the import or intent of this agreement, and any contract concluded pursuant to the provisions of this agreement.

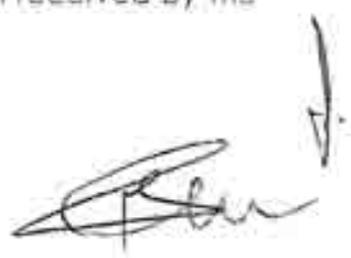
18. DOMICILIUM

18.1 Each of the parties chooses *domicilium citandi et executandi* ["domicilium"] for the purposes of the giving of any notice, the serving of any process and for any other purpose arising from this agreement at their respective addresses set forth in the information schedule.

18.2 Each of the parties shall be entitled from time to time, by written notice to the others to vary its domicilium to any other address within the Republic of South Africa which is not a post office box or *poste restante*.

18.3 Any notice given and any payment made by a party to any of the others ("the addressee") which:

18.3.1 is delivered by hand during the normal business hours of the addressee at the addressee's domicilium for the time being shall be presumed, unless the contrary is proved by the addressee, to have been received by the addressee at the time of delivery;





18.3.2 is posted by prepaid registered post from an address within the Republic of South Africa to the addressee at the addressee's domicile for the time being shall be presumed, unless the contrary is proved by the addressee, to have been received by the addressee on the fourth day after the date of posting;

18.3.3 is transmitted by teletax during normal business hours of the addressee shall be presumed, unless the contrary is proved by the addressee, to have been received by the addressee within one hour after receipt of transmission.

18.4 Notwithstanding the provisions of clause 18.3 above, in the event that a written notice or any process is actually received by a party, such receipt shall be valid for all purposes under this agreement notwithstanding that it was not received at a party's chosen domicile.

19. GENERAL PROVISIONS

19.1 No alteration, cancellation, variation of, or addition hereto shall be of any force or effect unless reduced to writing and signed by all parties to this agreement or their duly authorised representatives.

19.2 This document contains the entire agreement between the parties and no party shall be bound by any undertakings, representations, warranties, promises or the like not recorded in this agreement.

19.3 No indulgence, leniency or extension of time which any party may grant or show to any other party shall in any way prejudice or preclude the party granting or showing such indulgence, leniency or extension of time from exercising any of its rights in the future.

Plan of Land Comprising Fernkloof Estate Development

(to be annexed)



HERMANUS GOLF ESTATE



REM FARM 501 (1)

FARM 100 (1)

REM 4700

FARM 101

APPROVED SCHEMATIC OF
FEDERAL GOVERNMENT RESERVE
(10 AUGUST 2004)

1253



NOTE

1. Original cadastral base provided by Sprock & Associates.
2. Precinct boundaries and precinct subdivisions provided by Overplan & Associates and Plan Consult (Cape).
3. Wetland elements provided by S.G. Ractiffe in association with Sprock & Associates during EIA process.
4. Golf course layout provided by Malkovich & Hayes.
5. All areas and dimensions to be confirmed by a registered land surveyor.
6. Contours provided by Sprock & Associates.

23 SEPTEMBER 2004

COMBINED PLAN OF
SUBDIVISION OF
CONSOLIDATED PROPERTY



SCALE 1:1000

73



1:1000

Atlantic Ocean

Draft Design Guidelines

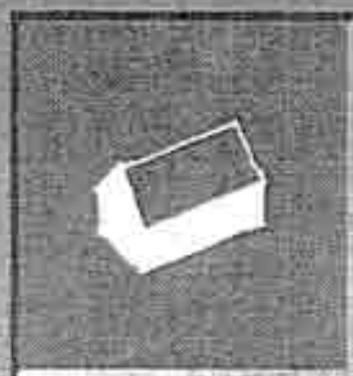
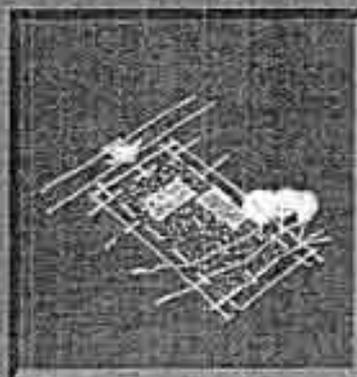
[to be annexed]

A handwritten signature in black ink, appearing to be 'R. S.', located in the bottom right corner of the page.

FERNKLOOF ESTATE

75

HOME OF HERMANUS GOLF



Architectural Design Guidelines

FERNKLOOF ESTATE

HOME OF HERMANUS GOLF



ARCHITECTURAL DESIGN GUIDELINES

Compiled by Munnik Visser Architects
assisted by Planning Partners
NOVEMBER 2004

Contents

ARCHITECTURAL DESIGN GUIDELINES

- 1 INTRODUCTION TO THE DESIGN GUIDELINES
- 2 FERNKLOOF ESTATE DEVELOPMENT PLAN
- 3 DESIGN PARAMETERS
 - 3.1 BUILDING LINES
 - 3.2 PLAN FORM
 - 3.3 BUILDING ENVELOPE
 - 3.4 SYNOPSIS OF THE PLANNING PRINCIPALS
- 4 BUILDING ELEMENTS
 - 4.1 ROOFS
 - 4.2 WALLS
 - 4.3 WINDOWS, DOORS AND SHUTTERS
 - 4.4 BALCONIES AND VERANDAHS
 - 4.5 PERGOLAS
 - 4.6 CHIMNEYS AND BRAAIS
 - 4.7 POOLS
 - 4.8 GARAGES AND CARPORTS
 - 4.9 BOUNDARY WALLS
 - 4.10 COLOUR
- 5 SERVICES
- 6 LANDSCAPING
- 7 BUILDING PLAN SUBMISSION AND ASSESSMENT





Ben

1 Introduction to the Design Guidelines

FERNKLOOF ESTATE - HOME OF HERMANUS GOLF

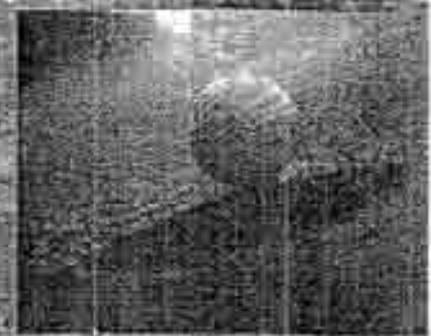
The guidelines are intended to provide a framework for the design of the individual houses in the Fernkloof Estate.

The implementation of the guidelines will facilitate a cohesive architectural character in the housing development responding positively to the golf course and the surrounding suburban fabric.

The guidelines are supplementary to the requirements of the Local Authority and the National Building Regulations.

The Design Review Committee and the Fernkloof Estate Master Property Owners Association (MPOA) must approve all plans prior to their submission to the local authority.

The MPOA reserves the right to make changes to the guidelines document. This will be done to ensure that the intention of the guidelines is maintained.



Introduction - Origins

The origins of the planning principles embodied in the guidelines are found in many forms of traditional South African architecture.

The use of linear forms with limited width and with double pitched roofs defined the form of primary building elements. The roof form was derived from the steep pitch of thatched roofs.

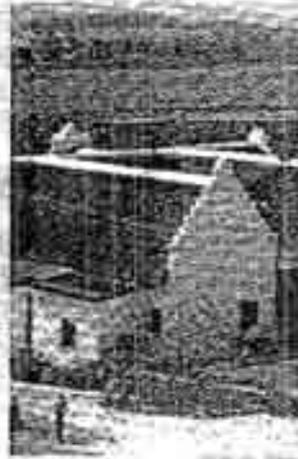
The flat roof form was a response to arid conditions like the Karoo. Sheet metal roof materials allowed the "flat roof" to become low pitched roofs.

The lean-to element was enclosed and allowed for the extended depth in the plan mass of the primary building form.

Enclosing walls, derived from the "kraal" or "werf" were used to connect primary and secondary building elements and could be varied in height to facilitate varying degrees of view and privacy.

Primary building elements were arranged to accommodate the public and private components of a house with each relating to common or separate outdoor spaces.

Secondary building elements were utilised to connect and support primary elements. These enhanced the relationship between inside and outside spaces and provided enclosure and definition.



Introduction - Planning Principals

The planning principals found in traditional architecture, as described in "Origins", have been interpreted and developed to provide design solutions appropriate for local climatic conditions and contemporary lifestyles.

In these guidelines, built form, consisting of simple rectangular pavilions linked together in a variety of configurations is encouraged.

The combination of primary and secondary elements provides versatile solutions to domestic accommodation requirements.

The resultant solid building elements can be arranged on the site to enclose outside space creating courtyards which trap the sun and provide shelter from the wind.

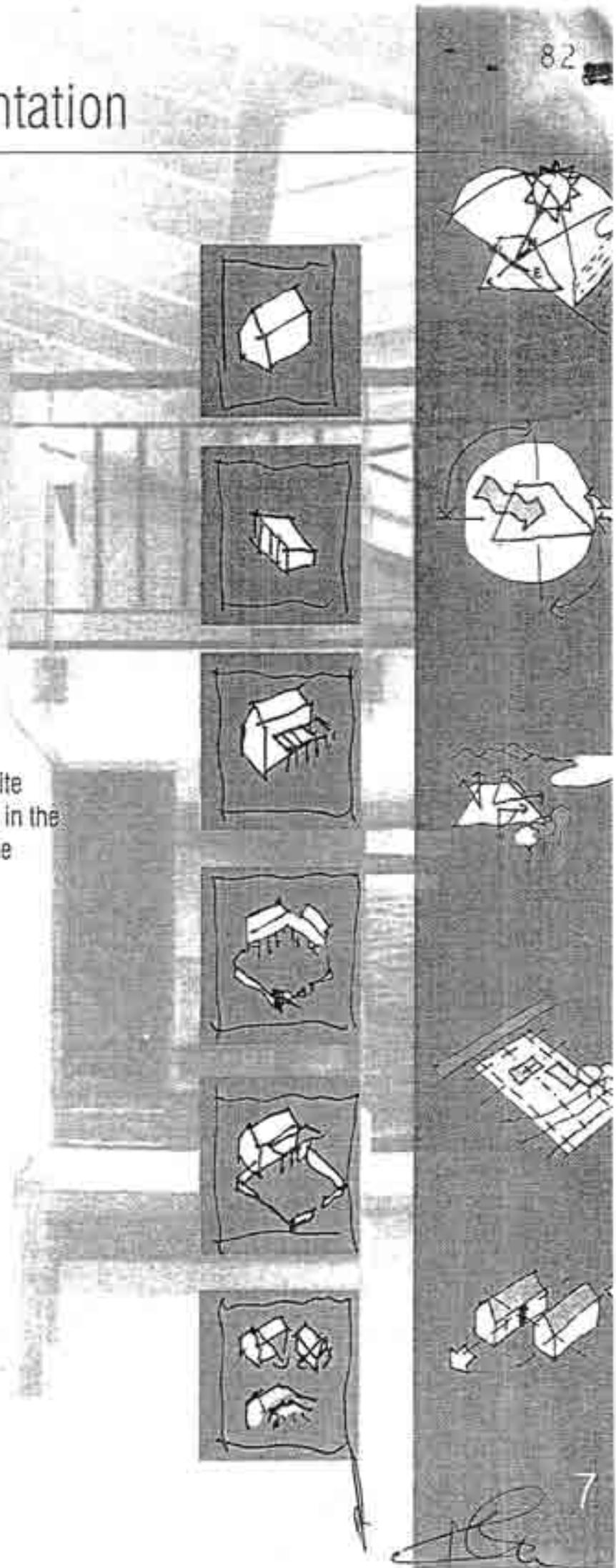
Linear building elements consisting of walls, screens and planting define the interface between private and public space and facilitate a response to the need for enclosure and privacy.

Introduction - Orientation

The Guidelines do not specifically address the environmental conditions, orientation and views enjoyed by the individual sites in the estate but have been formulated to facilitate an appropriate response to these fundamental design determinates.

The opportunities provided by each site must be interpreted and incorporated in the design brief, must be developed in the design process and must be realized in the building of every home.

The guidelines define the building line constraints of each site, the nature of the plan form and the extent of the building envelope allowed. These variables, acting together, generate the built form and its relationship to the site.



Introduction - The Home

The guidelines also identify and define individual building components and details, and prescribe their use and application to the built form.

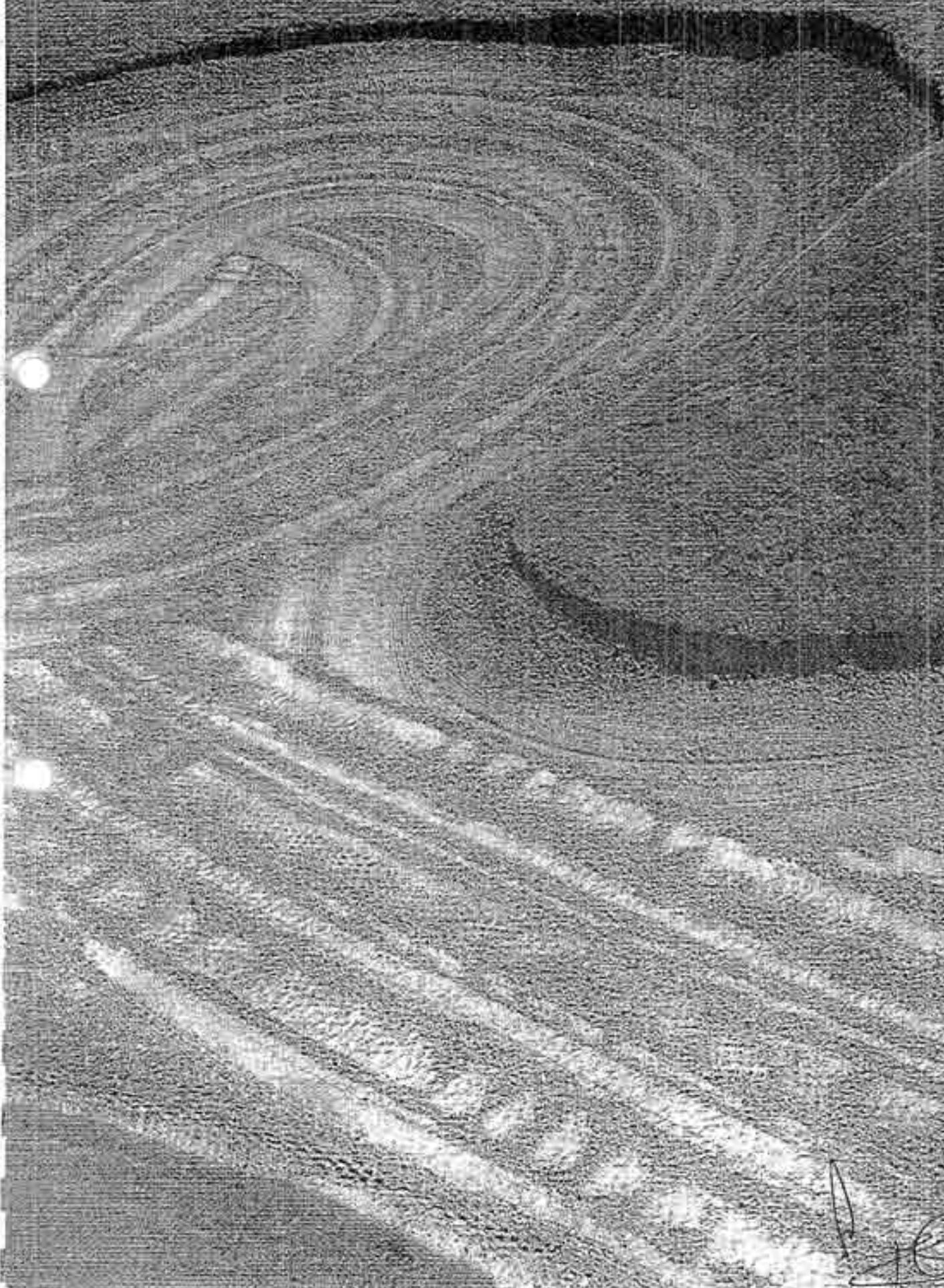
These components and details are incorporated into the building design in a prescribed manner. This will result in a cohesive character in the housing development as a whole and promote individual expression in the design of the house.

The intention is to provide a planning framework which encourages rather than restricts the design process.

The planning framework has been formulated to encourage an appropriate response to the sites and their environment.

In order to promote a cohesive character certain building forms, elements and materials have specifically been excluded.





[Handwritten signature/initials]

2 Fernkloof Estate Development Framework



The residential erven in the Fernkloof Estate are arranged in 9 precincts or villages, each with their own particular relationship to the golf course, and the surrounding suburban fabric.

The site plans shown here are indicative marketing drawings and may vary from the approved cadastral diagrams.

These guidelines apply to precinct numbers 1, 2, 5, 6, 7, 8 and 9



A handwritten signature or set of initials in the bottom right corner of the page.

2 Fernkloof Estate Development Framework

The seven residential precincts are closely associated to the golf course.

The precincts vary in size and have individual means of vehicular access. The erven vary in size ranging from 550m² to 1500m².

The principal distinguishing features of the precincts can be outlined as follows:

- The 6 erven in precinct 1 each have individual street access off an existing street.
- Precincts 2 & 7 have gated access of existing streets.
- Precinct 5 has gated access off an existing street and is situated adjacent to Berg en See Retirement Village, and is in close proximity to existing houses.
- Erven numbers 2 to 9 and 52 to 64 may only have single storey houses.
- Precinct 6 has gated access at its perimeter and is entirely contained within the golf course.
- Precinct 8 and 9 have gated access via an existing street.



Precinct 1 & 2



Precinct 5



Precinct 6



Precinct 7



Precinct 8 & 9



11

3 Design Parameters

3.1 Building Lines

3.1.1 Street Building Lines

- 2.5m for single storey buildings.
- 4.6m for double storey buildings
- 1.5m for garages with doors facing the street.
- 1.0m for garage walls, where the garage door does not face the street.
- 0 m for boundary walls less than 1.2m height for 1/2 length of site street boundary
- 1.5m for boundary walls less than 1.8m height.
- 2.5m for screen walls 2.1m in height.
- 2.0m for braais.
- 1.0m for swimming pools.

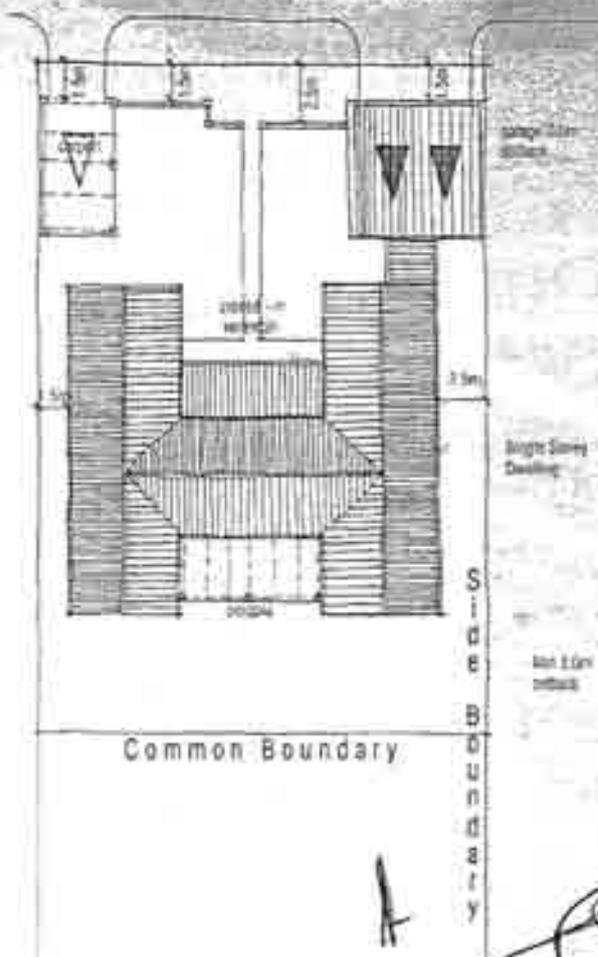
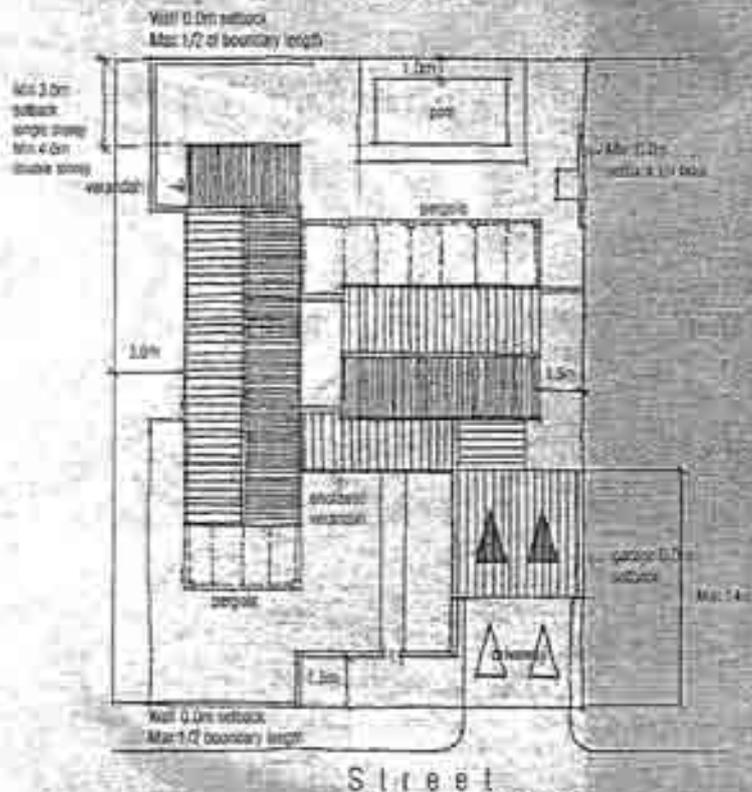
3.1.2 Golf Course / Open Space / Rear Building Lines

- 3.0m for the main building / covered verandah.
- 4.0m for a double storey building.
- 3.0m for a balcony.
- 2.0m for pergolas.
- 2.0m for braais / screen walls higher than 1.2m.
- 1.0m for swimming pools.
- 0.0m for boundary walls less than 1.2m height for 1/2 length of site boundary and 1.0m for the balance.
- 1.5m for boundary walls less than 1.8m height.

3.1.3 Side Boundary or Common Boundary Building Lines

- 4.0m aggregate with a minimum of 1.5 to one side for single storey building including covered verandah.
- 3.0m for double storey building including covered verandah.
The extent of a double storey building may not extend more than 60% of the length of the site boundary, excluding balconies.
- 3.0m minimum to balcony.
- 1.0m for swimming pool.
- 0.0m for garages up to a max of 14m from street boundary.
- 0.0m for braai structure or pergola up to 1/3 length of side boundary.

Golf course or Public open space



A

3 Design Parameters

3.1 Building Lines

3.1.4 Special Conditions

The majority of sites are rectangular or are approximately rectangular in shape and have a street or golf course / open space frontage of 20-22m.

Where the average frontage dimension is greater than 22m, the aggregate side space is 4.5m with a minimum of 2.0m to one side.

Where the minimum frontage dimension is greater than 25m, the aggregate side space is 5.5m with a minimum of 2.5m to one side.

Precinct 5:

For Erven 2 to 9 on the Western side of precinct 5, which are opposite Berg & See retirement village, there is an 10m set back building line.

The MPOA Design Review Committee reserves the right to interpret the above constraints in respect of special sites and to permit variations at it's own discretion.



3 Design Parameters

3.2 Plan Form

Plan Configuration of primary building elements

The plan form is defined by the site building line and building envelope constraints. The form generated consists of built elements as illustrated in the diagrams.



Possible Configuration of Primary and Secondary Elements

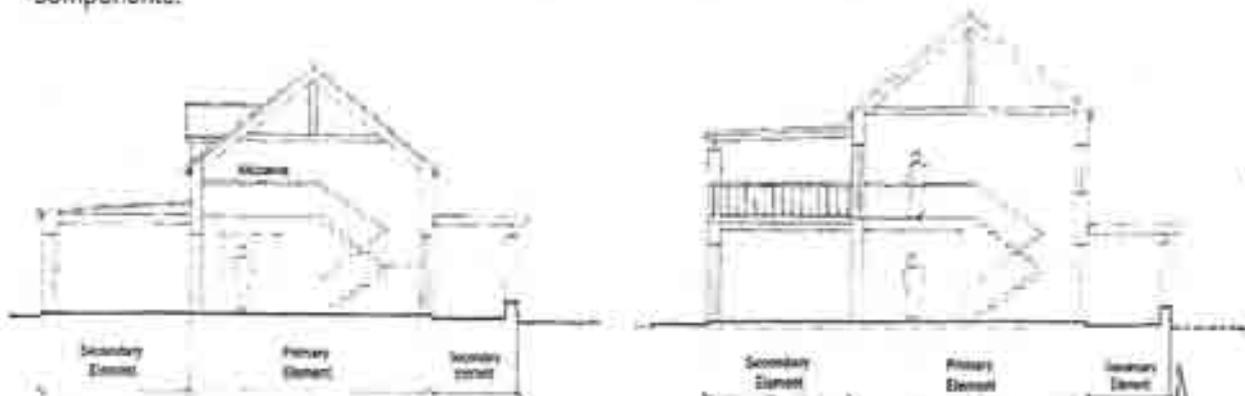
The primary pavilion forms consist of rectangular or square forms with double pitched roofs. Primary building elements are connected by mono-pitched secondary elements including lean-tos, pergolas or verandahs.



Possible Double storey component

The primary building forms can be single or double storey. Single storey buildings can incorporate mezzanine levels.

The extent of double storey buildings is restricted by setbacks and area constraints. The first floor component must cover the full extent of the ground floor footprint of one or more of the components.



Typical Section Single Storey

Typical Section Double Storey



3 Design Parameters

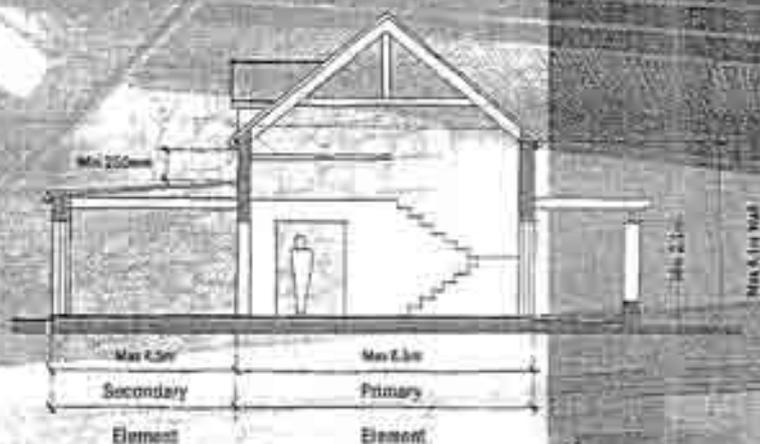
3.3 Building Envelope

3.3.1 Building Width

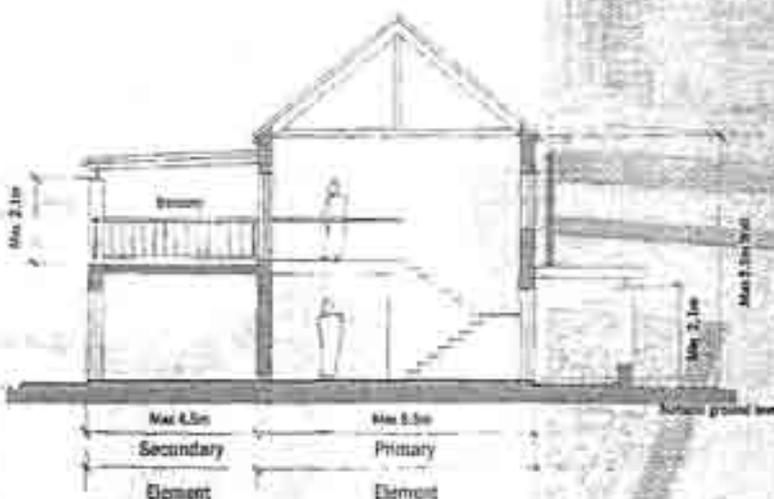
- The maximum width of primary building elements is 6.5m.
- The maximum width of secondary building elements is 4.5m including verandahs, pergolas and balconies.
- The maximum width of garages is 6.2m.

3.3.2 Building Height

- The height of single storey building elements is 4.1m measured from natural ground level to wall plate level.
- The height of a double storey primary building element is 5.5m measured from natural ground level to wall plate level.
- The height of secondary building elements is related to the building height of primary building elements as illustrated.
- The building height is measured from the mean natural ground level around the primary building prior to any disturbance to the site.



Typical Section - Single Storey



Typical Section - Double Storey

3.3.3 Roof Pitch

- Roofs to principal forms must be double pitched (equal pitch both sides) and the angle may vary from 27.5° to 40°.
- Where there is more than one primary building element they must be roofed individually and linked by secondary building elements.
- Roofs to secondary elements must be flat or mono pitched and the angle of the mono pitch may vary from 2.5° to 12.5°.

↓
[Handwritten signature]

3 Design Parameters

3.3 Building Envelope

3.3.4 Garages

- Garages may be free-standing, must have parapet walls on three sides and must have mono-pitched roofs.
- Garages may be incorporated into the primary and / or secondary built forms.

3.3.5 Coverage and Bulk Factors

For single storey buildings (incl. buildings with mezzanines)

- Coverage refers to the external footprint of roofed primary and secondary building elements, including verandahs.
- Pergolas and garages are excluded.

The coverage factor for single storey buildings is 50% of the site area.

Example

Calculation of allowable coverage for a single storey house on a 600m² site:

$$\begin{aligned}
 \text{Allowable coverage} &= \text{Site Area} \times \text{Coverage Factor} \\
 &= 600\text{m}^2 \times 50\% \\
 &= 300\text{m}^2 \text{ (excluding garage)} \\
 &+ \text{maximum of } 48.75\text{m}^2 \text{ of garage area} \\
 \text{Total} &= 348.75\text{m}^2
 \end{aligned}$$

For a house which includes double storey building

- Coverage refers to the external footprint of ground floor area including verandas and garages and may not exceed 45% of the of the site area.
- The bulk factor is 0.65.
- The first floor area of a double storey house may not exceed 60% of the ground floor area.

Example

Calculation of allowable coverage, bulk and first floor area for a double storey house on a 600m² site.

$$\begin{aligned}
 \text{Allowable coverage} &= \text{Site area} \times \text{Coverage factor} \\
 &= 600\text{m}^2 \times 45\% \\
 &= 270\text{m}^2 \text{ (including garage)} \\
 \text{Allowable bulk} &= \text{Site area} \times \text{Bulk factor} \\
 &= 600\text{m}^2 \times 0.65 \\
 &= 390\text{m}^2 \\
 \text{First Allowable floor area} &= \text{Bulk area} - \text{Ground floor area} \\
 &= 390\text{m}^2 - 270\text{m}^2 \\
 &= 120\text{m}^2
 \end{aligned}$$





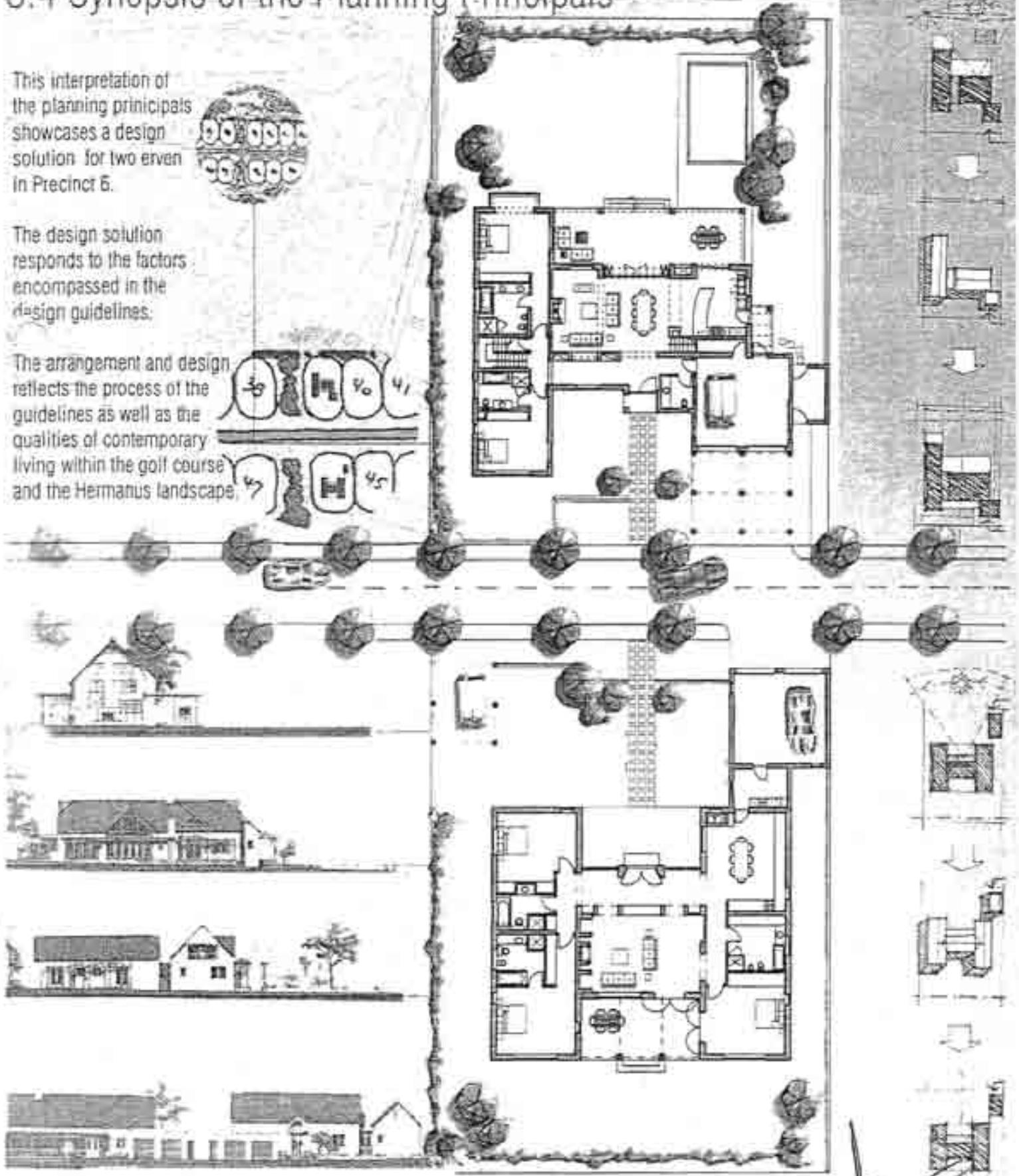
3 Design Parameters

3.4 Synopsis of the Planning Principals

This interpretation of the planning principals showcases a design solution for two erven in Precinct 6.

The design solution responds to the factors encompassed in the design guidelines.

The arrangement and design reflects the process of the guidelines as well as the qualities of contemporary living within the golf course and the Hermanus landscape.



4 Building Elements

4.1 Roofs

The roof pitch has been defined in section 3.3.3 Building Envelope.

Roof Materials

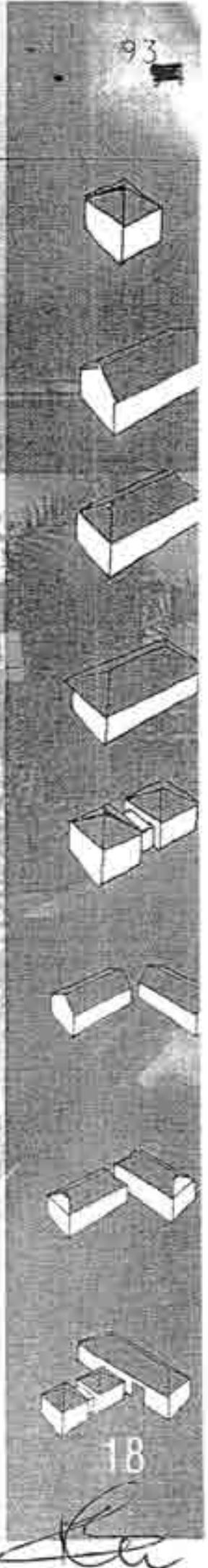
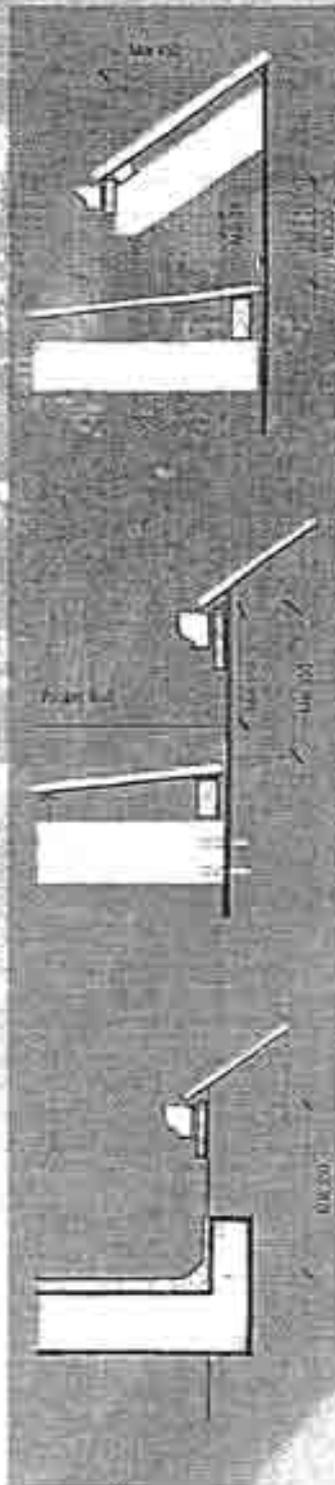
- Natural mazista slate.
- Flat profile, colour through concrete roof tiles limited to shades of grey.
- 'S' profile corrugated sheet metal pre-painted and limited to shades of grey.
- For the low pitched roofs between 2.5 and 5 degrees on secondary building elements standing seam pre-painted sheet metal roofs like "KILP-LDK" or equivalent may be used. The colour is limited to shades of grey.
- Flat concrete roofs in secondary building elements are to be covered with stone chip or with tiled trafficable surfaces.
- No thatch roofs or thatch gazebos will be permitted

Roof Form

- Principal roofs may be double pitched, gable or hip ended, with or without ventilators.
- It is recommended that the roof forms for the pavilions in each house be consistent.

Roof Eaves

- Roof eaves should be clipped or limited to an overhang of 450mm. Where a roof overhang is adopted the roof sprockets are to be exposed as illustrated.
- Epoxy coated aluminium rainwater goods to standard profiles.



4 Building Elements

4.1 Roofs

Roof and Dormer Windows

- Roof windows are contained in the plane of the roof and may have opening sections.
- Dormer windows are projecting structures within the roof and may also be incorporated as an extension of the wall plane above the eaves line.
- The number, position and types of roof and dormer windows are as illustrated.
- Dormer window types are as illustrated.

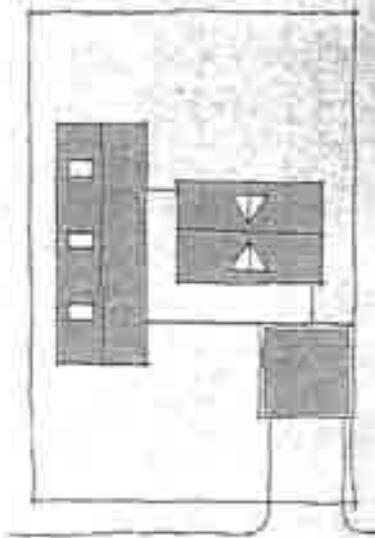
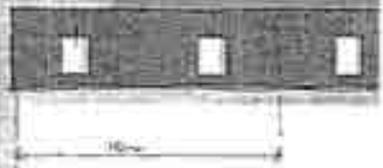


Primary and Secondary Roof Relationship

- The relationship between primary and secondary roof elements is as illustrated.



Roof Floor



19

4 Building Elements

4.2 Walls

Walls

- The walls of the primary and secondary building elements are to be plastered and painted.
- The walls may be smooth or textured, may have plinths and may have a combination of textures and colours.
- Materials are restricted to painted plaster, textured plaster, natural stone and shiplap cladding. Face brick and precast concrete elements are not allowed.



A
[Handwritten signature]

4 Building Elements

4.3 Windows, Doors and Shutters

Windows and Doors

- Tinted or reflective glazing is not allowed.
- Are to have vertical or square proportions.
- May be any size allowed in terms of wall height.
- Sub-division of windows and doors into smaller sections must maintain vertical or square proportions.
- Can be constructed from timber, aluminium or P.V.C.
- Must have frames sized as illustrated.

The intention is to have doors and windows with robust sections which look like timber sections but may be made of other materials.

- Where windows and / or doors are combined to provide large openings between internal and external spaces they must be composed of sections that are vertical. Large openings may only occur where they are covered by a verandah, roof, balcony or pergola.
- Shutters are to be functional, match proportions of the doors or windows they cover and may be folding or sliding.
- Shutters can be constructed from timber, aluminium or P.V.C.



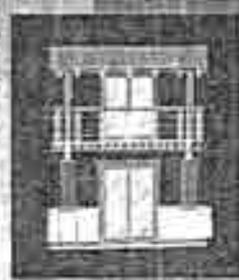
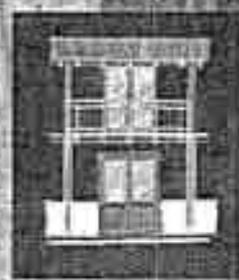
A [Signature]

4 Building Elements

4.4 Balconies and Verandahs

Balconies

- May only be constructed in association with double storey houses or mezzanine levels.
- May address the street, the golf course, open space boundary or the courtyard side.
- May not occur on a common boundary.
- May not have a verandah or pergola attached to it at ground floor level.
- Overlooking sides are to be screened.
- Support structures for balconies can consist of materials as described under Walls, timber or steel.
- Balustrades to balconies may be in timber, steel or aluminium and are to be arranged as illustrated.



Verandahs

- Support structures for verandah roofs can consist of materials as described under Walls, timber or steel.
- The structure of the verandah roof is to be exposed and expressed.
- The maximum roof overhang is 400mm.
- The relationship between a parapet wall associated with a verandah roof and a primary building element shall be as illustrated.



22
[Handwritten signature]

4 Building Elements

4.5 Pergolas

Pergolas

- Support structures for pergolas can be as for verandahs above.
- Pergola elements can be constructed from wrought and planed timber and steel.
- The maximum pergola overhang is 400mm.
- Pergolas may be covered in timber laths, "Spaanse-riet" and canvas awnings.
- Shade cloth is not permitted.
- Pergolas may support planting.
- Carports to be constructed as for pergolas.
- No shade cloth covering is permitted.



Handwritten signature and the number 23.

4 Building Elements

4.6 Chimneys and Braais

Chimneys for houses

- Chimneys may be constructed of materials as described under Walls and may also consist of approved steel or steel clad structures.
- Chimneys may not extend more than 1.2m above eaves height or 1.2m above their exit point from the roof.

Braais

- Braai fireplaces and pizza ovens must consist of approved pre-manufactured units.
- Units are to be incorporated into the wall of the house, screen wall or boundary wall.
- The chimneys are to be constructed as per chimneys above.
- Chimneys of braai's/pizza ovens may not extend more than 1.2m above the top of the braai/pizza oven.

4 Building Elements

4.7 Pools

Pools

- Pool filtration and heating systems are to be enclosed and screened.
- Pools and their enclosures are to comply with NBR safety regulations.
- Pools and associated pool decks may not project from the natural ground level by more than 450mm.

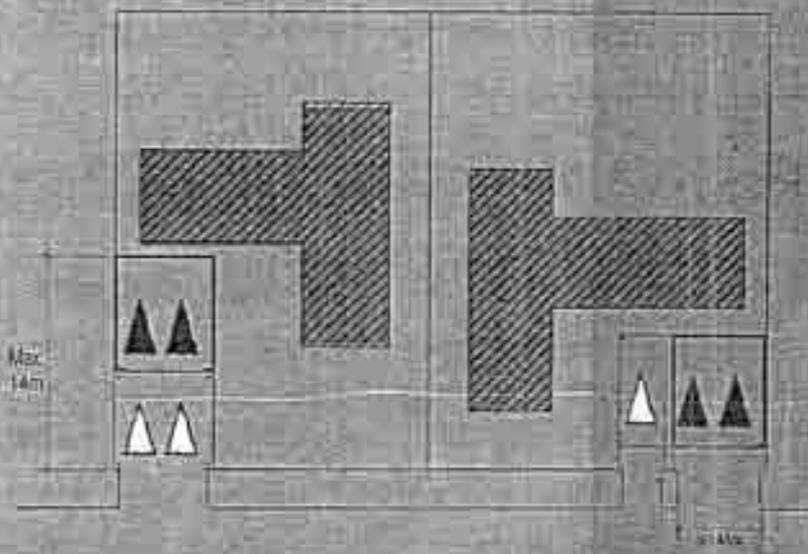


4 Building Elements

4.8 Garages and Carports

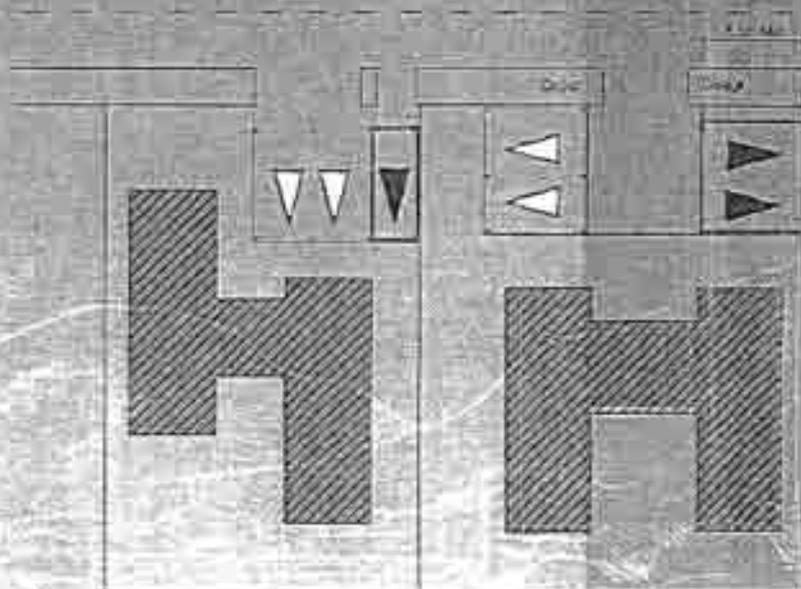
Garages

- Each site must have either a single or double garage, with size restricted to 6.5m wide by 7.5m long
- Garages facing the street have a minimum set back of 1.5m from the boundary
- Garages facing away from the street have a minimum setback of 1m from the boundary
- Maximum height of parapet of garage wall = 3.5m



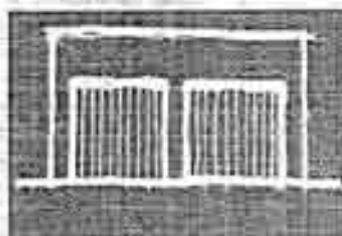
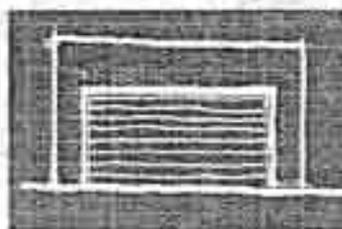
Carports

- Each site must provide 3 off street parking bays
- Each site may have a single or double carport.
- Support structure for carports is to be as for pergolas above.
- Are to be set back from street equal to the front garage wall or by no less than 1.5m.
- Configuration of garages, carports and driveways are as illustrated.



Curb Crossings

- Curb Crossings are to be limited to 5.5m and 2.5m wide
- Each site may have only one wide and one narrow crossing.
- Curb crossings are to be separated by a medium island of minimum 0.5m in width.



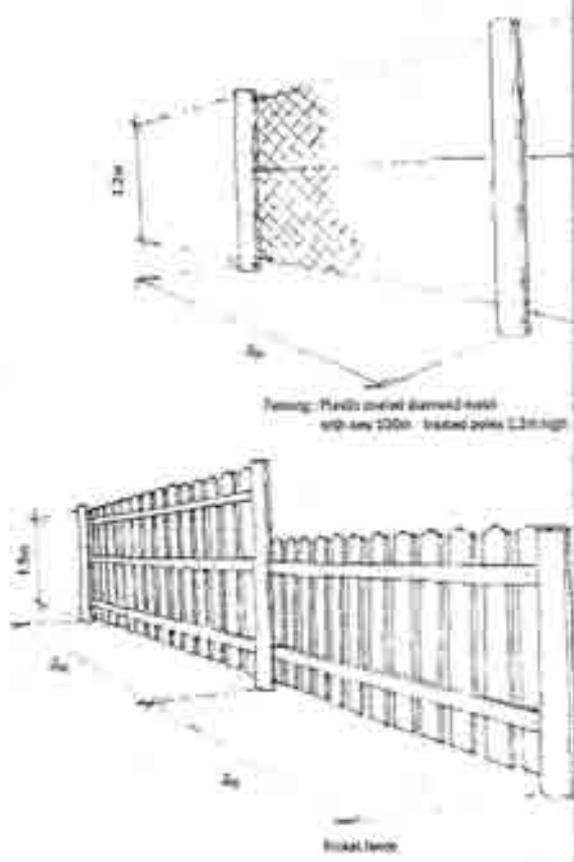
[Handwritten signature]

4 Building Elements

4.9 Boundary Walls

Boundary Walls

- Boundary walls on the street, golf course and open space sides of a site are limited to 1.2m high.
- Walls of 1.8m height are to be set back from the boundary by 1.5m.
- The above walls are limited to 1/2 the length of the site boundary.
- Common boundary walls maximum 1.8m high.
- Screen walls to laundry and kitchen yards are to be a maximum of 2.1m high and will screen clothes lines and refuse bins. Laundry screen walls are to be a maximum of 10m long.
- Where the natural ground line slopes, boundary walls are encouraged to have their top line run parallel to the ground line.
- Other elements of enclosure can be constructed of picket or wire fencing and planting and must conform to all of the limitations of boundary walls, as described above.
- A combination of wall and fencing elements may be constructed as illustrated.
- No wire fencing to face the street boundary.



Boundary Enclosure - Precinct 1

- Prior to the development of individual erven in precinct 1 the golf course side will be secured with palisade fencing.
- Once individual erven have secured their street and common boundaries the golf course fencing may be removed.

[Handwritten signature]

4 Building Elements

4.10 Colour

E16-1
Fences

E16-2
Fences

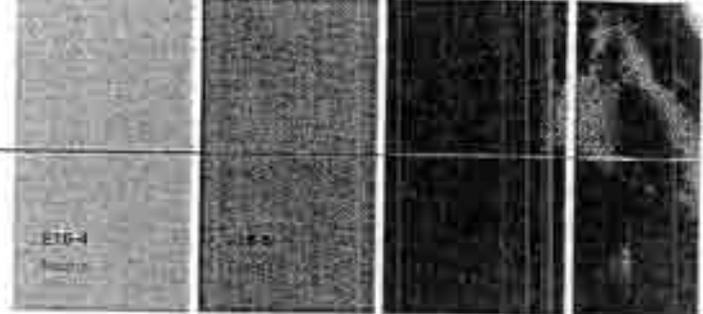
E16-3
Aluminium

E16-4
Fences

E16-5
Fences

E16-6
Fences

E16-7
Fences



Roofs

E26

Grey colours only will be accepted for concrete roof tiles and metal roof sheeting. The colour range is indicative of the shades of grey only. Other hues of grey will be allowed, provided they fall within the following colour range:

E26-1
Burns

E26-2
Richmond

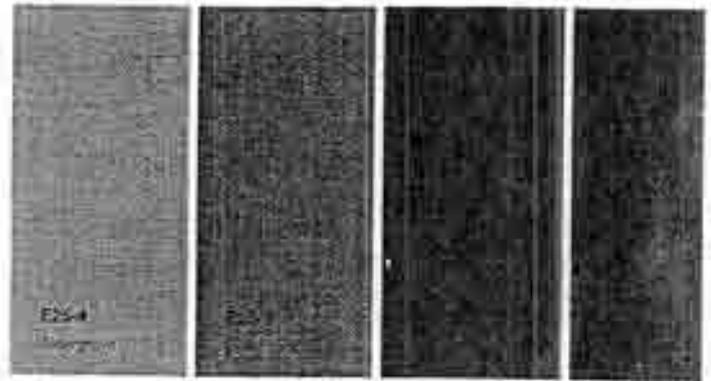
E26-3
Largan

E26-4
Maggery

E26-5
Maggery

E26-6
Maggery

E26-7
Maggery



- Piascon
- E29-3 Silver
 - E29-4 Sterling
 - E29-5 Pencil
 - E29-6 Bovine

Colours for natural slate (mazista) tiles are to be in the dark grey colour range. Only a limited extent of the brown mottled tile will be accepted. Refer to doors and windows under walls for dormers and roof windows.

E33-1

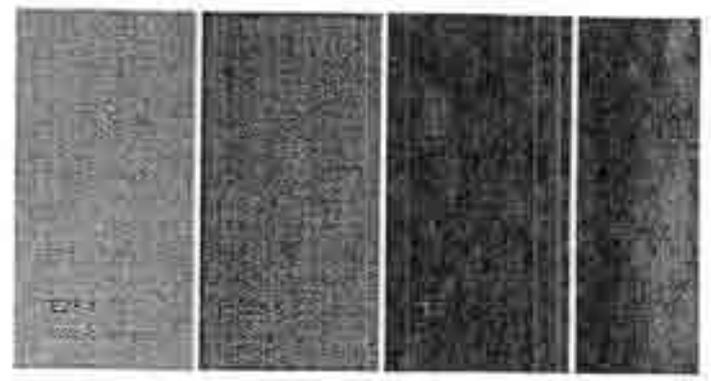
E33-2
Sydney

E33-3
Sydney

E33-4
Sydney

E33-5
Sydney

E33-6
Sydney



Walls

E33 Two colour ranges are available for walls and their associated elements which are:

- Door frames
- Windows
- Shutters
- Verandahs
- Dormer windows
- Roof windows

E33-1
Walls

E33-2
Richmond

E33-3
Sydney

E33-4
Wool

E33-5
Wool

E33-6
Wool

E33-7
Wool



One or the other of the available colour ranges must be adopted for each house.

E35

E35-1

E35-2

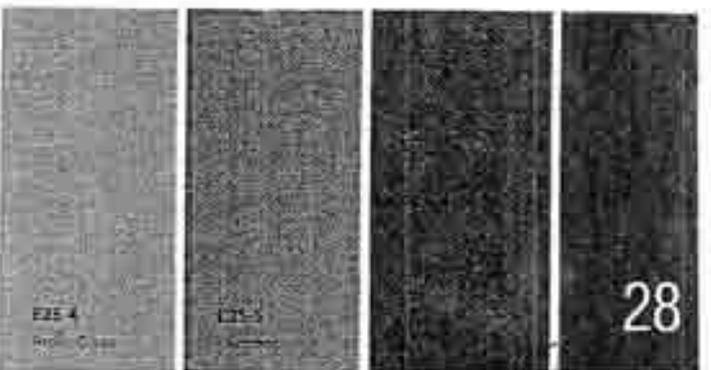
E35-3
Aluminium

E35-4
Aluminium

E35-5
Aluminium

E35-6
Aluminium

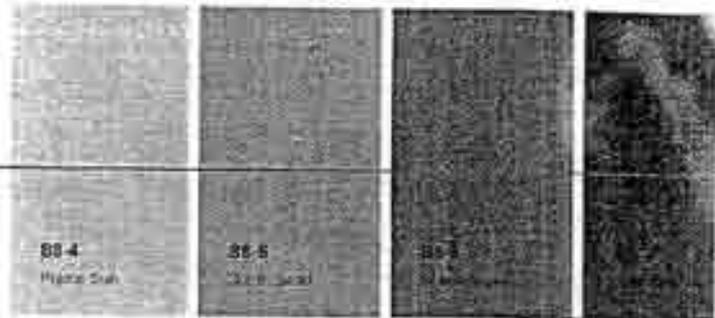
E35-7
Aluminium



4 Building Elements

4.10 Colour

11
 B8-2 Prairie Rain
 B8-3 Prairie Dust



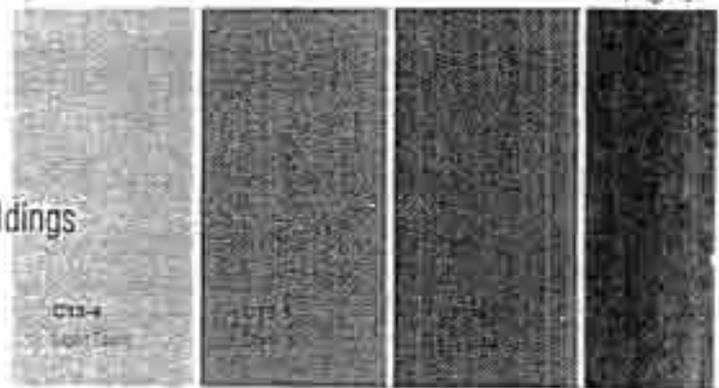
1 Earth Colours

Walls

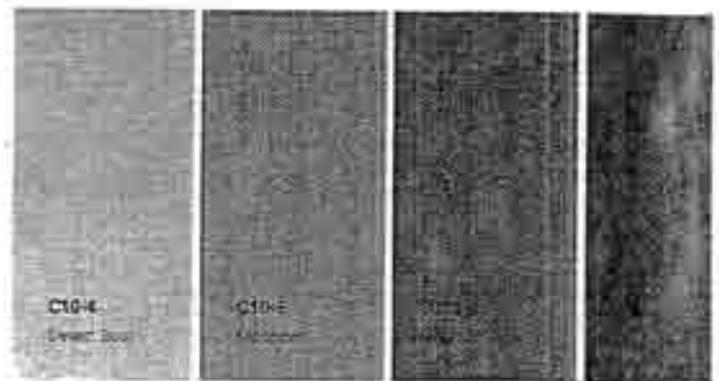
12-1 Plascon
 B8-1 Wheat Dust
 B8-2 Prairie Rain
 C8-1 Soft Suede
 C8-2 Clay Bisque
 C10-1 Kid Leather
 C10-2 Nubuck
 C13-1 Water Cracker
 C13-2 Arrow Root
 D9-1 Horseradish
 D9-2 Stucco
 E9-1 White Poplin
 E9-2 Woodpecker

Plinths / Plaster Mouldings

B8-3 Prairie Dust
 C8-3 Cracked Vessel
 C10-3 Footstep
 C13-3 Biscuit
 D9-3 Dune Beige
 E9-3 Nomad



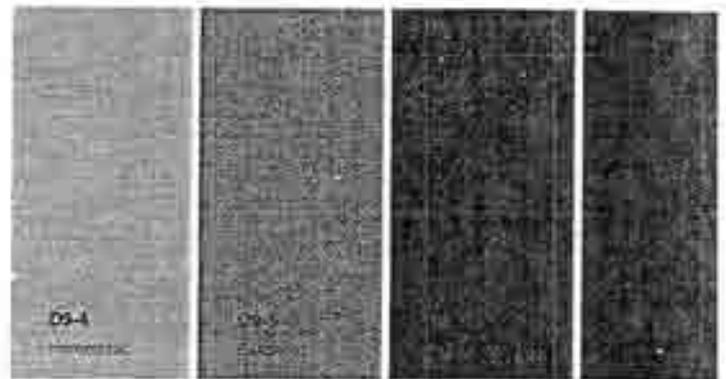
10-1 C10-2 Nubuck
 C10-3 Footstep



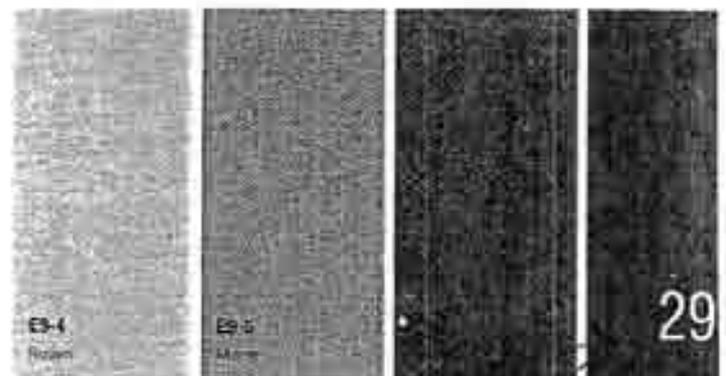
Associated Elements

12-1 Plascon
 B12-4 Brant Field
 B12-5 Bancroft
 B12-6 Indian Corn
 B12-7 Tomato Pasta
 D5-4 Quest
 D5-6 Choco Maisse
 D13-3 Chaps
 D13-4 Safari Town
 D13-5 Trade Winds
 D13-6 Beech Tree
 D5-5 Rondo
 D5-7 Moose Brown

9-1 D9-2 Stucco
 D9-3 Dune Beige



7-1 E9-2 Woodpecker
 E9-3 Nomad



104

29



4 - Building Elements

4.10 Colour

13-1 13-2 13-3

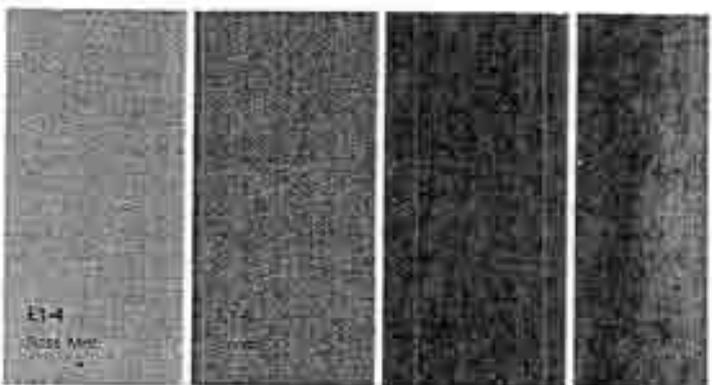
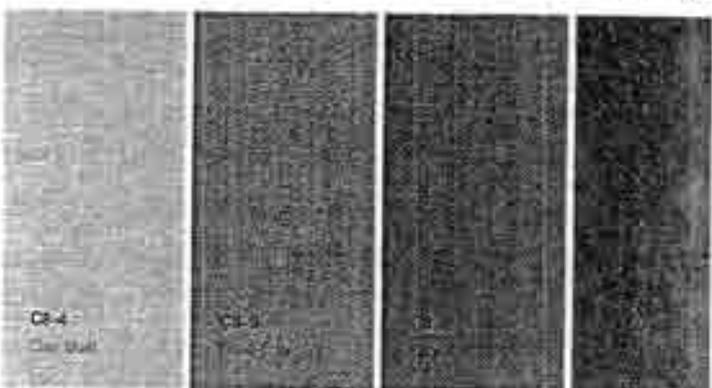


105

2 Grey Colours

Walls Plinths / Plaster Mouldings

- | | | |
|---------|----------------------|--------------------|
| Plascon | E1-1 Manon White | E1-3 Sarabond |
| | E1-2 Devan Ash | E16-3 Mayor |
| | E16-1 Eyelet | E26-3 Langley |
| | E16-2 Plaster | E28-3 Bliffow |
| | E26-1 Burnaby | E33-3 Sydney |
| | E26-2 Richmond | E35-3 Morning Mist |
| | E28-1 Solitude | |
| | E28-2 Storm Cloud | |
| | E33-1 Halifax | |
| | E33-2 Bathurst | |
| | E35-1 Off the Wall | |
| | E35-2 Shades of Grey | |

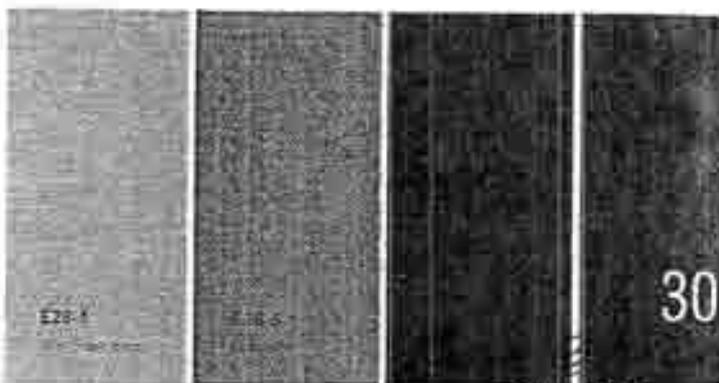
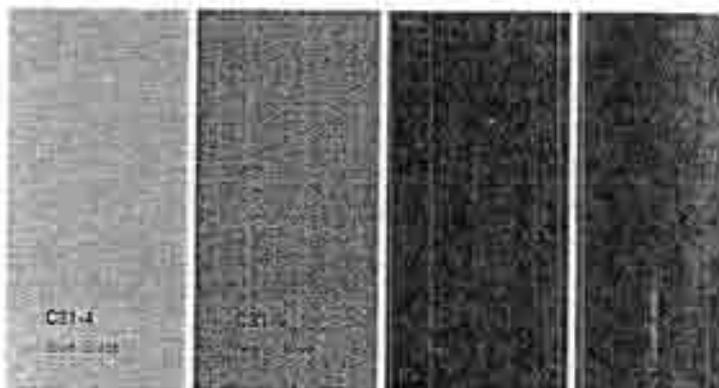


Associated Elements

- | | | |
|---------|-------------------|-------------------|
| Plascon | C31-4 Blue Glaze | D28-6 Blue Slate |
| | C31-5 Metal Blue | D28-7 Blue Black |
| | C31-6 Fraser Blue | D31-4 Barker Lake |
| | C31-7 Black Sea | D31-5 Holden Lake |
| | D28-4 Grey Dove | D31-6 Bonnachere |
| | D28-5 Canso Sky | D31-7 Buchorn |

The wall, associated element colours and white may be used for:

- Shutters and doors
- Timber elements may be left natural, finished with a clear protective coating.
- Boundary wall colours are as for wall colours.
- Boundary picket fences are as for wall, associated element colours or white. Treated timber components may be left natural, unpainted.
- Gate colours are to be as for the window and door colours.



30

5 Services

Services

- Waste and supply services are not to be exposed externally
- Television aerial and satellite dishes are to be installed below the roof eaves line
- AC condenser units are to be at ground level and screened
- Gas bottles to be housed in the kitchen yard
- External lighting is to be wall mounted
- Bollard lights are to be restricted to 900mm high and no pole mounted lighting will be allowed
- Solar water heating devices are to have their storage tanks concealed from view and separate from the heating panels
- Heating panels are to be mounted flush on the primary roof forms only
- Heating systems are to consist of approved pre-manufactured units

6 Landscaping

Landscaping

Landscaping must be undertaken within the integrated landscaping language of the Estate.

The extent of paving, particularly to driveways, is to be limited to the choice of materials relating to those used in the adjacent public or Estate roadways and spaces. Driveway widths are limited to 5m between avenue tree planting

The use of hedgerows is recommended and the planting of indigenous trees and shrubs is encouraged where possible. Exotic plant material common to the surroundings of the Estate may be used

Landscaping Character

In order to maintain continuity in the overall landscape character, owners of erven are required to design and implement the garden landscapes around the houses in accordance with certain conditions, specifications and restrictions.

In this way the collective landscape theme will be realized for the appreciation and benefit of all

6 Landscaping

Residential Landscape Guidelines

The character of the Estate's landscape is a rich blend of elements derived from the nature reserve, the residential pattern and the golf course. The character of different areas around the Estate is reflected in various landscapes, each contributing to the complete environment as described by paving, enclosures, lawns and planting.

The Estate's character is itself by nature broadly diverse, but of a sufficiently large scale that enables smaller scale diversity to be absorbed and calmed by the strength of the overall structure. Each of the six precincts have their own geometry and a style and selection of vernacular or historically correct plant material. This is repeated in the avenue and hedgerow plantings of the residential areas.

The landscape character changes as one progresses around the Estate and should be made of plant material which will create a range of habitats attractive to birdlife.

The residential gardens are an integral part of the Estate's landscape pattern and represent a substantial area. With the objective of encouraging continuity between gardens and streetscape as well as gardens and golf course/open space, the following plant lists have been compiled. Certain plants are not permitted. The list of recommended plants is intended to guide owners to select plant material that is ecologically, aesthetically and practically appropriate to this area and its micro-climate.

A

6 Landscaping

107

Recommended Plant List

A garden cottage style is encouraged; including hedges of varying height and species, defining beds containing rambling mixtures of more informal planting.

Planting on walls and pergolas is encouraged as is the planting of side spaces between houses, in an effort to reduce the overall impact of the built element.

Streetside gardens may best relate to the formality of the avenue and residential geometry. Gardens fronting the golf course may not flow out into the out of play areas of the golf course.

Extensive rehabilitation will be undertaken on site using indigenous plant material some of which will be sourced during a "search and rescue" programme which precedes the development. This material will be cultivated and propagated where possible and used to re-establish the local vegetation pattern.

The principles of the Department of Water Affairs Waterwise gardening programme are supported and encouraged.

A limited range of indigenous plant material is appropriate for planting on this site. The following list is recommended.

These species are indigenous, some locally others to a wider area but suited to this site.



6 Landscaping

Trees

- Brachylaena discolor - Coast Liver Oak
- Tarconanthus camphorates - Wild Camphor Bush
- Buddleja salviifolia - Sage Wood
- Ekebergia capensis - Cape Ash
- Sideroxylon Inermis - Milkwood
- Erythrina caffra - Coast Coral Tree
- Olea europaea subsp. Africana - Olive Tree
- Olea capensis - Cape Olive
- Rhus lucida - Glossy Currant
- Brabejum stellatofolium - Wild Almond
- Harpophyllum caffrum - Wild Plum



Shrubs and Ground Covers

The objective is for the gardens to contribute to the natural habitat embraced by the estate, golf course and open spaces.

- | | | |
|----------------------------|-------------------------|-----------------------------|
| Arctotis stoechadifolia | Haemanthus pubescences | Zygophyllum flexuosum |
| Arcotheca populifolia | Lachenalia rubida | Zygophyllum sessilifolium |
| Carpobrotus acinaciformis | Caesia contorta | Ruschia macowanii |
| Carpobrotus edulis | Chlorophytum triflorum | Ruschia tumidula |
| Conicosia pungiterniformis | Trachyandra divaricata | Phylla cephalantha |
| Gazania rigida | Trachyandra cillata | Tetragonia fruticosa |
| Jordaniella dubia | Trachyandra falcata | Indigofera complicata |
| Albuca fragrans | Asparagus rubicundus | Indigofera incana |
| Brunsvigia orientalis | Asparagus capensis | Senecio aloides |
| Babiana nana | Eriosephalus racemosus | Pelargonium capitatum |
| Cyristetes longifolia | Euphorbia mauritanica | Citua daphnoides |
| Moraea setifolia | Ottionna arborescens | Euclea racemosa |
| Putterlickia oyracantha | Myrica cordifolia | Lycium ferocissimum |
| Limonium peregrinum | Rhus glauca | Rhus laevigata |
| Solanum guineense | Senecio halimifolius | Salvia chamaeaeagnea |
| Pelargonium gibbosum | Chrysanthemoides incana | Chrysanthemoides monilifera |
| Salvia lanceolata | Zygophyllum morgsana | Rhus crenata |
| Eudea racemosa | Salvia africana-futea | Salvia africana-caerulea |

Climbers

- | | | |
|-----------------------|------------------------|--------------------------|
| Cotyledon orbiculata | Hellmuthia membranacea | Thamnochortus spicigerus |
| Tylecodon paniculatus | Cissampelos capensis | Microloma sagittatum |
| Kedrostis nana | Senecio tamoides | |

6 Landscaping

Hard Landscaping

Hard landscaping surfaces, i.e. brick paving, tiling etc. around houses will not be permitted to cover the entire site. Cumulatively paving shall not cover more than 35% of each erf's area and a minimum of 20% of each erf must be soft landscaping.

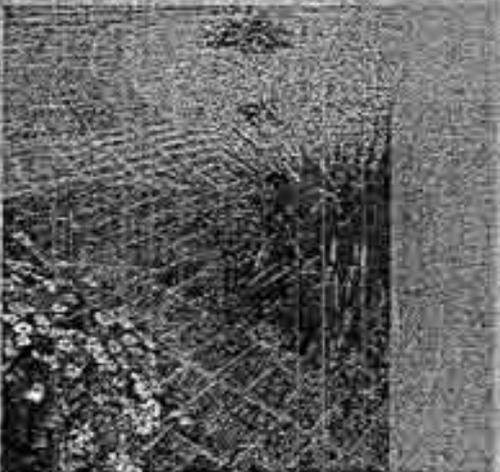
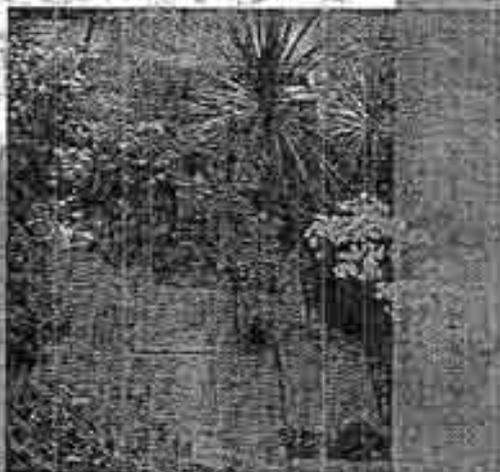


Conditions

A landscape plan for the garden of an erf is to accompany the building plan at submission for approval by the Design Review Committee.

The plan shall be to a scale of 1:100 and shall show the following:

- Adjacent areas of private open space or golf course.
- All grading, retaining structures and terracing intended to be undertaken, including gradients and structural elements, must be indicated.
- All plant material must conform with the restrictions in plant choice given in these guidelines.
- All paving and fencing must be indicated and the intended finishes specified.



6 Landscaping

Restrictions

The gardening and landscaping activities of an owner shall be confined to the physical extent of the pegged residential erf and may not extend into the golf course, fairway or out of play area.

Garden lighting is not permitted other than bulkhead lighting units fitted with 45° louvres and attached to the building itself. Final numbers and positions to be approved by the Design Review Committee.

No temporary structures are permitted on the erf. No "wendy houses" are allowed. Where the intention of the erf owner is to cultivate a hedge, the position, type and final height shall be indicated on the site plan.

Invasive alien vegetation clearance on any undeveloped erf remains the responsibility of the owner.



7 Building Plan Submission and Assessment

Building Plan Submission

The design proposals will be scrutinized for compliance by the MPOA Design Review Committee.

The proposal will firstly be submitted as a design concept and once it has been approved, as the local authority submission drawing.

Information Required

The following documentation and information is required for the design concept and local authority submission drawings:

- Site development plan with contours at 1m intervals showing the boundary, building lines and setbacks at 1 : 100.
- Site area calculation.
- Coverage area calculation.
- 1st Floor area calculation.
- Bulk calculation.
- Bulk earthworks plan at 1 : 100.
- Plans at 1 : 100 for each level.
- Roof plan at 1 : 100
- Elevations and sections at 1 : 100.
- Site number and North point.
- Drainage plan.
- Boundary walls and retaining structures.
- External finishes and colour schedule.
- External lighting and services layout.
- Landscaping plan.



Notes

This document is to accompany the submission of the *Design Concept Drawings to the Design Review Committee (DRC) of the Master Property Owners Association (MPOA).

DESIGN CONCEPT DRAWINGS	ERF NO.	SUBMISSION DATE	DRC
	PRECINCT NO.	APPROVAL DATE	MPOA

Prior to the submission of drawings to the Local Authority for Building Plan Approval, a copy of the drawings is to be issued to the DRC and MPOA for their final approval.

LOCAL AUTHORITY SUBMISSION DRAWINGS FOR BUILDING PLAN APPROVAL	SUBMISSION DATE	DRC
	APPROVAL DATE	MPOA

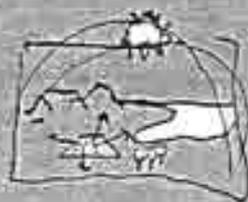
* The term Design Concept refers to PROCAP work stage 2 as defined in the Client/Architect Agreement for use in the Private Sector.

This document has been produced to illustrate the aesthetic and architectural requirements at Fernkloof Estate. The MPOA reserve the right to vary these requirements at any time and shall have absolute discretion in approving or refusing to approve plans and specifications submitted for approval.



Notes

↓
AG



↓
Ker

Draft Constitution of the Fernkloof Estate Master Property Owners Association

[to be annexed]

A handwritten signature in black ink is located at the bottom right of the page. A thin black arrow points downwards from above the signature towards the center of the signature.

CONSTITUTION

**FERNKLOOF ESTATE MASTER
PROPERTY OWNERS ASSOCIATION**

a body corporate established
in terms of section 29 of the Land Use
Planning Ordinance (Ord 15 of 1985)



1. ESTABLISHMENT IN TERMS OF STATUTE

The Fernkloof Estate Master Property Owners Association is constituted as a body corporate in terms of section 29 of the Land Use Planning Ordinance (Ord 15 of 1985) (as amended) in accordance with the conditions imposed by the Overstrand Municipality when approving in terms of sections 25(1) and 42 of the said ordinance the subdivision of the consolidated property known as the Hermanus Golf Estate and shall come into existence simultaneously with the registration in the deeds office of the first of the erven in the development.

2. INTERPRETATION

In this constitution:

2.1 the following words shall, unless the context otherwise requires, have the meanings hereinafter assigned to them:

2.1.1 "Association" means the Fernkloof Estate Master Property Owners Association;

2.1.2 "auditors" mean the auditors of the Association;

2.1.3 "business day" means a weekday other than Saturdays, Sundays and public holidays;

2.1.4 "chairperson" means the chairperson of the trustee committee;

2.1.5 "common areas" mean the following:

2.1.5.1 the wetlands on the golf course as depicted on ___ on the plan which is annexure "___" hereto (unless the ownership thereof and/or the obligation for maintenance thereof is passed to the golf club); and

2.1.5.2 the control room/s for the control of the electrification of the external perimeter walls and fences (if applicable);



2.1.5.3 any other area/s and/or facilities which the trustee committee may designate as common areas from time to time;

and includes all common areas designated as such in any further phase/s of the development;

2.1.6 "Council" means the Overstrand Municipality or its successor/s in title;

2.1.7 "design guidelines" means the design guidelines to control all aspects of design and landscaping of any development on the land, as amended from time to time in terms of this constitution or as required by the Council or the development facilitator;

2.1.8 "developer" means the Overstrand Municipality which may be represented by the appointed development facilitator, Rabcov Joint Venture, a joint venture between Cavcor (Proprietary) Limited (Registration No 1994/0067641/07) and Rabie Property Projects (Proprietary) Limited (Registration No 1990/001920/07), and includes its successor/s in title or assign/s as developer of the land;

2.1.9 "developer trustee" means a trustee appointed by the developer;

2.1.10 "development" means the development or developments established or to be established on the land, and includes all such additional area/s as may be incorporated as further phases into the development in terms of clause 38.1 below;

2.1.11 "development period" means the period from the incorporation of the Association until all the erven in the development have been sold and transferred by the developer, including all such additional area/s as may be incorporated as further phases into the development in terms of clause 38.1 below, or until the date of completion of the services by the developer in the development, as certified by the relevant authority, whichever occurs last;

- 2.1.12 "erven" mean the erven in the development, and "erf" means any one of them;
- 2.1.13 "golf club" means the Hermanus Golf Club and includes its successor/s in title;
- 2.1.14 "in writing" means written, printed or lithographed or partly one and partly another, and other modes of representing or producing words in a visible form;
- 2.1.15 "land" means any land within Fernkloof Estate which includes any further land which may be incorporated into the Fernkloof Estate development by the developer from time to time in terms of clause 38 below;
- 2.1.16 "LUPO" means the Land Use Planning Ordinance (Ord 15 of 1985);
- 2.1.17 "member" means a member of the Association and includes the developer in its capacity as such during the development period;
- 2.1.18 "member trustee" means a trustee appointed by the members;
- 2.1.19 "month" means a calendar month;
- 2.1.20 "occupation right" means a right of occupation in respect of any dwelling in the development which is registered in the deeds office as a registered life right in terms of a retirement scheme or registered leasehold right;
- 2.1.21 "office" means the registered office of the Association;
- 2.1.22 "precinct developments" mean the developments established or to be established on the precincts 2 to 9 on the land, and "precinct development" means any one of them;
- 2.1.23 "precinct 1 member" means a member of the Association pursuant to such member being the registered owner of a single residential erf in precinct 1 as contemplated in clause 6.1.1 below;
- 2.1.24 "prime rate" means a rate of interest per annum which is equal to the published minimum lending rate of interest

per annum charged by ABSA Bank, compounded monthly in arrears on the unsecured overdrawn current accounts of its most favoured corporate clients in the private sector from time to time. (In the case of a dispute as to the rate so payable, the rate shall be certified by any manager or assistant manager of any branch of the said bank, whose certificate shall be final and binding on the parties);

- 2.1.25 "property owner" means any of the following persons:
 - 2.1.25.1 any precinct 1 member; and
 - 2.1.25.2 any member of a property owners association constituted in terms of LUPO in respect of a precinct development on the land; and
 - 2.1.25.3 any member of a body corporate constituted in terms of the Sectional Titles Act (Act 95 of 1986) in respect of a sectional title scheme on a portion of the land;
- 2.1.26 "rules" mean the rules imposed by the developer or the trustees from time to time relating to the management of the development;
- 2.1.27 "sectional title unit" means a dwelling unit in a sectional title scheme in the development, but excludes a unit designated for other purposes, e.g. a garage or storeroom;
- 2.1.28 "single residential erf" means an erf in the development on which only one dwelling house is lawfully permitted;
- 2.1.29 "special resolution" means a resolution passed at a special general meeting in accordance with the provisions of clause 29 below;
- 2.1.30 "trustee committee" means the board of trustees of the Association;
- 2.1.31 "trustee" means a member of the trustee committee;
- 2.1.32 "vice-chairperson" means the vice-chairperson of the trustee committee;



2.1.33 "year" means a calendar year;

2.2 unless the context otherwise requires, any words importing the singular shall include the plural, and vice versa and words importing any one gender only shall include the other two genders;

2.3 the headings to the respective clauses are for reference purposes only and shall not be taken into account in the interpretation of these clauses;

2.4 where consent or approval of the Association is required for any act by a member, such consent or approval shall be in writing and duly signed by the Association, and shall be given prior to the member taking action;

2.5 reference to "this constitution" means this constitution and all rules, regulations and by-laws of the Association from time to time enforced.

3. PURPOSE DESCRIBING MAIN BUSINESS

The main business of the Association is to carry on the promotion, advancement and protection of the common interests of the members of the Association from time to time and the maintenance and control of the common areas.

4. MAIN OBJECT

The main object of the Association is:

4.1 the control and maintenance over:

4.1.1 the external perimeter walls and fences but specifically excluding the entrances, gate houses, walls and fences on the perimeter of each precinct development and access permits which will be controlled and maintained by the property owner associations established or to be established in respect of the precinct developments;

4.1.2 the external electrification system of the perimeter walls and fences including the control room/s for the control thereof (if applicable); and

4.1.3 the wetlands on the golf course referred to in clause 2.1.5.1 above, provided that any amount to be spent on



the maintenance of the wetlands shall be determined in conjunction with the Council and the Botanical Society on an annual basis;

- 4.1.4 all other common areas designated as such by the trustee committee from time to time;
- 4.2 the control over the compliance and enforcement of the design guidelines and the provisions of the relevant contractor's agreements;
- 4.3 the promotion, advancement and protection of the common interests of the members generally;
- 4.4 to enter into services agreements with the local authority or any other authority or supplier of services in regard to the supply of services in respect of the common areas.

5. FINANCIAL YEAR END

The financial year end of the Association is 30 June of each year or such other date as the trustees may decide from time to time.

6. MEMBERSHIP OF THE ASSOCIATION

- 6.1 Membership of the Association shall be compulsory for the following persons:
 - 6.1.1 each registered owner of a single residential erf on precinct 1 ("precinct 1 member");
 - 6.1.2 each property owners association constituted in terms of LUPO in respect of a precinct development on the land;
 - 6.1.3 each body corporate constituted in terms of the Sectional Titles Act (Act 95 of 1986) in respect of a sectional title scheme on a portion of the land;
 - 6.1.4 the developer in its capacity as such, whether it is the owner of land (or any portion thereof) or not, during the development period.
- 6.2 The Hermanus Golf Club shall be entitled to nominate 3 representatives to attend all meetings of members of the Association in an information sharing and advisory capacity

provided, however, that such representatives shall not be entitled to any voting rights at such meeting.

6.3 The trustee committee may, by regulation, provide for the issue of a membership certificate, which certificate shall be in such form as may be prescribed by the trustee committee.

6.4 The rights and obligations of a member shall not be transferable and every member shall:

6.4.1 to the best of such member's ability further the objects and interests of the Association; and

6.4.2 observe all by-laws and regulations made by the Association or the trustee committee;

provided that nothing contained in this constitution shall prevent a member from ceding such member's rights in terms of this constitution as security to the mortgagee of the single residential erf, sectional title unit or occupation right of such member, as the case may be.

6.5 The developer or its nominee/s shall be entitled on behalf of the Association to sign all such documents as may be necessary in order to enable the developer to give transfer of erven sold by the developer to the purchaser thereof.

6.6 A member shall not be entitled to:

6.6.1 consolidate two or more erven into one erf: a member shall remain liable for the payment of levies in respect of each of the erven which form part of the consolidated erf;

6.6.2 subdivide an erf into two or more portions: a member shall be liable for the payment of levies in respect of each new erf which shall come into existence as a result of the subdivision of the erf;

without the prior written approval of the Association and the property owners association in respect of the relevant precinct development, which approval may be withheld for any reason.

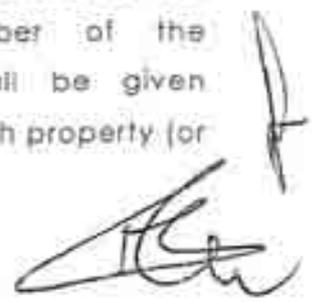


7. TERMINATION OF MEMBERSHIP

- 7.1 When the affairs of any member, save for the developer, are terminated and such member is wound up, such member shall *ipso facto* cease to be a member of the Association with effect from the date upon which such member is finally wound up.
- 7.2 The developer shall be entitled to cede all of its rights in terms of this constitution and the transferee shall be entitled to exercise such rights.
- 7.3 The developer may at any time abandon, in writing, in whole or in part, any rights conferred upon it in terms of this constitution.
- 7.4 When a precinct 1 member ceases to be the registered owner of a single residential erf within precinct 1, such member shall *ipso facto* cease to be a member of the Association.
- 7.5 No member ceasing to be a member of the Association for any reason shall, (nor shall any such member's executor, curators, trustees or liquidators) have any claim upon or interest in the funds or other property of the Association, but this clause shall be without prejudice to the rights of the Association to claim from such member or his estate any arrears of subscriptions or other sums due from him to the Association at the time of his so ceasing to be a member.

8. ALIENATION

- 8.1 No precinct 1 member shall be entitled in any manner to:
 - 8.1.1 sell, transfer and/or alienate such member's property (or any part thereof), unless it is a condition of such alienation that:
 - 8.1.1.1 the transferee becomes a member of the Association;
 - 8.1.1.2 the registration of transfer of the property concerned (or any part thereof) into the name of the transferee shall *ipso facto* constitute the transferee becoming a member of the Association, which consent shall be given provided that the transferee of such property (or



any part thereof) agrees in writing to be bound by the provisions of this constitution (including any rules and regulations made thereunder), and provided further that such member has paid all levies and other amounts owing by such member to the Association as at the date of transfer of such property (or any part thereof):

8.1.1.3 such member first obtains the written consent of the Association which consent shall be given provided that the Purchaser and/or transferee of such single residential erf agrees in writing to abide by the provisions of the constitution of the Association (including all rules made by the trustees and/or the developer in terms of this constitution), and provided further that such member has paid all levies and any other amounts owing by such member to the Association as at the date of transfer of such single residential erf, and provided further that such member has complied with all such member's obligations in terms of the constitution.

8.2 The registered owner of a property within precinct 1 shall not be entitled to resign as a member of the Association.

9. LEVIES PAYABLE BY THE MEMBERS

9.1 The trustee committee shall from time to time, impose levies upon the members for the purpose of meeting all the expenses which the Association has incurred, or to which the trustee committee reasonably anticipates the Association will be put to by way of:

9.1.1 maintenance, repair, improvement and keeping in order and condition of the common areas including, specifically landscaping, all township services, sewage treatment, the security systems to be installed on the common areas; and/or



9.1.2 payment of all rates and other charges payable by the Association in respect of the common areas, if any, and/or for services rendered to it, and/or

9.1.3 payment of all expenses necessary or reasonably incurred in connection with the management of the Association, the common areas and the Association's affairs.

In calculating levies, the trustee committee shall take into account, income, if any, earned by the Association.

9.2 The trustee committee shall estimate the amount which shall be required by the Association to meet the expenses during each year, together with such estimated deficiency (if any) as shall result from the preceding year, and shall impose a levy upon the members equal as nearly as is reasonably practical to such estimated amount. The trustee committee may include in such levies an amount to be held in reserve to meet anticipated future expenditure not of an annual nature. Every such levy shall be made payable by equal monthly installments due in advance on the first day of each and every succeeding month of such year,

9.3 The trustee committee may from time to time impose special levies upon the members in respect of all such expenses as are mentioned in clause 9.1 (which are not included in any estimate made in terms of clause 9.2), and such levies may be made in the sum or by such installments and at such time or times as the trustee committee shall think fit.

9.4 Any amount due by a member by way of a levy shall be a debt due by such member to the Association. The obligation of a member to pay a levy shall cease upon such member ceasing to be a member of the Association, without prejudice to the Association's right to recover arrear levies. No levies paid by a member shall under any circumstances be repayable by the Association upon such member ceasing to be a member.

9.5 A member shall make payment of the monthly levies by virtue of a debit order drawn on the member's banker.

9.6 The developer shall not be liable for the payment of levies in respect of any unsold erven or undeveloped land arising from the subdivision of the land.

9.7 The trustee committee shall at all times ensure that the maintenance and control of the common areas and the expenditure incurred in respect thereof is carried out in a manner which is fair and equitable to all the members of the Association.

9.8 No member shall be entitled to any of the privileges of membership including voting at any meeting unless and until such member shall have paid every subscription and other sum (if any) which shall be due and payable to the Association by such member.

10. DEALING WITH THE COMMON AREAS

Neither the whole nor any portion of the common areas shall be:

10.1 sold, let, alienated, otherwise disposed of, subdivided or transferred; or

10.2 mortgaged; or

10.3 subjected to any rights, whether registered in a deeds registry or not, of use, occupation or servitude, (save those enjoyed by the members in terms hereof and any servitudes in favour of the Council as required in terms of any condition of subdivision);

without the specific prior written consent of the Council and the sanction of a special resolution of the Association (and no member shall be entitled to unreasonably vote against any such special resolution which may be proposed); or

10.4 built upon, improved or enhanced in value by the construction of buildings, erections, facilities or amenities, without the sanction of a special resolution of the Association, save for any construction relating to the electrical substations or transformers, the construction of the private roads, the landscaping of the private open spaces and all such structures as may be required for purposes of security and communication equipment and/or security and communication personnel.

11. RESPONSIBILITY FOR THE COMMON AREAS

The Association acknowledges that the Council shall not be responsible for, and the Association shall be solely responsible for the care, repair, maintenance, cleaning, upkeep, improvement and property control of the





common areas, all services therein and any structure or thing erected on or contained therein.

12. DESIGN GUIDELINES

12.1 All buildings and other structures within the development (or any part thereof) shall comply with the provisions of the design guidelines.

12.2 No resident shall be entitled to:

12.2.1 erect any new building and/or structures of any nature whatsoever on any erf in the development;

12.2.2 make any changes or alterations to existing buildings and/or structures on any erf in the development including changes to the external colour scheme;

without the prior written approval of the trustees having regard to the design guidelines, and without execution of the contractors' agreement by all parties thereof.

12.3 The approval of the trustees as contemplated in clause 12.2 shall only be given:

12.3.1 after detailed plans of the proposed work have been submitted to the trustees, the architectural review committee or any other competent person (as nominated by the trustees from time to time) which person may be an architect or architects registered within the South African Council of Architects or the Institute of South African Architects; and

12.3.2 the trustees or their nominee/s are satisfied that the proposed work is in accordance with the design guidelines for the purposes of which the trustees, the architectural review committee and/or any other nominee/s shall be the sole arbiter and their decision shall be final and binding on the property owner concerned; and

12.3.3 the property owner concerned has made payment of any costs which may be incurred in obtaining this approval, including the costs of the trustees or their nominee/s; and

12.3.4 the property owner concerned has paid to the trustees a deposit in such amount as the trustees may from time to time determine in their sole discretion, as security for any damage to any of the common areas, which amount shall be held in trust by the trustees, subject to the provisions of clause 13 below below;

provided the foregoing shall not be interpreted as detracting from the sole and final responsibility of the Council to approve or reject building plans.

12.4 Subject to the restrictions imposed or directions given at a general meeting of the Association and subject to the prior written approval by the Council, the trustee committee may from time to time amend, amplify, substitute or add to the provisions of the design guidelines. Any such amendment, amplification, substitution or addition shall be subject to a resolution passed by the trustees holding not less than 75% of the total voting rights of the trustees, provided that the developer shall during the development period be entitled to make all such amendments to the design guidelines as the developer in its sole discretion deems fit.

12.5 In the event of any of the provisions of the design guidelines being amended, amplified, substituted or added to, and such amendment, amplification, substitution or addition, in the opinion of the trustee committee, materially affects any further development within the development (or any part thereof), the trustee committee shall give written notice of such amendment, amplification, substitution or addition to all members. Upon receipt of such written notification, the members, except for the developer, shall by written notice inform their respective members of such amendment, amplification, substitution or addition.



13. DEPOSIT FOR DAMAGES

- 13.1 Each property owner shall, when submitting to the trustees for approval the detailed plans for the construction of any building and/or improvements, or alterations or additions to existing improvements in the development, pay to the trustees a deposit in an amount to be determined from time to time by the trustees which amount shall be retained by the trustees in trust until completion by the property owner and/or its contractors of such work, the interest on which deposit shall accrue to the association.
- 13.2 Upon completion of all such building and other activities, the trustees shall if they are satisfied that no damage has been effected by the property owner or any of its contractors to the common areas and/or landscaped areas within the development and that the work has been constructed in accordance with duly approved plans, release the building deposit to the property owner, excluding any interest thereon which will accrue to the Association less any fines or penalties payable in terms of the contractors agreement.
- 13.3 In the event of any landscaped area and/or the common areas having damage due to such work, the property owner shall within 15 days of having been requested to do so in writing by the trustees, rectify the damage to the satisfaction of the trustees, failing which, the trustees shall be entitled to appoint an independent contractor or contractors to repair the damage and the amount paid to the trustees as a building deposit shall be utilised to pay all costs of such repair. If the amount paid to the trustees as a building deposit is not sufficient to cover the cost of such repairs, the trustees shall be entitled to recover the shortfall from the property owner.
- 13.4 Each property owners association and sectional title body corporate being a member of this Association in terms of clauses 6.1.2 or 6.1.3 (as the case may be) shall procure that their respective members comply with the provisions of clauses 12 and 13 and hereby indemnify the Association in respect of any loss or



damage which the Association may suffer as a result of any such of their respective members not so complying.

14. MANAGING AGENT AND ESTATE MANAGER

- 14.1 The trustees shall appoint:
- 14.1.1 a managing agent from time to time to control, manage and administer the common areas and to exercise such powers and duties as may be entrusted to the managing agent, including the power to collect levies; and
 - 14.1.2 an estate manager to control, manage and administer all building works including the conclusion of contractors agreements with the relevant contractors.
- 14.2 During the development period and for a period of 3 years thereafter, the developer shall be entitled to appoint the managing agent and the estate manager, which appointment shall be valid and binding on the Association.
- 14.3 The Association hereby irrevocably appoints the development facilitator *In rem suam* with power of substitution to be his or her lawful attorney and agent, to appoint on its behalf the managing agent and the estate manager for the development, and to sign all such documents and do all such other things as may be necessary or desirable to give effect to any steps taken by the development facilitator in pursuance of the rights and powers which it may have as agent in terms of this clause 14.3 or at common law.

15. RULES AND CONTRACTS OF THE ASSOCIATION

- 15.1 Subject to any restrictions imposed or directions given at a general meeting of the Association and subject to the conditions imposed by the Council in approving the rezoning and subdivision of the land and the subdivision of the portions of the land comprising the precinct developments, the trustee committee may (but shall not be obliged to) from time to time:
- 15.1.1 make rules but governing, *inter alia*:
- 

- 15.1.1.1 the management of the development including (but not limited to) the contractors agreements;
- 15.1.1.2 the use, occupation and enjoyment of the common areas;
- 15.1.1.3 the external appearance of and the maintenance of the common areas and the buildings or other improvements erected thereon;
- 15.1.1.4 the erection of any buildings and/or structures of any nature whatsoever, and the alteration, modification and renovation to such buildings and/or structures on the common areas;
- 15.1.2 enter into agreement(s) with the local authorities governing the matters set out in clause 15.1.1 and any other incidental matters.
- 15.2 Each member undertakes to the Association that such member will comply with, and procure compliance by its members with:
 - 15.2.1 the provisions of this constitution;
 - 15.2.2 the design guidelines referred to in clause 12 above;
 - 15.2.3 any rules made in terms of clause 15.1.1 above;
 - 15.2.4 any agreement(s) referred to in clause 15.1.2 insofar as those agreements may directly or indirectly impose obligations on such member and/or the members of any member referred to in clauses 6.1.2 and 6.1.3 above;
 - 15.2.5 rules made by the Hermanus golf club from time to time in respect of the access to the golf course.
- 15.3 In the event of any breach of any of the provisions, guidelines, rules and/or agreements referred to in clauses 15.2.1 to 15.2.5 (both inclusive) by:
 - 15.3.1 any precinct member; and/or
 - 15.3.2 any member of a member referred to in clauses 6.1.2 and 6.1.3 above; and/or



15.3.3 any person of the household, or guest or lessee of such member's member;

such breach shall be deemed to have been committed by the member itself, but without prejudice to the foregoing, the trustee committee may take or cause to be taken such steps against the person actually committing the breach, as the trustee committee may in its sole discretion deem fit.

15.4 All officials, employees and contractors employed by the Association, local authority, any public service company, the developer and/or development facilitator shall, at all times, have reasonable access to the erven and common areas for purposes of inspecting and/or maintaining all services supplying and/or traversing any part thereof.

16. BREACH

16.1 Should any member:

16.1.1 fail to pay on due date any amount due by that member in terms of this constitution or any regulation made thereunder and remain in default for more than 7 days after being notified in writing to do so by the trustees; or

16.1.2 commit any other breach of any of the provisions of this constitution or any regulation made thereunder and fail to commence remedying that breach within a period of 7 days after the receipt of written notice to that effect by the trustees and complete the remedying of such breach within a reasonable time;

then and in either such event, the trustees shall be entitled (but not obliged) on behalf of the Association, without prejudice to any other rights or remedies which the trustees or the Association or any other member may have in law, including the right to claim damages;

16.1.3 to institute legal proceedings on behalf of the Association against such member for payment of such overdue amount or for performance of that member's obligations in terms of this constitution or any regulation made thereunder, as the case may be; or

- 16.1.4 In the case of clause 16.1.2 above, to remedy such breach and immediately recover the total cost incurred by the trustees or the Association in so doing from such member.
- 16.2 In the event of any member disputing the fact that such member has committed a breach of any of the rules and/or guidelines made under this constitution, a committee of 3 trustees appointed by the chairperson for the purpose shall adjudicate upon the issue at such time and in such manner and according to such procedure (provided that natural justice shall be observed) as the chairperson may direct.
- 16.3 Notwithstanding anything to the contrary contained in this constitution, the trustee committee may in the name of the Association enforce any provisions of the constitution (including any rules and/or guidelines made hereunder) by civil application or action in a court of competent jurisdiction (including by arbitration in terms of clause 34 below) and for this purpose may appoint attorneys and counsel, as the trustee committee may deem fit.
- 16.4 Without prejudice to all or any of the rights the trustees or the Association granted under this constitution, should any member fail to pay any amount due by that member on due date, then such member shall pay interest thereon at the prime rate plus 4% calculated from the due date for payment until the actual date of payment of such amount.
- 16.5 Should the trustees institute any legal proceedings against any member pursuant to a breach by that member of this constitution or any regulation made thereunder, then without prejudice to any other rights which the trustees or the Association or any other member may have in law, the trustees shall be entitled to recover from such member all legal costs incurred by the trustees or the Association, including attorney/client charges, tracing fees and collection commission.

17. TRUSTEE COMMITTEE

- 17.1 Each member (other than a precinct 1 member) shall be entitled to appoint 1 trustee to the trustee committee. The precinct members shall collectively be entitled to appoint 1 trustee to the trustee committee.



137

- 17.2 During the development period, the trustees of the Association shall be divided into two classes, namely developer trustees and member trustees. Upon expiry of the development period, there shall only be member trustees.
- 17.3 Until the first trustees of the Association are appointed, the developer shall be entitled to carry out all the functions and duties of the trustees in terms of this constitution.

18. REMOVAL AND ROTATION OF TRUSTEE MEMBERS

- 18.1 Each trustee, except for the developer trustees who shall not be required to rotate on an annual basis, shall continue to hold office until the annual general meeting next following his said appointment, at which meeting each trustee shall be deemed to have retired from office as such, and shall be eligible for re-appointment to the trustee committee by the member concerned in terms of clause 17.1 above.
- 18.2 A trustee shall be deemed to have vacated his or her office as such upon:
- 18.2.1 his or her estate being sequestered, whether provisionally or finally, or surrendering his or her estate;
 - 18.2.2 his or her making any arrangement or compromise with his or her creditors;
 - 18.2.3 his or her conviction for any offence involving dishonesty;
 - 18.2.4 his or her becoming of unsound mind or being found lunatic;
 - 18.2.5 his or her resigning from such office in writing delivered to the secretary;
 - 18.2.6 his or her death;
 - 18.2.7 his or her being removed from office by a special resolution of the members.

provided that anything done in the capacity of a trustee in good faith, by a person who ceases to be a trustee, shall be valid until the fact that he or she is no longer a trustee has been recorded in the minute book of the trustee committee.



- 18.3 Upon any vacancy occurring on the trustee committee prior to the next annual general meeting, the vacancy in question shall be filled by a person nominated by the member which appointed such trustee in terms of clause 17.1 above.
- 18.4 The developer may at any time and from time to time remove and replace any developer trustee at any time on written notice to the remaining trustees.

19. **OFFICE OF TRUSTEES**

- 19.1 The trustees shall appoint from amongst themselves, a chairperson and vice-chairperson.
- 19.2 The first chairperson and the first vice-chairperson may be appointed by the developer, and such office bearers shall hold their respective offices until the first annual general meeting following the date of their appointment, provided that any such office shall *ipso facto* be vacated by the trustee holding such office upon his or her ceasing to be a trustee for any reason.
- 19.3 As soon as reasonably possible after the holding of such annual general meeting, the trustee committee shall meet and shall elect from its own number the chairperson and vice-chairperson, who shall hold their respective offices until the annual general meeting held next after their said appointment, provided that the office of the chairperson or vice-chairperson shall *ipso facto* be vacated by the trustee holding such office upon his or her ceasing to be a trustee for any reason. No one trustee shall be appointed to more than one of the aforesaid offices. In the event of any vacancy occurring in any of the aforesaid offices at any time, the trustee committee shall meet to appoint one of their number as a replacement in such office.
- 19.4 Save as otherwise provided in this constitution, the chairperson shall preside at all meetings of the trustee committee, and all general meetings of members, and shall perform all duties incidental to the office of chairperson and such other duties as may be prescribed by the trustee committee or of members, and to allow or refuse to permit invitees to speak at any such meetings, provided however, that any such invitees shall not be entitled to vote at any such meetings.
- 19.5 The vice-chairperson shall assume the powers and duties of the chairperson in the absence of the chairperson, or his inability or



f

refusal to act as chairperson, and shall perform such other duties as may from time to time be assigned to him by the chairperson or the trustee committee.

- 19.6 Trustees shall be entitled to be repaid all reasonable and bona fide expenses incurred by them respectively in or about the performance of their duties as trustees and/or chairperson, vice-chairperson, as the case may be, but save as aforesaid, shall not be entitled to any other remuneration fees or salary in respect of the performance of such duties.

20. FUNCTIONS AND POWERS OF THE TRUSTEE COMMITTEE

- 20.1 Subject to the express provisions of this constitution, the trustee committee shall manage and control the business and affairs of the Association, and shall have full powers in the management and direction of such business and affairs and, save as may be expressly provided in this constitution, may exercise all such powers of the Association, and do all such acts on behalf of the Association as may be exercised and done by the Association, and as are not by this constitution required to be exercised or done by the Association in general meeting, subject nevertheless to such regulations as may be prescribed by the Association in general meeting from time to time, provided that no regulation made by the Association in general meeting shall invalidate any prior act of the trustee committee which would have been valid if such regulation had not been made.
- 20.2 The trustee committee shall have the right to vary, cancel or modify any of its decisions and resolutions from time to time.
- 20.3 The trustee committee may, should it so decide, investigate any suspected or alleged breach by any member or trustee of this constitution, in such reasonable manner as it shall decide from time to time.
- 20.4 The trustee committee may make regulations and by-laws, not inconsistent with this constitution, or any regulations or by-laws prescribed in the Association in general meeting:
- 20.4.1 as to disputes generally;
 - 20.4.2 for the furtherance and promotion of any of the objects of the Association;



- 20.4.3 for the better management of the affairs of the Association;
- 20.4.4 for the advancement of the interests of members;
- 20.4.5 for the conduct of trustee committee meetings and general meetings; and
- 20.4.6 to assist it in administering and governing its activities generally;

and shall be entitled to cancel, vary or modify any of the same from time to time.

21. PROCEEDINGS OF THE TRUSTEE COMMITTEE

- 21.1 The trustee committee may meet together for the dispatch of business, adjourn and otherwise regulate their meetings as they think fit, subject to any provisions of this constitution.
- 21.2 Meetings of the trustee committee shall be held at least once every 12 months, provided that if all the trustees shall in writing have waived the above requirement in respect of a particular 12 months, then no meeting of the trustee committee need be held for that period.
- 21.3 The quorum necessary for the holding of any meeting of the trustee committee shall be 3 trustees, provided that during the development period the developer trustees shall be necessary at all meetings of trustee committee to form a quorum.
- 21.4 Each trustee shall be entitled to the following number of votes:
 - 21.4.1 a member trustee, to a number of votes equal to the number of members of such member which appointed such member trustee;
 - 21.4.2 the developer trustee, to 1 votes provided that during the development period, the development trustee shall be entitled to the same number of votes of all the other members of the Association plus 1 vote.
- 21.5 The chairperson shall preside as such at all meetings of the trustee committee, provided that should at any meeting of the trustee committee the chairperson not be present within 5 minutes after the time appointed for the holding thereof, then the vice-chairperson shall act as chairperson at such meeting, provided

A handwritten signature and a vertical mark resembling a checkmark or the letter 'A' are located at the bottom right of the page.

further that should the vice-chairperson also not be present within 5 minutes of the time appointed for the holding of such meeting, those present of the trustees shall vote to appoint a chairperson for the meeting, who shall thereupon exercise all the powers and duties of the chairperson in relation to such meeting.

21.6 Minutes shall be taken at every trustee committee meeting, although not necessarily verbatim. These minutes shall be reduced to writing without undue delay after the meeting and shall then be certified correct by the chairperson of the meeting. All minutes of trustee committee meetings shall after certification as aforesaid be placed in a trustee committee minute book to be kept in accordance, *mutatis mutandis*, with the provisions of the law relating to the keeping of minutes of meetings of directors of companies. The trustee committee minute book shall be open for inspection at all reasonable times by a trustee, the auditors, and the members.

21.7 All competent resolutions recorded in the minutes of any trustee committee meeting shall be valid and of full force and effect as therein recorded, with effect from the passing of such resolutions, and until varied or rescinded, but no resolution or purported resolution of the trustee committee shall be of any force or effect, or shall be binding upon the members or any of the trustees unless such resolution is competent within the powers of the trustee committee.

21.8 Save as otherwise provided in this constitution, the proceedings at any trustee meeting shall be conducted in such reasonable manner and form as the chairperson of the meeting shall decide.

21.9 A resolution signed by all the trustees shall be valid in all respects as if it had been duly passed at a meeting of the trustee committee duly convened.

22. GENERAL MEETINGS OF THE ASSOCIATION

22.1 The Association shall within 3 calendar months after each financial year of the Association, hold a general meeting as its annual general meeting, in addition to any other general meetings, during such financial year, and shall specify the meeting as such in the notices in terms of clause 23.1 below.

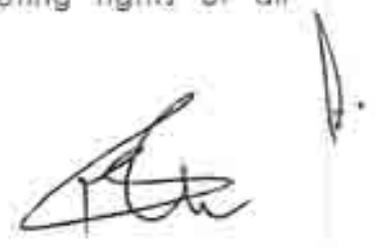
- 22.2 Such annual general meeting shall be held at such time and place, subject to the foregoing provisions, as the trustee committee shall decide from time to time.
- 22.3 All general meetings other than annual general meetings shall be called special general meetings.
- 22.4 The trustee committee may, whenever they think fit, convene a special general meeting.
- 22.5 General meetings of the Association shall take place at such place/s as shall be determined by the trustee committee from time to time.

23. NOTICE OF MEETINGS OF THE ASSOCIATION

23.1 An annual general meeting and a meeting called for the passing of a special resolution, shall be called by not less than 21 days' notice in writing at the least, and a special general meeting, other than one called for the passing of a special resolution, shall be called by not less than 14 days' notice in writing. In each case, the notice shall be exclusive of the day on which it is dispatched, and shall specify the place, the day and the hour of the meeting and, in the case of special business, in addition to any other requirements contained in this constitution, the general nature of that business, and in the case of a special resolution, the terms and effect of the resolution and the reasons for it shall be given in the manner hereinafter mentioned or in such other manner (if any) as may be prescribed by the trustee committee to such persons as are under this constitution entitled to receive such notices from the Association; provided that a general meeting of the Association shall, notwithstanding that it is called by shorter notice than that specified in this constitution, be deemed to have been duly called if it is so agreed:

23.1.1 In the case of a meeting called as the annual general meeting, by the members holding not less than 75% of the total voting rights of all members; and

23.1.2 In the case of a special general meeting, by a majority in number of the members having a right to attend and vote at the meeting, being a majority together holding not less than 50% of the total voting rights of all members.



23.2 The accidental omission to give notice of a meeting or of any resolution, or to give any other notification, or present any document required to be given or sent in terms of this constitution, or the non-receipt of any such notice, notification or document by any member or other person entitled to receive the same, shall not invalidate the proceedings at, or any resolution passed at, any meeting.

24. **QUORUM FOR GENERAL MEETINGS**

24.1 No business shall be transacted at any general meeting unless a quorum is present when the meeting proceeds to business. The quorum necessary for the holding of any general meeting shall be such of the members entitled to vote in person or by proxy, as together for the time being, represent 50% of the total votes of all members of the Association entitled to vote, for the time being save that not less than 3 members must be personally present and provided further that during the development period, the developer is represented at such meeting.

24.2 If within 30 minutes from the time appointed for the holding of a general meeting a quorum is not present, the meeting, if convened on the requisition of members, shall stand adjourned for another 30 minutes, and if at such adjourned meeting a quorum is not present, the members present shall be a quorum.

25. **AGENDA AT GENERAL MEETINGS**

In addition to any other matters required by this constitution to be dealt with at an annual general meeting, the following matters shall be dealt with at every annual general meeting:

- 25.1 the consideration of the chairperson's report;
- 25.2 the composition of the trustee committee;
- 25.3 the consideration of any other matters raised at the meeting including any resolutions proposed for adoption by such meeting, and the voting upon any such resolutions;
- 25.4 the consideration of the balance sheet of the Association for the last financial year of the Association preceding the date of such meeting;
- 25.5 the consideration of the report of the auditors;



25.6 the consideration of the total levy (as referred to in clause 8) for the calendar year during which such annual general meeting takes place; and

25.7 the consideration and fixing of the remuneration of the auditors for the financial year of the Association preceding the annual general meeting.

26. PROCEDURE AT GENERAL MEETINGS

26.1 The chairperson shall preside as such at all general meetings, provided that should he or she not be present within 5 minutes after the time appointed for the holding thereof, then the vice-chairperson shall act as chairperson at such meeting, provided further that should the vice-chairperson also not be present within 5 minutes of the time appointed for the holding of such meeting, then the members present at such meeting entitled to vote, shall vote to appoint a chairperson for the meeting, who shall thereupon exercise all the powers and duties of the chairperson in relation to such meeting.

26.2 The chairperson may, with the consent of any general meeting at which a quorum is present (and if so directed by the meeting), adjourn a meeting from time to time and from place to place, but no business shall be transacted at any adjourned meeting other than the business which might have been transacted at the meeting from which the adjournment took place.

26.3 Whenever a meeting is adjourned for 10 days or more, notice of the adjourned meeting shall be given in the same manner as of an original meeting. Save as aforesaid, the members shall not be entitled to any notice of adjournment, or of the business to be transacted at an adjourned meeting.

26.4 Except as otherwise provided for in this constitution, all general meetings shall be conducted in accordance with generally accepted practice.

27. PROXIES FOR GENERAL MEETINGS

27.1 A member may be represented at a general meeting by a proxy, who need not be a member of the Association. The instrument appointing a proxy shall be in writing signed by the member concerned or such member's duly authorised agent in writing, but need not be in any particular form, provided that where a



f

member is more than one person, any one of those persons may sign the instrument appointing a proxy on such member's behalf, where a member is a company, the same may be signed by the chairperson of the board of directors of the company or by its secretary, and where an Association of persons, by the secretary thereof.

- 27.2 The instrument appointing a proxy and the power of attorney or other authority (if any) under which it is signed, or a copy certified by a commissioner of oaths thereof shall be deposited at the office at any time before the time appointed for the commencement of the meeting, or adjourned meeting, at which the person named in the instrument is proposed to vote. No instrument appointing a proxy shall be valid after the expiration of 12 months from the date of its execution.
- 27.3 A vote given in accordance with the terms of an instrument of proxy shall be valid notwithstanding the previous death of the principal or revocation of the proxy, provided that no intimation in writing of the death or revocation shall have been received by the trustee committee at least one hour before the time fixed for the holding of the meeting.
- 27.4 Should a member be absent from the recorded domicilium address which the trustees may have for such member, for a continuous period in excess of 6 months, a proxy must be appointed by such member prior to such member's absence in accordance with clauses 27.1 and 27.2 above, failing which a member shall not be entitled to vote, at any special general meeting, called during such member's absence.

28. VOTING AT GENERAL MEETINGS

- 28.1 At every general meeting, every member in person or by proxy and entitled to vote shall have the following votes:
- 28.1.1 where the member is a person referred to in clause 6.1.1 above, one vote for each single residential erf owned by such member;
- 28.1.2 where the member is a property owners' association referred to in clause 6.1.2 above, the number of votes equal to the number of single residential erven in such member's precinct development;



- 28.1.3 where the member is a body corporate referred to in clause 6.1.3 above, the number of votes equal to the number of sectional title units in the sectional title scheme in respect of such member;
- 28.1.4 the developer shall have the number of votes equal to the aggregate number of votes held by all members referred to in clauses 28.1.1 to 28.1.3 (both inclusive) plus one vote.
- 28.2 Save as expressly provided for in this constitution, no person other than a member duly registered, and who shall have paid every levy and other amount (if any) which shall be due and payable to the Association in respect of or arising out of his membership, and who is not under suspension, shall be entitled to be present or to vote on any question, either personally or by proxy, at any general meeting.
- 28.3 At any general meeting any resolution put to the vote of the meeting shall be decided on a show of hands unless the chairperson determines that the relevant decision be taken on a poll or unless a poll is demanded by any member.
- 28.4 In computing the majority on the poll, regard shall be had to the number of votes cast for and against the resolution.
- 28.5 An ordinary resolution (that is a resolution other than a special resolution) or the amendment of an ordinary resolution, shall be carried on a simple majority of all the votes cast thereon, and an abstention shall not be counted as a vote for or against the resolution in question. In the case of an equality of votes, the chairperson of the general meeting shall be entitled to a casting vote in addition to his or her deliberative vote.
- 28.6 Unless any member present in person or by proxy at a general meeting shall have objected to any declaration made by the chairperson of the meeting as to the result of any voting at the meeting, or to the propriety or validity of the procedure at such meeting, such declaration shall be deemed to be a true and correct statement of the voting, and the meeting shall in all respects be deemed to have been properly and validly constituted and conducted, and an entry in the minutes to the effect that any motion has been carried or lost, with or without a record of the number of votes recorded in favour of or against such motion, shall be conclusive evidence of the vote so recorded



if such entry conforms with the declaration made by the chairperson of the meeting as to the result of any voting at the meeting. The chairperson of the meeting shall be obliged to announce the result of any voting either at the meeting or as soon as reasonably possible thereof.

29. SPECIAL RESOLUTION

29.1 A resolution by the Association shall be a special resolution if at a general meeting of which not less than 21 clear days' notice has been given specifying the intention to propose the resolution as a special resolution, the terms and effect of the resolution and the reasons for it and at which members holding in aggregate not less than one-fifth of the total votes of all the members entitled to vote thereat, are present in person or by proxy, the resolution has been passed by not less than 75% of the total votes to which the members present in person or by proxy are entitled.

29.2 If less than 20% of the total votes of all the members entitled to attend the meeting and to vote thereat are present or represented at a meeting called for the purpose of passing a special resolution, the meeting shall stand adjourned for 30 minutes.

29.3 After the expiry of the said 30 minute period, the members who are present in person or by proxy and are entitled to vote may deal with the business for which the original meeting was convened and a resolution passed by not less than 75% of the total votes of all the members present or represented at such meeting shall be deemed to be a special resolution even if less than 20% of the total votes are represented after the expiry of the said 30 minute period.

30. OTHER PROFESSIONAL OFFICERS

Save as specifically provided otherwise in this constitution, the trustee committee shall at all times have the rights to engage on behalf of the Association, the services of accountants, auditors, attorneys, advocates, architects, engineers, any other professional person or firm and/or any other employee/s whatsoever, for any reasons thought necessary by the trustee committee and on such terms as the trustee committee shall decide, subject to any of the provisions of this constitution, provided that any expenditure incurred in respect of the above, shall not exceed 5% of the total annual levy for the year in question unless authorised by a special resolution.



31. ACCOUNTS

- 31.1 The Association in general meeting or the trustee committee, may from time to time make reasonable conditions and regulations as to the time and manner of the inspection by the members of the accounts and books of the Association, or any of them, and subject to such conditions and regulations, the accounts and books of the Association shall be open to the inspection of members at all reasonable times during normal business hours.
- 31.2 At each annual general meeting the trustee committee shall lay before the Association a proper income and expenditure account for the immediately preceding financial year of the Association, or in the case of the first account, for the period since the incorporation of the Association, together with a proper balance sheet made up as at the last financial year end of the Association. Every such balance sheet shall be accompanied by proper and extensive reports of the trustee committee and the auditors if appointed, and there shall be attached to the notice sent to members convening each annual general meeting, as set forth in clause 23.1 above, copies of such accounts, balance sheet and reports and of any other documents required by law to accompany the same.
- 31.3 Should the trustees or the majority of the members so require, the accounts of the Association shall be examined and the correctness of the income and expenditure account and balance sheets ascertained by the auditors at least once a year.

32. SERVICE OF NOTICES

- 32.1 A notice shall be in writing and shall be given or served by the Association upon any member, either personally or by post in a prepaid registered letter, properly addressed to the member at the address of the erf owned by such member.
- 32.2 No member shall be entitled to have a notice served on him or her at any address not within the Republic of South Africa, but any member may require the Association, by notice, to record an address within the Republic of South Africa which shall be deemed to be his address for the purpose of the service of notices.
- 32.3 Any notice by post shall be deemed to have been served at the time when the letter containing the same was posted, and in



proving the giving of the notice by post, shall be sufficient to prove that the letter containing the notice was properly addressed and posted.

32.4 The accidental omission to give notice of a meeting to, or the non-receipt of notice of a meeting by, any person entitled to receive notice shall not invalidate the proceedings of that meeting.

33. INDEMNITY

33.1 All trustee members shall be indemnified out of the funds of the Association against any liabilities bona fide incurred by them in their respective said capacities and in the case of a trustee member, in his capacity as chairperson or vice-chairperson, whether defending any proceedings, civil, criminal or otherwise, in which relief is granted to any such person/s by the court.

33.2 Every trustee member, every servant, agent and employee of the Association, shall be indemnified by the Association against (and it shall be the duty of the trustee committee out of the funds of the Association to pay) all costs, losses and expenses (including travelling expenses) which such person or persons may incur or become liable for by reason of any contract entered into, or any act or deed done, by such person or persons in the discharge of any of his/their respective duties, including in the case of a trustee member, his duties as chairperson or vice-chairperson. Without prejudice to the generality of the above, the Association shall specifically indemnify every such person against all losses of whatsoever nature incurred arising out of any bona fide act, deed or letter done or written by him jointly or severally in connection with the discharge of his duties, provided that any such act, deed or letter has been done or written in good faith.

33.3 A trustee member shall not be liable for the acts, receipts, neglects or defaults of the auditors or of any of the other trustee members, whether in their capacities as trustee members or as chairperson or vice-chairperson, or for any loss or expense sustained or incurred by the Association through the insufficiency or deficiency of title to any property acquired by the trustee committee for or on behalf of the Association, or for the insufficiency or deficiency of any security in or upon which any of the monies of the Association shall be invested, or for any loss or damage arising from the insolvency or tortuous act of any person with whom any monies, securities or effects shall be deposited, or



for any loss or damage occasioned by any error of judgment or oversight on his part, or for any other loss, damage or misfortune whatever which shall happen in the execution of any of the duties of his office/s or in relation thereto, unless the same shall happen through lack of bona fides or breach of duty or breach of trust.

- 33.4 No member shall have any claim of any nature whatsoever against the Association for any loss, damage or injury which such member may directly or indirectly suffer (even if such loss, damage or injury is caused through the negligence of the Association, the trustees, or any of the Associations employees or appointees) by reason of any latent or patent defects on the development (including the common areas), or fire on the development, or theft from the development, or by reason of any building, improvement or other structure within the development being in a defective condition or state of disrepair or any particular repair not being effected by the Association timeously or at all, by any person whatsoever, or for any purpose whatsoever, or arising from any other cause whatsoever, and each member is advised to take the necessary steps to insure his or her interest.

34. ARBITRATION

- 34.1 Any dispute, question or difference arising at any time between member or between members and trustees out of or in regard to:
- 34.1.1 any matters arising out of this constitution; or
 - 34.1.2 the rights and duties of any of the parties mentioned in this constitution; or
 - 34.1.3 the interpretation of this constitution.

shall be submitted to and decided by arbitration on notice given by any party to the other parties who are interested in the matter in question.

- 34.2 Arbitration shall be held in Cape Town informally and otherwise upon the provisions of the Arbitration Act No 42 of 1965 (as amended or replaced from time to time) it being intended that if possible it shall be held and concluded within 21 business days after it has been demanded.
- 34.3 Save as otherwise specifically provided herein, the Arbitrator shall be, if the question in dispute is:



- 34.3.1 primarily an accounting matter - an independent accountant;
- 34.3.2 primarily a legal matter - a practicing counsel or attorney of not less than 10 years standing;
- 34.3.3 any other matter - an independent and suitably qualified person appointed by the auditors;
- as may be agreed upon between the parties to the dispute.
- 34.4 If agreement cannot be reached on whether the question in dispute falls under clauses 34.3.1, 34.3.2 or 34.3.3 or upon a particular arbitrator in terms of clause 34.3.3 above, within 3 business days after the arbitration has been demanded, then:
- 34.4.1 the President for the time being of the Law Society of the Cape of Good Hope or its successor/s shall determine whether the question in dispute falls under clauses 34.3.1, 34.3.2 or 34.3.3 above; or
- 34.4.2 the President for the time being of the Law Society of the Cape of Good Hope shall nominate the arbitrator in terms of clause 34.3.1 within 7 business days after the parties have failed to agree so that the arbitration can be held and concluded as soon as possible within the 21 business days referred to in clause 34.2 above.
- 34.5 The arbitrator shall make his award within 7 days after completion of the arbitration and shall in giving his award, have regard to the principles laid down in terms of this constitution. The arbitrator may determine that the cost of the arbitration may be paid either by one or other of the disputing parties or by the Association as he in his sole discretion may deem fit.
- 34.6 The decision of the arbitrator shall be final and binding and may be made an order of the Cape Provincial Division of the High Court of South Africa or its successor/s upon the application of any party to the arbitration.
- 34.7 Notwithstanding anything to the contrary contained in clauses 34.1 to 34.7 (both inclusive), the trustees shall be entitled to institute legal proceedings on behalf of the Association by way of application, action or otherwise in any Court having jurisdiction for the purposes of restraining or interdicting breaches of any of these provisions.



35. **AMENDMENTS TO CONSTITUTION**

This constitution, or any part thereof, shall not be repealed or amended, and no new rules shall be made, save by a special resolution adopted at an annual general meeting or a general meeting of the members and subject further to the prior written consent of the Council being obtained for the amendment of this clause 35 and clauses 1, 2, 3, 4, 6, 7, 8, 9, 11, 37 and 38 of this constitution and subject further to the prior written consent of the developer during the development period being obtained for the amendment of this clause and clauses 37 and 38 of this constitution.

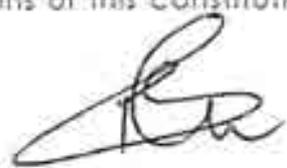
36. **EFFECTIVE DATE**

This constitution shall come into force when the first erf or sectional title unit within the development (or any part thereof) is registered in the deeds office.

37. **STATUS OF DEVELOPER**

During the development period, the following provisions shall apply in addition to the provisions of and notwithstanding anything to the contrary contained in this constitution:

- 37.1 the developer shall be entitled:
 - 37.1.1 to nominate and appoint the chairperson of the trustee committee;
 - 37.1.2 to a number of votes equal to the total number of the votes of all members in terms of clause 28.1 plus 1 vote;
 - 37.1.3 to impose any rules relating to the management of the development from time to time, as the developer may deem fit, and to amend, amplify, substitute and/or add to any such rules;
 - 37.1.4 to make all such amendments to the design guidelines as the developer may in its sole discretion deem fit;
 - 37.1.5 to require that the trustee committee enforces the rights granted to it in terms of this constitution against any member who in the opinion of the developer is not complying with his obligations as a member by giving such member written notice in which his failure to comply with the particular provisions of this constitution



is detailed and calling upon such member to remedy such failure within a prescribed period of not more than 30 days, failing which, the developer shall be entitled at the sole cost of that member to do all such things as may be required to maintain such building and other improvements on its erf;

- 37.1.6 to erect such signage, flagpoles, messages and/or other forms of notices or advertising on the development including the common areas, the private road area and/or the exterior walls (if any) of the development, subject to the regulations and by-laws of the Council appertaining to signage from time to time;
- 37.1.7 to change the name of the Association from time to time to any name which the developer may deem fit;
- 37.2 neither the trustee committee nor any member of the Association shall prevent or hinder in any way the developer from:
- 37.2.1 gaining access to and egress from the development;
- 37.2.2 continuing any building operations at the development;
- provided that, after the termination of the development period, the provisions of this clause 37 shall not be interpreted as allowing the developer access onto any of the erven already transferred to a member unless 48 hours prior written notice has been given to the member concerned. The developer shall make good any subsequent damage to plants, property or improvements thereon to the satisfaction of the member. No member shall be entitled to refuse the developer access if the required notice has been given;
- 37.3 upon expiry of the development period, the rights of the developer in terms of the provisions of this clause 37 shall immediately terminate *ipso facto* and no longer be of any force and effect.

38. INCORPORATION OF FURTHER PHASES

The developer has a continuing and permanent interest to ensure that certain basic provisions are entrenched in perpetuity to ensure the success of the development. Accordingly, none of the following provisions may be



deleted or varied in any way in terms of clause 35 above, without the prior written consent of the developer:

- 38.1 the developer has the right at any time and from time to time to extend or alter the area or composition of the development by requiring the Association to incorporate into the development any additional areas from time to time as further phases of the development which the developer shall be entitled to develop as it may deem fit;
- 38.2 should any further property be incorporated into the development, the developer shall be entitled to require that the first and all subsequent owners of erven therein become owners of the Association in respect of those parts from such date as the developer may determine, and on the same terms and conditions as are applicable to the other members of the Association. The members shall be bound by any such requirement of the developer.

ooOOoo

A handwritten signature in cursive script, followed by a vertical line and a small horizontal tick mark at the top.

Draft Constitution of the Fernkloof Estate Precinct Property Owners Association

[to be annexed]

A handwritten signature in black ink, appearing to be 'G. J. ...', located in the bottom right corner of the page.



CONSTITUTION

FERNKLOOF ESTATE PRECINCT NO _____
PROPERTY OWNERS ASSOCIATION

a body corporate established
in terms of section 29 of the Land Use
Planning Ordinance (Ord 15 of 1985)



1. ESTABLISHMENT IN TERMS OF STATUTE

The Property Owners Association referred to on the cover page of this constitution is constituted as a body corporate in terms of section 29 of the Land Use Planning Ordinance (Ord 15 of 1985) (as amended) in accordance with the conditions imposed by the Overstrand Municipality when approving in terms of sections 25(1) and 42 of the said ordinance of the subdivision of the land which comprises the precinct referred to on the cover page of this constitution ("the land") and shall come into existence simultaneously with the registration in the deeds office of the first of the erven in the development.

2. INTERPRETATION

In this constitution:

2.1 the following words shall, unless the context otherwise requires, have the meanings hereinafter assigned to them:

2.1.1 "Association" means the Property Owners Association referred to on the cover page of this constitution;

2.1.2 "auditors" mean the auditors of the Association;

2.1.3 "business day" means a weekday other than Saturdays, Sundays and public holidays;

2.1.4 "chairperson" means the chairperson of the trustee committee;

2.1.5 "common areas" mean the following:

2.1.5.1 all the private roads within the development; and

2.1.5.2 all the private open spaces within the development;

2.1.5.3 any other area/s which the board of trustees may designate as common areas from time to time;

and includes all common areas designated as such in any further phase/s of the development;

2.1.6 "Council" means the Overstrand Municipality or its successor/s in title;

2.1.7 "contractors agreement" means the agreement to be entered into between the Association and any constructor appointed to construct an improvement on an erf substantially in accordance with the specimen contractors agreement, which is available for inspection at the offices of the developer;

2.1.8 "design guidelines" means the design guidelines to control all aspects of design and landscaping of any development within the Fernkloof Estate development, as amended from time to time in terms of the constitution of the Fernkloof Estate Master POA or as required by the Council or the development facilitator, a copy of the current draft which is available for inspection at the offices of the developer;

2.1.9 "developer" means Overstrand Municipality which may be represented by the appointed development facilitator, Rabcov Joint Venture, a joint venture between Cavcor (Proprietary) Limited (Registration No 1994/006764107) and Rabie Property Projects (Proprietary) Limited (Registration No 1990/001920/07), and includes its successor/s in title or assign/s as developer of the land;

2.1.10 "developer trustee" means a trustee appointed by the developer;

2.1.11 "development" means the proposed residential development established or to be established on the land, and includes all such additional area/s as may be incorporated as further phases into the development in terms of clause 41.1 below;

2.1.12 "development period" means the period from the incorporation of the Association until all single residential erven, sectional title units and/or occupation rights (as the case may be) in the development have been sold, transferred and/or ceded (as the case may be) by the developer, including all such erven, units and



rights in respect of all such additional area/s as may be incorporated as further phases into the development in terms of clause 41.1 below;

2.1.13 "erven" mean the erven in the development, and "erf" means any one of them;

2.1.14 "estate rules" mean the rules imposed by the developer or the trustees from time to time relating to the management of the development;

2.1.15 "Fernkloof Estate development" means the property development or developments on the land known as "Fernkloof Estate" situate at the Hermanus golf course;

2.1.16 "in writing" means written, printed or lithographed or partly one and partly another, and other modes of representing or producing words in a visible form;

2.1.17 "land" means all the land forming part of the precinct referred to on the cover page of this constitution;

2.1.18 "member" means a member of the Association and includes the developer in its capacity as such during the development period;

2.1.19 "member trustee" means a trustee appointed by the members;

2.1.20 "month" means a calendar month;

2.1.21 "occupation right" means a right of occupation in respect of any dwelling in the development which is registered in the deeds office as a registered life right in terms of a retirement scheme or registered leasehold right;

2.1.22 "office" means the registered office of the Association;

2.1.23 "precinct developments" mean the developments established or to be established on the precincts 2 to 9 on the total land comprising the Fernkloof Estate, and "precinct development" means any one of them;

2.1.24 "prime rate" means a rate of interest per annum which is equal to the published minimum lending rate of interest per annum charged by ABSA Bank, compounded

monthly in arrears on the unsecured overdrawn current accounts of its most favoured corporate clients in the private sector from time to time. (In the case of a dispute as to the rate so payable, the rate shall be certified by any manager or assistant manager of any branch of the said bank, whose certificate shall be final and binding on the parties);

2.1.25 "single residential erf" means an erf in the development on which only one dwelling house is lawfully permitted;

2.1.26 "special resolution" means a resolution passed at a special general meeting in accordance with the provisions of clause 32 below;

2.1.27 "trustee committee" means the board of trustees of the Association;

2.1.28 "trustee" means one of the trustee committee;

2.1.29 "vice-chairperson" means the vice-chairperson of the trustee committee;

2.1.30 "year" means a calendar year;

2.2 unless the context otherwise requires, any words importing the singular shall include the plural, and vice versa and words importing any one gender only shall include the other two genders;

2.3 the headings to the respective clauses are for reference purposes only and shall not be taken into account in the interpretation of these clauses;

2.4 where consent or approval of the association is required for any act by a member, such consent or approval shall be in writing and duly signed by the Association, and shall be given prior to the member taking action;

2.5 reference to "this constitution" means this constitution and all rules, regulations and by-laws of the Association from time to time enforced.

3. **PURPOSE DESCRIBING MAIN BUSINESS**

The main business of the Association is to carry on the promotion, advancement and protection of the interests of the members of the Association from time to time and the maintenance and control of the common areas.

4. **MAIN OBJECT**

The main object of The Association is:

- 4.1 the control and maintenance over:
 - 4.1.1 all buildings and/or structures within the development, but excluding all buildings and structures within the development, in respect of which maintenance the Fernkloof Master POA is responsible;
 - 4.1.2 all private open spaces and private roads,
 - 4.1.3 all services, common landscaping, irrigation and amenities on the common areas;
 - 4.1.4 all other common areas designated as such by the trustee committee from time to time;
- 4.2 the control over the compliance and enforcement of the design guidelines;
- 4.3 the promotion, advancement and protection of the communal and group interests of the members generally, including security;
- 4.4 to take title to the common areas simultaneously with the first separate registration of an erf;
- 4.5 to enter into services agreements with the local authority or any other authority or supplier of services in regard to the supply of services in the development, including refuse removal and security services.

5. **FINANCIAL YEAR END**

The financial year end of the Association is 30 June of each year or such other date as the trustees may decide from time to time.



6. MEMBERSHIP OF THE ASSOCIATION

- 6.1 Membership of the Association shall be compulsory for every registered owner of a single residential erf or occupation right.
- 6.2 Such membership shall commence simultaneously with registration of such single residential erf or occupation right (as the case may be) into the name of the transferee in the deeds office.
- 6.3 Membership of the Association shall be limited to:
 - 6.3.1 the registered owners of a single residential erf or an occupation right provided that:
 - 6.3.1.1 a person who is entitled to obtain a certificate of registered title to any single residential erf or occupation right shall be deemed to be the registered owner thereof;
 - 6.3.1.2 where any such owner is more than one person, all the registered owners of a single residential erf or occupation right shall be deemed jointly and severally to be one member of the Association and nominate one owner to represent them and vote at meetings of the Association;
 - 6.3.2 the developer in its capacity as such during the development period.
- 6.4 When a member ceases to be the registered owner of a single residential erf or an occupation right, he or she shall *ipso facto* cease to be a member of the Association.
- 6.5 A member shall not be entitled to:
 - 6.5.1 sell or transfer a single residential erf or occupation right, unless it is a condition of the sale and transfer that:
 - 6.5.1.1 the transferee becomes a member of the Association;
 - 6.5.1.2 the registration of transfer or cession (as the case may be) of such single residential erf or occupation right into the name of that



transferee shall ipso facto constitute the transferee as a member of the Association:

6.5.1.3 such member first obtains the written consent of the Association which consent shall be given provided that the purchaser, transferee or cessionary (as the case may be) of such single residential erf or occupation right (as the case may be) agrees in writing to abide by the provisions of the constitution of the Association including all rules made by the trustees and/or the developer in terms of this constitution, and provided further that such member has paid all levies and any other amounts owing by him to the Association as at the date of transfer or cession (as the case may be) of such single residential erf or occupation right (as the case may be) including all amounts payable in terms of clauses 7.6 and 7.7; and that such member has complied with all such member's obligations in terms of the constitution.

6.5.2 without the prior written approval of the trustees and without signature of the contractors agreement having regard to the design guidelines:

6.5.2.1 erect any new buildings and/or structures of any nature whatsoever on any erf in the development;

6.5.2.2 make any changes or alterations to existing buildings and/or structures on any erf in the development, including changes to the external colour scheme.

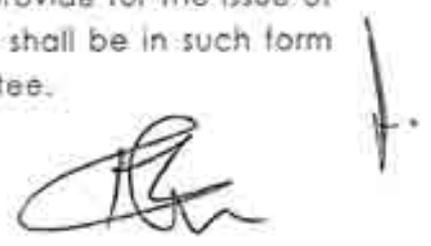
6.6 The approval of the trustees as contemplated in clause 6.5.2 shall only be given:

6.6.1 after detailed plans of the proposed work have been submitted to the trustees, the architectural review committee or any other competent person(s) as nominated by the trustees from time to time (who may be an architect or architects registered with the South African Council of Architects or the Institute of South African Architects); and

- 6.6.2 the trustees or their nominee/s are satisfied that the proposed work is in accordance with the design guidelines for the purposes of which the trustees, the architectural review committee or such other nominee/s shall be the sole arbiter and their decision shall be final and binding on the member, subject to the right of such member to refer their decision to arbitration in terms of clause 37 below: and
- 6.6.3 the member has made payment of any costs which may be incurred in obtaining this approval, including the costs of the trustees or their nominee/s;
- 6.6.4 the member has paid to the trustees a deposit in such amount as the trustees may from time to time determine in their sole discretion, as security for any damage to any of the common areas which amount shall be held in trust by the trustees subject to the provisions of clause 9 below;

provided the foregoing shall not be interpreted as detracting from the sole and final responsibility of the Council to approve or reject building plans.

- 6.7 A member shall not without the prior written approval of the trustees be entitled to:
 - 6.7.1 consolidate 2 or more erven into 1 erf; a member shall remain liable for the payment of levies in respect of each of the erven which form part of the consolidated erf;
 - 6.7.2 subdivide an erf into 2 or more portions; a member shall be liable for the payment of levies in respect of each new erf which shall come into existence as a result of the subdivision of the erf.
- 6.8 The registered owner of a single residential erf, a sectional title unit or an occupation right may not resign as a member of the Association and shall remain a member for as long as such owner is the registered owner thereof.
- 6.9 The trustee committee may, by regulation, provide for the issue of a membership certificate, which certificate shall be in such form as may be prescribed by the trustee committee.



6.10 The rights and obligations of a member shall not be transferable and every member shall;

6.10.1 to the best of such member's ability further the objects and interests of the Association; and

6.10.2 observe all by-laws and regulations made by the Association or the trustee committee;

provided that nothing contained in this constitution shall prevent a member from ceding such member's rights in terms of this constitution as security to the mortgagee of the single residential erf, sectional title unit or occupation right of such member, as the case may be.

6.11 The developer or its nominee/s shall be entitled on behalf of the Association to sign all such documents as may be necessary in order to enable the developer to give transfer of erven sold by the developer to the purchaser thereof.

6.12 No member ceasing to be a member of the Association for any reason shall, (nor shall any such member's executor, curators, trustees or liquidators) have any claim upon or interest in the funds or other property of the Association, but this clause shall be without prejudice to the rights of the Association to claim from such member or his estate any arrears of subscriptions or other sums due from him to the Association at the time of his so ceasing to be a member.

7. LEVIES PAYABLE BY THE MEMBERS

7.1 The trustee committee shall from time to time, impose levies upon the members for the purpose of meeting all the expenses which the Association has incurred, or to which the trustee committee reasonably anticipates the Association will be put to by way of:

7.1.1 maintenance, repair, improvement and keeping in order and condition of the common areas, including landscaping, sewerage treatment and township services; and/or

7.1.2 payment of all rates, refuse collection and other charges payable by the Association in respect of the common areas and/or for the services rendered to it;

7.1.3 payment of all expenses necessary or reasonably incurred in connection with the management of the Association, the common areas and the Association's affairs.

In calculating levies, the trustee committee shall take into account, income, if any, earned by the Association.

7.2 The trustee committee shall estimate the amount which shall be required by the Association to meet the expenses during each year, together with such estimated deficiency (if any) as shall result from the preceding year, and shall impose a levy upon the members equal as nearly as is reasonably practical to such estimated amount. The trustee committee may include in such levies an amount to be held in reserve to meet anticipated future expenditure not of an annual nature. Every such levy shall be made payable by equal monthly installments due in advance on the first day of each and every succeeding month of such year.

7.3 The trustee committee may from time to time impose special levies upon the members in respect of all such expenses as are mentioned in clause 7.1 (which are not included in any estimate made in terms of clause 7.2), and such levies may be made in the sum or by such installments and at such time or times as the trustee committee shall think fit.

7.4 Any amount due by a member by way of a levy shall be a debt due by such member to the Association. The obligation of a member to pay a levy shall cease upon such member ceasing to be a member of the Association, without prejudice to the Association's right to recover arrear levies. No levies paid by a member shall under any circumstances be repayable by the Association upon his or her ceasing to be a member. A member's successor in title to a single residential erf, sectional title unit or occupation right (as the case may be) shall be liable as from the first day of the month following the date upon which he or she becomes a member pursuant to the transfer thereof, to pay the levy attributable thereto.

7.5 The monthly levy payable by the members on the first day of any month in terms of clause 7.2 above shall be payable and apportioned at the first day of any month shall pay the same levy.

7.6 Upon any member ("the selling member") selling his or her erf or occupational right (as the case may be), the selling member shall pay to the Association an amount equal to 0.25% of the purchase



- price (exclusive of VAT, if any) at which the selling member sold his or her erf or occupational right (as the case may be), or such other portion of the purchase price as may be resolved by the members from time to time by special resolution.
- 7.7 The amount payable by the selling member in terms of clause 7.6 shall become due and payable upon registration of transfer or cession (as the case may be) of the selling member's erf or occupational right into the name of the transferee concerned.
- 7.8 A member shall make payment of the monthly levies by virtue of a debit order drawn on the member's banker.
- 7.9 The developer shall not be liable for the payment of levies in respect of any unsold erven on the land or in respect of any unsold erven arising from the subdivision of the properties referred to in clause 41.1 below.
- 7.10 The trustee committee shall at all times ensure that the maintenance and control of the common areas and the expenditure incurred in respect thereof is carried out in a manner which is fair and equitable to all the members of the Association.
- 7.11 No member shall be entitled to any of the privileges of membership including voting at any meeting unless and until he shall have paid every subscription and other sum (if any) which shall be due and payable to the Association in respect of his membership thereof.

B. DESIGN GUIDELINES

- 8.1 All buildings and other structures within the development be subject to and comply with the provisions of the Fernkloof Estate design guidelines.
- 8.2 Subject to the restrictions imposed or directions given at a general meeting of the Fernkloof Estate Master POA and subject to the prior written approval by the Council, the trustee committee of the Fernkloof Master POA may from time to time amend, amplify, substitute or add to the provisions of the Fernkloof Estate design guidelines. Any such amendment, amplification, substitution or addition shall be subject to a resolution passed by the trustees holding not less than 75% of the total voting rights of the trustees of the Fernkloof Master POA.
- 
- 

- 8.3 In the event of any of the provisions of the design guidelines being amended, amplified, substituted or added to, and such amendment, amplification, substitution or addition, in the opinion of the trustee committee, materially affects any further development within the development (or any part thereof), the trustee committee of the Fernkloof Estate Master POA shall give written notice of such amendment, amplification, substitution or addition to, *inter alia*, the Association. Upon receipt of such written notification, the Association shall by written notice inform the members of such amendment, amplification, substitution or addition.

9. **DEPOSIT FOR DAMAGE**

- 9.1 Each member shall, when submitting to the trustees of the Fernkloof Estate Master POA for approval the detailed plans for the construction of any building and/or improvements, or alterations or additions to existing improvements in the development in terms of clause 6.6.1 above, pay to the trustees a deposit in an amount to be determined from time to time by the trustees which amount shall be retained by the trustees in trust until completion by the member and/or its contractors of such work, the interest on which deposit shall accrue to the association.
- 9.2 Upon completion of all such building and other activities, the trustees of the Fernkloof Estate Master POA shall if they are satisfied that no damage has been effected by the member or any of its contractors to the common areas and/or landscaped areas within the development and that the work has been constructed in accordance with duly approved plans, release the building deposit to the member, excluding any interest thereon which will accrue to the Fernkloof Estate Master POA less any fines or penalties payable in terms of the contractors agreement.
- 9.3 In the event of any landscaped area and/or the common areas having damage due to such work, the member shall within 15 days of having been requested to do so in writing by the trustees, rectify the damage to the satisfaction of the trustees, failing which, the trustees shall be entitled to appoint an independent contractor or contractors to repair the damage and the amount paid to the trustees as a building deposit shall be utilised to pay all costs of such repair. If the amount paid to the trustees of the



Fernkloof Estate Master POA as a building deposit is not sufficient to cover the cost of such repairs, the trustees shall be entitled to recover the shortfall from the member.

10. ERECTION OF DWELLING

10.1 Any member who fails to complete the dwelling as per the approved plans on such member's erf:

10.1.1 within 3 years after the date of registration of the first transfer of such erf from the Council to the first transferee; and/or

10.1.2 within 1 year after the commencement of the works in respect of or incidental to the erection of the dwelling;

such member shall pay in respect of each month of delay of completion of the dwelling, a monthly penalty levy to the Association in an amount of the current monthly levy multiplied by 4.

10.2 The penalty levy shall be paid in addition to the levy payable by the member in terms of clause 7, and in the event of a dispute arising as to whether a dwelling is completed for purposes of the provisions of this clause, the chairperson shall determine such dispute and his or her decision shall be final and binding.

10.3 The trustees shall be entitled to:

10.3.1 perform such acts as are necessary to accomplish the purposes expressed or implied herein, which acts shall include, *inter alia*, the examination and endorsement of the relevant building plans as are necessary for any construction, renovation and/or alterations within the scheme;

10.3.2 appoint such advisors as are necessary to scrutinize the relevant plans referred to herein;

10.3.3 impose a scrutiny fee on members for the services as mentioned herein.



- 10.4 The provisions of this clause shall not be applicable in relation to any of the works to be undertaken by the developer prior to the completion of the scheme.

11. DEALING WITH THE COMMON AREAS

Neither the whole nor any portion of the common areas shall be:

- 11.1 sold, let, alienated, otherwise disposed of, subdivided or transferred; or
- 11.2 mortgaged; or
- 11.3 subjected to any rights, whether registered in a deeds registry or not, of use, occupation or servitude, (save those enjoyed by the members in terms hereof and any servitudes in favour of the Council as required in terms of any condition of subdivision);

without the specific prior written consent of the Council and the sanction of a special resolution of the Association (and no member shall be entitled to unreasonably vote against any such special resolution which may be proposed); or

- 11.4 built upon, improved or enhanced in value by the construction of buildings, erections, facilities or amenities, without the sanction of a special resolution of the Association, save and except for the construction of the gatehouse, any storeroom/s, and/or any construction relating to the electrical substation or transformer, the construction of the private road and the landscaping of the private open spaces.

12. RESPONSIBILITY FOR THE COMMON AREAS

- 12.1 The Association shall take title to the common areas in each phase simultaneously with the first separate registration of an erf in such phase.
- 12.2 The Association acknowledges that the Council shall not be responsible for, and the Association shall be solely responsible for the care, repair, maintenance, cleaning, upkeep, improvement and property control of the common areas, all services therein and any structure or thing erected on or contained therein, including the private road and parking thereon.



13. VERGES AND CARRIAGE CROSSINGS

The registered owner/s of each erf shall at such owner's cost construct and maintain:

- 13.1 the carriage crossing between his or her erf and the road;
- 13.2 the landscaping, grass, plants and flowers on the verge between such owner's erf and the road and/or any other adjacent common area/s;

and shall at all times keep the carriage crossing and the verge in a clean, neat and tidy condition.

14. ENCROACHMENTS

14.1 It is recorded that the erven which are situated on the outer perimeter of the development and on the outer perimeter of any further development/s which might take place on the properties referred to in clause 4.1 shall be subject to the following encroachments in favour of the Association:

- 14.1.1 the erection of outer perimeter walls/fences within the boundary of the erven;
- 14.1.2 the installation of security communication ducts on the outer perimeter walls/fences and the installation of manholes.

14.2 The Association shall have the right of access to the erven referred to in clause 14.1 for the purpose of the installation, upkeep, repair and maintenance of the encroachments referred to in clause 14.1.1 and 14.1.2 above.

15. ESTATE RULES

15.1 The trustees and/or the developer may from time to time, but shall not be obliged to do so, make rules relating to the management of the development, all of which rules shall be binding on the members.



15.2 The trustees are empowered to amend, amplify, substitute or repeal any such rule (inter alia the rules relating to the design guidelines and the contractors agreement) with the approval of not less than three fourths of the trustees. In the absence of such approval, any trustee shall be entitled to call a general meeting where the proposed change to such rules shall be voted upon in terms of clause 31 below.

16. **SIGNAGE**

No member other than the developer shall be entitled at any time(s) to erect any signage, flagpole, message and/or other form of notices or advertising within the development (whether on such member's erf or at any other place):

- 16.1 during the development period, without the prior written consent of the developer which may withhold its consent for any reason; and thereafter
- 16.2 without the prior written consent of the Association.

17. **MANAGING AGENT**

17.1 The trustees shall appoint a managing agent from time to time to control, manage and administer the common property and to exercise such powers and duties as may be entrusted to the managing agent, including the power to collect levies and to appoint a supervisor.

17.2 The developer shall be entitled to appoint the managing agent for the development period or for a period of 3 years after the establishment of the association, whichever period is the longest, which appointment shall be valid and binding on the Association.

17.3 The Association hereby irrevocably appoints the development facilitator in rem suam with power of substitution to be his or her lawful attorney and agent, to appoint on his or her behalf a managing agent for the development, and to sign all such documents and do all such other things as may be necessary or desirable to give effect to any steps taken by the development



facilitator in pursuance of the rights and powers which it may have as agent in terms of this clause 17.3 or at common law.

18. RULES AND CONTRACTS OF THE ASSOCIATION

18.1 Subject to any restrictions imposed or directions given at a general meeting of the Association and subject to the conditions imposed by the Council in approving the rezoning and subdivision of the land, the trustee committee may (but shall not be obliged to) from time to time:

18.1.1 make rules but governing, *inter alia*:

18.1.1.1 the management of the development;

18.1.1.2 the member's rights of use, occupation and enjoyment of the common areas;

18.1.1.3 the external appearance of and the maintenance of the common areas and the buildings or other improvements erected thereon;

18.1.1.4 the erection of any buildings and/or structures of any nature whatsoever, and the alteration, modification and renovation to such buildings and/or structures on the common areas;

18.1.2 enter into agreement(s) with the local authorities governing the matters set out in clause 18.1.1 and any other incidental matters.

18.2 In the event of a conflict between any rule made in terms of clause 18.1.1 and any the provisions of the constitution of the Fernkloof Master POA (including any rules and guidelines made hereunder), the provisions of the constitution of the Fernkloof Master POA (including any rules and guidelines made hereunder) shall prevail.

18.3 Each member undertakes to the Association that such member will comply with:

18.3.1 the provisions of this constitution;

18.3.2 the design guidelines referred to in clause 8 above;

18.3.3 any rules made in terms of clause 18.1.1 above.

- 18.3.4 any agreement(s) referred to in clause 18.1.2 insofar as those agreements may directly or indirectly impose obligations on such member;
- 18.3.5 the provisions of the constitution of the Fernkloof Master POA (including any rules and guidelines made hereunder);
- 18.3.6 rules made by the Hermanus golf club from time to time in respect of the access to the golf course.
- 18.4 In the event of any breach by person of the household of, or guest or lessee of a member, such breach shall be deemed to have been committed by the member itself, but without prejudice to the foregoing, the trustee committee may take or cause to be taken such steps against the person actually committing the breach, as the trustee committee may in its sole discretion deem fit.
- 18.5 All officials, employees and contractors employed by the Association, local authority, any public service company, the developer and/or development facilitator shall, at all times, have reasonable access to the erven and common areas for purposes of inspecting and/or maintaining all services supplying and/or traversing any part thereof.

19. BREACH

- 19.1 Should any member:
- 19.1.1 fail to pay on due date any amount due by that member in terms of this constitution or any regulation made thereunder and remain in default for more than 7 days after being notified in writing to do so by the trustees; or
- 19.1.2 commit any other breach of any of the provisions of this constitution or any regulation made thereunder and fail to commence remedying that breach within a period of 7 days after the receipt of written notice to that effect by the trustees and complete the remedying of such breach within a reasonable time;

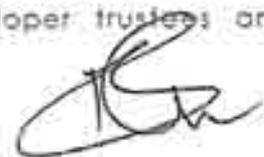


then and in either such event, the trustees shall be entitled on behalf of the Association, without prejudice to any other rights or remedies which the trustees or the Association or any other member may have in law, including the right to claim damages:

- 19.1.3 to institute legal proceedings on behalf of the Association against such member for payment of such overdue amount or for performance of that member's obligations in terms of this constitution or any regulation made thereunder, as the case may be; or
 - 19.1.4 to suspend all or any services to the erf owned by that member; and/or
 - 19.1.5 in the case of clause 19.1.2 above, to remedy such breach and immediately recover the total cost incurred by the trustees or the Association in so doing from such member.
- 19.2 Should the trustees institute any legal proceedings against any member pursuant to a breach by that member of this constitution or any regulation made thereunder, then without prejudice to any other rights which the trustees or the Association or any other member may have in law, the trustees shall be entitled to recover from such member all legal costs incurred by the trustees or the Association, including attorney/client charges, tracing fees and collection commission.
- 19.3 Without prejudice to all or any of the rights the trustees or the Association granted under this constitution, should any member fail to pay any amount due by that member on due date, then such member shall pay interest thereon at the publicly quoted prime rate plus 4% calculated from the due date for payment until the actual date of payment of such amount.

20. TRUSTEE COMMITTEE

- 20.1 There shall be a board of trustees of the Association which shall consist of not less than 3 and not more than 7 members.
- 20.2 Every trustee must be a member of the Association or an authorised representative of the member where the member is not a natural person.
- 20.3 The trustees of the Association shall for the development period be divided into two classes, namely developer trustees and



member trustees. Upon expiry of the development period there shall only be member trustees.

20.4 During the development period, the majority of the trustees may be appointed by the developer and the remainder of the trustees shall be appointed by the members provided that after the development period, all trustees shall be appointed by the members.

20.5 Until the first trustees of the Association are appointed, the developer shall be entitled to carry out all the functions and duties of the trustees in terms of this constitution,

21. REMOVAL AND ROTATION OF TRUSTEE MEMBERS

21.1 Save as set forth in clause 20.3 above, each trustee, except for the developer trustees who shall not be required to rotate on an annual basis, shall continue to hold office until the annual general meeting next following his said appointment, at which meeting each trustee shall be deemed to have retired from office as such, and shall be eligible for re-election to the trustee committee at such meeting.

21.2 A trustee shall be deemed to have vacated his or her office as such upon:

21.2.1 his or her estate being sequestered, whether provisionally or finally, or surrendering his or her estate;

21.2.2 his or her making any arrangement or compromise with his or her creditors;

21.2.3 his or her conviction for any offence involving dishonesty;

21.2.4 his or her becoming of unsound mind or being found lunatic;

21.2.5 his or her resigning from such office in writing delivered to the secretary;

21.2.6 his or her death;

21.2.7 his or her being removed from office by a special resolution of the members.

provided that anything done in the capacity of a trustee in good faith, by a person who ceases to be a trustee, shall be valid until

the fact that he or she is no longer a trustee has been recorded in the minute book of the trustee committee.

- 21.3 Upon any vacancy occurring on the trustee committee prior to the next annual general meeting, the vacancy in question shall be filled by a person nominated by those remaining for the time being of the trustee committee. Whilst developer trustees are in office the remaining developer trustees shall nominate a person to fill any such vacancy in their number.
- 21.4 The developer may at any time and from time to time remove and replace any developer trustee at any time on written notice to the remaining trustees.

22. OFFICE OF TRUSTEES

- 22.1 The trustees shall appoint from amongst themselves, a chairperson and vice-chairperson.
- 22.2 The first chairperson and the first vice-chairperson may be appointed by the developer, and such office bearers shall hold their respective offices until the first annual general meeting following the date of their appointment, provided that any such office shall ipso facto be vacated by the trustee holding such office upon his or her ceasing to be a trustee for any reason.
- 22.3 Within 14 days of the holding of such annual general meeting, the trustee committee shall meet and shall elect from its own number the chairperson and vice-chairperson, who shall hold their respective offices until the annual general meeting held next after their said appointment, provided that the office of the chairperson or vice-chairperson shall ipso facto be vacated by the trustee holding such office upon his or her ceasing to be a trustee for any reason. No one trustee shall be appointed to more than one of the aforesaid offices. In the event of any vacancy occurring in any of the aforesaid offices at any time, the trustee committee shall meet to appoint one of their number as a replacement in such office.
- 22.4 Save as otherwise provided in this constitution, the chairperson shall preside at all meetings of the trustee committee, and all general meetings of members, and shall perform all duties incidental to the office of chairperson and such other duties as may be prescribed by the trustee committee or of members, and to allow or refuse to permit invitees to speak at any such



meetings, provided however, that any such invitees shall not be entitled to vote at any such meetings.

22.5 The vice-chairperson shall assume the powers and duties of the chairperson in the absence of the chairperson, or his inability or refusal to act as chairperson, and shall perform such other duties as may from time to time be assigned to him by the chairperson or the trustee committee.

22.6 Trustees shall be entitled to be repaid all reasonable and bona fide expenses incurred by them respectively in or about the performance of their duties as trustees and/or chairperson, vice-chairperson, as the case may be, but save as aforesaid, shall not be entitled to any other remuneration fees or salary in respect of the performance of such duties.

23. FUNCTIONS AND POWERS OF THE TRUSTEE COMMITTEE

23.1 Subject to the express provisions of this constitution, the trustee committee shall manage and control the business and affairs of the Association, and shall have full powers in the management and direction of such business and affairs and, save as may be expressly provided in this constitution, may exercise all such powers of the Association, and do all such acts on behalf of the Association as may be exercised and done by the Association, and as are not by this constitution required to be exercised or done by the Association in general meeting, subject nevertheless to such regulations as may be prescribed by the Association in general meeting from time to time, provided that no regulation made by the Association in general meeting shall invalidate any prior act of the trustee committee which would have been valid if such regulation had not been made.

23.2 The trustee committee shall have the right to vary, cancel or modify any of its decisions and resolutions from time to time.

23.3 The trustee committee shall have the right to co-opt onto the trustee committee any member or members chosen by it. A co-opted trustee shall enjoy all the rights and be subject to all the obligations of the trustees.

23.4 The trustee committee may, should it so decide, investigate any suspected or alleged breach by any member or trustee of this constitution, in such reasonable manner as it shall decide from time to time.



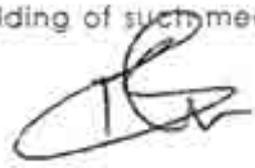
23.5 The trustee committee may make regulations and by-laws, not inconsistent with this constitution, or any regulations or by-laws prescribed in the Association in general meeting:

- 23.5.1 as to disputes generally;
- 23.5.2 for the furtherance and promotion of any of the objects of the Association;
- 23.5.3 for the better management of the affairs of the Association;
- 23.5.4 for the advancement of the interests of members;
- 23.5.5 for the conduct of trustee committee meetings and general meetings; and
- 23.5.6 to assist it in administering and governing its activities generally;

and shall be entitled to cancel, vary or modify any of the same from time to time.

24. PROCEEDINGS OF THE TRUSTEE COMMITTEE

- 24.1 The trustee committee may meet together for the dispatch of business, adjourn and otherwise regulate their meetings as they think fit, subject to any provisions of this constitution.
- 24.2 Meetings of the trustee committee shall be held at least once every 12 months, provided that if all the trustees shall in writing have waived the above requirement in respect of a particular 12 months, then no meeting of the trustee committee need be held for that period.
- 24.3 The quorum necessary for the holding of any meeting of the trustee committee shall be 3 trustees, provided that during the development period at least 2 developer trustees shall be necessary at all meetings of trustees to form a quorum.
- 24.4 The chairperson shall preside as such at all meetings of the trustee committee, provided that should at any meeting of the trustee committee the chairperson not be present within 5 minutes after the time appointed for the holding thereof, then the vice-chairperson shall act as chairperson at such meeting, provided further that should the vice-chairperson also not be present within 5 minutes of the time appointed for the holding of such meeting,



those present of the trustees shall vote to appoint a chairperson for the meeting, who shall thereupon exercise all the powers and duties of the chairperson in relation to such meeting.

- 24.5 Minutes shall be taken at every trustee committee meeting, although not necessarily verbatim. These minutes shall be reduced to writing without undue delay after the meeting and shall then be certified correct by the chairperson of the meeting. All minutes of trustee committee meetings shall after certification as aforesaid be placed in a trustee committee minute book to be kept in accordance, *mutatis mutandis*, with the provisions of the law relating to the keeping of minutes of meetings of directors of companies. The trustee committee minute book shall be open for inspection at all reasonable times by a trustee, the auditors, and the members.
- 24.6 All competent resolutions recorded in the minutes of any trustee committee meeting shall be valid and of full force and effect as therein recorded, with effect from the passing of such resolutions, and until varied or rescinded, but no resolution or purported resolution of the trustee committee shall be of any force or effect, or shall be binding upon the members or any of the trustees unless such resolution is competent within the powers of the trustee committee.
- 24.7 Save as otherwise provided in this constitution, the proceedings at any trustee meeting shall be conducted in such reasonable manner and form as the chairperson of the meeting shall decide.
- 24.8 A resolution signed by all the trustees shall be valid in all respects as if it had been duly passed at a meeting of the trustee committee duly convened.

25. GENERAL MEETINGS OF THE ASSOCIATION

- 25.1 The Association shall within 3 calendar months after each financial year of the Association, hold a general meeting as its annual general meeting, in addition to any other general meetings, during such financial year, and shall specify the meeting as such in the notices in terms of clause 26.1 below.
- 25.2 Such annual general meeting shall be held at such time and place, subject to the foregoing provisions, as the trustee committee shall decide from time to time.



- 25.3 All general meetings other than annual general meetings shall be called special general meetings.
- 25.4 The trustee committee may, whenever they think fit, convene a special general meeting.
- 25.5 General meetings of the Association shall take place at such place/s as shall be determined by the trustee committee from time to time.

26. NOTICE OF MEETINGS OF THE ASSOCIATION

- 26.1 An annual general meeting and a meeting called for the passing of a special resolution, shall be called by not less than 21 days' notice in writing at the least, and a special general meeting, other than one called for the passing of a special resolution, shall be called by not less than 14 days' notice in writing. In each case, the notice shall be inclusive of the day on which it is dispatched, and shall specify the place, the day and the hour of the meeting and, in the case of special business, in addition to any other requirements contained in this constitution, the general nature of that business, and in the case of a special resolution, the terms and effect of the resolution and the reasons for it shall be given in the manner hereinafter mentioned or in such other manner (if any) as may be prescribed by the trustee committee to such persons as are under this constitution entitled to receive such notices from the Association: provided that a general meeting of the Association shall, notwithstanding that it is called by shorter notice than that specified in this constitution, be deemed to have been duly called if it is so agreed:

26.1.1 In the case of a meeting called as the annual general meeting, by all the members entitled to attend and vote thereat: and

26.1.2 In the case of a special general meeting, by a majority in number of the members having a right to attend and vote at the meeting, being a majority together holding not less than 75% of the total voting rights of all members.

- 26.2 The accidental omission to give notice of a meeting or of any resolution, or to give any other notification, or present any document required to be given or sent in terms of this constitution, or the non-receipt of any such notice, notification or document by



any member or other person entitled to receive the same, shall not invalidate the proceedings at, or any resolution passed at, any meeting.

27. QUORUM FOR GENERAL MEETINGS

27.1 No business shall be transacted at any general meeting unless a quorum is present when the meeting proceeds to business. The quorum necessary for the holding of any general meeting shall be such of the members entitled to vote in person or by proxy, as together for the time being, represent 50% of the total votes of all members of the Association entitled to vote, for the time being save that not less than 3 members must be personally present and provided further that during the development period, the developer is represented at such meeting.

If within half an hour from the time appointed for the holding of a general meeting a quorum is not present, the meeting, if convened on the requisition of members, shall proceed and the members present shall be a quorum.

28. AGENDA AT GENERAL MEETINGS

In addition to any other matters required by this constitution to be dealt with at an annual general meeting, the following matters shall be dealt with at every annual general meeting:

- 28.1 the consideration of the chairperson's report;
- 28.2 the election of the trustee committee;
- 28.3 the consideration of any other matters raised at the meeting including any resolutions proposed for adoption by such meeting, and the voting upon any such resolutions;
- 28.4 the consideration of the balance sheet of the Association for the last financial year of the Association preceding the date of such meeting;
- 28.5 the consideration of the report of the auditors;
- 28.6 the consideration of the total levy (as referred to in clause 7) for the calendar year during which such annual general meeting takes place; and

- 28.7 the consideration and fixing of the remuneration of the auditors for the financial year of the Association preceding the annual general meeting.

29. PROCEDURE AT GENERAL MEETINGS

- 29.1 The chairperson shall preside as such at all general meetings, provided that should he or she not be present within 5 minutes after the time appointed for the holding thereof, then the vice-chairperson shall act as chairperson at such meeting, provided further that should the vice-chairperson also not be present within 5 minutes of the time appointed for the holding of such meeting, then the members present at such meeting entitled to vote, shall vote to appoint a chairperson for the meeting, who shall thereupon exercise all the powers and duties of the chairperson in relation to such meeting.
- 29.2 The chairperson may, with the consent of any general meeting at which a quorum is present (and if so directed by the meeting), adjourn a meeting from time to time and from place to place, but no business shall be transacted at any adjourned meeting other than the business which might have been transacted at the meeting from which the adjournment took place.
- 29.3 Whenever a meeting is adjourned for 10 days or more, notice of the adjourned meeting shall be given in the same manner as of an original meeting. Save as aforesaid, the members shall not be entitled to any notice of adjournment, or of the business to be transacted at an adjourned meeting.
- 29.4 Except as otherwise provided for in this constitution, all general meetings shall be conducted in accordance with generally accepted practice.

30. PROXIES FOR GENERAL MEETINGS

- 30.1 A member may be represented at a general meeting by a proxy, who need not be a member of the Association. The instrument appointing a proxy shall be in writing signed by the member concerned or such member's duly authorised agent in writing, but need not be in any particular form, provided that where a member is more than one person, any one of those persons may sign the instrument appointing a proxy on such member's behalf, where a member is a company, the same may be signed by the chairperson of the board of directors of the company or by its



secretary, and where an Association of persons, by the secretary thereof;

30.2 The instrument appointing a proxy and the power of attorney or other authority (if any) under which it is signed, or a copy certified by a commissioner of oaths thereof shall be deposited at the office at any time before the time appointed for the commencement of the meeting, or adjourned meeting, at which the person named in the instrument is proposed to vote. No instrument appointing a proxy shall be valid after the expiration of 12 months from the date of its execution.

30.3 A vote given in accordance with the terms of an instrument of proxy shall be valid notwithstanding the previous death of the principal or revocation of the proxy, provided that no intimation in writing of the death or revocation shall have been received by the trustee committee at least one hour before the time fixed for the holding of the meeting.

30.4 Should a member be absent from the recorded domicillum address which the trustees may have for such member, for a continuous period in excess of 3 weeks, a proxy must be appointed by such member prior to such member's absence in accordance with clauses 30.1 and 30.2 above, failing which a member shall not be entitled to vote, at any special general meeting, called during such member's absence.

31. VOTING AT GENERAL MEETINGS

31.1 At every general meeting, every member in person or by proxy and entitled to vote shall have 1 (one) vote per erf owned by such member provided that if a single residential erf, sectional title unit or occupation right is registered in the name of more than one person, then they shall jointly exercise such rights in respect thereof.

31.2 Save as expressly provided for in this constitution, no person other than a member duly registered, and who shall have paid every levy and other amount (if any) which shall be due and payable to the Association in respect of or arising out of his membership, and who is not under suspension, shall be entitled to be present or to vote on any question, either personally or by proxy, at any general meeting.

- 31.3 During the development period, the developer shall be entitled on a poll to the same number of votes of all the other members of the Association, in addition to the number of votes to which the developer is entitled as a member in terms of this constitution.
- 31.4 At any general meeting a resolution put to the vote of the meeting shall be decided on a show of hands, unless either prior to or on the declaration by the chairperson of the result of the show of hands, a poll is demanded by:
- 31.4.1 any person entitled to vote at such meeting; and/or
- 31.4.2 by the chairperson.
- 31.5 Notwithstanding the provisions of clause 31.4 above, voting on the election of a chairperson of a general meeting (if necessary) or on any question of adjournment shall be decided on a show of hands by a majority of the members present in person or by proxy, and entitled to vote, unless a poll is (before or on the declaration of the result of the show of hands) demanded by the chairperson or any of the members in terms of clause 31.6 below.
- 31.6 When a poll is demanded regard shall be had, in computing the majority on the poll, to the number of votes cast for and against the resolution.
- 31.7 An ordinary resolution (that is a resolution other than a special resolution) or the amendment of an ordinary resolution, shall be carried on a simple majority of all the votes cast thereon, and an abstention shall not be counted as a vote for or against the resolution in question. In the case of an equality of votes, whether on a show of hands or on a poll, the chairperson of the general meeting shall be entitled to a casting vote in addition to his deliberative vote.
- 31.8 Unless any member present in person or by proxy at a general meeting shall have objected to any declaration made by the chairperson of the meeting as to the result of any voting at the meeting, whether by show of hands or by poll, or to the propriety of validity of the procedure at such meeting, such declaration shall be deemed to be a true and correct statement of the voting, and the meeting shall in all respects be deemed to have been properly and validly constituted and conducted, and an entry in the minutes to the effect that any motion has been carried or lost, with or without a record of the number of votes recorded in favour of or against such motion, shall be conclusive evidence of the



vote so recorded if such entry conforms with the declaration made by the chairperson of the meeting as to the result of any voting at the meeting. The chairperson of the meeting shall be obliged to announce the result of any voting either at the meeting or as soon as reasonably possible thereof.

32. SPECIAL RESOLUTION

- 32.1 A resolution by the Association shall be a special resolution if at a general meeting of which not less than 21 days' notice has been given specifying the intention to propose the resolution as a special resolution, the terms and effect of the resolution and the reasons for it and at which members holding in aggregate not less than one-fourth of the total votes of all the members entitled to vote thereat, are present in person or by proxy, the resolution has been passed, on a show of hands, by not less than three-fourths of the number of members of the Association entitled to vote on a show of hands at the meeting who are present in person or by proxy or, where a poll has been demanded, by not less than three-fourths of the total votes to which the members present in person or by proxy are entitled.
- 32.2 If less than one-fourth of the total votes of all the members entitled to attend the meeting and to vote thereat are present or represented at a meeting called for the purpose of passing a special resolution, the meeting shall stand adjourned for 30 minutes.
- 32.3 After the expiry of the said 30 minute period, the members who are present in person or by proxy and are entitled to vote may deal with the business for which the original meeting was convened and a resolution passed by not less than three-fourths of such members shall be deemed to be a special resolution even if less than one-fourth of the total votes are represented at such meeting.

33. OTHER PROFESSIONAL OFFICERS

Save as specifically provided otherwise in this constitution, the trustee committee shall at all times have the rights to engage on behalf of the Association, the services of accountants, auditors, attorneys, advocates, architects, engineers, any other professional person or firm and/or any other employee/s whatsoever, for any reasons thought necessary by the trustee committee and on such terms as the trustee committee shall decide, subject to any of the provisions of this constitution, provided that



any expenditure incurred in respect of the above, shall not exceed 5% of the total annual levy for the year in question unless authorised by a special resolution.

34. ACCOUNTS

- 34.1 The Association in general meeting or the trustee committee, may from time to time make reasonable conditions and regulations as to the time and manner of the inspection by the members of the accounts and books of the Association, or any of them, and subject to such conditions and regulations, the accounts and books of the Association shall be open to the inspection of members at all reasonable times during normal business hours.
- 34.2 At each annual general meeting the trustee committee shall lay before the Association a proper income and expenditure account for the immediately preceding financial year of the Association, or in the case of the first account, for the period since the incorporation of the Association, together with a proper balance sheet made up as at the last financial year end of the Association. Every such balance sheet shall be accompanied by proper and extensive reports of the trustee committee and the auditors if appointed, and there shall be attached to the notice sent to members convening each annual general meeting, as set forth in clause 26.1 above, copies of such accounts, balance sheet and reports and of any other documents required by law to accompany the same.
- 34.3 Should the trustees or the majority of the members so require, the accounts of the Association shall be examined and the correctness of the income and expenditure account and balance sheets ascertained by the auditors at least once a year.

35. SERVICE OF NOTICES

- 35.1 A notice shall be in writing and shall be given or served by the Association upon any member, either personally or by post in a prepaid registered letter, properly addressed to the member at the address of the erf owned by such member.
- 35.2 No member shall be entitled to have a notice served on him or her at any address not within the Republic of South Africa, but any member may require the Association, by notice, to record an address within the Republic of South Africa which shall be



deemed to be his address for the purpose of the service of notices.

- 35.3 Any notice by post shall be deemed to have been served at the time when the letter containing the same was posted, and in proving the giving of the notice by post, shall be sufficient to prove that the letter containing the notice was properly addressed and posted.
- 35.4 The accidental omission to give notice of a meeting to, or the non-receipt of notice of a meeting by, any person entitled to receive notice shall not invalidate the proceedings of that meeting.

36. INDEMNITY

- 36.1 All trustee members shall be indemnified out of the funds of the Association against any liabilities bona fide incurred by them in their respective said capacities and in the case of a trustee member, in his capacity as chairperson or vice-chairperson, whether defending any proceedings, civil, criminal or otherwise, in which relief is granted to any such person/s by the court.
- 36.2 Every trustee member, every servant, agent and employee of the Association, shall be indemnified by the Association against (and it shall be the duty of the trustee committee out of the funds of the Association to pay) all costs, losses and expenses (including travelling expenses) which such person or persons may incur or become liable for by reason of any contract entered into, or any act or deed done, by such person or persons in the discharge of any of his/their respective duties, including in the case of a trustee member, his duties as chairperson or vice-chairperson. Without prejudice to the generality of the above, the Association shall specifically indemnify every such person against all losses of whatsoever nature incurred arising out of any bona fide act, deed or letter done or written by him jointly or severally in connection with the discharge of his duties, provided that any such act, deed or letter has been done or written in good faith.
- 36.3 A trustee member shall not be liable for the acts, receipts, neglects or defaults of the auditors or of any of the other trustee members, whether in their capacities as trustee members or as chairperson or vice-chairperson, or for any loss or expense sustained or incurred by the Association through the insufficiency or deficiency of title to any property acquired by the trustee



committee for or on behalf of the Association, or for the insufficiency or deficiency of any security in or upon which any of the monies of the Association shall be invested, or for any loss or damage arising from the insolvency or fortuous act of any person with whom any monies, securities or effects shall be deposited, or for any loss or damage occasioned by any error of judgment or oversight on his part, or for any other loss, damage or misfortune whatever which shall happen in the execution of any of the duties of his office/s or in relation thereto, unless the same shall happen through lack of bona fides or breach of duty or breach of trust.

- 36.4 No member shall have any claim of any nature whatsoever against the Association for any loss, damage or injury which such member may directly or indirectly suffer (even if such loss, damage or injury is caused through the negligence of the Association, the trustees, or any of the Associations employees or appointees) by reason of any latent or patent defects on the development (including the common areas), or fire on the development, or theft from the development, or by reason of any building, improvement or other structure within the development being in a defective condition or state of disrepair or any particular repair not being effected by the Association timeously or at all, by any person whatsoever, or for any purpose whatsoever, or arising from any other cause whatsoever, and each member is advised to take the necessary steps to insure his or her interest.

37. ARBITRATION

- 37.1 Any dispute, question or difference arising at any time between member or between members and trustees out of or in regard to:
- 37.1.1 any matters arising out of this constitution; or
 - 37.1.2 the rights and duties of any of the parties mentioned in this constitution; or
 - 37.1.3 the interpretation of this constitution.

shall be submitted to and decided by arbitration on notice given by any party to the other parties who are interested in the matter in question.

- 37.2 Arbitration shall be held in Cape Town informally and otherwise upon the provisions of the Arbitration Act No 42 of 1965 (as amended or replaced from time to time) it being intended that if




possible it shall be held and concluded within 21 business days after it has been demanded.

37.3 Save as otherwise specifically provided herein, the Arbitrator shall be, if the question in dispute is:

37.3.1 primarily an accounting matter - an independent accountant;

37.3.2 primarily a legal matter - a practising counsel or attorney of not less than 10 years standing;

37.3.3 any other matter - an independent and suitably qualified person appointed by the auditors;

as may be agreed upon between the parties to the dispute.

37.4 If agreement cannot be reached on whether the question in dispute falls under clauses 37.3.1, 37.3.2 or 37.3.3 or upon a particular arbitrator in terms of clause 37.3.3 above, within 3 business days after the arbitration has been demanded, then:

37.4.1 the President for the time being of the Law Society of the Cape of Good Hope or its successor/s shall determine whether the question in dispute falls under clauses 37.3.1, 37.3.2 or 37.3.3 above; or

37.4.2 the President for the time being of the Law Society of the Cape of Good Hope shall nominate the arbitrator in terms of clause 37.3.1 within 7 business days after the parties have failed to agree so that the arbitration can be held and concluded as soon as possible within the 21 business days referred to in clause 37.2 above.

37.5 The arbitrator shall make his award within 7 days after completion of the arbitration and shall in giving his award, have regard to the principles laid down in terms of this constitution. The arbitrator may determine that the cost of the arbitration may be paid either by one or other of the disputing parties or by the Association as he in his sole discretion may deem fit.

37.6 The decision of the arbitrator shall be final and binding and may be made an order of the Cape Provincial Division of the High Court of South Africa or its successor/s upon the application of any party to the arbitration.



37.7 Notwithstanding anything to the contrary contained in clauses 37.1 to 37.7 (both inclusive), the trustees shall be entitled to institute legal proceedings on behalf of the Association by way of application, action or otherwise in any Court having jurisdiction for the purposes of restraining or interdicting breaches of any of these provisions.

38. AMENDMENTS TO CONSTITUTION

This constitution, or any part thereof, shall not be repealed or amended, and no new rules shall be made, save by a special resolution adopted at an annual general meeting or a general meeting of the members and subject further to the prior written consent of the Council being obtained for the amendment of this clause 38 and clauses 1, 2, 3, 4, 6, 7, 8, 9, 11, 12, 40 and 41 of this constitution and subject further to the prior written consent of the developer during the development period being obtained for the amendment of this clause and clauses 40 and 41 of this constitution.

39. EFFECTIVE DATE

This constitution shall come into force when the first erf in the development is registered in the deeds office.

40. STATUS OF DEVELOPER

During the development period, the following provisions shall apply in addition to the provisions of and notwithstanding anything to the contrary contained in this constitution:

40.1 the developer shall be entitled;

40.1.1 to nominate and appoint the majority of the trustees to the board of trustees;

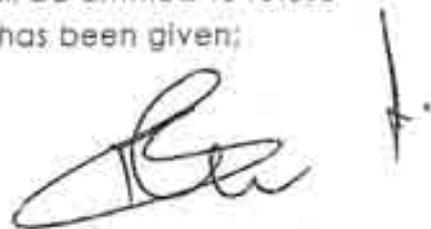
40.1.2 to a number of votes equal to the number of erven registered in its name at any time plus the number of votes referred to in clause 31.3 at any meeting of members or the trustee committee;

40.1.3 to impose any rules relating to the management of the development from time to time, as the developer may deem fit, and to amend, amplify, substitute and/or add to any such rules;



- 40.1.4 to require that the trustee committee enforces the rights granted to it in terms of this constitution against any member who in the opinion of the developer is not complying with his obligations as a member, and in particular, without restricting the generality of the foregoing, has failed to maintain all buildings and other improvements on its erf by giving such member written notice in which his failure to comply with the particular provisions of this constitution is detailed and calling upon him to remedy such failure within a prescribed period of not more than 30 days, failing which, the developer shall be entitled at the sole cost of that member to carry out all such work as may be required to maintain such building and other improvements on its erf;
- 40.1.5 to erect such signage, flagpoles, messages and/or other forms of notices or advertising on the development including the common areas, the private road area and/or the exterior walls (if any) of the development, subject to the regulations and by-laws of the Council appertaining to signage from time to time;
- 40.1.6 to change the name of the Association from time to time to any name which the developer may deem fit;
- 40.2 neither the trustee committee nor any member of the Association shall prevent or hinder in any way the developer from:
- 40.2.1 gaining access to and egress from the development;
- 40.2.2 continuing any building operations at the development;
- 40.2.3 marketing and selling any of its unsold erven, including the advertisement of the sale of such erven on the common areas and/or at the development;

provided that the provisions of this clause 40 shall not be interpreted as allowing the developer access onto any of the erven after the termination of the development period unless 48 hours prior written notice has been given to the member concerned. The developer shall make good any subsequent damage to plants, property or improvements thereon to the satisfaction of the member. No member shall be entitled to refuse the developer access if the required notice has been given;



- 40.3 no consent shall be given by the board of trustees as contemplated in clause 6.5.2 unless the developer trustees or their nominee/s have voted in favour of such consent granted;
- 40.4 upon the transfer of the last erf from the developer to a member, the rights of the developer in terms of the provisions of this clause 40 shall immediately terminate ipso facto and no longer be of any force and effect.

41. INCORPORATION OF FURTHER PHASES

The developer has a continuing and permanent interest to ensure that certain basic provisions are entrenched in perpetuity to ensure the success of the development. Accordingly, none of the following provisions may be deleted or varied in any way in terms of clause 38 above, without the prior written consent of the developer:

- 41.1 the developer has the right at any time and from time to time to extend or alter the area or composition of the development by requiring the Association to incorporate into the development any additional areas from time to time as further phases of the development which the developer shall be entitled to develop as it may deem fit;
- 41.2 should any further property be incorporated into the development, the developer shall be entitled to require that the first and all subsequent owners of erven therein become owners of the Association in respect of those parts from such date as the developer may determine, and on the same terms and conditions as are applicable to the other members of the Association. The members shall be bound by any such requirement of the developer.

ooOoo

A handwritten signature in cursive script, followed by a vertical line and a horizontal tick mark.

Specimen Bank Guarantee

[to be annexed]

 d.

SPECIMAN BANK GUARANTEE

OVERSTRAND MUNICIPALITY

We hold at your disposal the sum of R ("the guaranteed amount").

We hereby irrevocably undertake to pay to Attorneys the guaranteed amount upon their written confirmation of the registration of transfer of Erf ("the property") into the name of ("the purchaser").

We hereby furthermore irrevocably undertake forthwith to pay the guaranteed amount to Attorneys in the event of their certifying that :

- (a) the purchaser has frustrated or delayed the registration of transfer; or
- (b) the sale of the property has been duly cancelled by reason of a breach by the purchaser of the sale agreement relating to the sale of the property.

This guarantee shall remain in force until registration of transfer of the property to the purchaser unless prior to that date you have submitted us a claim under this guarantee in which event this guarantee shall remain in force until such claim has been paid or settled.

Yours faithfully

.....
(name of Banker
authorized signatory)

Specimen Contractors Agreement

[to be annexed]

ILG

f.



CONTRACTORS AGREEMENT

**AGREEMENT FOR QUALIFICATION OF AND CODE OF CONDUCT
FOR CONTRACTORS, SUB-CONTRACTORS AND OWNER BUILDERS
WITHIN THE FERNKLOOF ESTATE ("THE ESTATE")**

ENTERED INTO BY AND BETWEEN

**The Fernkloof Master Property Owners
Association ("MPOA")**

AND

("THE CONTRACTOR")

1. PREAMBLE

The purpose of this agreement is to ensure integration between residential living and control over building activities within the Estate with minimal impact on the environment. These terms and approved conditions have been developed in terms of the Environmental Management Plan ("EMP") for the Estate. The MPOA reserves the right to make amendments and additions to this document from time to time.

2. QUALIFICATION OF CONTRACTORS

- 2.1 Only contractors who can furnish at least three references of prior building contracts will be allowed to build in the Estate.
- 2.2 An owner builder who qualifies under 2.1 will be allowed to construct his own home.
- 2.3 Contractors are at all times responsible for their sub-contractors and employees while on the Estate.

3. RULES AND REGULATIONS

The rules and regulations described below are intended to ensure that the quality of life for residents in the Estate is not unduly compromised and the impact to the environment is minimised by the construction operations, yet allowing for efficient construction by contractors.

When a contractor is found to be in breach of the stated rules and regulations, a penalty will be levied. The extent of the penalty is detailed below the description of each rule and regulation.

3.1 Environmental controls

The contractor acknowledges the importance of environmental sensitivity and agrees to conform to all environmental controls specified in this document and revised from time to time. These controls form part of the EMP for the development and are required to be legally enforced. Presently, these specifications include the following considerations.

3.1.1 Personnel Training

a. Description

All contractor and sub-contractor personnel will be required to be briefed on the Builders Code of Conduct. The main contractor must do these briefings before his personnel will be allowed to work on the Estate.

b. Breach

Personnel who have not been briefed will not be allowed onto the Estate.

3.1.3 Limits of building activity

a. Description

All activities relating to the construction operations of any dwelling must be confined to within the erf boundary where construction is taking place. This relates to location of personnel, siting of storage bins, etc.

b. Breach

- (i) Work by the contractor will be stopped until such time as the contractor's equipment has been moved to within the building site.
- (ii) The contractor will be fined R150,00 per transgression.

3.1.4 Site presentation

a. Description

The contractor will be expected to keep the appearance of his building site neat and tidy at all times. Building rubble must be removed from the site at intervals not exceeding one week, and litter must be removed from the site on a daily basis. No litter may be stored or mixed in amongst building rubble. Refuse drums/containers must be supplied for the purposes of storing refuse until removed from site by the contractor.

b. Breach

- (i) Should a builder not comply with the removal of building rubble, the rubble will be removed by an outside contractor and the costs thereof claimed from the builder. The contractor will be denied access to the Estate until such costs have been paid in full.
- (ii) Should wind blown litter be generated from the site, the contractor will be fined R250,00 per day until all refuse has been removed from the stand and the surrounding area.

3.1.5 Cleaning of vehicles/equipment

a. Description

Washing of vehicles and equipment will not be allowed on the Estate and must be carried out elsewhere.

b. Breach

The building contractor will be fined R500,00 per offence.

3.1.6 Fires

a. Description

No fires will be allowed on any part of the estate including the building site.

b. Breach

- (i) The building contractor will be fined R1 000,00 per offence.
- (ii) The building contractor will in addition be held legally and financially responsible for any damage caused by the breach of this regulation.

3.1.8 Ablution facilities

a. Description

Contractors must make adequate provision for drinking water and temporary toilets situated on the building site for the use of their employees until such time as the water-borne sewer drainage is available.

b. Breach

- (i) The contractor will be denied access to the Estate until such time as this regulation is complied with.
- (ii) In addition the contractor will be fined R500,00 per offence.

3.1.9 Spoil of excess material and building rubble

a. Description

The contractor must make adequate provision for removal of building rubble and excess material. No material or building rubble will be spoiled on the Estate.

b. Breach

The estate will appoint a person to remove all such spoil for the contractors account. In addition to this the contractor will pay R1 000,00 per offence.

3.1.10 Screening of building sites

a. Description

The contractor will be required to screen off the site with a 1,8m green shade-netting screen firmly attached with a minimum of 4 horizontal wire strands for vertical support and which vertical support must not be visible from the road. The screen must be kept in place and maintained for the entire building process and must be able to withstand the elements.

b. Breach

The contractor will be denied access onto the Estate until such structures are properly in place.

3.2 Hours of Work

3.2.1 Public/Private time

a. Description

Contractors may only be present on the Estate during the following public time hours

Normal Weekdays	07H00 to 17H00 - Estate to be vacated by 17h30
Saturdays	08H00 to 13H00 - Estate to be vacated by 13h30

Sundays - No work permitted
 Public Holidays - No work permitted

b. Breach

- (i) Contractors may be escorted from the Estate by security during private times.
- (ii) In addition the building contractor will be fined R500,00 per transgression.

3.2.2 Permission to work during private times

a. Description

Contractors are not allowed on the Estate on Sundays and proclaimed public holidays without the written permission of the relevant precinct POA as these days are considered to be private time. Special applications for contractors to be present on site during private time should be lodged in writing with the relevant precinct POA at least one week prior to the private time activity.

b. Breach

- (i) Contractors may be escorted from the Estate by security during private times.
- (ii) In addition the building contractor will be fined R500,00 per transgression

3.2.3 Watchman**a. Description**

No employees will be allowed to remain on site during private time.

b. Breach

- (i) Contractors may be escorted from the Estate by security during private times.
- (ii) In addition the building contractor will be fined R500,00 per transgression

3.3 Vehicle Sizes Allowed**a. Description**

Due to the road surfacing and limited road widths and radii the following restrictions are placed on any vehicle entering the Estate.

- (i) Only fixed axle design vehicles will be allowed.
- (ii) Maximum length = 9.1m
- (iii) Maximum width = 2.6m
- (iv) Maximum gross mass = 20,000kg
- (v) Maximum axle weight = 8,000kg

b. Breach

Vehicles larger than above will be denied access to the Estate.

3.4 Deliveries to Contractors**3.4.1 General deliveries****a. Description**

Contractors will at all times be responsible for the delivery personnel. All delivery times will be limited to public times as defined under 3.2 above. Size of delivery vehicles will be limited as defined under 3.3 above. Deliveries to the building site will take place only from the street frontage of the site. Access across adjoining erven may only be gained after obtaining written permission from the owner of such erf a copy of which must be lodged with the MPOA.

b. Breach

Penalties levied on the building contractor will be the same as if the contractor's employees were guilty of the transgression.

3.4.2 Concrete deliveries

The delivery of concrete has the potential of causing the most damage to the road surfacing and landscape vegetation. It is therefore important that these deliveries are handled in a particular way. The following rules relate specifically to the concrete delivery vehicles.

a. Description

Drivers of concrete delivery vehicles must be briefed on this document.

b. Breach

- (i) Drivers not briefed will not be allowed access onto the Estate.
- (ii) Drivers found contravening the Estate rules and regulations will be escorted off the estate and refused access to the Estate. The building contractor will be liable for penalties incurred by a concrete delivery vehicle.

a. Description



The washing off of Readymix concrete delivery vehicles. Under no circumstances may concrete be spill onto the road surface and the contractor will be held responsible for the repair to the road if this occurs.

- b. **Breach**
The building contractor will be fined R500,00 per offence.

3.5 Storage Sheds/Huts

a. **Description**
The contractor will be allowed to erect green storage sheds/huts or containers within the boundaries of the building site and to a maximum height of 2.4m. The position of such structures must be indicated on the site diagram, which must be approved by the MPOA in terms of item 3.8 (iii) below. Storage facilities must be clean on the outside and in good condition. No advertising, writing or signage is permitted on the outside on the container.

- b. **Breach**
The contractor will be instructed to remove any structures that do not conform to this regulation and may not continue/commence with building activities until this regulation has been complied with.

3.6 Security

a. **Description**
(i) The development is located in a secure and controlled environment and therefore individual watchmen will not be allowed on the Estate during private times.

(ii) Personnel and sub contractors of the contractor must at all times comply with and adhere to the security procedures imposed by the relevant precinct POA and/or the MPOA from time to time.

- b. **Breach**
(i) Any member of building contractor's staff not adhering to this regulation will be removed from site.
(ii) In addition the building contractor will be fined R150,00 per transgression.

3.7 Speed Limit

a. **Description**
For security and safety reasons, the speed limit on the Estate for all contractors' vehicles is 20kph. The contractor is responsible for all his employees, subcontractors and delivery vehicles to ensure adherence to this rule.

- b. **Breach**
The contractor will be fined an amount of R500,00 per transgression. Continuous non-compliance will result in the contractor being expelled from the site.

3.8 Building Plan Controls

a. **Description**
(i) The building contractor must ensure that a copy of the signed approved building plan must at all times be on site available for inspection by the MPOA's representative.
(ii) Any variations to the approved building plan must be submitted to the MPOA or their authorized representatives for signed approval and may only be implemented once the variation has been so approved.
(iii) Prior to commencing building the contractor must (i) set out the foundations for inspection and approval by the MPOA; (ii) confirm the height of buildings with the POA; (iii) set out and confirm the form of driveway with the MPOA; (iv) provide a site drawing indicating the position of storage shed(s); position of topsoil and excavated soil storage areas; the position of building material storage areas; and the position of deliveries.




b. Breach

- (i) The contractor will be denied access to the Estate until the above documentation is in place.
- (ii) The contractor will be required to remove any structures that do not conform to approved plans.

3.9 Roads and Road Verges

a. Description

- (i) The Contractor must ensure that the road in front of its building site is at all times swept clean. This is to minimise damage and ensure longevity of the road surface.
- (ii) The Contractor must ensure that the kerbs and sidewalks in front of its building site are adequately protected from damage by the building operations.
- (iii) Building material must be stored on the building stand. Special permission may be obtained from the MPOA to neatly store some material on the road verge directly in front of the building site.

b. Breach

- (i) The contractor will be fined R150,00 per day for unswept roads.
- (ii) The contractor will be held financially and legally responsible for the damage to road surfaces and kerbs caused through its building operations.

3.10 Advertising

a. Description

- (i) The contractor or his sub-contractors may not place any advertising material on the Estate.
- (ii) The contractor may place an approved builders board on the stand for the duration of the construction period. Builder's boards must be removed no later than one month after the construction has been completed.

b. Breach

- (i) Advertising material will be removed from the erf without notice.
- (ii) Any material held by management for more than 2 days will be discarded of.
- (iii) The contractor will be fined R150,00 per offence.

3.11 CONTRACTOR'S DEPOSIT

The contractor is required to lodge a deposit of R2 000,00 with the MPOA prior to commencing with any activities on site. The deposit, less any fines (for which the contractor will be notified in writing) will be refunded on completion of all construction activities and vacation of the site.

3.12. PAYMENT OF FINES

a. Description

The contractor will be notified in writing of any contraventions and the amount of each fine. Should the value of the fines exceed the deposit, the contractor will be required to lodge a further R2 000,00 deposit.

b. Breach

In the event of the contractor failing to pay any required deposit the contractor will be denied access onto the estate.



SIGNED AT _____ ON _____

THE CONTRACTOR:

Fernkloof Master Property Owners Association

NAME OF PERSON WHO WARRANTS THAT HE/SHE IS DULY AUTHORISED:

NAME OF PERSON WHO WARRANTS THAT HE/SHE IS DULY AUTHORISED:

SIGNATURE: _____

SIGNATURE: _____

[Handwritten signature]

~~SECRET~~

Estate Rules

[to be annexed]

ESTATE RULES

1.0 INTRODUCTION

The Fernkloof Estate ("the Estate") has been designed to provide a comfortable and secure living environment and lifestyle for the residents of the Estate. The intention of these rules is that of protecting and enhancing this lifestyle and the environment of the Estate. These rules are binding upon all owners, residents, visitors and contractors, as are decisions taken by the trustees in interpreting or enforcing these rules. The registered owners of properties are responsible for ensuring that members of their families, tenants, visitors, friends and all their employees are aware of, and abide by, these rules. The Fernkloof MasterProperty Owners Association (MPOA) reserves the right to modify, amend, add to, or delete any of these rules from time to time.

This document should be read in conjunction with the other documentation issued to purchasers that includes the design guidelines for the Fernkloof Estate, the Constitution of the Fernkloof Master Property Owners Association, the Constitution of the relevant Precinct Estate Property Owners Association, and the Contractors Agreement which stipulates the conditions under which construction may take place on the Estate.

The Fernkloof Estate is a private estate, which permits a higher degree of control of the living environment than would be the case in a normal suburb. Therefore these structures have been set up to manage this environment and to exercise certain objectives such as access control and general on site security.

2.0 USE OF THE STREETS

- 2.1 The speed limit is 20kph.
- 2.2 The use of motorcycles, quad bikes, scramblers, motorised scooters or other vehicles with noisy exhaust systems is prohibited anywhere on the Estate.
- 2.3 Hooting at the entrance or anywhere within the estate is prohibited.

3.0 LANDSCAPING & MAINTENANCE OF VERGES

- 3.1 It is a requirement that the homeowner landscape and maintain the verge(s) adjacent to his property and that the road surface is kept free from sand, stone or any other foreign material emanating from the verge.

4.0 REFUSE REMOVAL

- 4.1 Refuse removal is to be outsourced or undertaken by the local authority on designated days. These days and type of bins to be used will be advised to residents.

5.0 DOGS AND OTHER ANIMALS

- 5.1 All dogs should be kept on a leash at all times when on the common property. No resident shall permit their dog(s) to cause a nuisance to other residents. This applies particularly to barking and defecating on common areas.

6.0 LETTING AND RE-SELLING OF PROPERTY - OUTSIDE AGENTS AND SHOWING OF HOUSES

- 6.1 Resales on any properties during the development period may only occur through the lead agent appointed by the Developer or the development facilitator from time to time.
- 6.2 Re-sales and letting of property is permitted by outside agents who are accredited with the POA.

6.3 Properties may be viewed by appointment only. No show days are permitted.

6.4 No signage is permitted on any plot or on any part of the common property.

7.0 PAYMENT OF LEVIES

7.1 Levies are due and payable by debit order on the first day of each and every month. Interest of 4% above prime will be raised on all amounts in arrears.

8.0 SECURITY AND ACCESS CONTROL

8.1

A central feature to the quality of life at the Fernkloof Estate is security. The Estate is fully protected by electrified fencing that is designed to prevent unauthorised access to the Estate.

8.2 An important element of a secure lifestyle is that of prevention and deterrence. Residents are requested to familiarise themselves with the procedures which have been developed to manage the influx of people and vehicles with the minimum disruption whilst at the same time protecting the residents. From time to time certain changes may be made to some of these procedures, and residents will be advised accordingly. Residents are reminded that they have the responsibility for the conduct of their visitors and for ensuring that they adhere to the security procedures.

9.0 REMOVAL OF ALIEN VEGETATION

9.1 Property owners must ensure that properties are free of weeds and alien vegetation and that undeveloped erven are neat and tidy at all times. In this regard the relevant precinct POA and/or the MPOA shall be entitled without prior notification to clear any property of alien vegetation and recover the cost thereof from the relevant property owner.

9.2 Property owners are required to take appropriate steps to ensure that any surface erosion does not result in the accumulation of soil on the roads and sidewalks.

10.0 APPOINTMENT OF CONTRACTORS

10.1 Once appointed by the property owners, Contractors will be required to enter into a Contractors Agreement with the MPOA. The agreement is designed to regulate the activities and conduct of contractors within the Estate.

11.0 MAINTENANCE OF STRUCTURES INCLUDING BOUNDARY WALLS:

11.1 Homeowners are required to maintain all structures on their properties, including boundary walls, in good condition.

12.0 BUILDING HOURS

12.1 Building hours are restricted to the following times:

Monday – Friday	07h00 to 17h00 (Estate to be vacated by 17h30)
Saturday	08h00 to 13h00 (Estate to be vacated by 13h30)
Sunday	No work permitted
Public Holidays	No work permitted

13.0 DOMESTIC STAFF

13.1 The relevant precinct POA and/or the MPOA shall be entitled to require that details of domestic staff be supplied to and shall furthermore be entitled to put into place such procedures as may be applicable for the control of access to the Estate by domestic staff.

Handwritten signature and initials.

The People-Centred Property Group

CO REG. NO. 94/06764/07

25 GREY STREET, WELGEMOED
6272 WELGEMOED 7530
CAPE TOWN WESTERN CAPE
SOUTH AFRICA

☎ (INT 27) 021-913 4528

● (INT 27) 021-913 4538

E-MAIL: cavcor@africa.com

"D."

CEL 083 261 8128
086 4356 431

Per fax: 0283122185

The Club Captain
Hermanus Golf Club
HERMANUS

Attention: Mr Tom de Klerk

Dear Sir

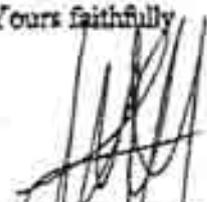
PROPOSED DEVELOPMENT: HERMANUS GOLF COURSE

Enclosed please find the information regarding the above as requested.

The development costs for the works to effect changes to the existing course and to construct a further nine holes is a budget at this stage and the objective would be to improve on these costs yet still provide a quality golf course.

I would appreciate your input on the proposed format for the presentation at the 25 May 2000 AGM and look forward to receiving your comments.

Yours faithfully



LESLIE VILJOEN



HERMANUS GOLF COURSE THE DEVELOPMENT FACILITATOR

The Hermanus Municipality has appointed Rabcav as the Development Facilitators for the greater Hermanus municipal area. The main objective of the appointment is to unlock land pockets and make these available to developers, investors and end-users once maximum value has been added to the land. Various tracts of land have been identified to form the first phase of the process and the golf course and surrounds are one of these precincts.

Concept

The Hermanus golf club is a well-known and respected club not only locally but also nationally. Because of its popularity the course cannot accommodate the demand. This fact is even more apparent during high season periods. In order to unlock the potential of the vacant municipal land surrounding the existing golf course, the course forms the anchor of an upmarket and prestigious secure residential estate.

To achieve this a limited amount of alterations and improvements need to be effected to the existing course and an additional nine hole course needs to be constructed. The net result of this will be approximately 600 residential opportunities targeting various market sectors as well as a hotel site.

To pitch the products at the correct market level and satisfy current demand, the entire estate is to be fenced along the perimeter with controlled entry points, thus ensuring security and correct branding.

1 x x

The Golf Course

Once finished the Hermanus Golf Club will consist of two courses namely the existing eighteen-hole course plus a new nine-hole course. The two courses would operate independently, each with its own ~~clubhouse~~ facility and supporting parking area. This new arrangement would alleviate pressure from the eighteen-hole course ~~with restrictions not being lifted~~ and allow the club to extend its capacity for membership.

With the popularity of the current golf course it is increasingly difficult to accommodate the demand for tee times especially during holiday periods. An additional 9 holes will help to ease the traffic on the existing 18 holes and generate maximum revenue for the club. While the course will be constructed to the latest specifications the market served will be:

- Golfers who only want to spend 2-3 hours on the course
- Overflow rounds that cannot be accommodated on the existing course
- Members who cannot play on the existing course due to corporate days
- Small groups

The land that has been made available to the developer for use as a golf course is located to the right of the existing 3rd hole. Alternative layouts were presented to the committee for incorporating the new 9 holes, however it was felt that while the new 9 holes should be attached to the existing club it should be a separate facility.

The new golf holes will be constructed using the most up to date techniques and specifications, which will provide the club with a facility that is cost effective to maintain while still providing members and visitors with superior playing conditions.

Process

all work referred

The work as ~~stated~~ ^{referred} to above will be completed at no cost to the Hermanus Golf Club and on completion the nine hole course would be handed to the club to form part of its existing lease. Provision would be made during the construction of the course that eighteen holes are playable at all times. ~~The costs budgeted for includes funding for the initial maintenance of the new nine-hole course and additional maintenance equipment.~~

Management

9-hole course

The management of the new 9 ^{hole course} will be an extension of the existing infrastructure. All administration will be done from the existing premises with the exception of the actual selling of green fees, which will be done at the new clubhouse. New admin staff will therefore be kept to a minimum.

Maintenance will be done under the supervision of the existing greenkeeper, however it is envisaged that an additional 6 operators and labourers will be required.

The Hermanus Golf club shall manage both golf courses for their own account. The entire estate, ~~including the golf course~~, will be regulated by a homeowners association. Owners of residential units will contribute a monthly levy for lifestyle, security, maintenance of common areas and the golf club will be responsible for maintaining and managing the two golf course areas.

Because the value of the residential units is dependent on the state of the golf course it is imperative that both courses are well maintained at all times. Should there be a shortfall in funds at the golf club to achieve this objective, the body corporate is to fund the shortfall from levies received from body corporate members.

150 Additional memberships for residents in the estate is to be provided for as statistics proved that approximately 30% of residents at a golf estate play golf, the balance live there because of lifestyle, security and value.

Funding

The developer will be responsible for all costs relating to the alterations to the existing holes and the construction of the new holes. The developer will also fund the grow in and supply the club with additional maintenance equipment for the upkeep of the new holes.

stress!

During peak periods the 9-hole course could generate in excess of R10 000/day. With an estimated operating budget of R500 000 for maintenance it would only require 10 000 rounds at R50,00/round to break even. Based on a conservative 300 playable days/annum, this amounts to less than 35 rounds/day, which should be easily achievable. If an additional category of membership is introduced this would also be a source of funding and the financial benefits to the club become even more attractive.

Course Equipment

1 x Greens King Toro
 1 x Bunker Rake Toro
 1 x Out Front Cutter Toro 325
 1 x 6500 Fairway Mower
 1 x 2300 Tees & Surrounds
 2 x Brush Cutters
 2 x Flymo
 1 x Workman

Course Items

Flag Poles & Cups
 Putting Green Markers
 Tee Markers
 Hole Cutter
 Hand Bunker Rakes
 Hand Fertilizer Spreader

Staff

The growing in of a new nine holes would need 10 people, for the first 12 months then 6 would be sufficient to carry out the maintenance thereafter.

The Budget

The cost to maintain the additional 9 holes would be approximately R500 000,00 per year. This would include the above staff complement.

Water

Pumps, irrigation controllers and sprinklers to be installed.

An additional 9 holes would require 500 000 litres of water per night. To ensure the availability of water for 27 holes the Planning Committee has recommended that all three dams above the golf course be made available for the exclusive use of the Hermanus Golf club and that capacity be increased if so required.

Golf Course Lease

To ensure the long term security and value of the residential estate it is important that the existing management of the golf course is guaranteed for as long as possible. To facilitate this the Planning Committee has recommended that the existing lease be expanded to include the additional 9 holes and that an option period for a further 49 years be added to the extended lease. The lease should further provide, as security for adjoining landowners, that the land currently utilized for the purpose of a golf course shall remain as such. Therefore the 10 year notice period currently provided for in the existing lease must be deleted.

Conclusion

With the present layout the only disadvantage is the placement of the starting and finishing holes in relation to the clubhouse. More importantly a dangerous situation exists with players crossing the 1st to get to the 10th tee, and again on completion of play at the 18th.

With the amount of rounds being played at Hermanus the greens will have to undergo reconstruction in the near future. Although the greens were rebuilt a few years ago, the club chose not to build them to USGA specifications. The USGA method of construction is expensive but will give the club at least 15 years of trouble free use and optimum playing conditions. When the greens are rebuilt additional strategy and interest can be worked into the design.

The biggest current disadvantages as perceived by the members and visitors would be the unavailability of tee times during the holiday periods and competition days, availability of water and security of tenure.

The alterations to existing holes and construction of new holes have been designed and phased in such a way to cause no disruption to members and 18 holes will be open for play at all times. The total alteration, construction and grow in period will be completed in approximately 16 months.

This proposal results in a win/win situation for all parties -

• The Golf Club

- receives an additional nine hole course at no cost to the club,
- secures income from the estate towards maintenance costs,
- receives parking facilities to service both golf courses,
- an opportunity is created to improve and extend current lease conditions,
- secures water rights for 27 hole golf course,
- opportunity for club to service and accommodate an increased number of players,
- additional revenue through green fees and memberships,
- more available tee times,
- reduced inconvenience to members and their guests during upgrade of remaining holes, which can now be phased in,



- The Local Authority
 - achieves maximum added value to its surrounding land holding,
 - extend its rates base,
 - receive much needed capital to fund capital expenditure,
 - receives a prestigious facility in the form of an upmarket residential golf estate in its municipal area.

- The Ratepayers of Hermanus
 - they are the ultimate winners benefiting from all the abovementioned and more,
 - create job opportunities.

1.


12/03
See para 9-2

HERMANUS GOLF ESTATE
COMMUNITY COMMITTEE MEETING NO. 4
HELD AT THE
FERNKLOOF BOTANICAL HALL
THURSDAY, 22 MARCH 2001

" E 214 "

Present : See attached attendance list.

Apologies : Graham Greathead
Max Leipold
Geraldine Gardner
Colin Green
Riaan Kuchar

Received
14.04.01.
P4 MARCH 9
P5
P6

1. Welcome

Leslie Viljoen opened the meeting and welcomed everyone present and thanked them for attending. A special welcome was addressed to Mr Jan Kuhn, the Deputy Mayor of the Overstrand Council.

2. Purpose of Meeting

The purpose of the meeting was to inform the committee on the process that has been followed to date and to give an overview of the development plan that has been formulated.

3. Process

Leslie Viljoen pointed out that the development plan has been informed by specialist studies, the consultant team and comment received from the public and the community committee members.

A 90% compromise agreement has been reached by the proposed development plan.

The process of formulating the development proposal started in 1999 and was followed by a public meeting in June 2000 and the various community committee meetings to date.

This meeting brings the first round of public participation to a close and will be followed by the first phase of the statutory process in acquiring development rights for the property.

It was emphasised that the development plan is an informed product that has undergone careful consideration from the various parties involved.

4. Package of Plans Approach

Christo Kannenberg explained that a package of plans approach will be adopted to manage the proposed development. This flexible process makes provision for the fact that all planning decisions do not have to be taken at this stage. This approach envisages a series of plans at various levels of detail, becoming more refined at more detailed stages of the development.

The main components of this approach are:

- A Development Plan ;
- Rezoning ;
- Consolidation and Subdivision of the site into a number of Development Packages ;
- Individual Subdivision Plans for each Development Package ;
- Landscape Master Plan ; and
- Environmental Management Plans.

The first phase of the statutory process includes an application for the approval of the development plan, rezoning, consolidation and subdivision of the site into a number of development packages.

5. Background on Development Plan

Robin Twentyman-Jones gave a brief background on the previous development plans that have been formulated and how these proposed development plans evolved to the current proposal.

The development proposals dated 8 June 2000, 30 July 2000, 7 November 2000 and the current proposal dated 16 March 2001, were illustrated.

The main amendments to the development plan dated 7 November 2000, in formulating the current development plan, were highlighted as follows:

- Wetland studies completed – areas indicated on Flat Street and Fairways Avenue.
- Practice range repositioned into the centre of the golf course, closer to the clubhouse and removed from affecting the wetlands.
- Holes 17 and 18 amended to cater for these wetlands.
- Hole 24 adjacent to Flat Street amended.
- Biological corridors created within the golf course, linking the wetland areas to the mountain edge/Fernkloof Nature Reserve, the Mossel River system and ocean.
- Residential Precinct 2 has been slightly enlarged.
- Golf Lodges are shown as conceptual footprints and not as a single development area.

6. Environmental Process

Louis de Villiers pointed out that an application in terms of the Environment Conservation Act, 1989, would also be required to facilitate the proposed development.

This application/process will run parallel to the applications/process in terms of the Land Use Planning Ordinance, 1985.

The Greater Hermanus Sub-Regional SDF has identified the site for development purposes on a strategic level and the current development plan is regarded as

consistent with the SDF. The SDF has also identified a wetland area and the opportunity to connect natural areas.

The study undertaken for the wetlands has identified the "no-development" option as the preferred ecological option, but this option has management problems and will hold a financial implication for Council. The current development plan is the preferred development proposal. This proposal provides for biological corridors and a significant enlargement of wetland areas. The opportunity exists to enhance and rehabilitate wetland elements that have been neglected and degraded in the past.

The importance of environmental management plans for the construction and operational phases of the development was pointed out.

7. Traffic Impact Assessment

Karen Dempers gave an overview of the traffic impact assessment that was conducted for the proposed development.

The assessment was conducted in consultation with officials of the Overstrand Municipality, the District Roads Engineer and the PAWC: Roads.

Guidelines set by national and international studies were used to conduct the assessment. It was not regarded as necessary to conduct any traffic counts for the study area.

The assessment concluded that the future traffic to be generated by the proposed development will not have a major impact on the study area. The traffic impact assessment does however, include a traffic management programme.

8. Engineering Services

André van der Merwe gave an overview of the engineering services required to facilitate the proposed development. The following was pointed out:

- Water - A new reservoir will be required to provide potable water to the proposed development.
- Irrigation - A borehole exists on the existing golf course which can provide irrigation water. A better solution however, may be to make use of treated effluent that is available from the Hermanus sewage works. This will also facilitate the irrigation of other open spaces/sport fields.
- Sewage Disposal - A conventional sewer system will be installed. Effluent will be reticulated to two pump stations from where it will be pumped to the Hermanus sewage treatment works.
- Stormwater - Stormwater will be conveyed to the Mossel River or Ocean. Flows in excess of the 1 in 2 year flow will be conveyed via roads and provision will be made for escape routes to the golf course (which will act as a retention area), the Mossel River and the ocean.

9. Market Product Provided

Leslie Viljoen pointed out that the development packages provided by the proposed development create a unique product which is not in competition with other areas or developments. Its location at the golf course in close proximity to natural areas contribute to the uniqueness of the development.

A market already exists for the products which are proposed. An unique lifestyle is promoted in a secure environment, which provides for a mix of residential erf sizes.

A product is thus created for the development, investment and end-user markets.

10. Residential Densities Provided

The densities of residential precincts are fixed at a maximum number and could thus in practice be lower as indicated. Precincts containing single residential and group housing sites were calculated to have a maximum density provided by a 50/50 split between the number of single residential and group housing units. Flexibility regarding the density is however, provided if a demand for larger erven (causing a lower density) is experienced.

11. Phasing

- * A project of this nature will need to be constructed in phases. It is envisaged that residential precincts 1, 2, 3, 4, 5 and 7 will form part of a First Phase. It is recommended that the construction of the additional 9 holes would be completed before residential precincts 6, 8 and 9 are developed. The latter should thus form part of a later phase.

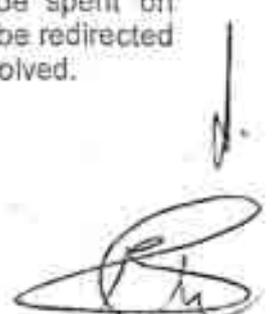
12. Discussion and Questions

Question/Comment : Mr Frank Tennick raised the point that there is a water shortage experienced in the Hermanus area. The Overstrand Municipality must ensure that the water demand for the proposed development can be accommodated and that this will not put undue pressure on existing capacity.

Response : Leslie Viljoen acknowledged that there is a water need in the Hermanus area. The proceeds of the proposed development will help fund the required infrastructure to provide water, not just to the proposed development, but to the Greater Hermanus area. The proposed development will thus aid the funding of critical projects in the Greater Hermanus area.

Mr Jan Kuhn stated that the Overstrand Council is aware of the capacity limitations regarding water provision. A long-term solution however, needs to be obtained for this issue. Council regards this issue as a top priority. The proposed development will aid to generate funds for a long-term solution.

Question/Comment : Mr Tennick commented that Council must ensure that funds generated by the proposed development would be spent on solving the water demand issue. Funds should not be redirected in such a way that the water demand issue is not resolved.



Response : Leslie Viljoen replied that he, as development facilitator, cannot prescribe to Council how funds must be distributed. Council has however, identified the issue as a priority.

Question/Comment : Mr Peter Stringthorpe requested that the advertisement for the proposed development must state that the water issue will be resolved by funds generated through the development.

Response : Council cannot be prescribed as to how funds must be distributed. Council has identified the water demand issue as a priority. This however, cannot be stated in an advertisement.

Question/Comment : Mr Geoff Andrew raised the concern that the Fernkloof residential area will be cut off from existing natural areas to the north. A barrier will in effect be created, which will further be aggravated by the erection of fencing. NB

Response : The current development plan attempts to address this issue by providing a biological corridor to the north of the existing Fernkloof residential area. Fencing of residential precincts will be addressed in the detail subdivision phase of each residential precinct. NB

Question/Comment : A concern was raised regarding the proposed residential densities. The question was posed as to when an objection can be made against the proposed densities.

Response : The proposed development plan sets a maximum density for each residential precinct. This density can however, in practice, be lower than indicated at the stage when detailed subdivision is undertaken. An objection against proposed densities can be lodged at the first phase of the statutory application process.

Question/Comment : A community committee member stated that an objection directed at a single component/precinct should not prohibit the proposed development to proceed.

Response : Agreed.

Question/Comment : When will "active" marketing commence for the proposed development?

Response : As soon as approval has been obtained for the first phase of the statutory applications.

Question/Comment : The link road, as directed by the PAWC, is a concern. Will possible future access control still be attainable in residential areas through which this link road stretches.

Response : This link road is not a requirement for the proposed development, but is indicated as instructed by the PAWC. The link road can however, be seen as an emergency route that can be managed by the Overstrand Municipality, if and when the need arises. The PAWC insists that the envisaged link road and bypass route must be indicated on the proposed development plan. ↓

Question/Comment : The alignment of the bypass route, as directed by the PAWC, is seen as a concern.

Response : The bypass route is not a requirement for the proposed development. The alignment of this route will go through a separate statutory process when the need arises for such a route.

Question/Comment : Mr Mike Ravenscroft enquired if a link road to the Voëlklip area is not desirable.

Response : The current link, provided by means of a gravel road between Hermanus Heights and the Fernkloof residential area, is rarely utilised and a further extension of this link road will be under-utilised.

Question/Comment : Mrs Lee Burman stated that the Fernkloof Nature Reserve must be accessible to the general public.

Response : The intent to provide efficient access to the nature reserve is shown on the proposed development plan. The issue of providing controlled access to residential areas surrounding the nature reserve will be dealt with at a future stage. NB

Question/Comment : The need for the utilisation of ecological corridors by the public was raised.

Response : The proposed development plan indicates the strategic planning of the site. Public access to certain ecological corridors could be addressed through management plans. It is envisaged that ecological corridors could be as accessible as the Mossel River area.

Question/Comment : Should the alignment of Fairways Avenue not be straightened at problematic areas?

Response : Possible hazardous locations can be alleviated through the removal of vegetation to improve sight distance and by means of introducing traffic-calming measures. The realignment of Fairways Avenue is not regarded as a necessity and is not recommended.

Question/Comment : The position of the required new reservoir is of concern.

Response : The position of the required reservoir will be determined through a separate process.

Question/Comment : Are the proposed golf lodges required for the development.

Response : The instruction to the development facilitator by Council was to add maximum value to the property. Golf lodges will greatly contribute to this directive. The market has also indicated a need for such a facility.

Golf lodges need to be located in close proximity to the clubhouse. Parking will be provided for these golf lodges at a central parking

area located at the existing clubhouse. It is envisaged that access to golf lodges will be provided by means of golf carts.

The utilisation of the golf lodges will be at a lower intensity than single residential units. Golf lodges are primarily utilised as overnight accommodation.

Question/Comment: Will golf lodges be double or single storey?

Response: A mix of double and single storey units will be provided. Single storey units will need a larger building footprint than double storey units. The specific location of single and double storey units could be negotiated with adjacent property owners. Leslie Viljoen and a land surveyor will be available to peg proposed development footprints.

Question/Comment: How many residential units are envisaged for Precinct 5?

Response: A maximum number of 150 units are proposed. The actual number currently under review by possible investors is between 110 and 120 units.

Question/Comment: Has any detailed planning of residential precincts been undertaken?

Response: No detailed planning of residential areas has been undertaken by the project team. Interested investors have, on their own accord, evaluated residential precincts to determine investment feasibility.

13. CONCLUSION

Community committee members were requested to contact Leslie Viljoen if any further questions and concerns should arise. The desire to conclude the first round of the public participation process was expressed. Committee members were requested to lodge any further concerns or questions within the next 14 days. All participants were thanked for their contributions.

→
No meetings or
discussion was held
to report back to
Golf Club committee





GOLF COURSE

Annexure B

1 Construction	10,282,500
2 Irrigation	1,870,000
3 Golf paths	347,500
4 Grow in costs	1,000,000
5 Maintenance Equipment	1,000,000
Sub-total	14,500,000
Provision for escalation	0

TOTAL CARRIED OVER TO VIAB

14,500,000



MEMORANDUM OF UNDERSTANDING BETWEEN RABCAV AND
HERMANUS GOLF CLUB – 24 NOVEMBER 2003

222
H

1. Notarial Deed of Servitude or extended 100 year lease over entire 27 holes.
2. New 9 holes built.
3. Changes to existing 18 holes – all greens to be of same standard.
4. Guaranteed water from dams and newly built pipeline subject to local authority requirements.
5. Land on both sides of clubhouse to be incorporated into club's title.
6. New vehicle entrance / exit to club with entrance / exit control.
7. Parking to be upgraded, increased and maximised according to land availability and rezoning conditions.
8. Perimeter wall with palisade fencing around entire golf course estate approximately 7.6 km in length.
9. Golf cart paths from green to tee through entire 27 holes as well as a service road for maintenance vehicles to accommodate homeowners to drive to club.
10. Supervision as well as grow in cost of golf course for grow in period of new 9 holes.
11. Equipment / implements for new 9 holes (approximately R1 000 000).
12. Extension to equipment storage facility as required to accommodate additional equipment.
13. Extension to golf cart storage and caddy enclosure to accommodate increase in membership.
14. Driving/practice range/practice putting and chipping greens.
15. Contract with homeowners association.
15. New trees planted as included in new golf course design.
17. Contract with Overstrand Municipality.
18. 300 New golf memberships to homeowners.



~~SECRET~~

- 19. Rabcav to appoint an independent party to evaluate the capacity of the existing club house/half way house facility and should half way house facility be found too small to accommodate the additional 300 members Rabcav will facilitate the funding of the required extension.
- 20. Assistance and cooperation from golf club to pre sell a minimum of 120 plots to members.
- 21. Once golf course design, construction, specification and development cost has been agreed with Matcovitch & Hayes, Hermanus Golf Club shall become the client and Rabcav will guarantee the development cost with progress payments on architect and engineers certificate.
- 22. Rabcav shall be allowed to erect a temporary marketing / information centre adjacent to the club house and putting green with adjoining designated parking for visitors and staff. An awareness campaign is to take place over the December / January period to introduce the project to members as well as the public.
- 23. The record of the meeting held with the Hermanus Golf Club Development Committee at Fancourt on 11 November 2003 is to be read in conjunction with this M.O.U.
- 24. Rabcav undertake to use its best endeavours as development facilitator to ensure that the objectives, as set out in this M.O.U., is achieved and accepted by the local authority.

50

90

[Handwritten signatures and initials]

[Signature]

[Signature]

[Handwritten signature]

11-2241
G

AN OPPORTUNITY IN HERMANUS AS RARE AS A HOLE IN ONE

Introducing a one-off opportunity –
the chance to buy a plot in the
unmatched natural beauty and security
of Fernkloof Estate, home of the
Hermanus Golf Club.



PROVOST TIMES OF HERM 19 NOV 04

After years of careful planning and
environmental research, approval has been
granted for the addition of a further nine holes
at the Hermanus Golf Course. Golf design gurus
Matkovich & Hayes will turn this much-loved
establishment, one of the oldest in the country,
into a 27-hole championship course.



At the same time, residential stands ranging in
size from 550 to 1500 square metres will be
released in six individual precincts, each
meticulously integrated into the topography of
the area and the layout of the course. A limited
number of golf club memberships will also be
available for purchase.

Hermanus, voted the cleanest town in South
Africa in 2003, offers the best land-based
whale-watching in the world. With its warm
safe beaches, wonderful walks and great
restaurants, it is also one of the country's
favourite summer holiday destinations.

Plots will be released on 2 December 2004.
Owing to the overwhelming response from the
public, interested purchasers will be required to
register on 29 and 30th November.
See below for details.

LAUNCHING 2 DECEMBER

GOLF ESTATE PLOTS FROM R600 000
– incl. VAT –

www.fernkloofestate.co.za
email: fernkloof@rabca.co.za

Phone Chris Immelman on 082 783 6253




rabca



EENHEID IN H KAARS SOOS 'N

"H" 22

Ons stel 'n eenmalige geleentheid bekend – die kans om 'n erf in die unieke, natuurlike skoonheid en sekuriteit van Fernkloof Estate te koop, tuis te van die Hermanus Gholfklub.

Full page Advert "Die Burger" 20 Nov 2004

Na jare van sorgvuldige beplanning en omgewingsnavorsing, is goedkeuring vir die toevoeging van 'n verdere nege putjies by die Hermanus Gholfbaan toegestaan. Gholfontwerp-spesialiste, Matkovich & Hayes, sal hierdie gesogte instelling – een van die oudste in die land – in 'n 27-putjie-kampioenskapbaan omskep.

Enkel, residensiële erwe, wat wissel in grootte vanaf 550 tot 1500 vierkante meters, sal terselfdertyd in ses individuele gebiede vrygestel word, elkeen noukeurig ingeskakel in die topografie van die area en die uitleg van die baan. 'n Beperkte aantal gholfklublidmaatskappe sal ook te koop beskikbaar wees.

Hermanus, wat in 2003 as Suid-Afrika se skoonste dorp bekroon is, bied die beste walviswaarneming in die wêreld. Met sy warm, veilige strande, wonderlike staproetes en fantastiese restaurante, is dit ook een van die land se gunsteling somervakansie-bestemmings.

Erwe sal op 2 Desember 2004 vrygestel word. Weens die oorweldigende reaksie van die publiek, sal van belangstellende kopers verwag word om op 29 of 30 November te registreer. sien onderstaande gedeelte vir besonderhede.

STEL 2 DESEMBER BEKEND

GOLFLANDGOED ERWE VANAF R600 000
(insluitende BTW)

E-pos: fernkloof@rabie.co.za



ISSUE 1 - FEB 2006

FERNKLOOF ESTATE NEWSLETTER

FIRST TRANSFERS EXPECTED SHORTLY

The construction of roads and services for the residential erven is well underway by CSV Construction which has subcontracted part of the work out to three local contractors.

Precincts on which work has started are 1, 5, 7, 8 & 9. After the felling of the alien trees, the views, particularly from precincts 7 and part of 8 & 9, are spectacular and would make a visit to the Estate well worthwhile.

The first transfers of residential erven are expected to go through in March with the balance taking place on a phased basis through to the end of the year.



Purchasers are reminded that they have three years from date of transfer to complete their homes.

Expected Transfer dates:

Barring any unforeseen circumstances, it is expected that transfers of erven in the various precincts will occur as of the dates below:

Precinct 1	March
Precinct 2	November
Precinct 5	June
Precinct 6	October
Precinct 7	May
Precinct 8/9	August

MEET THE TEAM

The development of Fernkloof Estate is being facilitated for the Overstrand Municipality by Rabcev, a joint venture between Rabie Property Projects and Cavcor Property Developers who have teamed up with a broad-based empowerment consortium, Buyambo which in turn is headed up by local businessman James Bool.



Clint Evans
Project Manager.

Management team Project manager for Fernkloof Estate is Clint Evans, who has more than 25 years experience in civil construction, and who is responsible for co-ordinating all aspects of the infrastructure and golf course development. Clint is contactable on his email address clinte@rabieonsite.co.za.

Some of the Stakeholders



From left, Phillip Kaps from Buyambo, Colin Green from Rabcev, Mzansi Mshenziswa from Buyambo, John Rabie of Rabcev, Leslie Viljoen of Rabcev and James Bool of Buyambo.



Palisade Fencing
Construction of the palisade fencing and walling to secure Fernkloof Estate will start in February with work expected to be completed by year end.



Clint Evans on the Fernkloof Estate Site.

LIVE WIRE
ELECTRIFIED FENCING

"J" 227


PO BOX 115
Private Bag X16
Constantia 7848

Tel: 552 6803/4
Fax: 552 6805
pet@livewireystems.co.za

12th December 2008
Hermanus Golf Estate

Dear Sirs,

Thank you for the affording Live Wire the opportunity further evaluate and report on the perimeter security systems and procedures at your Golf Estate, and herewith our findings and recommendations for your perusal.

The present system offers very little form of access control to the Golf Estate. Access can be gained through various properties, gaps in and below the fencing as well as gates that are left open, as was found during our 15minute walk on the 11th of December 2008.

The proposed installation of palisade fencing on the sections of the northern and southern boundaries will provide an additional physical barrier.

The only way of protecting the entire estate would be to ensure that the whole perimeter is uniformly fenced and gated. By so doing you will not have to rely on measures taken by others. The erection of this perimeter barrier will then be the first step in providing an alarmed and monitored security barrier.

The top of the perimeter walls and fencing should then be electrified with either 3 or 5 strands and at the same time ensure that no sections of the fence or walls can be breached. The electrified fencing should be divided into zones of approximately 200meters and the energizers should be installed along the inside of the perimeter, these energizers should be monitored and controlled from a central point.

We believe that anything less than the above will always be inadequate and leave residents and players at risk.

A detailed description and costing structure for the above can be provide on request.

We hope that the above meets with your requirements and look forward to being of assistance in the future.

For LIVE WIRE SYSTEMS CC
Chris Snyders
Technical Advisor
LIVE WIRE SYSTEMS CC 2003 / 049911 / 23



"K" 228

MEMORANDUM OF SETTLEMENT AGREEMENT

made and entered into by and between:

OVERSTRAND MUNICIPALITY

herein represented by the Municipal Manager, duly authorised thereto,
whose full and further particulars appear in **Schedule A** hereto
("Overstrand")

and

HERMANUS GOLF CLUB

herein represented by, Wendell Meiring and Henk Kleinloog, duly authorised thereto,
whose full and further particulars appear in **Schedule A** hereto.
("HGC")

1. INTERPRETATION AND DEFINITIONS

Headings to clauses in this Agreement are for purposes of convenience and reference only and shall not be used in the interpretation of nor modify nor amplify the terms of this agreement nor any clause hereof.

In this Agreement, unless a contrary intention clearly appears:

1.1 Words importing any one gender include the other gender; the singular includes the plural and vice versa; and natural persons include created entities (incorporated or unincorporated) and vice versa.

1.2 The following terms shall have the meanings assigned to them hereunder and cognate expressions shall have a corresponding meaning unless the contrary clearly appears from the context:

1.2.1 "Business Days" means any day of the week, excluding Saturdays, Sundays and Public Holidays.

1.2.2 "Course" means the Hermanus golf course.

1.2.3 "Date of Signature" means the date on which the last signing party affixes its signature to this agreement.

1.2.4 "Development" means the development of the Course.

1.2.5 "Rabcav" means the RABCAV joint venture comprising Rable Property Developers (Pty) Ltd and Cavcor Property Developers (Pty) Ltd.

2. RECORDAL

WHEREAS Overstrand, with Rabcav as its agent, developed the Course, together with the surrounding Fernkloof Estate;

AND WHEREAS the Development is now, for all practical purposes, completed;

AND WHEREAS Overstrand wishes to finalise all outstanding matters with regard to the Development, with HGC,

NOW THEREFORE the parties agree as follows:

3. OUTSTANDING MATTERS

3.1 Overstrand shall pay to HGC or its nominee in writing, the amount of R948 000.00 (nine hundred and forty eight thousand rand) in respect of all outstanding matters/works with regard to the Course/Development, save for the servitudes to be registered in favour of HGC as reflected in the Addendum to the Deed of Sale between itself and Overstrand, signed on even date.

3.2 Payment in terms of clause 3.1 is made without prejudice to and under reservation of all the Municipality's rights and without admission of any liability or obligation on the part of the Municipality or Rabcav in regard to the Course/Development.

3.3 Payment of the aforementioned amount shall be effected within 14 (fourteen) Business Days from Date of Signature.

4. INDEMNITY

In consideration for the payment to HGC in terms of clause 3.1 above, HGC hereby indemnifies and holds Overstrand harmless and shall keep Overstrand indemnified, against all and any claims, proceedings or liability of whatsoever nature and howsoever arising in any way whatsoever, other than specifically set out herein, in respect of, in connection with or resulting from the Development or the failure to attend to any aspect of the Development.

5. COSTS

HGC shall bear all costs in respect of and related to this agreement, including without limiting the generality thereof, the negotiation, drafting, signing and execution thereof, on demand.

6. BREACH

In the event of any of the parties hereto (the defaulting party) failing to fulfil on due date any of the terms and conditions of this Agreement, the other party shall be entitled, having given the defaulting party 5 (five) Business Days written notice to remedy the breach, either to cancel this agreement and claim damages and interest, or to enforce specific performance of this agreement and recover damages and interest.

Handwritten signature and initials in black ink, located at the bottom right of the page. The signature appears to be 'J. de V.' followed by a large, stylized initial 'K'.

7. ARBITRATION

- 7.1 Should any dispute, question or difference arise between the parties with regard to any matter relating to any of the parties' obligations in terms hereof such dispute shall be decided by arbitration in the manner set out herein.
- 7.2 The arbitration shall:
 - 7.2.1 be held in Hermanus and conducted in an informal summary manner on the basis that it shall not be necessary to observe or carry out either the usual formalities or procedures relating to pleadings or discovery or the strict rules of evidence; and
 - 7.2.2 commence as soon as reasonably possible after it is demanded and with a view to it being completed within 21 (twenty one) Business Days after it is demanded; and
 - 7.2.3 be held under the provisions of the Arbitration Act of the Republic of South Africa (as amended or replaced from time to time) except insofar as the provisions of this arbitration clause shall apply.
- 7.3 The arbitrator shall be a practising counsel or attorney of not less than 10 (ten) years standing, appointed by agreement between the parties to the arbitration within 5 (five) Business Days of being called upon to make such appointment and failing such agreement within the 5 (five) Business Day period, appointed by the President of the Cape Bar Association or the Chairman of the Law Society of the Cape of Good Hope.
- 7.4 The arbitrator shall, in giving his/her award, have regard to the principles contained in this agreement and he/she shall decide the matter as submitted to him/her according to what he/she considers just and equitable in the circumstances and, therefore, the strict rules of Law need not be observed or be taken into account by him/her in arriving at his/her decision. The arbitrator's decision shall be presented within 7 (seven) Business Days after the completion of the arbitration, in a written document, and he/she shall state the reasons for his/her decision therein. The arbitrator may determine that the cost of the arbitration be paid either by one or other of the disputing parties or by each of the parties as he/she in his/her sole discretion may deem fit.
- 7.5 Each of the parties to the arbitration irrevocably agrees that the decision of the arbitrator made at such arbitration proceedings; shall be final and binding on each of them; and shall be carried into effect immediately; and may be made an order of any Court having jurisdiction over the parties.
- 7.6 Notwithstanding anything to the contrary contained in this clause 7, the parties shall be entitled to institute legal proceedings by way of application, action or otherwise in any Court having jurisdiction for the purposes of restraining or interdicting breaches of any of the provisions of this agreement.

Handwritten signatures and initials, including a large signature that appears to be 'D. ...' and another signature below it.

8. GENERAL

- 8.1 This agreement constitutes the entire agreement concluded between the parties regarding the subject matter hereof and no warranties or undertakings or representations other than those specifically recorded herein may be relied on by either of the parties.
- 8.2 No amendment or consensual cancellation of this agreement or any provision or term thereof or of any agreement or other document issued or executed pursuant to or in terms of this agreement and no settlement of any dispute arising under this agreement and no extension of time, waiver or relaxation or suspension of any of the provisions or terms of this agreement, shall be binding unless recorded in a written document signed by the parties. Any such extension, waiver or relaxation or suspension which is so given or made shall be strictly construed as relating only to the matter in respect whereof it was made or given.

9. DOMICILIA AND NOTICES

- 9.1 The parties choose *domicilia citandi et executandi* at their respective addresses as set out in **Schedule A** hereto, at which addresses all notices and legal process in relation to this agreement or any action arising therefrom may be effectually delivered and served.
- 9.2 Any notice given by one of the parties to the other ("the addressee") which:
 - 9.2.1 is delivered by hand to the addressee's *domicilium citandi et executandi* shall be deemed to have been received by the addressee at the time of delivery;
 - 9.2.2 is posted by prepaid registered post from an address within the Republic of South Africa to the addressee at the addressee's *domicilium citandi et executandi* shall be deemed to have been received by the addressee on the 3rd (third) Business Day after the date of posting;
 - 9.2.3 is sent by fax or electronic mail to the addressee's *domicilium citandi et executandi* shall be deemed to have been received on the Business Day following the day of transmission.
- 9.3 Either party shall be entitled, on written notice to the other, to change its address as set out in **Schedule A**.

Signed at Hermanus on 19 May 2009.

AS WITNESSES:

1. 
 2. 


 OVERSTRAND MUNICIPALITY



Signed at Hermanus on

2009.

AS WITNESSES:

1. _____

HERMANUS GOLF CLUB

2. _____

[Handwritten signatures]

OVERSTRAND MUNICIPALITY

Address 8 Magnolia Avenue, Hermanus. 7200

Contact Numbers **Tel:** 028 - 313 8000
Fax: 028 - 313 8030
e-mail: wzybrands@overstrand.gov.za

Contact person Werner Zybrands

HERMANUS GOLF CLUB

Address Main Road, P O Box 313, Hermanus. 7200

Contact Numbers **Tel:** 028 - 312 1954/5
Fax: 028 - 312 2333
Cell: 083 255 1902
e-mail: manager@hgc.co.za

Contact person Wendell Meiring



"L" 23.
[Handwritten marks]

MEMORANDUM OF AGREEMENT

made and entered into by and between:

OVERSTRAND MUNICIPALITY

herein represented by the Municipal Manager, duly authorised thereto,
whose full and further particulars appear in Schedule A hereto
["Overstrand"]

and

FERNKLOOF ESTATE MASTER PROPERTY OWNERS' ASSOCIATION

herein represented by Izek Krige, duly authorised thereto,
whose full and further particulars appear in Schedule A hereto.
["FEMPOA"]

1. INTERPRETATION AND DEFINITIONS

Readings to clauses in this agreement are for purposes of convenience and
reference only and shall not be used in the interpretation of nor modify nor amplify
the terms of this agreement nor any clause hereof.
In this agreement, unless a contrary intention clearly appears:

- 1.1 Words importing any one gender include the other gender; the singular includes the plural and vice versa; and natural persons include created entities (incorporated or unincorporated) and vice versa.
- 1.2 The following terms shall have the meanings assigned to them hereunder and cognate expressions shall have a corresponding meaning unless the contrary clearly appears from the context:

1.2.1 "Attorneys" means Chir Incorporated,
H Q House, 6 Dirkie Uys Street,
Hermanus
Tel No: (028) 313 2450
Fex No: (028) 313 2455
Trust banking details:
ABSA, Hermanus 334 812
Acc. No: 406 298 5577.

1.2.2 "Business Days" means any day of the week,
excluding Saturdays, Sundays
and Public Holidays.

1.2.3 "Contractor" means the contractor or
contractors to whom the
contract to erect the fence is
awarded.

[Handwritten signatures]

[Large handwritten signature]

1.2.4 "Course"	means the Hermanus golf course.
1.2.5 "Date of Signature"	means the date on which the last signing party attaches its signature to this agreement.
1.2.6 "Deeds of Sale"	means the agreements entered into between Overstrand and purchasers of erven in the Estate.
1.2.7 "Development"	means the development of the Estate and, where applicable, the Course.
1.2.8 "Estate"	means the Fernkloof Estate, developed around the Course.
1.2.9 "HGC"	means Hermanus Golf Club.
1.2.10 "Purchasers"	means initial purchasers of erven in the Estate.
1.2.11 "Quotation"	means the quotation acquired by FEMPOA for fencing certain sections of the Course, as described in clauses 3 and 4 below, attached hereto as Annexure A .
1.2.12 "Quotation Amount"	means the amount payable for the fencing as reflected in the Quotation.
1.2.13 "Rabcav"	means the joint venture comprising Rabie Property Developers (Pty) Ltd and Cavor Property Developers (Pty) Ltd.

2. RECORDAL

WHEREAS Overstrand was the owner of the Course and surrounding land in parts of which the Estate was developed;

AND WHEREAS Overstrand, with Rabcav as its agent, upgraded the Course and developed the Estate into erven which were sold to Purchasers;

AND WHEREAS, subsequent to the sale of erven to Purchasers (now FEMPOA members) on 22 November 2015, Overstrand sold the Course to HGC on 6 December 2006;

AND WHEREAS the Estate, being open fronted onto the course, shares a common boundary with the Course, parts of which are not fenced yet;

Handwritten initials and signature

Large handwritten signature

AND WHEREAS the unfenced areas posing a security risk to the Estate, are on the Course;

AND WHEREAS certain Purchasers insist on the entire Development being fenced as represented in the Deeds of Sale;

AND WHEREAS a legal opinion obtained by Overstrand concluded that in terms of the Deeds of Sale, Overstrand is obliged to fence the entire Development;

AND WHEREAS the FEMPOA is prepared to accept the responsibility of fencing the unfenced areas on the Course, provided that Overstrand contribute to the cost thereof,

the parties agree as follows:

3. OBLIGATION TO FENCE

FEMPOA hereby irrevocably accepts the obligation to fence all areas necessary to provide a fully fenced estate, whether such areas fall within the boundaries of the Estate or not, subject to the terms and conditions set out herein.

4. STANDARD OF FENCING

FEMPOA shall cause brick/stone/palisade- as well as electrical fencing, similar in appearance and standard to the fencing surrounding the rest of the Estate, to be erected on the unfenced areas as specified in the Quotation.

5. PAYMENT FOR FENCING

5.1 Overstrand agrees to contribute to the cost of such fencing, as follows:

5.1.1 the ex gratia payment of R1 300 000 (one million three hundred thousand rand) received by Overstrand from Rabcov in terms of a settlement agreement between them, shall be paid into the trust account of the Attorneys within 7 (seven) Business Days of receipt of same from Rabcov, for payment to the Contractor upon instruction from the FEMPOA, for the sole purpose of erecting the fence as herein provided; and thereafter

5.1.2 R900 000,00 (nine hundred thousand rand) shall be paid by Overstrand directly to FEMPOA upon demand by FEMPOA, within 65 (sixty five) Business Days of Date of Signature or any extended period agreed between Overstrand and FEMPOA in writing, provided that Overstrand is satisfied with the progress made with the erection of the fence at that time; and provided further that in the event of litigation instituted to prevent or halt the erection of the fence, the remainder of the aforesaid period of 65 (sixty five) Business Days, or agreed extension, shall be suspended pending the outcome of such litigation.

5.2 The payment by Overstrand in terms of clause 5.1 above, shall cover, but not exceed, the Quotation amount.

Overstrand 






- 5.3 Funds held in trust by the Attorneys in terms hereof shall be invested in an interest bearing account, interest accruing to the person/entity to whom the funds are ultimately paid, provided that no interest shall accrue to the Contractor.
- 5.4 Should the fence not be erected within the time period referred to in clause 5.1.2 above, or at all, the balance of the amount in trust in terms of clause 5.1.1, shall be paid to HGC, provided that should HGC have been the cause of the fence not being erected/completed, the amount shall be paid to Overstrand.
- 5.5 Payment to HGC in terms of clause 5.4 above shall only be made after receipt by the Attorneys of written notification by FEMPOA that it does not wish to erect the fence, or expiry of the period in accordance with clause 5.1.2 above, whichever is the earlier.

6. INDEMNITY

FEMPOA hereby indemnifies Overstrand and shall keep Overstrand indemnified, against all or any claims and of liability and of related costs, other than specifically set out herein, in respect of or resulting from the fence around the Estate and the Course or the lack of such fence.

7. BREACH

In the event of any of the parties hereto (the defaulting party) failing to fulfil on due date any of the terms and conditions of this Agreement, the other party shall be entitled, having given the defaulting party 5 (five) Business Days written notice to remedy the breach, either to cancel this agreement and claim damages and interest, or to enforce specific performance and recover damages and interest.

8. ARBITRATION

- 8.1 Should any dispute, question or difference arise between the parties with regard to any matter relating to any of the parties' obligations in terms hereof such dispute shall be decided by arbitration in the manner set out in this clause 8.
- 8.2 The arbitration shall:
 - 8.2.1 be held in Hermanus and conducted in an informal summary manner on the basis that it shall not be necessary to observe or carry out either the usual formalities or procedures relating to pleadings or discovery or the strict rules of evidence; and
 - 8.2.2 commence as soon as reasonably possible after it is demanded and with a view to its being completed within 21 (twenty one) Business Days after it is demanded; and
 - 8.2.3 be held under the provisions of the Arbitration Act of the Republic of South Africa (as amended or replaced from time to time) except insofar as the provisions of this arbitration clause shall apply.

Handwritten signature or initials.

Large handwritten signature or initials at the bottom right of the page.

- 8.3** The arbitrator shall be a practising counsel or attorney of not less than 10 (ten) years standing, appointed by agreement between the parties to the arbitration within 5 (five) Business Days of being called upon to make such appointment and failing such agreement within the 5 (five) Business Day period, appointed by the President of the Cape Bar Association or the Chairman of the Law Society of the Cape of Good Hope.
- 8.4** The arbitrator shall, in giving his/her award, have regard to the principles contained in this Agreement and he/she shall decide the matter as submitted to him/her according to what he/she considers just and equitable in the circumstances and, therefore, the strict rules of Law need not be observed or be taken into account by him/her in arriving at his/her decision. The arbitrator's decision shall be presented within 7 (seven) Business Days after the completion of the arbitration in a written document and he/she shall state the reasons for his/her decision therein. The arbitrator may determine that the cost of the arbitration be paid either by one or other of the disputing parties or by each of the parties as he/she in his/her sole discretion may deem fit.
- 8.5** Each of the parties to the arbitration irrevocably agrees that the decision of the arbitrator made at such arbitration proceedings:
- 8.5.1** shall be final and binding on each of them; and
 - 8.5.2** shall be carried into effect immediately; and
 - 8.5.3** may be made an order of any Court having jurisdiction over the parties.
- 8.6** Notwithstanding anything to the contrary contained in this clause 8, the parties shall be entitled to institute legal proceedings by way of application, action or otherwise in any Court having jurisdiction for the purpose of restraining or interdicting breaches of any of the provisions of this Agreement.

9. COSTS

All costs in connection with the negotiation, drafting, signature and execution of this agreement, shall be borne by the FEMPOA and shall be payable on demand.

10. GENERAL

- 10.1** This Agreement constitutes the entire agreement concluded between the parties and no warranties or undertakings or representations other than those specifically recorded herein may be relied on by either of the parties.
- 10.2** No amendment or consensual cancellation of this Agreement or any provision or term thereof or of any agreement, bill of exchange or other document issued or executed pursuant to or in terms of this Agreement and no settlement of any dispute arising under this Agreement and no extension of time, waiver or relaxation or suspension of any of the provisions or terms of this Agreement, shall be binding unless recorded in a written document signed by the parties. Any such extension, waiver or relaxation or suspension which is so given or made shall be strictly construed as relating only to the matter in respect whereof it was made or given.



11. DOMICILIA AND NOTICES

- 11.1 The parties choose domicile citandi et executandi at their respective addresses as set out in **Schedule A** hereto, at which addresses all notices and legal process in relation to this Agreement or any action arising therefrom may be effectually delivered and served.
- 11.2 Any notice given by one of the parties to the other ("the addressee") which:
 - 11.2.1 is delivered by hand to the addressee's domicilium citandi et executandi shall be deemed to have been received by the addressee at the time of delivery;
 - 11.2.2 is posted by prepaid registered post from an address within the Republic of South Africa to the addressee at the addressee's domicilium citandi et executandi shall be deemed to have been received by the addressee on the 3rd (third) Business Day after the date of posting;
 - 11.2.3 is sent by fax or electronic mail to the addressee's domicilium citandi et executandi shall be deemed to have been received on the Business Day following the day of transmission.
- 11.3 Either party shall be entitled on written notice to the other, to change its address as set in **Schedule A** hereto.

Signed at Hermanus on 15 MAY 2009

AS WITNESSES:

1. [Signature]

2. [Signature]

[Signature]
OVERSTRAND

Signed at Hermanus on 2009

AS WITNESSES:

1. _____

2. _____

FEMPOA

[Signature]

SCHEDULE A

OVERSTRAND MUNICIPALITY

Address: 8 Magnolia Avenue, Hermanus, 7208

Contact Numbers: Tel: 028 - 313 8000
 Fax: 028 - 313 8030
 e-mail: wzybrands@overstrand.gov.za

Contact person: Werner Zybrands

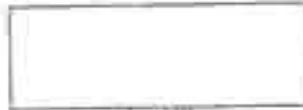
FERNKLOOF MASTER PROPERTY OWNERS' ASSOCIATION

Address: Fernkloof Estate, Theron Street, Hermanus.

Contact Numbers: Tel: 028 - 313 1130
 Fax: 080 661 2048
 Cell: 082 558 8206
 e-mail: izak.krige@infekom.co.za

Contact person: Izak Krige

ANNEXURE A



Since 1988

Box 115, Private Bag X16, Combrisa, 7949
 Tel: 021 652 6000/4 Fax: 021 203 6006
info@livewirefencing.co.za www.livewirefencing.co.za

Date: 4 Th March 2008
 Quote No: PCNS245A
 Attention: ZAK KRIGER
 E-mail: zak.kriger@stratcom.co.za/manager@hgc.co.za

QUOTE FOR LIVE WIRE ELECTRIFIED FENCING AT: HERMANUS GOLF CLUB

Thank you for selecting Live Wire to quote for the above installation. Our quotation is valid for 21 days.
 Live Wire was established in 1988 and is highly reputable operating in the greater Cape Town area. Our installations are carried out by our own trained Live Wire staff and all installations comply fully with the SABS legal requirements.
 (Note) An electrified fence is the most effective deterrent available for keeping trespassers outside the property perimeter. Any shorting, cutting or tampering of the fence will activate audible and visual alarms.

Palisade 2055 meters at R815/meter	R 1 674 625-00
Electrification of above palisade fencing including energizers and cabling required to be incorporated into 20 zone monitoring system of above palisade (2 energizers 2055 meters of coom cable @ 22.5m)	R 61 237-60
Installation of 4 strand electrified fencing on the front of Precinct 1 (140mts @ 45meter + 6 gates)	R 11 000-00
Installation of remainder of 20 zone monitoring system to existing electrified fencing (7 energizer 445mts of coom cable @ 22.5meter	R 128 012-00
Upgrade existing electrified fencing to 4-strands 1 above & 1 below At request of Overstrand Municipality	R 95 000-00
10 solar panel installations 1 per energizer/Option	R 105 000-00
6.5meter automated sliding gate at front entrance	R 26 750-00
11 meter stone clad brick walling at entrance	R 43 000-00
Contingency for architects and QS	R 55 175-00
TOTAL	R 2 200 000-00

The above prices exclude Value added Tax

TERMS & DEPOSIT:

- Please cross or tick the options required and fax to us on \$21 \$52-\$800 together with confirmation of deposit. On acceptance, a tax invoice will be issued reflecting your deposit and balance.
- Terms: We require a 50% deposit paid into our bank account prior to commencement of installation. On receipt we will perform an installation date which suits you and issue a tax invoice for the balance which will become due to Live Wire on completion.
- All equipment installed remains the property of Live-Wire until paid for in full.
- Your guarantee is for 12 months and covers workmanship and parts installed.
- Bank Details: Live Wire Systems, Standard Bank A/c. No: 971 801 766, Constellation Branch Code 553305.

ACCEPTANCE OF QUOTE: We trust that the above quote meets with your approval and look forward to your acceptance of the above quotation and terms and conditions supplied.

Accepted by _____ @ _____ On this
_____ day of _____ 2005.

SPECIFICATIONS FOR YOUR LIVE WIRE ELECTRIFIED FENCING AS QUOTED ABOVE:

Special attention will be given to ensure that the fencing is as unobtrusive as possible whilst remaining effective.

- A Palisade fence of the same height and design as the existing palisade fence will be erected on perimeter of the property indicated as per plan by mutual agreement by owners open frontage.
- A neat and effective 4 strand electrified fence will be fitted to the top of this palisade fence as discussed.
- 10 x 8 Joule Merlin M28 two zone energizers will be installed along the perimeter at approximately 650m apart, providing 20 zones of approximately 320m each. These energizers will be installed in weather proof housings mounted on galvanized pedestals 1 meter inside the perimeter fence.
- A cat 5 communications cable linking the energizers together for the monitoring system will be installed around the entire perimeter, all cabling will be sleeved in 20mm PVC conduit secured to the palisade fence and cement walls.
- Power points need to be provided to the Energizers, if this is not possible we have included an optional price for the installation of 120 watt solar panels with 105AH batteries including housings and brackets fully installed.
- We recommend that the entire existing fence be checked and upgraded to a 4 strand standard.
- We only use 1.2mm marine grade 316 stainless steel wire attached to UV resistant insulators, secured to hot dipped galvanized epoxy coated round bar or zinc free and tamper proof flat bar brackets.
- Wiring will be spaced 100 mm apart, as per legislation, effectively raising the perimeter boundary height by 200mm.

Handwritten signature/initials

Large handwritten signature

- The electrified wires will be tensioned with stainless steel springs and spring hooks.
- SABS approved 1.6m "A" grade earth spikes will be driven into the ground at intervals of approximately 75 meters, depending on soil type.
- The entire electrified fence system will be monitored at a central control point, via the twoweek 20 zone keypad system.

- A 6.5meter sliding gate of the same design as the existing parade fence will be installed across the front entrance. This gate will be automated via a Centurion D5 gate motor and supplied with 4 remote controls. of the same design as the existing parade fence will be installed across the front entrance.
- **Liability & Preparation of site:** Please note that it is advisable for you to prepare the site prior to installation should you have exotic or soil/protected plants. Live Wire cannot be held responsible or liable for damage. Please make us aware of any such situation prior to installation.

ADDITIONAL

in the unlikely event that we need to move any electricity cables, water pipes or rock, a separate quote will be negotiated

POWERFUL MERLIN ENERGIZER - UNCONDITIONAL 2 YEAR REPLACEMENT GUARANTEE.**ENERGIZER**

The Merlin M28 has 2 zones allowing for easy identification of the section of fencing that has been violated. This energizer has a stored energy of 8 joules and delivers maximum pulse energy of 8 joules. This is non-lethal, yet delivers a shock strong enough to stop the most determined intruder. A 12x 7amp hour maintenance free sealed lead acid battery will provide a maximum of 120 hours operation in the event of a mains-power failure. This microprocessor based energizer has programmable operating parameters that ensure that this energizer can operate effectively under various conditions. The energizer can be activated or de-activated by entering a 4 digit code on the electronic keypad. Auxiliary inputs and outputs are provided on the energizer to allow system monitoring. We will install the keypad in your bedroom, which will indicate which zone has been activated. This keypad controls the energizer which indicates the status and alarm conditions for all zones. NB This unit is for two zones only.

GUARANTEE

- Workmanship and equipment supplied is guaranteed for 12 months from date of completion. Our guarantee does not cover malicious damage to property or damage by falling trees, builders etc.
- Live Wire Signage will be put up at legislated intervals. Live Wire signage remains the property of Live Wire and assures your guarantee and support from us.

Please do not hesitate to call me should you have any questions. I am more than happy to discuss any queries you may have.

Assuring you of our best service at all times.
Kind regards

Peter

PETER RECK
082 828 0345

MANAGING MEMBER
LIVE WIRE SYSTEMS CC




~~244~~

244

Office: 021 552-6003
Email: pepe@lucytrsystems.co.za
Fax: 021 552-6006
www.lucytrsystems.co.za

Chris

[Signature]

[Signature]



"M"
24
[Handwritten scribbles]

8 September 2010

LETTER TO ALL FERNKLOOF ESTATE TRUSTEES REGARDING THE FENCE ISSUE

Dear Trustees,

We have reached a crucial point in the negotiations with the HGC and Overstrand Municipality.

Firstly, I must give some background information:

The MPOA took a decision in November 2009 to engage the interested parties involved with the fence issue in a round table discussion with the objective to arrive at a mutually acceptable agreement without resorting to legal action. Some twelve formal meetings were held and at least four informal discussions.

During the period of the round table discussions, obvious weaknesses in the perimeter were identified and addressed. This entailed a total of 260m of palisade fencing on the southern boundary, a motorised gate at the Golf Rd entrance and a remote controlled pedestrian gate at the Simm St entrance. Overstrand Municipality paid R 300 000 for this work. A further thorough inspection of the perimeter showed up more weaknesses and differing standards of the security measures in place, for example some areas had electric fences on top and other areas did not. Overstrand Municipality paid a further R 150 000 to upgrade the identified problem areas. This work should be completed during this week.

Regarding the matter of the unfenced sections of the N/S boundary, many ideas were tabled and discussed. It was resolved that the MPOA, HGC and Overstrand Municipality would enter into an agreement. This was after the N/S Boundary owners informed the round table meeting that they would not be able to form legally empowered bodies that could speak for all the N/S boundary residents.

The Overstrand Municipality contracted Mariki Chin to draft the said agreement. After a series of interactions, the draft that is attached to this letter was circulated to the Estate trustees for comment and feedback. Three important issues were raised, namely the rights of the individual erf owners in the Estate, the legal liability of the MPOA trustees if they impaired the rights of the individual erf owners and a penalty to be applied if the HGC did not fence out a property that did not maintain the roadside barrier to the agreed standard.

I engaged the parties in correspondence with these proposed amendments as follows:
On 16 August I wrote to the parties :

"Dear All,
I have subsequently heard from Sarel that precinct 5 wants to add a sentence to clause 5 stating:
"The rights of individual erf owners in the Fernkloof Estate are not impeded and are reserved in this agreement".
This is to prevent individual erf owners from suing the MPOA for having perhaps derogated their rights.

If this insert is agreed to, then we need to distribute to all round table delegates for their approval. If they agree, I shall distribute it to all the precinct POAs for agreement at precinct level."

On 23 August I wrote to Mariki Chin and Overstrand Municipality:

"Dear Mariki,

Prestwick Village (Precinct 5) held a trustees meeting on Friday and they wish to have some sort of penalty clause inserted into the contract in the event that HGC does not fence out a property that does not abide to the prescribed security measures. My proposal is:

"In the event that the HGC does not either get a property on its boundary to correct the deficiency in the street side security or does not fence out such property within 30 days, HGC agrees to pay to the FEMPOA a sum of R10 000 per month for every month that that security breach exists."

As far as the penalties are concerned, HGC rejected this concept outright as follows:

On 2 September Roydon Pybus wrote:

"Dear Mariki,

The agreement between the Hermanus Golf Club and the other parties was supposed to be the document to insure that our mutual interests were maintained. Introduction of any penalty clauses, to my mind, is not in the interests of this agreement and the Golf Club cannot agree to the inclusion of such clauses.

The only change to be made to the draught at this stage is that which was suggested by Izak Krige to clarify the areas of responsibility.

Regards

Roydon Pybus

Hermanus Golf Club"

As far as the individual rights and legal liability of the MPOA trustees are concerned, I wrote to the parties as follows:

"Dear Mariki,

The MPOA trustees will not sign the agreement without including the amendment to the indemnity clause as sent to you on 16/8/2010.

For ease of reference I include it:

"The rights of individual erf owners in the Femkloof Estate are not impeded and are reserved in this agreement".

This is necessary to prevent any estate owner taking legal action against the individual MPOA trustees."

On Monday 6 September the Mayor called a meeting with myself representing the MPOA and Roydon Pybus representing the HGC. Sharon Sleigh and Mariki Chin were also present. The Mayor informed me that the penalty clause was off the table and that the individual rights clause would not be inserted into the indemnity clause. The draft agreement on the table was final.

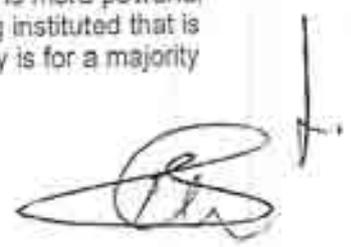
I did not give up and wrote to the Mayor on 7 September:

"Dear Theo,

I have given the stalemate situation some thought overnight.

It would be a pity if all the effort we have put into the process came to less than a satisfactory end.

A point that was not tabled at all yet, is that the indemnity from the MPOA is more powerful than it appears at first sight. It removes the possibility of legal action being instituted that is funded by the collective of Estate owners. The easiest way to raise money is for a majority



vote at MPOA level to impose a levy increase to fund legal fees and everybody helps to pay, even if they disagree.

If the MPOA signs an indemnity, any legal action has to be by individuals and my experience is that when there is a call for real funds to be paid over, enthusiasm wanes very quickly. I therefore urge you to reconsider the indemnity clause with reservation of the rights of individual owners and protection of the position of the trustees. You and your legal advisor are invited to suggest wording to suit."

On 7 September I received a reply from Mariki Chin as follows:

"Dear Izak

My instructions are to advise you that the window of opportunity offered by the municipality, is now closed. The municipality requires the indemnity included in the draft document and if that is unacceptable to the MPOA, the status quo shall prevail until the funds are paid to the golf club when it is absolutely certain that all possible claims have become prescribed.

Should the MPOA in the interim reconsider its position regarding the indemnity, you are welcome to approach the municipality with a proposal to that effect."

NOTE: The Overstrand Municipality intends keeping all the remaining funds received from Rabcav for three years to ensure that prescription will occur, if the agreement is not signed.

The pertinent questions now are:

1. Is the indemnity clause, in its present form, an impairment of the rights of individual erf owners?
2. Are the MPOA trustees at any risk if they sign the agreement in its present form?
3. Does the agreement give the Estate some legal way of enforcing N/S boundary owners' responsibility to maintain their roadside security through the threat of being fenced off?
4. Should the MPOA sign the agreement in its present form?
5. Should we walk away and be satisfied that the security upgrades that have taken place are what we have gained through the round table discussions and be satisfied?
6. Not signing the agreement means that individual owners, singly or as a group, or the MPOA are all not prohibited from taking further action in order to get the remainder of the fence built. Is this a serious consideration?

Please feed back to me your thoughts and ideas.

Kind Regards

Izak



248
N

Golfcourse break-ins										
Name	Precinct	Coy	date	time	alarm on	Occupied	entry forced	what stolen	clues	
Kleynhans		2 ADT	7/15/2009	1 none		yes	yes	laptop	dogs	
Hulse	N-boundary	ADT	9/15/2009	3 faulty		no	yes	mask (R400)	single item	
Vanderhoeven	N-boundary	Safe	10/10/2009	4 yes - 1m delay?		yes	yes	money (R1200)	finger print	
Hooper	N-boundary	Safe	10/31/2009	3 didn't function		yes	yes	laptop		
Brynard	N-boundary	ADT	10/28/2009	3 didn't function		yes	yes	laptop	dogs, panic button	
van Schoor		7 ADT	11/17/2009	5 no		yes	yes	laptop	bicycle	
Holmes		7 ADT	11/17/2009	3 didn't function		yes	yes	hifi	finger-print	
Nel	N boundary	Safe	11/17/2009	2 didn't function		yes	yes	bab proof	baboon proof window	
Koster		2 ADT	12/12/2009	2 yes		yes	yes	laptop	beam broken 10 pm	
Melvin-Barry	N-boundary	Safe	2/9/2010	2 no		yes	yes	Plasma TV	black Golf	
Teuer		2 ADT	3/28/2010	5 no - 3.30 off		yes	yes	Plasma TV	3.30 alarm - returned	
vanderhoeven	N boundary	Safe	5/12/2010	4 ext beam set off		yes	no	no	beams scared thieves	
Tiley	N boundary	ADT	5/14/2010	3 no		yes	yes	laptop		
Lilley	N boundary	ADT	5/17/2010	3 yes		yes	yes	sunglasses	alarm scared thieves	

Burgers & Van Noordwyk

ATTORNEYS - PROKUREURS
J. S. VAN NOORDWYK, B.A. LL.B., M. RANGE, B.Juris. LL.B.
Attorneys / Prokureurs - Conveyancers / Transportiesorgers

Our Ref	MR/AM/K071R
Our View	
Your Ref	
U-View	

Tel (028) 312-1127/8/9
Fax / Faks: (028) 312-1420 (Conveyancing / Aktes)
Fax / Faks: (028) 312-2554 (Litigation / Litigasie)
6, 7 & 101 Warrington Arcade
Warringtonarkade 6, 7 & 101
4 Harbour Road / Hawweg 4
PO Box / Posbus 50
HERMANUS 7200
Docex 4 Hermanus
E-mail: bjvnp@hermanus.co.za
VAT / BTW NO: 4030114443

22 NOVEMBER 2010

THE MUNICIPAL MANAGER
OVERSTRAND MUNICIPALITY
MAGNOLIA STREET
HERMANUS
7200

BY HAND

Dear Sirs,

RE: OUR CLIENT: M KLEYNHANS AND OTHERS

1. We act on behalf of Mr Marius Kleynhans of 14 Innesbrook Village, Fernkloof Estate, Hermanus and other owners of properties in various other precincts on the Fernkloof Estate (the Estate).
2. We are instructed that the Overstrand Municipality (the Municipality):
 - was at all material times the owner of the Hermanus Golf Course and the surrounding land on which parts of the Estate was developed;
 - during December 2005, sold erven in the Estate; and
 - prior to the aforementioned sales either itself and/or through its development agent and estate agents, marketed erven in the Estate on the basis that they would form part of a security development where residents would be ensured of a secure lifestyle adjacent to the Hermanus Golf Club.
3. Our client and other purchasers of erven received sale documents consisting of a pack of documents with various annexures including the "Estate Rules" which provide as follows:

"8.1 A central feature to the quality of life at the Fernkloof Estate is security. The Estate is fully protected by electrified fencing that is designed to prevent unauthorised access to the Estate. [Emphasis added]

A.


8.2 *An important element of a secure lifestyle is that of prevention and deterrence."*

4. It is furthermore recorded in the first Estate newsletter in February 2006 that:

"Pallsade fencing – Construction of the pallsade fencing and walling to secure Fernkloof Estate will start in February with work expected to be completed by the year end."

5. It is clear from the aforesaid that it was understood by all parties that the Municipality as the seller of the erven would ensure that the Estate would be fully protected by electrified fencing designed to prevent unauthorised access to the Estate. In the premises our client holds the view that the Municipality is obliged to fence the entire Estate by means of electrified fencing in such a way so as to ensure that purchasers obtain the secure lifestyle that they were promised.
6. To date a very substantial part of the Estate has indeed been fenced in accordance with the Municipality's aforementioned obligation. In this regard we are instructed that until as recently as six months ago portions of the perimeter fence were still being built up and electrified. This work has however been discontinued and there are still important sections of the northern and southern boundaries that have not yet been properly secured by means of electric fencing. This has and continues to pose a serious security risk to our clients and to their families.
7. In the result we have instructions to demand, as we hereby do, that the Municipality fence all remaining boundaries of the Estate by means of electrified fencing in such a way so as to ensure that purchasers obtain the secure lifestyle that they were promised.
8. In so far as it may be necessary, we hereby request your confirmation that you have been provided with sufficient notice in terms of section 3 of Act 40 of 2002 of our clients intended legal action, failing which this correspondence will serve as notice that application will in due course be made for condonation as may be required. This correspondence will be used in support of any application for condonation.
9. Please be advised that unless we receive your written confirmation within seven (7) days from date hereof that the unfenced portions of the northern and southern boundaries of the Estate will be secured by electric fencing, it is our instruction to proceed with the bringing of the necessary application to compel such fencing.





Yours faithfully,
BURGERS & VAN NOORDWYK

[Handwritten signature]
M RANGE

[Handwritten signature]

Receipt obo Overstrand
Municipality
C. C. GROENEWALD

Date: **OVERSTRAND MUNICIPALITY**
20 NOV 2010
Time: *14:15*
DIRECTOR: MANAGEMENT SERVICES

[Handwritten signature]

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NO:

In the matter between:

MARIUS JAKOBUS KLEYNHANS
In his capacity as Trustee for the
time being of The Kleynhans Family Trust

FIRST APPLICANT

HEATHER KLEYNHANS
In her capacity as Trustee for the
time being of the Kleynhans Family Trust

SECOND APPLICANT

CORNERCADE (PTY) LTD

THIRD APPLICANT

SHIRLEY MILLICENT KOSTER

FOURTH APPLICANT

TIELMAN NIEUWOUDT AGENBAG

FIFTH APPLICANT

AND

OVERSTRAND MUNICIPALITY

RESPONDENT

SUPPORTING AFFIDAVIT

I undersigned

HEATHER KLEYNHANS

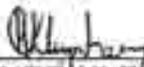
do hereby make oath and say:

|

Ⓢ

- 1 I am an adult female and the Second Applicant. I reside at 14 Innesbrook Villiage, Fernkloof Estate, Hermanus. I am duly authorised to depose to this affidavit in my capacity as Trustee for the time being of the Kleynhans Family Trust.
- 2 The facts disposed to herein are within my own personal knowledge, unless the context indicates otherwise, and are, to the best of my knowledge and belief, true and correct.
- 3 To the extent that legal submissions are advanced, they are made on the basis of advice received from my legal representatives, which advice I believe to be true and correct.
- 4 I have read the affidavit deposed to by the First Applicant and I confirm the correctness thereof in all respects.
- 5 The Kleynhans Family Trust is the owner of erf 9977, which is located in precinct 2 of the Fernkloof Estate and also known as 14 Innesbrook Villiage, Fernkloof Estate. The aforesaid erf was bought from the developer of the Fernkloof Estate.
- 6 The decision to acquire property in the Fernkloof Estate was also motivated by the fact that the Overstrand Municipality undertook to provide a secure lifestyle in a property development that would be fully secured by an electrified fence around the perimeter of the Fernkloof Estate.

- 7 Although the Overstrand Municipality has been paid the purchase price for the erf, the secure lifestyle that the Overstrand Municipality promised us has not been received. The First Applicant and I together with our three daughters reside in the most unprotected precinct on the Fernkloof Estate and it is unacceptable that the secured living promised by the Overstrand Municipality has been provided for other precincts in the Fernkloof Estate, whilst my daughters and I feel unsafe in our own home.
- 8 The Application for the relief sought in the Notice of Motion is herewith supported.


 HEATHER KLEYNHANS
 in her capacity as Trustee of the
 Kleynhans Family Trust

I hereby certify that on this 23rd day of June 2011 in my presence at Hermanus the Deponent declared that she knew and understood the contents of this affidavit, no objection to taking the oath, and that she considered the oath as binding on her conscience.


 COMMISSIONER OF OATHS

FULL NAME: IGNATIUS STEIN VAN NOORDWIJN
 COMMISSIONER OF OATHS
 PRACTISING ATTORNEY R.S.A.
 RANK: 101 WARRINGTON PLACE
 HARBOUR ROAD
 HERMANUS
 NUMBER: _____
 STATION: _____

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NO:

In the matter between:

MARIUS JAKOBUS KLEYNHANS
in his capacity as Trustee for the
time being of The Kleynhans Family Trust

FIRST APPLICANT

HEATHER KLEYNHANS
In her capacity as Trustee for the
time being of the Kleynhans Family Trust

SECOND APPLICANT

CORNERCADE (PTY) LTD

THIRD APPLICANT

SHIRLEY MILLICENT KOSTER

FOURTH APPLICANT

TIELMAN NIEUWOUTD AGENBAG

FIFTH APPLICANT

AND

OVERSTRAND MUNICIPALITY

RESPONDENT

SUPPORTING AFFIDAVIT

I undersigned

MINETTE KLEYNHANS

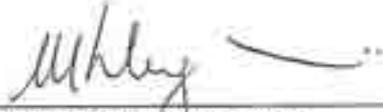
do hereby make oath and say:



- 1 I am an adult female and a Director of the Third Applicant. I reside at 11 Tobias Haiyeko Street, Swakopmund, Namibia. I am duly authorised to depose to this affidavit on behalf of the Forth Applicant.
- 2 The facts disposed to herein are within my own personal knowledge, unless the context indicates otherwise, and are, to the best of my knowledge and belief, true and correct.
- 3 To the extent that legal submissions are advanced, they are made on the basis of advice received from my legal representatives, which advice I believe to be true and correct.
- 4 I have read the affidavit deposed to by the First Applicant and I confirm the correctness thereof in all respects.
- 5 The Third Applicant owns erf 10131, which is located in precinct 6 of the Fernkloof Estate and also known as 60 Lakewood Villiage, Fernkloof Estate. The aforesaid erf was bought from the developer of the Fernkloof Estate.
- 6 The decision to acquire property in the Fernkloof Estate was also motivated by the fact that the Overstrand Municipality undertook to provide a secure lifestyle in a property development that would be fully secured by an electrified fence around the perimeter of the Fernkloof Estate.
- 7 Although the Overstrand Municipality has been paid the purchase price for the erf, we have unable to develop the property as the secure lifestyle that the Overstrand Municipality promised has not been received and no such representation can thus be made to prospective buyers of the developed erf.

A handwritten signature in black ink, appearing to be 'AK', is located in the bottom right corner of the page.

8 The Application for the relief sought in the Notice of Motion is herewith supported.


MINETTE KLEYNHANS

I hereby certify that on this 22 day of June 2011 in my presence at ~~Hermannus~~ ^{Susanna} the Deponent declared that she knew and understood the contents of this affidavit, no objection to taking the oath, and that she considered the oath as binding on her conscience.


COMMISSIONER OF OATHS

FULL NAME: _____

RANK: _____
GERTRUIDA MARIA MAGRIETA ENGELBRECHT
COMMISSIONER OF OATHS
CHIEF LEGAL CLERK: MINISTRY OF JUSTICE
M/PT TPAAT'S COURT, TOBIAS HAINYEKO STREET
WINDHOLE, REPUBLIC OF NAMIBIA

NUMBER: 2011 06 22
MINISTRY OF JUSTICE
THE MAGNETIC

STATION: _____



CASE NO:

In the matter between:

MARIUS JAKOBUS KLEYNHANS
in his capacity as Trustee for the
time being of The Kleynhans Family Trust

FIRST APPLICANT

HEATHER KLEYNHANS
in her capacity as Trustee for the
time being of the Kleynhans Family Trust

SECOND APPLICANT

CORNERCADE (PTY) LTD

THIRD APPLICANT

SHIRLEY MILLICENT KOSTER

FOURTH APPLICANT

TIELMAN NIEUWOUDT AGENBAG

FIFTH APPLICANT

AND

OVERSTRAND MUNICIPALITY

RESPONDENT

SUPPORTING AFFIDAVIT

I undersigned,

SHIRLEY MILLICENT KOSTER

do hereby make oath and say:

1 I am an adult female residing at 12 Innesbrook Village, Fernkloof Estate, who acts herein in my personal capacity as registered co-owner of erf 9965, Fernkloof Estate, which is located in precinct 2 of the Fernkloof Estate and also known as 12 Innesbrook Village, Fernkloof Estate and also *nomine officio* in my capacity as a Trustee for the time being of the E W KOSTER Family Trust and the registered co-owner of erf 9965, Fernkloof Estate, which is located in precinct 2 of the Fernkloof Estate and also known as 12 Innesbrook Village, Fernkloof Estate.

A.S. 

- 2 I am duly authorised to depose to this affidavit on behalf of the Forth Applicant.
- 3 The facts disposed to herein are within my own personal knowledge, unless the context indicates otherwise, and are, to the best of my knowledge and belief, true and correct.
- 4 To the extent that legal submissions are advanced, they are made on the basis of advice received from my legal representatives, which advice I believe to be true and correct.
- 5 I have read the affidavit deposed to by the First Applicant and I confirm the correctness thereof in all respects.
- 6 I am the co - owner of erf 9965, which is located in precinct 2 of the Fernkloof Estate and also known as 12 Innesbrook Villiage, Fernkloof Estate. The aforesaid erf was bought from the developer of the Fernkloof Estate.
- 7 The decision to acquire property in the Fernkloof Estate was also motivated by the fact that the Overstrand Municipality undertook to provide a secure lifestyle in a property development that would be fully secured by an electrified fence around the perimeter of the Fernkloof Estate.
- 8 Although the Overstrand Municipality has been paid the purchase price for the erf, the secure lifestyle that the Overstrand Municipality promised us has not been received. I live alone in the most unprotected precinct on the Fernkloof Estate and has been the victim of a housebreaking in December 2009. It is unacceptable that the secured living promised by the Overstrand Municipality has been provided for other precincts in the Fernkloof Estate, whilst I feel unsafe in my own home.

A. S. Smith

9. The Application for the relief sought in the Notice of Motion is herewith supported.

S.M. Koster
SM KOSTER

I hereby certify that on this 24th day of June 2011 in my presence at Hermanus the Deponent declared that she knew and understood the contents of this affidavit, has no objection to taking the oath, and that she considered the oath as binding on her conscience.

[Signature]
COMMISSIONER OF OATHS

A3
11
06
24

ASHLEY J. W. G. U.
FULL NAME: ~~Shirley Mitchell Koster~~

A3
11
06
24

RANK: Housew. CONST.

NUMBER: 7112204 U

STATION: HERMANUS



IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NO:

In the matter between:

MARIUS JAKOBUS KLEYNHANS
in his capacity as Trustee for the
time being of The Kleynhans FamilyTrust

FIRST APPLICANT

HEATHER KLEYNHANS
in her capacity as Trustee for the
time being of the Kleynhans Family Trust

SECOND APPLICANT

CORNERCADE (PTY) LTD

THIRD APPLICANT

SHIRLEY MILLICENT KOSTER

FOURTH APPLICANT

TIELMAN NIEUWOUDT AGENBAG

FIFTH APPLICANT

AND

OVERSTRAND MUNICIPALITY

RESPONDENT

SUPPORTING AFFIDAVIT

I undersigned

TIELMAN NIEUWOUDT AGENBAG

do hereby make oath and say:

1 I am an adult male and the Sixth Applicant. I reside at 1 Lobelia Street, Berghof, I am duly authorised to depose to this affidavit on behalf of the Forth Applicant.



- 2 The facts disposed to herein are within my own personal knowledge, unless the context indicates otherwise, and are, to the best of my knowledge and belief, true and correct.
- 3 To the extent that legal submissions are advanced, they are made on the basis of advice received from my legal representatives, which advice I believe to be true and correct.
- 4 I have read the affidavit deposed to by the First Applicant and I confirm the correctness thereof in all respects.
- 5 I am the owner of erf 9977, which is located in precinct 2 of the Fernkloof Estate and also known as 1 Innesbrook Villiage, Fernkloof Estate. The aforesaid erf was bought from the developer of the Fernkloof Estate.
- 6 The decision to acquire property in the Fernkloof Estate was also motivated by the fact that the Overstrand Municipality undertook to provide a secure lifestyle in a property development that would be fully secured by an electrified fence around the perimeter of the Fernkloof Estate.
- 7 Although the Overstrand Municipality has been paid the purchase price for the erf, I have unable to develop the property as the secure lifestyle that the Overstrand Municipality promised has not been received and I cannot represent to prospective buyers of the developed erf that it is indeed the case.
- 8 The Application for the relief sought in the Notice of Motion is herewith supported.



BC

[Handwritten Signature]

T N AGENBAG

I hereby certify that on this 21st day of June 2011 in my presence at Hermanus the Deponent declared that he knew and understood the contents of this affidavit, no objection to taking the oath, and that he considered the oath as binding on his conscience.

[Handwritten Signature]

717328
516

COMMISSIONER OF OATHS

FULL NAME: Banca Cloete

RANK: 7173284-5 / 1st

NUMBER: 7173284-5

STATION: Hermanus

ANDRÉ DANIEL KING
Commissioner of Oaths
Ex Officio
Accounting Officer
IACAC 650330
Onrus Trading Post, Main Road, Onrus River



In the case between:

MARIUS KLEYNHANS & 4 OTHERS
and
OVERSTRAND MUNICIPALITY

PLAINTIFF

RESPONDENT

Address where served:
MAGNOLIA STREET, HERMANUS

NOTICE OF MOTION

I certify on 28 JUNE 2011 at 14.20, I handled the abovenamed process in the manner indicated below:

MANNER OF SERVICE/EXECUTION:

By proper service of a copy of the NOTICE OF MOTION at the OVERSTRAND MUNICIPALITY, HERMANUS, upon MR DESMOND LAKAY, ATTORNEY at the above address, apparently not less than 16 years of age, apparently in charge of the premises at the time of service, after explaining the nature and contents thereof to the said person served.

(Signed) SHERIFF J N L MCLACHLAN

From: SHERIFF
J.N.L MCLACHLAN
PO BOX 177
HERMANUS, 7200

Tel: 028-3122508
Fax: 028-3122508
Email: sheriffhermanus@gmail.com

Account info for bank deposits/transfers
FIRST NATIONAL BANK (200-412 (HERMANUS))
Name: J N L MCLACHLAN
No. 52472945570

To:

MICHAEL RANGE & ASSOCIATES
PO BOX 548
HERMANUS
7200
Your VAT No:

Account No: 415
Your reference: MR/AM

DESCRIPTION OF FEES	FEES
Registration	6.00
Return & Copy	23.00
Service	44.00
Travelling	24.00
Item 32	2.00

Sub-total Fees 99.00
Plus VAT 13.88
TOTAL OWING R 112.88

Invoice No: 101989 My VAT No: 4270180535
Invoice issued on 29-Jun-2011

IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE HIGH COURT, CAPE TOWN

265

Before the Honourable Acting Justice Smit
On Wednesday 27 July 2011

Case No: 12755/2011

In the matter between:

MARIUS KLEYNHANS

First Applicant

In his capacity as Trustee for the time
being of The Kleynhans Family Trust

HEATHER KLEYNHANS

Second Applicant

In her capacity as Trustee for the time
being of The Kleynhans Family Trust

CORNERCADE (PTY) LTD

Third Applicant

SHIRLEY MILLICENT KOSTER

Fourth Applicant

TIELMAN NIEUWOUDT AGENBAG

Fifth Applicant

and

OVERSTRAND MUNICIPALITY

Respondent

ORDER

By agreement between the parties it is ordered that:



for hearing on the opposed motion roll.

1. The matter be postponed to 15 May 2012 at 10:00 or as soon thereafter as the matter may be heard; and
2. That the costs of this postponement are to stand over for later determination.

BY ORDER OF COURT



COURT REGISTRAR

Michael Range & Associates
HERMANUS
c/o 5 Strauss Daly Inc.
CAPE TOWN

/mdz

WESTERN CAPE HIGH COURT
FOURTH DIVISION
2011-07-28
CAPE TOWN/KAAPSTAD
WES-KAAP HOE HOF

BOX 135

IN THE HIGH COURT OF SOUTH AFRICA

WESTERN CAPE HIGH COURT, CAPE TOWN

CASE NUMBER : 12755/2011

In the application of :

MARIUS KLEYNHANS

1st APPLICANT

In his capacity as Trustee for the time being of
The Kleynhans Family Trust

HEATHER KLEYNHANS

2nd APPLICANT

In her capacity as Trustee for the time being of
The Kleynhans Family Trust

CORNERCADE (PTY) LTD

3rd APPLICANT

SHIRLEY MILLICENT KOSTER

4th APPLICANT

TIELMAN NIEUWOUDT AGENBAG

5th APPLICANT

and

OVERSTRAND MUNICIPALITY

RESPONDENT

NOTICE TO OPPOSE

PLEASE TAKE NOTICE that the respondent intends opposing the Notice of Motion application as set down for Wednesday, **27 JULY 2011** and appoints the offices of the undersigned as the address at which they will accept service of pleadings and notices in connection with the application.

Dated at Cape Town this 8th day of JULY 2011

CHIN INC
HERMANUS

VANDERSPUY
P C Neethling
021 419 3622
paulan@vdslaw.co.za

CHIN INC
21B HOPE STREET
HERMANUS

268

c/o Van der Spuy Cape Town
Attorneys for Respondent

per:

(Ref. PC Neethling/ar/CHI1/0028)

4th Floor
14 Long Street
Cape Town
P O Box 1701
Cape Town
DX : 53 Cape Town
(Tel. 419-3622)
(FX: 418-1329)

To: THE REGISTRAR
High Court
CAPE TOWN

and to: MICHAEL RANGE & ASS
Attorney for Applicants
Hermanus
c/o **Strauss Daly Inc**
15th Floor
The Terraces
34 Bree Street
CAPE TOWN
Ref: L Malherbe

BOX 135

IN THE HIGH COURT OF SOUTH AFRICA

WESTERN CAPE HIGH COURT, CAPE TOWN



CASE NUMBER : 12755/2011

In the application of :

MARIUS KLEYNHANS

In his capacity as Trustee for the time being of
The Kleynhans Family Trust

1st APPLICANT

HEATHER KLEYNHANS

In her capacity as Trustee for the time being of
The Kleynhans Family Trust

2nd APPLICANT

CORNERCADE (PTY) LTD

3rd APPLICANT

SHIRLEY MILLICENT KOSTER

4th APPLICANT

TIELMAN NIEUWOUDT AGENBAG

5th APPLICANT

and

OVERSTRAND MUNICIPALITY

RESPONDENT

FILING NOTICE

DOCUMENT FILED :

Respondent's Answering Affidavit

Dated at Cape Town this 9th day of DECEMBER 2011

CHIN INC
HERMANUS

c/o Van der Spuy Cape Town
Attorneys for Respondent

0000

per:

(Ref. PC Neethling/ar/CHI1/0028)
4th Floor
14 Long Street
Cape Town
P O Box 1701
Cape Town
DX : 53 Cape Town
(Tel. 419-3622)
(FX: 418-1329)

To: THE REGISTRAR
High Court
CAPE TOWN

and to: MICHAEL RANGE & ASS
Attorney for Applicants
Hermanus
c/o Strauss Daly Inc
15th Floor
The Terraces
34 Bree Street
CAPE TOWN
Ref: L Malherbe



IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NUMBER: 12755/11

In the matter between:

MARIUS KLEYNHANS

In his capacity as Trustee for the time
being of the Kleynhans Family Trust

First Applicant

HEATHER KLEYNHANS

In her capacity as Trustee for the time
being of the Kleynhans Family Trust

Second Applicant

CORNERCADE (PTY) LTD

Third Applicant

SHIRLEY MILLICENT KOSTER

Fourth Applicant

TIELMAN NIEUWOUDT AGGENBACH

Fifth Applicant

and

OVERSTRAND MUNICIPALITY

Respondent

ANSWERING AFFIDAVIT

I, the undersigned,

ALFRED RIAAN KUCHAR

do hereby make oath and say that:



1. I am an adult male and Senior Manager: Town Planning and Property Administration, Overberg Municipality. I am duly authorised to make this affidavit on behalf of the Respondent.
2. The facts set out herein are true and correct and, save where the contrary is indicated - in which event I verily believe such contents to be true and correct - are within my personal knowledge and belief. Where I make legal submissions herein, I do so based on advice received from the Respondent's legal representatives and in the belief that such advice is correct.
3. I have perused the Notice of Motion dated 27 June 2011 and the affidavits deposed to by the Applicants in support thereof. I will in due course deal with the allegations contained therein. Before doing so, I, however, wish to address the fact that the Applicants failed to join necessary parties in these proceedings and also deal with the Respondent's special defence of prescription as points *in limine*.

FIRST POINT IN LIMINE – NON-JOINDER OF NECESSARY PARTIES

4. The Applicants seek an order directing the Respondent to ensure that the "*Femkloof Estate*" is fully protected by electrified fencing that is designed to prevent unauthorised access to the estate. When regard is had to annexure "A" to the founding affidavit, it is clear that the Applicants in reality require this Honourable Court to order the Respondent to erect an electrified fence (the precise make-up or design of which is not altogether clear) along certain portions of the

northern and southern boundaries of the Hermanus Golf Course – in areas where the golf course (which is the property of the Hermanus Golf Club) share a common boundary with properties which are owned by third parties. It stands to reason that the Hermanus Golf Club and the said third parties have a direct and substantial interest in the subject matter of the issues involved and the order which this Honourable Court might make.

5. I have been advised and verily believe that the Applicants' failure to join the third party owners (being the Hermanus Golf Club and the individual owners of the erven which the Applicants seek to fence out, as well as owners of properties in the Fernkloof Estate itself) is fatal to their case (in the sense that the Court will not deal with those issues without such a joinder being effected).

5.1 As can be gleaned from the founding affidavits, Cavcor (Pty) Ltd and Rabie Properties (Pty) Ltd, carrying out a joint venture under the style of "*Rabcav Joint Venture*", developed the residential estate known as the Fernkloof Estate on behalf of the Respondent. (It should be noted that during the planning and approval stage the proposed development was referred to as the Hermanus Golf Estate, but was after approval rebranded to Fernkloof Estate).

5.2 The municipal land upon which the estate has been developed is adjacent to and in some cases within the borders of land

R. G. M.

which had previously been leased by the Respondent to the Hermanus Golf Club (and on which the latter's golf course is located). The Respondent has in the interim (on 6 December 2006) sold the golf course land to the Hermanus Golf Club. Registration of transfer of the property comprising the golf course in the name of the Hermanus Golf Club was effected on 22 May 2007.

- 5.3 It should, however, be emphasised that the Fernkloof Estate is not a golf estate. (This much is made clear in clause 1.1.7 of the agreement of sale (standard conditions, wherein the Fernkloof Estate development is defined to mean "*collectively the property developments on the land known as 'Fernkloof Estate' situate at the Hermanus golf course*").
- 5.4 There are seven separate entrances off public roads to seven of the nine separate and distinct pockets of land (referred to as "*precincts*") comprising the Fernkloof Estate. Save for Precincts 8 and 9, none of the precincts are linked. Precinct 1 consists of six erven, each of which has direct access from an adjoining public road.
- 5.5 The golf course, although adding value to the properties in the Fernkloof Estate, is completely independent of the various precincts and home owners may only enjoy the golf club amenities if they become members of the club or by invitations

R. gph

of a club member. Care should therefore be taken not to conflate the Fernkloof Estate, which consists of the precincts only, with the golf course.

5.6 I annex hereto, marked "ARK1" and "ARK2" respectively, copies of a proposed development plan dated 8 June 2001 and an undated plan, on which the position of the relevant precincts - relative to the golf course, the neighbouring residential developments and each other - is graphically depicted. A copy of Plan 7209/2005, as approved by the Surveyor-General, depicting the boundaries of the land which comprises the Hermanus Golf course (hereinafter "*golf course land*"), is annexed hereto, marked Annexure "ARK3".

5.7 As is evident from the aforesaid documents, the various precincts are scattered over a vast area of land (the total extent of the Fernkloof Estate and the golf course land is approximately 138 hectares). In the result, vast portions of the golf course land directly abut residential properties which do not form part of or in any way involve the Fernkloof Estate.

5.8 Those parts of the golf course which the Applicants seek to have fenced in (which are shown in a coloured marker on Annexure "A" to the founding affidavit of Mr. Kleynhans and is described by him as "*the portion that has to date not been fully protected by electrified fencing*") do not abut property that can be described

as Fernkloof Estate property, but (save for three small pockets of land which belong to the Respondent, being erven 5892 and 5996 – which includes a strip of land situated between erven 5828 and 5830, which are zoned "*Public Open Space*" and which are situated on the northern boundary of the golf course) adjoin properties which belong to third parties.

5.9 I annex hereto, marked Annexure "ARK4", a copy of a diagram on which the properties which will be directly affected by the order sought by the Applicants are identified with reference to their erf numbers. As is evident from the aforesaid diagram the "*fencing in*" of the golf course will directly affect 58 properties which lie alongside the golf course (excluding the three pieces of municipal land) – 11 on the southern border (in the vicinity of Main Road, Hermanus) and 47 on the northern border, adjoining the suburb known as Hermanus Heights. (For ease of reference I shall refer to the properties adjoining the northern border of the golf course land as the "*Hermanus Heights properties*" and those located on the southern boundary of the course as "*Main Road properties*").

5.10 I also annex hereto, marked "ARK5" a schedule reflecting the identities of the owners of the Hermanus Heights and Main Road properties that will be directly affected by the court order which is sought by the Applicants. In this regard it is also reiterated that the Hermanus Golf Club is the owner of the golf course land.

- 5.11 The Hermanus Heights and Main Road properties were in existence at the time of the conceptualisation of the Fernkloof Estate development. These properties were historically not fenced out and at all relevant times enjoyed golf course access and open frontage onto the golf course land.
- 5.12 Should an order be issued that a fence be erected, as prayed for by the Applicants, such fence will have to be erected either on the individual Hermanus Heights or Main Road properties, the golf course land or on the boundary between each such individual property and the golf course. In all instances (with the possible exception of the three pockets of land that are the property of the Respondent and are zoned public open space) compliance with the court order will entail that the fencing will have to be erected on the property of individuals or entities that are not party to these proceedings.
- 5.13 In addition, certain buildings and structures which have been erected on Main Road properties are situated very close to the golf course boundary. Should this Honourable Court grant the relief sought by the Applicants, the fence will have to be erected in close proximity of these structures and buildings. In certain instances this will result in the structures and buildings being virtually propped up against the fence. The owners of the properties concerned, however, are not before court and have

not been afforded an opportunity to oppose the relief sought by the Applicants.

- 5.14 The Hermanus Heights properties are located in an area known as Hermanus Extension No 9 - an area in respect of which special building regulations have been promulgated in terms of the Respondent's zoning scheme regulations during or about 1987. In this regard I annex hereto, marked "ARK6", a copy of a notice in terms of Section 9(2) of the Land Use Planning Ordinance 15 of 1985 (C) (hereinafter "LUPO") in which it is made clear that the following special provision applies in respect of the fencing of Hermanus Heights properties which abut the golf course land:

"8(d) All boundary and garden walls shall be constructed of plastered brickwork painted white, or timber fencing painted white, or nylon coated wire fencing. Where even abut the golf course, only nylon coated wire fencing shall be permitted on that boundary".

- 5.15 It is submitted that the order sought by the Applicants, if implemented, will effectively mean that the special zoning provisions, which have clearly been imposed for the creation and retention of the specific character of the area, will be frustrated. What is of special significance in the context of the aspect under discussion, is that the owners of the properties



concerned – in whose collective interest the regulation was promulgated to begin with – are not before court to protect their vested interests.

5.16 As is evident from the founding affidavit, the Applicants seek to rely on clause 8.1 of the estate rules, which records that the "Estate" is fully protected by electrified fencing. If one bears in mind that the golf course land does not form part of the Fernkloof Estate, it stands to reason that if clause 8.1 creates an obligation to fence in the entire Fernkloof Estate, this involves fencing each of the separate precincts constituting the estate but it does not extend to fencing any sections of the golf course itself. Under the circumstances each and every owner of property in the various precincts (who, up to now, has enjoyed open frontage to the golf course land) has a real and substantial interest in the outcome of this application.

6. For all of the foregoing reasons I submit that the Hermanus Golf Club, the 58 owners of Hermanus Heights and Main Road properties as well as the owners of properties which comprise the Fernkloof Estate have a vital interest in the outcome of the proceedings and ought to have been joined.

2-9/10

SECOND POINT IN LIMINE - THE APPLICANTS' CLAIMS HAVE
PRESCRIBED

7. As the Applicants clearly seek final relief on motion, it should, as a point of departure, be borne in mind that they can only succeed if the facts stated by the Respondent, together with the admitted facts in the Applicants' affidavits, justify the relief sought.
8. The respective Applicants seek to enforce contractual rights against the Respondent arising out of deeds of sale which they entered into with the Respondent and pursuant whereunto the erven in the Fernkloof Estate were transferred to them.
9. As is evident from the deed of sale which had been concluded by the Kleynhans Family Trust (Annexure "B" to the founding papers), the sale was concluded on 22 November 2005, being the date upon which Mr. J Koekemoer, the Municipal Manager, signed the agreement on behalf of the Respondent. Although the Third, Fourth and Fifth Applicants have not bothered to annex the deeds of sale by means of which they acquired their respective properties, I confirm that Mr. Koekemoer signed all the agreements concerned (the terms of which were in every material respect identical to Annexure "B" to the affidavit of Mr. Kleynhans) on the same day. In the premises all the agreements concerned were finally concluded on 22 November 2005.
10. The Applicant's application, however, was only issued on 27 June 2011 by the Registrar of this Honourable Court - that is some 5½ years after

R. G. M.

the conclusion of the agreements in question. (The precise date on which the papers were served on the Respondent could not be ascertained – for purposes hereof it is accepted that the date of service coincided with the date on which the application was issued by the Registrar).

11. Section 12(1) of the Prescription Act provides that prescription shall commence to run as soon as "*the debt is due*". In terms of Section 12(3) of the Act a debt is not deemed to become due until the creditor has knowledge both of the identity of the debtor and of the facts from which the debt arises – provided, however, that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care.
12. Thus, if the date on which the three-year prescription period commenced running, was before 27 June 2008 (the latter date being exactly three years prior to the date of institution of the present application), then any claims which the Applicants may have had against the Respondent would have become prescribed.
13. In essence that means that if the evidence shows that the Applicants had acquired the actual or deemed knowledge required by section 12 of the Act before 27 June 2008, the special defence of prescription should be upheld by this Honourable Court.
14. According to the Applicants the deeds of sale which they concluded with the Respondent are the *fons et origo* of the obligation on the part

of the Respondent to cause the Fernkloof Estate to be "fully protected by electrified fencing designed to prevent unauthorised access". It is also clear that it is the Applicants' case that they, since the date upon which the agreements were concluded, were aware of the fact that the obligation to do so was cast upon the Respondent.

15. That the Respondent had no intention of erecting a fence along the boundary of the golf course land was made clear to the prospective purchasers before the agreements of sale were signed by them. In this regard I refer to the fact that the Respondent issued a Boundary Structures Key Plan 201 during August 2004 on which it was expressly indicated that the areas to which the Applicants' application pertain would not be fenced, but would be dealt with on the basis of agreement between the owners of the affected properties and the golf course properties (i.e. Hermanus Golf Club) and that open frontage was the preferred option, subject to satisfactory security measures. A copy of this plan, reduced to fit size A3 paper, is annexed hereto, marked "ARK7". (I have been advised that a copy of the full scale plan, size A0, will be made available to this Honourable Court at the hearing of the matter). I will again deal with the status of the Boundary Structures Key Plan and the fact that the detail thereof was disclosed to prospective buyers prior to the sale of the properties concerned. To the extent that it may be necessary to do so, I request the Honourable Court to also have regard thereto when considering the question of prescription.



16. The Applicants therefore would have acquired the right to pursue their respective claims (for specific performance - the erection of an electrified fence) by way of court action on the date when their agreements were signed for and on behalf of the Respondent. To put it differently, by 22 November 2005 the entire set of facts which the Applicants, as claimants, must be able to prove in order to succeed with their claim for specific performance against the Respondent, was in place.
17. In the alternative to the above and only in the event of it being held that the debt did not become due on 22 November 2005, it is in any event submitted that by the end of February 2008 the Applicants knew that the Respondent maintained that it was not contractually bound to erect a fence in front of existing properties that had open frontage onto the golf course land.
- 17.1 In this regard I annex hereto, marked "ARK8" a copy of a letter dated 31 January 2008, which was addressed by Messrs Rabcav (speaking on behalf of the Respondent) to the Chairman: Development Committee of the Hermanus Golf Club (who happened to be the late Mr. J.A. "Hannes" Kleynhans - the father of the First Applicant and the sole director of the Third Applicant at the time), and which was copied to the chairmen of the home owners associations of the various precincts of the Fernkloof Estate.

- 17.2 The Respondent's stance in the aforesaid regard was reaffirmed in a follow-up letter to the said committee (which letter was yet again copied to the chairmen of the home owners associations) dated 25 February 2008. In this letter, a copy of which is annexed hereto, marked "ARK9", Mr. Green of Rabcav articulated the stance adopted by Rabcav and the Respondent as follows:

"Having reconsidered all the historical documentation concerning the Femkloof Estate we wish to reaffirm our position expressed at the meeting, that neither Rabcav nor the Municipality has an obligation to the club to erect a fence on the golf course boundary in front of the existing Hermanus Heights and Main Road properties.

In addition, there is no obligation to any of the purchasers to erect such fence."

- 17.3 It is in the premises submitted that by the end of February 2008 the Applicants knew, alternatively, ought to have known, had they exercised reasonable care, that the Respondent disputed the fact that it was contractually bound to erect the fences concerned. The Applicants must therefore, by reason of the provisions of section 12(3) of the Act, be deemed to have had such knowledge by that date.

- 17.4 The Applicants, on a best-case scenario for them, therefore acquired a complete cause of action for the recovery of the debt by the end of February 2008, some 4 months prior to 27 June 2008 (and 3 years and 4 months before the application was served on the Respondent).
18. I, in the premises, submit that the Applicants' claims for specific performance of the deeds of sale have prescribed.

DEFENCE ON THE MERITS

19. The Respondent maintains that the agreements of sale which had been concluded with the purchasers of erven in the Fernkloof Estate did not give rise to a contractual obligation on its part to provide the additional fencing which the Applicants are contending for.
20. For the reasons set out in the rest of this affidavit the Respondent, therefore, opposes the application.
21. I have been advised that, in order to enable this Honourable Court to fully appreciate the contextual background giving rise to the agreements of sale, it would be necessary to at the outset refer to certain of the conditions on which the authority to subdivide and develop the property concerned had been obtained. (It should also be borne in mind that the agreements of sale (standard conditions), in clause 11.3 thereof, expressly stipulate that the properties concerned were sold subject to all existing conditions of title, the conditions of

approval and "any further conditions which the competent authorities may impose with the approval of the subdivision of the land comprising the development and/or the subdivision of the property").

22. The authorisation for the development of the Fernkloof Estate and the extension of the golf course which was granted in terms of the Environment Conservation Act 73 of 1989 was contained in a record of decision dated 11 July 2002 (hereinafter "record of decision"). This was followed by an approval from the Department of Environmental Affairs and Development Planning (*the Department*) of the rezoning and subdivision of the relevant properties given in terms of Chapters II and III of LUPO (hereinafter "Lupo Approvals"). The LUPO approvals (which followed on appeals) were recorded in a letter from the Department dated 30 September 2003. Copies of the aforesaid approvals are annexed hereto, marked Annexure "ARK10" and "ARK11" respectively.

22.1 As far as the record of decision is concerned, its conditions of authorisation do not address the question of fencing. Condition 7 provides, however, that public access to Fernkloof must not be restricted by the development. For the rest, the conditions imposed no obligation on the owner of the land to construct any fencing at all.

22.2 The Lupo approvals, in condition 4.8 thereof, provided that the type of fencing for the golf course and open spaces should be as unobtrusive as possible, to the satisfaction of the

Respondent. It was to be of such a nature that the movement of small creatures was not restricted. Condition 16.2 of the record of decision requires the developer to address the "[D]esign, colour and placement of the surrounding fence around the activity and around particular precincts. It is important that the local fauna are able to cross the fence line between the activity and the Fernkloof Nature Reserve".

- 22.3 In terms of condition 4.16 of the Lupo approvals a network of pedestrian footpaths/boardwalks providing access for the general public to the golf course land were incorporated into the Boundary Structures Key Plan 201 ("ARK7"), so as to link the western and southern residential areas to Fernkloof Road and to the Fernkloof nature Reserve. Access control measures were to be workshopped with the Hermanus Golf Club and the surrounding public when detailed planning took place.
- 22.4 The approved site development plan, a copy of which is annexed hereto, marked "ARK12", also did not provide for the erection of the fencing now in issue.
23. I turn to the individual paragraphs of the founding affidavit in this matter as deposed to by Mr. Marius Kleynhans.



~~286~~
~~287~~
288

AD PARAGRAPHS 1 TO 11

24. As has already been pointed out above, Mr. Marius Kleynhans is the son of the late Mr. Hannes Kleynhans, who chaired the Development Committee of the Hermanus Golf Club (hereinafter "the Committee") during or about 2007 to 2008. Mr. Hannes Kleynhans was also the President of the Golf Club at the time. Mr. Hannes Kleynhans was intimately involved with the development on behalf of the Hermanus Golf Club since early 2000 until his untimely death during or about 2009.
25. I note that Mr. Marius Kleynhans in his founding affidavit failed to disclose the fact that he is also a director of Cornercade (Pty) Ltd (the Third Applicant). In this regard I annex hereto, marked "ARK13" a copy of an extract from the records of the Companies and Intellectual Property Commission wherein it is recorded that Mr. Marius Kleynhans and Ms. Minette Kleynhans were appointed as directors of the Third Applicant on 16 October 2009. As is also evident from this document, the late Mr. Hannes Kleynhans was the sole director of the company at the time when the Third Applicant concluded the agreement of sale which forms the subject matter of these proceedings with the Respondent.
26. The late Mr. Hannes Kleynhans (as President of the Hermanus Golf Club and Chairman of the Committee) was intimately involved in the planning phases of the development and, to the extent that it may be



necessary to do so, I deny that he could have been under any misapprehension about the fact that the deed of sale which he concluded on behalf of the Third Applicant was never intended to create a contractual obligation on the part of the Respondent to fence out the Hermanus Heights and Main Road properties, as is now contended by the Applicants.

27. It has been brought to my attention that the Third Applicant has alienated Erf 10131 since Mr. Marius Kleynhans and Ms Minette Kleynhans have deposed to their affidavits. Registration of transfer of the property in the name of Kalani Investments (Pty) Ltd was effected on 15 November 2011. I attach hereto marked "ARK14" a copy of a deeds search report confirming the date of transfer. I, in the premises deny that the Third Applicant still has any interest in this litigation.
28. For purposes of the adjudication of the second point *in limine* raised hereinabove and for reasons that will become apparent in due course, it is necessary to point out that Mr. Marius Kleynhans, through a close corporation, carries on business as an estate agent under the name and style of Fernkloof Properties (formerly Fernkloof Estate Properties). During or about 2004 and more importantly, at the time of the conclusion of the agreements of sale of the Fernkloof Estate properties in question, he traded as Voëlklip Properties.
29. What is of particular relevance, is that Mr. Marius Kleynhans at the time also formed part of the co-ordinated sales team (to which Pam Golding

Properties was appointed as lead agent) of the Fernkloof Estate project.

29.1 That this is so is, *inter alia*, confirmed by a letter addressed by Mr. Marius Kleynhans to Rabcav on 18 February 2004, a copy of which is annexed hereto, marked "ARK15".

29.2 The involvement of Mr. Kleynhans/Voëklip Properties in the marketing phase of the development is further evidenced by the list of participating marketing agents (on which the contact details of Mr. Marius Kleynhans appear) and a letter addressed to him and his agency by Rabcav on 24 November 2004, copies of which are annexed hereto, marked "ARK16" and "RK17" respectively.

30. It should be made clear at this juncture that the Respondent takes issue with the general assertion by Mr. Marius Kleynhans that he had been lead to believe, through promotional material or the pre-sale advertising campaign and representations which had been made prior to the conclusion of the deed of sale, that the entire golf course would be *"surrounded by electrified fencing so as to prevent unauthorised entry to the estate"*.

31. Apart from the fact that in the deed of sale which Mr. Kleynhans concluded on behalf of his family trust he expressly contractually precluded his trust from relying on any representation allegedly made by the Respondent, he in his affidavit conveniently ignores certain

material facts which fly in the face of the case which he seeks to promote.

32. The imposition of the aforesaid detailed conditions for environmental and planning approval for the Fernkloof Estate development was preceded by widespread opposition to the development from existing residents and interested and affected parties. The golf course was to be extended onto open municipal land which had previously been accessible to members of the public and there was a particular concern that this amenity should not be unnecessarily interfered with.
33. The suggestion that the entire golf course should be fenced in was at the time seriously opposed by owners of existing surrounding properties. Hermanus generally (and the area in particular) was not characterised by properties with intrusive and extensive security such as high walls and electric fencing and the sentiment was that, where possible, such character was to be maintained.
34. Existing homes in the Hermanus Heights and Main Road areas had historically enjoyed open frontage onto the golf course land. Similarly, certain of the new properties to be constructed were also to have open frontage onto the golf course land. A yet further category of properties comprised existing properties which were not adjacent to the golf course land, but which had previously enjoyed uninterrupted views over the golf course, the wetlands or open space. Quite apart from

[Handwritten signature]

these, the nature reserve component of the development also had to be catered for.

35. It therefore soon became clear that different external boundary conditions required different treatment. (The planning and environmental approvals, which have been dealt with above, also had a role to play).
36. After much deliberation during the planning stage, it was eventually resolved that the existing property owners that previously enjoyed open frontage onto the golf course land (who at that stage made it clear they would object to the development in the event of them being fenced out) should be accommodated and that no fence would be erected on the boundary between their properties and the golf course land, subject to acceptable security arrangements on their part.
37. This resulted in the "*Boundary Structures Key Plan*", Annexure "ARK7" which was workshopped with the Hermanus Heritage Committee and was accepted by the Respondent during or about August 2004 and approved for building purposes on 7 March 2006. A copy of this plan was also submitted to the Hermanus Golf Club during 2004. On this plan the various ways in which boundary conditions were to be treated are indicated.
38. What is of particular importance for purposes of these proceedings, is that the boundary-areas of the golf course land which are targeted by the relief sought by the Applicants were clearly demarcated and

identified on the plan (by means of distinctive markings - comprising a horizontal line with vertical lines in close proximity drawn through it). It was also expressly indicated that these areas would be dealt with on the basis of agreement with the owners, and that open frontage was the preferred option. This is recorded thus on the plan itself:

"By mutual agreement by owners open frontage is first option as long as integrity of security is maintained to satisfaction of house owners / golf course owners."

39. It is also significant to note that the detail of the design and make-up of the different types of fences that were due to be built and erected at various locations along the perimeters of the golf course land and Fernkloof Estate are also reflected on the plan. Even a cursory glance at the plan would have alerted any interested party to the fact that the plan did not incorporate any design for a fence which was supposed to be erected along the boundaries of the Hermanus Heights and Main Road properties.
40. This (in framed form) formed part of the marketing material used to market the development in November and December 2004. According to Mr. Green it was thereafter on permanent display in the Sales and Information Centre of the Fernkloof Estate until the centre was destroyed during or about 2007 by strong winds.
41. As I have stated above, Mr. Marius Kleynhans actively participated in the marketing process as a marketing agent and it defies belief that he

would have been unaware of the fact that the plan made it quite clear that there was no intention on the part of the Respondent (as seller and developer) to fence out the Hermanus Heights and Main Road properties.

42. Save for the foregoing, and save to deny that the affidavit of Mr. Kleynhans is true and correct in the respects in which it differs from what is stated in the Respondent's opposing affidavits, the Respondent admits the contents of these paragraphs.

AD PARAGRAPHS 12 TO 15

43. I deny that the agreements in question cast an obligation on the Respondent to erect the fence as alleged herein.
44. I will deal with the provisions of the deed of sale more fully below, but wish to point out that it is the Respondent's case that the sale agreement itself does not embody a contractual obligation or undertaking – in the form of an enforceable promise - on the part of the Respondent to fence off the entire golf course and/or the entire Fernkloof Estate.
45. The Applicants' reliance on the provisions of the "Estate Rules" which are annexed to the agreement of sale (wherein it is stated that the estate is fully protected by electrified fencing that is designed to prevent unauthorised access to the estate) is misplaced. The set of rules which were annexed to the agreement of sale was intended to be

2008
2000
294

29/10

a mere specimen of the estate rules which would be imposed *in futuro* and was in any event subject to amendment and revision. I, in the premises, deny that the estate rules annexed to the agreements of sale were intended to create contractual obligations between them (*qua* developer/seller and purchaser).

46. The Respondent has already performed whatever contractual obligations it had in respect of providing fencing to the Fernkloof Estate and I, in the premises, deny that there are unfulfilled obligations as contended by the Applicants. The Respondent therefore disputes the Applicants' entitlement to the relief sought in the Notice of Motion.

AD PARAGRAPH 16

47. I have already dealt with the effect that the relief which the Applicants seek will have on the owners of the golf course land, the Hermanus Heights and Main Road properties as well as the Fernkloof Estate properties. To the extent that Annexure "A" serves to identify the affected properties and indicate the position of the fence, it is admitted.

AD PARAGRAPHS 17 TO 29 (PROVISIONALLY)

48. It is evident that the Applicants seek to enforce the agreements of sale as they stand. I have been advised and verily believe that much (if not all) of what is stated in these paragraphs is irrelevant to the true issue, namely whether the agreements of sale indeed contained a provision such as the one contended by the Applicants.

49. I have been advised that (particularly in the light also of the fact that there is no claim for rectification of the deeds of sale) evidence concerning the intention of the parties, their prior negotiations and discussions and what they understood certain references in the contract (and contained in promotional material) to mean, is inadmissible. This evidence, so I have been advised, is also not admissible as "context".
50. I have, in the premises, been advised to at this juncture first deal with the terms of the agreement of sale. Once I have done so I will again revert to the contents of these paragraphs, to the extent that it may be necessary to do so.

AD PARAGRAPHS 30 TO 41

51. Save to point out that Mr. Marius Kleynhans was actively involved in the process as a marketing agent, the Respondent does not take issue with the description of the process that led to the conclusion of the agreements of sale, as contained in paragraphs 30 to 34 of the affidavit of Mr. Marius Kleynhans. It is also admitted that Annexure "C" is a copy of the deed of sale that had been signed by Mr. Kleynhans on behalf of the Kleynhans Family Trust.
52. That the parties to the agreement concerned intended the deed of sale to be the sole memorial of the terms of the transaction is borne out by the provisions of Clause 19. Clause 19.1 amounts to a non-variation

clause, whereby the provisions of the contract are entrenched against oral or tacit variation, Clause 19.2 reads as follows:

"19.2. This document contains the entire agreement between the parties and no party shall be bound by any undertakings, representations, warranties, promises or the like not recorded in this agreement."

53. Relying on clause 1.2 of the signature document and clause 1.4 of the standard conditions of sale, the Applicants contend that clauses 8.1 and 8.2 of the estate rules oblige the Respondent to construct the fence. These clauses read as follows:

"8.1 A central feature to the quality of life at the Fernkloof Estate is security. The Estate is fully protected by electrified fencing that is designed to prevent unauthorised access to the Estate.

8.2. An important element of a secure lifestyle is that of prevention and deterrence ..."

54. The estate rules and the fact that those rules are annexed to the deeds of sale must be viewed in its proper context.

54.1 To begin with, the only references in the body of the agreements of sale to the "estate rules" are the following:

54.1.1 The reference at the beginning of the standard conditions of sale to the estate rules being an annexure;

54.1.2 Clause 14.2 of the standard conditions of sale which states that the purchaser shall not be entitled to display notices or advertising signs on the property without the prior written consent of the property owners association.

54.2 The standard conditions of sale oblige property owners to become members of the relevant precinct property owners association with such obligation being recorded as a title deed condition. Clauses 8.4 to 8.7 of the standard terms provide as follows in this regard:

"8.4 The Purchaser shall become a member of the POA upon transfer of the property into the name of the Purchaser, and agrees to remain a member for as long as the Purchaser is the registered owner of the property.

8.4. The Purchaser agrees that a title deed condition shall be registered against the property

8.5. The constitution of the POA is included in the contract documents.

8.6. The Purchaser warrants and undertakes that he or she shall take all such steps which are necessary to familiarise himself or herself with the constitution as amended from time to time and any regulations and resolutions passed by the POA from time to time.'

54.3 Provision is also made for obligatory membership for certain parties of the Fernkloof Master Property Owners Association. Property owners who are obliged to become members of a precinct property owners association are not in turn required to be members of the master property owners association (in this connection, each precinct property owners association is itself a member of the master property owners association).

54.4 The constitution of the precinct property owners association (where convenient "*the association*") defines estate rules to mean *'the rules imposed by the developer or the trustees from time to time relating to the management of the development'*. The constitution of the master property owners association does not refer to estate rules, but its definition of "*rules*" is the same as the "*estate rules*" definition contained in the precinct property owners association constitution.

54.5 Clause 15 of the constitution of the precinct property owners association deals further with the estate rules, as follows:

"15.1. The trustees and/or the developer may from time to time, but shall not be obliged to do so, make rules relating to the management of the development, all of which rules shall be binding on the members.

15.2. The trustees are empowered to amend, amplify, substitute or repeal any such rule ..."



- 54.6 It is important to note that at the time of the conclusion of the sale neither of the two types of property owners associations to which reference is made in the deeds of sale was in existence. The estate rules were at the time also not imposed in terms of clause 15.1 either by the trustees or the developer. Annexure "G" to the deed of sale was therefore intended to be nothing more than a specimen of the estate rules which would be imposed in the future.
55. The nature of the estate rules must also be borne in mind. They are intended to be binding provisions which are enforceable (if and when they come into operation) by the association against its members and by the members *inter se*.
- 55.1 Given that the estate rules are intended to be akin to conduct rules, enforceable against members by the association, one would not expect the rules to house contractual obligations of the developer, and in particular a term such as that now relied on by the Applicants.
- 55.2 The estate rules form what may be described as a living document, subject to amendment and revision. This is a further reason why one would not expect the purchaser and the seller to locate an important term of the sale in rules subject to possible future amendment.



55.3 Clauses 8.4 to 8.7 of the standard terms (set out above) emphasise that the constitution is a living document subject to amendment and that it is included in the contract documents in order for the purchaser to familiarise himself or herself with the contents thereof. The contents do not, *per se*, and cannot be expected to, include contractual terms binding on the purchaser and the seller.

55.4 Similarly, it is submitted that the estate rules were not intended to create binding contractual obligations on the part of the developer. As is the case with the constitution, the rules were annexed not to create additional contractual obligations between the purchaser and seller, but rather for the information of the purchaser. Accordingly, the content of the constitution and the estate rules does not provide a body of further or supplementary contractual terms.

55.5 In fact, the only contractual provisions of significance as far as both the constitution and the estate rules are concerned, are those contained in clauses 8.4 and 8.5 of the standard terms, which serve to establish the binding force of the constitution and the rules.

55.6 Not only does the fact that clause 8.1 is contained in the estate rules count against the contention of the Applicants, the manner and form in which it is framed further detracts from the

u
GMS

Applicants' claim that it constitutes a contractual term. On the face of it, it appears to constitute no more than a recordal or commendation emphasising the security benefits of estate living, as opposed to an operative provision of the contract. As such, it does not, so I am advised, qualify as a contractual undertaking or warranty.

55.7 The wording of clause 8.1 also does not go as far as the Applicants would have it. That the estate is "*fully protected*" does not equate to the estate being fenced in its entirety. What is being recorded is clearly not the extent of the fencing but the adequacy of the protection.

55.8 I furthermore reiterate that the estate is not to be conflated with the golf course. If clause 8.1 creates an obligation to fence the entire estate (which is denied to be the case) this involves the fencing of the precincts constituting the Fernkloof Estate, not the entire golf course land.

56. The Applicants' reliance on the plan, annexure "A" to the standard conditions of sale, for its contention that the entire golf course is included in or forms part of the Fernkloof Estate, is, to say the least, contrived and baseless. This plan clearly was not intended to circumscribe the subject-matter of the sale or the Fernkloof Estate development in any detail. (The plan itself in any event does not

stipulate that a fence was to be erected along the perimeter which is indicated thereon by the broken line).

57. That the plan was not intended to be anything more than a general indication of where the land (the individual erven – as identified in the signature document) that formed the subject-matter of the sale was located in the bigger scheme of the development, is indicated by the notes which appear on the plan itself, unequivocally recording that "*all areas and dimensions*" were to be confirmed by a registered land surveyor.
58. I again point out that the Fernkloof Estate development was defined in clause 1.1.7 of the standard conditions of sale as meaning "*collectively the property developments on the land known as 'Fernkloof Estate' situate at the Hermanus golf course*". This definition makes it quite clear that the development comprises the precincts as a group. The fact that the development did not cover or include golf course land was made clear by the use of the preposition "*at*" in the definition. The plan, so it is submitted, cannot trump the clear description contained in the body of the agreement itself.
59. I will now revert to the remainder of the paragraphs of the affidavit of Mr. Kleynhans.



AD PARAGRAPH 17, AS WELL AS PARAGRAPHS 29, 59, 60, 61, 62 & 63

60. I deny that the precinct in which the property of the Kleynhans Family Trust is located (Precinct 2) has been rendered "*vulnerable*" as a result of the failure of the Respondent to perform its contractual obligations. It is also submitted that the fact that Mr Marius Kleynhans and his family have been victimised by one alleged incident of crime, cannot be ascribed or attributed to the fact that no security fence has been erected along the boundary of the golf course land and the affected Hermanus Heights and main Road properties.
61. The development was never envisaged as a high security node and it was always made clear that members of the public would continue to have access to the golf course land. This, together with the conditions of approval, the differing boundary conditions, the nature of the fencing planned, the planned public access points and the requirement that the development had to be in line with the general character of the area, would have made the creation of a high security development practically impossible.
62. As is evident from the Boundary Structures Key Plan, Annexure "ARK7", no provision was originally made for the installation of electrified fencing. The decision to install electrified fencing followed upon a request by interested and affected parties and was primarily intended as a baboon deterrent.



63. In the aforesaid regard it is submitted that there are in any event numerous factors, other than the absence of a fence along the boundaries of the golf course land with the Hermanus Heights and Main Road boundaries, to which the incidence of crime in the area where Mr Kleynhans resides can be ascribed. The following factors, while not exhaustive, impact directly on the ease with which outsiders can gain access to the golf course land (and due to the fact that there are no fences between the houses in the precincts and the golf course land – also to the properties of the Applicants) and are relevant to the security issue as raised by the Applicants:

63.1 The club house and the parking area for members and visitors are situated in the vicinity of the Main Road properties. Access to the club house and the parking area is gained via a sliding gate which is opened in the mornings and closed at night. I attach hereto a photograph of the open gate and entrance guard house, marked "ARK18". This guard house is not manned on a continuous basis, but a roaming guard is employed to patrol the outer perimeters of the clubhouse and the parking area, when the gate is open. At night, when the last employee/guest leaves the premises, the gate is locked and is again unlocked the next morning when the first employee arrives. In my experience anyone can drive through the gate onto the parking area virtually unchallenged. (There, for instance, is no procedure in place whereby visitors are required to sign in or provide their personal details or proof of membership before being allowed onto the



premises). The club house and the parking area are not fenced off and once on the premises, the precincts which enjoy open frontage onto the golf course land can easily be accessed during times when the roaming guard is doing his rounds away from the gate.

- 63.2 Precinct 2 is situated along Fairways Avenue, at the western boundary of the golf course land and is one of the smaller precincts in the Fernkloof Estate. Precinct 1, which is situated right next to Precinct 2, consists of 6 erven, each with street access directly off Fairways Avenue. All of these erven enjoy open frontage onto the golf course land and once entry is gained via any one of them there is nothing that prevents access being gained to the property of the Kleynhans Family Trust. It is essentially left to the individual property-owners of this precinct to exercise access control by ensuring that their individual access gates are in a working condition and properly closed. This is comparable with the security arrangement that is in place at the Hermanus Heights and Main Road properties, where the property owners were called upon to secure their own street and lateral boundaries with walls or fences, thus rendering the golf course land secure from outside access from that side.

- 63.3 With the exception of Precinct 1, Precinct 2 is the only precinct of the Fernkloof Estate which does not employ a 24 hour security guard service to guard and control the entrance to the



precinct. The security guard service for Precinct 2 is limited to 12 hours a day (daytime only).

- 63.4 The sliding gates situated at the entrance to Precinct 2 were clearly not designed to keep intruders out, thus rendering the precinct vulnerable at the times when the gates are unattended by security guards. As can be seen on the photograph of the gates in question, a copy of which is annexed hereto, marked "ARK19", the gates consist of horizontal wooden slats fitted onto metal frames at intervals, creating a step-ladder effect, and are not fitted with electrified fencing on the top.
- 63.5 In terms of the record of decision, the golf course land has to remain accessible to members of the public. As such, the development was never meant to be impregnable or completely out of bounds to members of the public.
- 63.6 In order to comply with the Lupo approvals, the golf course perimeter fence was fitted with a number of pedestrian gates. In total there are 5 such gates. As can be seen on the photograph annexed hereto marked "ARK20", one such pedestrian gate, which allows access to the golf course from Fairways Avenue, is situated only a few metres from the boundary of the property of the Kleynhans Family Trust in Precinct 2, adjoining the wetlands area.

gms
u

- 63.7 Although the pedestrian gates are kept locked, members of the public may apply for access (key) discs from the Hermanus Golf Club against payment of an amount of R100.00.
- 63.8 In the latter regard I annex hereto, marked "ARK21", a copy of a document setting out the terms and conditions upon which these disks are issued. As is made clear herein, the disc holders are entitled to use the golf course for recreational walking or jogging – especially in the early morning and late afternoon (outside of normal golfing hours).
- 63.9 Once the discs have been issued, however, the Golf Club effectively has no means, other than to rely on the integrity of the registered disc holder, to ensure that they are not abused or fall into the hands of miscreants.
- 63.10 In Precinct 1 there is a strip of land containing 4 masonry washing troughs which had apparently been used by local people in the pre-washing machine era.
- 63.11 As these washing troughs were regarded as having some historical significance, the site was excluded from the development. Although the site is fenced in by the perimeter fence that runs along Fairways Avenue, a pedestrian gate was placed in the fence in order to provide public access to the washing troughs. A copy of a photograph depicting the gate and

[Handwritten signature]

the washing troughs in the background is annexed hereto, marked "ARK22".

63.12 Unlike the other pedestrian gates, the gate to the washing troughs was, however, not fitted with a locking device that allows it to be opened with an access disc. In the result, the gate remained unlocked. The site (which is not fenced off on the golf course side) therefore remained readily accessible to members of the public at any time of the day or night. This situation only changed after the last three break-ins on the northern boundary during May 2010 (as reflected in Annexure "N" to the founding papers) when Mr Roydon Pybus, the then (and current) captain of the Hermanus Golf Club, Hermanus Heights property owner, as well as Fernkloof Estate property owner, caused the pedestrian gate to be fitted with a lock. The key to the lock is available at the Hermanus Golf Club reception, should a member of the public wish to visit the site, but to date nobody has ever requested the key from the Hermanus Golf Club.

64. It is noted that the information pertaining to break-ins which is contained in Annexure "N" to the founding papers relate to break-ins that are alleged to have occurred during the period 15 July 2009 to 17 May 2010 – being at a time when the gate to the washing troughs was not locked. It is also noted that it is not stated in the document precisely how and from where the burglars are alleged to have gained access to the properties concerned. Nine of the properties concerned

[Handwritten signature]

(those identified as "N-boundary") are Hermanus Heights properties and have street access. There is nothing to suggest that the burglars gained access to those premises from the golf-course side thereof. To the contrary, the statistics recorded in Annexure "N" show that houses situated within the precincts of Fernkloof Estate are less prone to burglary than those with street frontage (such as those on the northern boundary).

65. The information contained in Annexure "N" certainly does not suggest that any of the burglaries could have been prevented had the fence as contended for by the Applicants been in place. The Respondent, in the premises, denies the assertion by Mr. Marius Kleynhans that any of the crimes (including the house-breaking that occurred at the premises of the Kleynhans Family Trust) was *"as a direct result of the un-secure perimeter of the Fernkloof Estate"*. This allegation is based on speculation on his part and has clearly been included in these papers for the sake of creating atmosphere. It is significant to note that the property of the Kleynhans Family Trust was at the time not fitted with an alarm, despite Mr Kleynhans claiming in paragraph 62 of his founding affidavit that the security of his home *"... where my wife and children live is of the utmost importance and my highest priority."*
66. It is, however, also to be noted that on the website (www.fernkloofproperties.com) of Fernkloof Properties, the estate agency which is controlled by Mr. Marius Kleynhans, the attractions of the Fernkloof Estate are, in current terms, described thus:

"The estate is surrounded by magnificent mountains and incredible natural scenery and is situated in the quiet suburb of Eastcliff. With 24 hour security ensuring privacy and only five minutes from the centre of Hermanus, Fernkloof Estate is the ideal place to raise a family, go on holiday or spend your golden years in peace and tranquility."

67. It is impossible to see how the description of the security situation as it pertains to the Fernkloof Estate, as contained in the Applicants' founding papers can be reconciled with the views expressed in this advertisement. If anything, the very discrepancy between the description on the website and the allegedly compromised security complained of by the Applicants in their founding affidavits, demonstrates the dangers inherent in relying absolutely on mere promotional material.
68. Save for the foregoing, the Respondent denies the allegations contained herein.

AD PARAGRAPHS 18 & 19

69. Subject to what has been stated hereinabove, the Respondent admits the allegations herein. I, however, again reiterate that the Fernkloof Estate does not extend to golf course land.

AD PARAGRAPHS 20, 21, 22, 23, AS WELL AS PARAGRAPHS 43, 44, 45, 46, 47, 48, 49, 50 & 51

70. The allegations contained in these paragraphs pertain to representations that had allegedly been made to the Applicants prior to the conclusion of the deeds of sale. In terms of the express provisions of the deeds of sale which had been concluded by the respective Applicants each one of them is contractually precluded from relying on any representation allegedly made. I again emphasise that the Applicants' collective case is not that the terms of the agreements of sale do not reflect the true agreement that had been concluded. There is no claim for rectification of the deeds of sale in question.
71. I, in the premises, repeat what I have said in paragraph 49 above and maintain that the contents of the paragraphs under discussion fall to be struck out. I have been advised that this aspect will be dealt with at the hearing of the matter. To the extent that I proceed to deal with the allegations herein, I do so under protest.
72. I repeat that Mr. Marius Kleynhans was a participating marketing agent and denies that he, at the time when the deed of sale was signed for or on behalf of his family trust, was not fully conversant with the fact that the Hermanus Heights and Main Street properties were not going to be fenced out, as explained in more detail above.
73. To the extent that Mr. Kleynhans seeks to rely on advertisements and promotional material wherein reference is made to "a secure



environment or *security* of the Fernkloof Estate, I deny that this material was in any way misleading or that a duty to erect a fence along non-estate boundaries are thereby imposed on the Respondent. What precisely amounts to or resorts under *"a secure environment"* or *security* is not capable of easy or exact definition. It certainly does not by necessity imply the involvement of electrified fences, as the Applicants seem to suggest.

74. It should also be noted that all the material relate to the pre-sale period. The initial communications (those referred to in paragraphs 43 and 44 respectively), in particular, relate to a period when the concept of the development was in embryo form and were made during the planning stage before much of the detail had been finalised. I again refer to the fact that the authority to rezone and subdivide the property concerned was only finally obtained on 30 September 2003.

75. The Applicants' reliance on the contents of the *"Memorandum of Understanding"* of 24 November 2003 (in paragraph 45 of the affidavit of Mr. Marius Kleynhans) is, to say the least, opportunistic.

75.1 That the contents of the memorandum should be viewed in its context, is expressly provided for in clause 23 thereof, which reads as follows:

"The record of the meeting held with the Hermanus Golf Club Development Committee at Fancourt on 11 November 2003 is to be read in conjunction with this MOU".

75.2 On that date representatives of the Rabcav and members of the Committee met at Fancourt Golf Estate, George. Minutes of this meeting were taken and were distributed by Rabcav and the Committee, the minutes of the latter being signed by both parties.

75.3 The minutes taken by the Committee, a copy of which is annexed hereto, marked "ARK23", record the following:

"The fence to be erected around the course must be a see-through fence.

Mr Viljoen said that the fence would be built right around the Estate, some 6 kilometres of fence. He went on to say that they would look at a similar fence to that of Fancourt or Steenberg, with brick pillars and palisade metal fencing. The existing home owners in Hermanus Heights to be approached individually, to arrange fencing of their properties.

75.4 The minutes taken by Rabcav, a copy of which is annexed hereto, marked "ARK24", are to the following effect:

"Fence around the golf course

It was confirmed that the entire golf course and estate would be fenced using a combination of solid wall with palisade infill panels, and palisade only sections. The palisade fence would

generally be used where the estate interfaced with existing residential properties.

Fencing around the outer perimeter.

LV confirmed that the entire Estate would be fenced/walled and controlled entrances would be provided to each development parcel. It was recorded that there would possibly be no fencing in front of the properties in Hermanus Heights which had golf course access. However, consensus would need to be reached with all residents to ensure that their front boundaries were secure.

- 75.5 The Fancourt meeting was followed by the signature of the Memorandum of Understanding on 24 November 2003.
- 75.6 If one analyses either version of the minutes, it is clear that the possibility that there would be no fencing in front of the Hermanus Heights properties had been discussed at the meeting. At the very least, those attending the meeting were at the time made aware that existing Hermanus Heights boundary property owners would have to be approached individually to arrange fencing/securing their properties on the street- and lateral sides.
- 75.7 The above culminated in the acceptance of the "Boundary Structures Key Plan", as I have already explained above.



Rabcav, acting on behalf of the Respondent, thereupon followed through by assessing the Hermanus Heights and Main Road properties to ensure that they offer an adequate barrier against entry.

76. The memorandum itself contains some 24 items or clauses. For the most part, consistent with the document's title and the intention of Rabcav and the Committee as articulated at the Fancourt meeting, these items purported to record the parties' understanding of key features of the development. Little detail or content is provided on each item, most of which are of such a character as to warrant more careful treatment in a detailed written agreement to be concluded in due course. No such formal agreement, however, was subsequently concluded between the Hermanus Golf Club and the Respondent.
77. Accordingly, neither the memorandum itself nor any subsequent implementation thereof gave rise to the obligation contended for by the Applicants.
78. The contention of the Applicants (in paragraphs 49 to 50 of the affidavit of Mr. Marius Kleynhans) that the map of the Femkloof Estate which is contained in Annexure "B" to the affidavit "*confirms that it was always intended for the Femkloof estate to be secured around its perimeter*" is not borne out by the map itself.
79. In this regard it should be noted that the notes which appear on the map make it clear that the perimeter which is drawn in by a broad solid

Handwritten signature
u

line would not be "walled" (as alleged by Mr. Marius Kleynhans), but would be treated in accordance with differing boundary conditions. The notes on the plan do not contain a key which corresponds with or explains the broad line on which Mr Kleynhans seeks to place reliance. However, it is clear that the notes, like those on the Boundary Structures Key Plan 201 (Annexure "ARK7") make provision for six different scenarios, to wit:

"2.3m high steel palisade fencing with concrete ground beam – Detail A;

2.1m high masonry wall with masonry columns – Detail B;

2.1m high masonry walls and pillars with palisade fence inserts – detail C;

Existing boundary structures to remain;

2.1m high temporary palisade fencing may be removed once property owner has secured property to satisfaction of master property owners association;

By mutual agreement by owners open frontage is first option as long as integrity of security is maintained to satisfaction of house owners/golf course."



80. The Respondent, in the premises (in any event), denies that the allegations which are contained in these paragraphs take the Applicants' case any further.

AD PARAGRAPHS 24, 26, 27, 28, AS WELL AS PARAGRAPHS 52, 53, 54, 55, 57 & 58

81. The Respondent proceeded to construct the perimeter fence as indicated on the Boundary Structures Key Plan 201.
82. The Applicants' suggestion that the decision not to fence out the properties concerned was taken after the agreements of sale had been concluded, is denied. As I have explained above, the decision not to fence out the Hermanus Heights and Main Road properties had been taken quite some time before the agreements of sale were signed by or on behalf of the Applicants.
83. It is true that during the implementation phase of the development the Committee, in the course of negotiations with property owners on the northern boundary to regulate their access to the golf course land by means of the formation of a property owners association, attempted to impose on them obligatory membership of the master property owners association and payment of an exorbitant once-off fee to the Hermanus Golf Club. These negotiations ultimately failed, and the Hermanus Golf Club turned to Rabcav as the Respondent's development facilitator for the erection of a fence on the golf course land adjoining those properties.



84. As a result, Rabcav held several meetings with representatives of Hermanus Heights and Main Road property owners and implemented what the Respondent considers to be the original concept i.e. looking at each property or open space individually to determine whether the barrier it presents is comparable to the barrier created by the walling/fencing erected along other boundaries. Where necessary individual home owners improved their respective properties to the satisfaction of the Respondent and the Hermanus Golf Club.
85. During the course of 2008 the fencing issue became quite acrimonious and much pressure was brought to bear on the Respondent by certain Fernkloof Estate property owners to have a fence erected as now contended by the Applicants. This caused widespread dissatisfaction amongst the owners of Hermanus Heights and Main Road properties. As a number of property owners in the opposing camps were also members of the Hermanus Golf Club, a rift soon developed in the club. The Respondent, without prejudice to its rights and in an attempt to defuse the situation, thereupon entered into settlement negotiations with the Hermanus Golf Club, the various property owners associations, as represented by the Fernkloof Estate Master Property Owners Association and the Hermanus Heights and Main Road property owners.
86. The draft settlement agreements on which the Applicants now seek to place reliance were generated in the course of these settlement negotiations and were presented to the Hermanus Golf Club and

Fernkloof Estate Master Property Owners Association in good faith and on a without prejudice basis. The Respondent, in the premises, objects to the introduction of these settlement proposals as evidence in these proceedings. I have been advised and verily believe that application will be made at the hearing of the application to have this evidence struck out.

87. It should be noted that the aforesaid settlement negotiations in any event came to naught when it transpired that the Chairman of the Fernkloof Estate Property Owners Association did not have a mandate from the trustees of his association to enter into the very agreement that was proposed by him. In this regard I annex hereto, marked "ARK25" and "ARK26" respectively, a letter from the Chairman of the Fernkloof Estate Master Property Owners Association dated 8 June 2009 (wherein he notified the Respondent that his association was not prepared to enter into the agreement referred to above) and the response thereto by the Respondent's attorney dated 10 June 2009.

88. The Fernkloof Estate Property Owners Association and the Hermanus Golf Club also refused to furnish the Respondent with indemnities against possible claims and legal action (anticipated from the Hermanus Heights and Main Road property owners). Whereas such claims appeared to pose a real threat, the Respondent was not willing to enter into settlement agreements without such indemnities being furnished. The settlement, in the premises, did not eventuate.



89. As is confirmed in the third last paragraph of Annexure "ARK26", the terms of settlement as set out in the draft settlement agreements formed part of a genuine attempt at settlement and was communicated to the Hermanus Golf Club and the Fernkloof Estate Property Owners Association in good faith and without prejudice of the Respondent's rights. In this regard I emphasise the concluding remarks of the Respondent's attorney in the letter under discussion:

"Our instructions are to advise that our client does not accept liability to erect the fence and will therefore not do so."

90. To the extent that it may be necessary to do so, it is also denied that the terms of the settlement proposals (which form part of privileged settlement negotiations which took place some 2½ years after the conclusion of the deeds of sale) imposed any contractual obligation (to erect the fence) on the Respondent *vis-à-vis* the Applicants or can serve as an acknowledgement that the Respondent was in terms of the deeds of sale contractually bound to do so.

91. I, in the premises, deny that the events that followed upon the conclusion of the agreements of sale in any way support the Applicants' case (which, to begin with, is one for specific performance of what is alleged to be an express term of the agreements of sale).



AD PARAGRAPHS 65 & 66

92. The Respondent admits receipt of the letter by Messrs Burgers and Van Noordwyk, Annexure "O" to the founding affidavit. For the reasons set forth in this affidavit and further affidavits that are filed for and on behalf of the Respondent, however, the veracity of the allegations and the legal conclusions contained therein are denied.
93. The Respondent repeats its arguments pertaining to the second point *in limine* as set out above. In the event of it being held that the Applicants' claims amount to "debts" as contemplated in Act 40 of 2002, the Respondent maintains that this Honourable Court should, by reason of the provisions of Section 3((4)(b) of said Act, refuse to condone the Applicants' failure to give notice, alternatively, their defective notice.

AD PARAGRAPHS 67 & 68

94. For all the above reasons, I submit that the Applicants are not entitled to the relief sought and accordingly request this Honourable Court to dismiss the Applicants' application with costs.

AD THE AFFIDAVITS OF HEATHER KLEYNHANS, MINETTE KLEYNHANS, SHIRLEY MILLICENT KOSTER AND TIELMAN NIEUWOUDT AGENBAG

95. To the extent that the allegations contained in these affidavits are at variance with or are not reconcilable with what is stated hereinabove




and in the Respondent's other opposing affidavits, the allegations are denied.

96. The Respondent, in the premises, deny that any of the Applicants are entitled to the relief sought and accordingly repeats its request that the Applicants' application be dismissed with costs



ALFRED RIAAN KUCHAR

Sworn to and signed in my presence at HERMANUS on this 9th day of December 2011 by the deponent who declared that he:

- (a) knows and understands the contents of this affidavit;
- (b) has no objection to the taking of the prescribed oath;
- (c) considers the oath to be binding on his conscience;

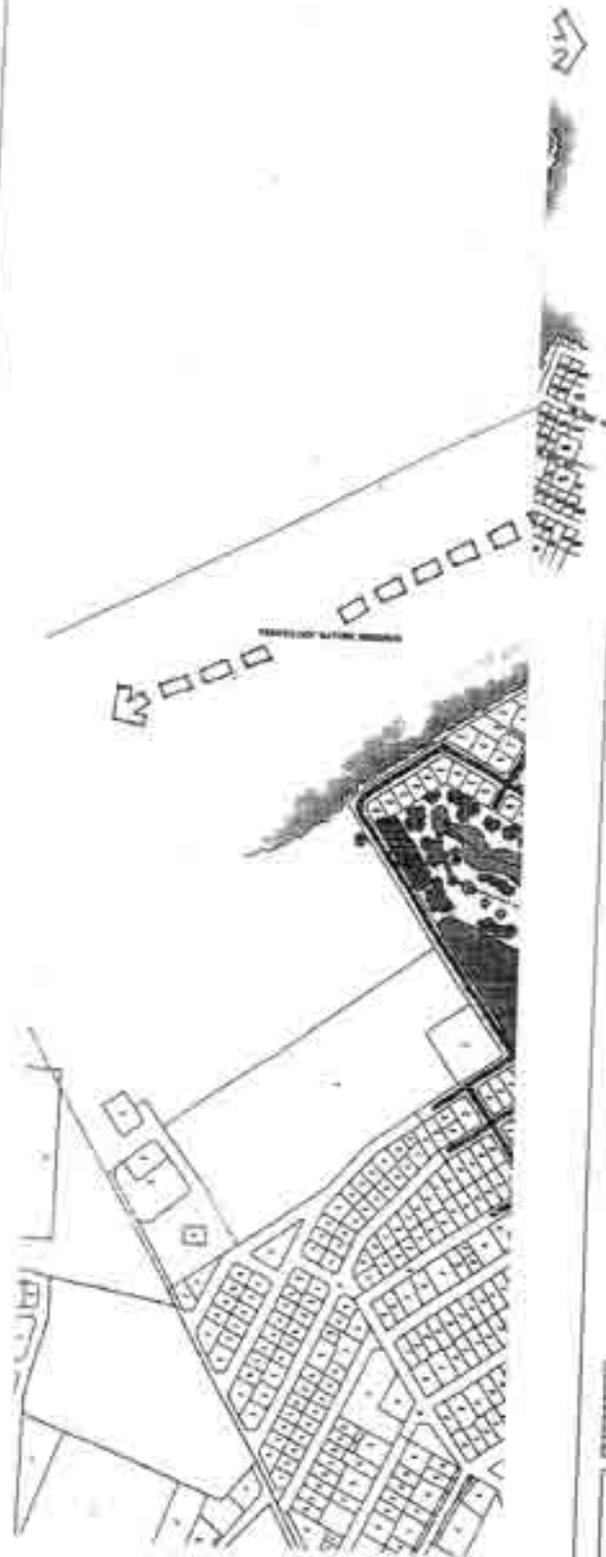
and uttered the words: *"I swear that the contents of this affidavit are true, so help me God."*



COMMISSIONER OF OATHS

Almero J.H. Oosthuizen
B.Com CA (SA)
Commissioner of Oaths
9 On College / P. O. Box 115
Hermanus, 7200

**HERMANUS GOLF ESTATE
PROPOSED
DEVELOPMENT PLAN**



-  SINGLE RESIDENTIAL (± 450m²)
-  SINGLE RESIDENTIAL (± 600 - 650m²)
-  SINGLE RESIDENTIAL (± 750m²)
-  SINGLE RESIDENTIAL (± 1500m²)
-  GROUP HOUSING (25u/ha)
-  MEDIUM DENSITY RESIDENTIAL
-  GOLF LODGES
-  WETLANDS
-  BIOLOGICAL CORRIDORS
-  DEVIATED FERNKLOOF DRIVE/CONTOUR STREET LINK.
-  POTENTIAL BYPASS AS DIRECTED BY SDF (refer to section 3.1 in text)
-  POSSIBLE CONTROLLED ACCESS



SCALE 1:10 000
8 JUNE 2001

PLAN No. / PLAN No.	DATE	BY

**PLANNING PARTNERS
BEPLANNINGSVENNOTE**

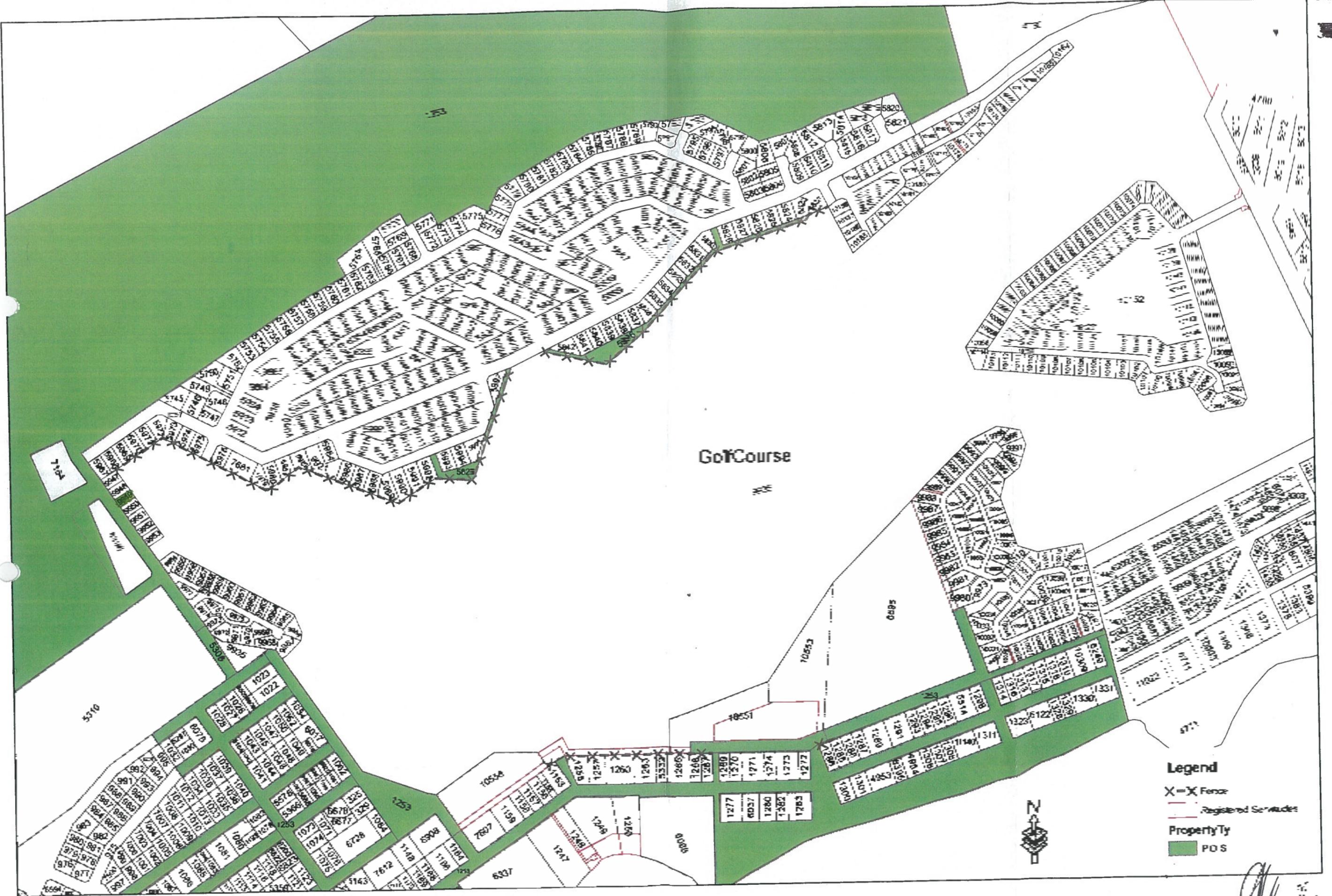
PLANNING PARTNERS BEPLANNINGSVENNOTE is a registered company in the Republic of South Africa. Registration No. 2000/0000000/08. VAT No. 423056733. Tel: 021 959 1000. Fax: 021 959 1001. Email: info@ppb.co.za

9



PLANNING PARTNERS BEPLANNINGSVENNOTE
10000000/08
VAT No. 423056733
Tel: 021 959 1000
Fax: 021 959 1001
Email: info@ppb.co.za

Handwritten signature or initials.



[Handwritten signature]

AFFECTED GOLF COURSE BOUNDARY PROPERTY OWNERS

SOUTHERN BORDER

ERF NO	NAME
1153	J & L Makepeace
1255	DA DE La Harpe Charlton, C/O Poplar Grove
1257	ME Crews
1260	Coppersun Nineteen (Pty) Ltd
1263	HR Bracher
5332	BR & I Zeisner
1265	Jupiter Motor Cycles Properties (Pty) Ltd
1268	Velvet Moon Properties 69 (Pty) Ltd, C/O S Maintz
1267	Dr. BRD & G Easter
1286	Lariza Investments No 170 (Pty) Ltd
1285	AG Westbrook Family Trust

NORTHERN BORDER

ERF NO	NAME
5967	WD & MJ Salda
5968	AJ Tyley & 4 Others
5969	JL Wallace
5970	Eagle Valley Properties 256 CC
5971	ME & LG Hooper
5972	MR Furst
5973	W & IC McGeachy
5974	JS & SJ Atkinson
5975	Tswalu Trust, C/O Di Hyman
5976	CJ Mouton
7681	WA Lewis
5979	M & J & H Hattingh & 2 Others
5980	IM & CJ Barrie
5981	B & JD Evans
5982	HJ Linney
9921	Royalstraat 3 Elendomme CC, C/O Mr. IH Kinston
5986	PM Hulse
5987	C & HM Swart
5988	WJ & EO van Rensburg & Nykamp
5989	WJ & MR van der Hoeven
5990	TWJ Reid
5991	OP & ME Kopke
5992	Talano Trust
5993	JM & J Orr & Rhodes
5994	ELCO Trust
5995	HDV Elwes
5997	Tamjon Inv Trust
5842	DH Bryer
5841	R. Rosseau
5840	Saint Maia Securities Pty Ltd
5839	Prof. F. Coetzee
5838	R. Brynard

R 90

5837	CAVN Corroy
5836	NV van der Riet
5835	CJ & MM van Dyk
5834	Mrs. Dur Storm Michael-Trustees
5833	JV Clotf
5832	JV Clotf
5831	RS Bysma
5830	S Kloucke
5828	Quantum Leap Inv 244 Pty Ltd, C/O JC Wright
5827	MR Furst
5826	Pybus Family Trust, C/O RN Pybus
5825	GAL Nel
5824	Bardix Discretionary Trust
5823	F & GJ Stroud
5822	VP de Villiers



MUNISIPALITEIT HERMANUS

WYSIGING VAN DIE SONERINGSKEMA
(ORDONNANSIE 15 VAN 1985)

Kennis geskied hiermee ingevolge die bepaling van artikel 9(2) van Ordonnansie 15 van 1985 dat die Stadsraad van Hermanus se soneringskema gewysig is met ingang vanaf die datum van hierdie advertensie soos hieronder uiteengesit.

1. *Klousule 1: Woordbepaling*

1.1 Deur die vervanging van die woordbepaling van "Kelder" met die volgende woordbepaling:

"'Kelder' die deel van 'n gebou waarvan die afgewerkte vloerhoogte minstens 2 meter onder 'n hoogte is, of die plafon hoogsens 1 meter bokant 'n hoogte is, halfpad tussen die hoogste en laagste natuurlike grondhoogtes wat onmiddellik aan die gebou grens."

1.2 Deur die byvoeging na die woordbepaling van "Toepaslike Datum" van die volgende woordbepaling:

"'Verdieping' een vlak van 'n gebou, uitsluitend 'n kelderverdieping, wat nie 'n hoogte van 4 m oorskry nie, gemeet van afgewerkte vloerhoogte tot afgewerkte vloerhoogte of tot die plafon in die geval van die boonste verdieping."

2. *Klousule 6: Spesiale Bepaling*

2.1 Deur die byvoeging na Klousule 6.7 van die volgende klousule:

"8. Die Raad mag 'n komitee van geskikte persone, wat nie Raadslede is nie, aanstel om in 'n raadgewende kapasiteit te dien in verband met die estetiese, funksionele, kulturele of historiese aspekte van enige voorgestelde of bestaande gebou, en mag by gewone besluit die reëls en prosedures vir sodanige komitee vasstel."

3. *Klousule 8: Digtheidsbeheer*

3.1 Deur die byvoeging na Klousule 8.A.1(c) van die volgende klousule:

"(d) Geen gebou of enige gedeelte daarvan mag, sonder die toestemming van die Raad, twee verdiepings > 8,5 m, wat ook al die hoogste is oorskry nie."

3.2 Deur die byvoeging na Klousule 7 van die volgende klousule:

"8. *Spesiale Voorwaardes met betrekking tot Hermanus Uitbreiding no. 9*

(a) Geen woonheid, saam met sy buitengeboue mag 'n oppervlakte van minder as 200 m² hê nie.

(b) Geen woonhuis mag van sement-blokke, en/of voorsafgegotte baksteemmure gebou word nie.

(c) Alle geboue moet wit geverf word.

(d) Alle grens- en tuinmure moet van gepieisterde bakstene, witgeverf, of witgeverfde hout, of nylon-bedekte draadheining gebou word; waar erwe aan die gholfbaan grens, word alleenlik nylonbedekte draadheining op daardie grens toegelaat.

(e) Geen dakplate word toegelaat nie; dakke word alleenlik met natuurlike blou leisteen, donkergroenkleurde asbessementsteëls of sementsteëls bedek."

(AF.213.6.0.3) — C. Sim, Stadsklerk

17158

MUNISIPALITEIT ROBERTSON

WYSIGING VAN DORPSAANLEGSKEMA

Kennis geskied hiermee kragtens ordonnansie 15 van 1985 dat 'n aansoek ontvang is vir die wysiging van die Soneringskema deur die hersonering van erwe 62 & 63 vanaf Enkelwoondoelindes na Algemene Woondoelindes.

Nadere besonderhede lê ter inasae by die Munisipale Kantore gedurende kantoorure en besware teen die voorgestelde wysiging van die skema, indien enige, moet die ondergetekende skriftelik bereik op 30 Julie 1987. (AF.101.19.4.2—R4). — P. J. Coetzer, Stadsklerk, Munisipale Kantore, Posbus 52, Robertson, 6705, 26 Junie 1987.

17172

HERMANUS MUNICIPALITY **ARABO**

AMENDMENT OF ZONING SCHEME
(ORDINANCE 15 OF 1985)

Notice is hereby given in terms of the Provisions of Section 9(2) of Ordinance 15 of 1985 that the Hermanus Town Council's zoning scheme has been amended with effect from the date of this advertisement as set out hereunder.

1. *Clause 1: Interpretation of Terms*

1.1 By the replacement of the definition of "basement" with the following definition:

"'Basement' means that portion of a building the finished floor level of which is at least 2 m below, or the ceiling of which is at most 1 m above, a level halfway between the highest and lowest natural ground levels immediately contiguous to the building."

1.2 by the insertion after the definition of "storey" of the following definition:

"'storey' means a single level of a building, excluding a basement, which does not exceed a height of 4 m, measured from finished floor level to finished floor level or to the ceiling in the case of the top storey."

2. *Clause 6: Special Provisions*

2.1 By the insertion after Clause 6.7 of the following clause:

"8. The Council may appoint a committee of suitable persons, not being Councilors, to advise it on the aesthetic, functional, cultural or historic aspects of any existing or proposed building and may by ordinary resolution determine rules and procedures for such committee."

3. *Clause 8: Density Control*

3.1 By the insertion after Clause 8.A.1.(c) of the following clause:

"(d) No building or any portion thereof shall, without the consent of the Council, exceed 2 storeys or 8,5 m, whichever is the highest."

3.2 By the insertion after clause 7 of the following clause:

"8. *Special Provisions relating to Hermanus Extension No. 9*

(a) No dwelling, together with its outbuildings, shall have an area of less than 200 m².

(b) No dwelling shall be constructed of precast concrete blocks and/or precast brick walls.

(c) All buildings shall be painted white.

(d) All boundary and garden walls shall be constructed or plastered brickwork painted white, or timber fencing painted white, or nylon coated wire fencing; where erven abut the golf course, only nylon coated wire fencing shall be permitted on that boundary.

(e) No sheet roofing shall be permitted; roofs shall be constructed only of natural blue slate, dark asbestos cement slate or cement tiles."

(AF.213.6.0.3) — C. Sim, Town Clerk

1715

ROBERTSON MUNICIPALITY

AMENDMENT OF TOWN PLANNING SCHEME

Notice is hereby given in terms of Ordinance 15 of 1985 that an application has been received for the amendment of the Town Planning Scheme by the rezoning of erven 62 & 63 from Single Residential Purpose to General Residential Purpose.

Further details are available for inspection at the Municipal Office during office hours and objections, if any, to the proposed amendment to the scheme must be lodged in writing to the undersigned not later than 30 July 1987. (AF.101.19.4.2—R4). — P. J. Coetzer, Town Clerk, Municipal Office, P.O. Box 52, Robertson, 6705, 26 June 1987.

171

[Handwritten signature]

31 January 2008

Chairman: Development Committee
Hermanus Golf Club
P O Box 313
Hermanus
7200

Att: Hannes Kleynhans

PERIMETER FENCING

We refer to your letter dated 28 January 2008 regarding the meeting held at the Hermanus Golf Club on Thursday 24 January 2008 and record the following in order to set the record straight:

From as early as November 2003 Rabcaay's intentions were made clear that there was never any intention to erect a fence in front of the existing properties that had open frontage onto the golf course.

We are in receipt of a legal opinion that there is no obligation on either Rabcaay as the development facilitator or the Overstrand Municipality as developer, to erect a fence in front of these properties.

Consequently we are following through with the original stated intention whereby each of these properties is being assessed independently to ensure that they offer an adequate barrier against entry. For example, where a vacant property exists, a fence will be erected to prevent unauthorised access.

Our negotiations with these homeowners is consistent with the prior negotiations that took place between the golf club and representatives from the northern boundary home owners, with the exception that there is no once-off fee payable to the golf club. We are pleased to confirm that we have made good progress in this regard.

We confirm the agreement that an additional three weeks was needed for both parties to verify their legal position in light of the discussions held on 24 January.

Yours sincerely



C W GREEN

CC: Mayor T Beylveidt
Chairmen POA (various precincts)



25 February 2008

Chairman: Development Committee
Hermanus Golf Club
P O Box 313
Hermanus
7200

Dear Sirs

PERIMETER FENCING

We refer to our meeting held on 24 January 2008 and our letter dated 31 January 2008.

Having reconsidered all the historical documentation concerning the Fernkloof Estate we wish to reaffirm our position expressed at the meeting, that neither Rabcoq nor the Municipality has an obligation to the club to erect a fence on the golf course boundary in front of the existing Hermanus Heights and Main Road properties.

In addition, there is no obligation to any of the purchaser to erect such a fence. As previously stated, we are following through with the original stated intention whereby each of the original Hermanus Heights and Main Road properties is assessed to ensure that they offer an adequate barrier to entry. Once complete we believe that the concerns expressed by the club and certain property owners will have been addressed.

It is our sincere hope that this difference of opinion will not mar the relationship between Rabcoq and the Golf Club. Few people can doubt that the end result of the Fernkloof Development has had positive benefits for all stakeholders. The golf club and course has been through a monumental transition and is an asset that both the club members and all Hermanus residents can be proud. The golf club's development committee has played a leading and fundamental role in this process.

Yours sincerely

C W GREEN

CC: Mayor T Beylveidt
Chairmen POA (various precincts)





Verwysing Reference Isalethixo AN 213/25/4 Hermanus Golf Course

Ngqirha Enqirha Isibizo JAQUETA KEET

Datum Date Umhla 11 July 2002

*Departement van Omgewing- en Kultuursake en Sport
Department of Environmental and Cultural Affairs and Sport
Isebe lemiCimbi yeNdalo esiNgqongileyo neNkcubeko nezemiDlalo*

The Interim Municipal Manager
Overstrand Municipality
PO Box 20
Hermanus
7200

Attention: Mr Riaan Kuchar

Tel: (028) 313-8087
Fax: (028) 312-1894

Dear Sir:

APPLICATION: CREATION OF THE HERMANUS GOLF ESTATE, HERMANUS, AN IDENTIFIED ACTIVITY IN TERMS OF SECTION 21 OF THE ENVIRONMENT CONSERVATION ACT, 1989 (ACT NO. 73 OF 1989).

With reference to your application, find below the Record of Decision in respect of this application.

RECORD OF DECISION

A. DESCRIPTION OF ACTIVITY:

The upgrading of a resort, the change of zoned open space to any other land-use and the reclamation of land from a wetland. The proposed activity entails the creation of the Hermanus Golf Estate on the current Hermanus golf course property and adjacent properties and adjacent properties, comprising:

- 1) the expansion and extension of the Hermanus Golf Course by nine holes;
- 2) the creation of 20 golf lodges;
- 3) the establishment of single, general & group-housing residential areas, involving approximately 670 units (excluding the 20 golf lodges) as per Table 2 of the final Scoping Report dated October 2001 prepared by DeVilliers Brownlie Associates;
- 4) the installation of roads, water reservoir and other service infrastructure;
- 5) the closure some existing roads;
- 6) the filling in of small areas of a wetland (and the rehabilitation of all the wetlands on the estate); and
- 7) the creation of open space areas;

These are activities identified in Schedule 1 of Government Notice No. R1182 of 5 September 1997, as amended, being:

- Item 1(m) The construction, erection or upgrade of public and private resorts and associated infrastructure
2(e) The change of land use from use for nature conservation or zoned open space to any other land use
7 The reclamation of land, including wetlands, below the high-water mark of the sea, and inland waters

hereinafter referred to as "the activity".

B. LOCATION:

The activity will be sited over the existing Hermanus golf course property and adjacent properties and streets in the town of Hermanus, Western Cape, comprising Erf 7531 Hermanus, unsubdivided Portions of Remainder Erf 1253 Hermanus, an unsubdivided Portion of Erf 4780 Hermanus, an unsubdivided Portion of Farm 591/1 Caledon and an unsubdivided Portion of Erf 5308 Hermanus, as well as portions of Contour Street, Theron Street, Flat Street, 11th Street, Fernkloof Drive, the existing access road to Fernkloof Nature Reserve (an extension of Fir Avenue) and the road between Flat Street and Main Road to be closed and/or realigned.

C. APPLICANT:

Overstrand Municipality
PO Box 20, Hermanus, 7200
Tel: (028) 313-8087
Fax: (028) 312-1894

D. CONSULTANT:

DeVilliers Brownlie Associates (Mr Louis de Villiers)
21 Menin Ave, Claremont, 7708
Tel/Fax: (021) 674-4263

E. SITE VISIT(S):

Mr Morgan Griffiths of this Directorate: Environmental Management, Western Cape Department of Environmental and Cultural Affairs and Sport inspected the site on 27 November. Mr Griffiths held numerous meetings and telephonic discussions with Messrs de Villiers and Kuchar regarding this application.

F. DECISION:

In terms of Sections 22 and by virtue of powers delegated by the Minister in terms of Sections 28 & 33 of the Environment Conservation Act, 1989 (Act No. 73 of 1989), the Chief Director: Environmental Affairs of the Department of Environmental and Cultural Affairs and Sport hereby grants authorisation, **with the conditions** contained in this Record of Decision, for the execution of the activity described above.



This Authorisation has been granted in terms of section 22 of the Environment Conservation Act, 1989 (Act No. 73 of 1989) solely for the purposes of undertaking the activity referred to above, and does not exempt the holder thereof from compliance with any other relevant legislation.

G. CONDITIONS OF AUTHORISATION:

1. The activity, including site preparation, may not commence before the statutory 30 day appeal period expires.
2. One week's notice, in writing, must be given to the Directorate: Environmental Management, (hereinafter referred to as "this Directorate"), before commencement of construction activities.
 - 2.1 Such notice shall make clear reference to the site location details and reference number given above.
 - 2.2 The said notice must also include proof of compliance with the following conditions described herein:
Conditions: 1, 4-11, 13-15, 18, 20 & 21
3. One week's notice, in writing, must be given to the Directorate: Environmental Management, (hereinafter referred to as "this Directorate"), before commencement of operation activities.
 - 3.1 Such notice shall make clear reference to the site location details and reference number given above.
 - 3.2 The said notice must also include proof of compliance with the following conditions described herein:
Conditions: 1, 4, 5, 7, 11, 16 & 21
4. The mitigation/rehabilitation measures and recommendations as detailed in the:
 - 4.1 Scoping Report, with particular reference to sections 4.2.4-10 and 6; and
 - 4.2 The Rezoning and Subdivision Application Report dated June 2001 by Planning Partners, with particular reference to sections 12 & 13, Figures 15a-c (With the architectural guidelines for each precinct) and section 8 of Annexure G;
must be adopted and complied with.
5. This authorisation does not include any increase in the permitted extraction of groundwater, for irrigation purposes, from the borehole on the existing golf course, should this be required. Any application for increased extraction from this borehole will be subject to its own environmental impact assessment and approval process.
6. The proposed treated effluent water pipeline and irrigation scheme for the golf estate (with the potential to supply the local sportsfields) must be implemented. It is suggested that all pipes and taps of this system are clearly marked to prevent accidental use of this water for potable purposes.
7. Public access to Fernkloof must not be restricted by this activity.
8. Should any paths be needed across any wetland, that raised boardwalks are utilised for such purpose.



9. Any stormwater pipes or channels entering the Mossel River or the wetlands must have litter-traps and energy dissipating measures to prevent erosion of the streambed.
10. That the canalised stream in the culvert is opened up and landscaped.
11. All invasive alien invaders must be cleared from the site, unless specifically retained on the instruction of the Environmental Control Officer (ECO – refer to Condition 15 below) as part of a phased tree replacement programme.
12. An integrated waste management approach must be used that is based on waste minimisation and should incorporate reduction, recycling, re-use and disposal where appropriate. Any solid waste shall be disposed of at a landfill licensed in terms of section 20 of the Environment Conservation Act, 1989 (Act No. 73 of 1989).
13. The proponent/developer/applicant must compile and submit an acceptable Master construction phase Environmental Management Plan ('EMP'), for the bulk lands clearing and earthworks and the installation of the service infrastructure, to this Directorate for approval at least 3 weeks prior to any land clearing and construction commencing. This Master EMP is specifically required to address the construction and visual mitigation of the proposed reservoir. The EMP must be included in all contract documentation for the construction phase of the development.
14. The proponent/developer/applicant must compile and submit an acceptable construction phase EMPs for each of the precinct development phases, to this Directorate for approval at least 3 weeks prior to any land clearing and construction commencing. The EMPs must be included in all contract documentation for the construction phase of the development. The construction phase EMP must also specifically address means to mitigate against the spread of alien grasses into the wetlands, in which regard consideration must be given to the construction of hard surfaced barriers between grassed areas and the wetlands where appropriate.
15. The proponent/developer/applicant must appoint a suitably experienced Environment Control Officer to ensure that the mitigation/rehabilitation measures referred to in this Authorisation are undertaken and that the provisions of the construction phase EMP are complied with.
16. The proponent/developer/applicant must compile and submit an acceptable Master and precinct level operational phase EMPs before any of the units may be occupied. This EMP will need to address the:
 - 16.1 Landscaping and stabilisation of the disturbed areas. This needs to consider the removal of the alien vegetation and the tree replacement programme;
 - 16.2 Design, colour and placement of the surrounding fence around the activity and around particular precincts. It is important that the local fauna are able to cross the fence line between the activity and the Fernkloof Nature Reserve;
 - 16.3 Management of the fairways, greens and open spaces, including the wetlands and ecological corridors. This needs to consider the fire-



management of the wetlands and the ongoing alien vegetation control and eradication;

16.4 Design and management of the interfaces between the different components of the activity, such as the golf course, residential areas, open space areas, existing residential areas and the Fernkloof Nature Reserve; and

16.5 Stormwater management

This EMP must also incorporate the conditions of approval given in this Record of Decision as appropriate to the operational phase of the project. The implementation of the approved EMP will then be a condition of this activity.

17. The applicant must submit an Environmental Audit Report, ("audit report") to this Directorate one (1) year after construction has been completed / and also after the site and approach road have been rehabilitated.

17.1 The audit report must indicate the date on which the construction was completed, and detail compliance with the conditions of this authorisation and the status of the rehabilitation programme.

17.2 This Directorate may require remedial action should the audit report reflect that rehabilitation is inadequate.

17.3 If the audit report is not submitted, this Directorate may give 30 days written notice and may have such an audit undertaken at the expense of the applicant and may authorise any person to take such measures necessary for this purpose.

18. The applicant must, within five calendar days of receipt of this Record of Decision:

- Inform the relevant local authority as well as all interested and affected parties, ("I & AP's") registered during the Scoping and Impact Assessment processes, of the outcome of this application and, if requested, provide copies of this Record of Decision;

- Include in such information the provisions of Regulation 11 of Government Notice No. R 1183 of 5 September 1997, as amended, which reads as follows:

- (1) An appeal to the Minister or provincial authority under section 35(3) of the Act must be done in writing within 30 days from the date on which the record of decision was issued to the applicant in terms of regulation 10(1);

- (2) An appeal must set out all the facts as well as the grounds of appeal, and must be accompanied by all relevant documents or copies of them which are certified as true by a commissioner of oaths.

- Include the date on which the record of decision was issued to the applicant in terms of regulation 10(1) and the date by which appeals must reach the Minister.

- Inform all I & AP's that a signed and certified Appeal Questionnaire, is obtainable from the Minister's office at tel. (021) 483 3915, e-mail



Gbrummer@pawc.wcape.gov.za, or URL
http://westcape.wcape.gov.za/environmental_cultural_affairs/default.asp
must accompany the appeal.

- If the applicant should appeal against this Record of Decision, he must inform all interested and affected persons that such an appeal is being lodged with the Minister and the applicant/appellant must provide those persons with reasonable access to a full copy of the appeal, if requested.
19. This Directorate must be notified, within 30 days thereof, of any change of ownership and/or project developer, as well as any change of address of the owner and/or project developer. Conditions imposed in this record of decision must be made known to the new owner and/or developer and are binding on the new owner and/or developer.
 20. The conditions of the authorisation must be brought to the attention of all persons (employees, sub-consultants etc.) associated with the undertaking of this activity and the applicant shall take such measures necessary to bind such persons to these conditions.
 21. All outdoor advertising associated with this activity, whether on or off the property concerned, must comply with the South African Manual for Outdoor Advertising Control (SAMOAC) available from:

The Director: Environmental Impact Management
Department of Environmental Affairs and Tourism
Private Bag X447, Pretoria, 0001.
 22. The owner and/or developer must notify this Directorate and any other relevant authority, in writing, within 24 hours thereof if any condition of this authorisation is not adhered to.

H. RECOMMENDATIONS:

This Directorate recommends that:

- Only indigenous, water-wise vegetation is used in the landscaping of the activity, and
- The architectural guidelines of the housing units promote:
 - a) the use of water saving/flow-reduction technology for plumbing and water fixtures;
 - b) water-wise gardens and garden irrigation systems; and
 - c) energy saving measures and technology, such as insulated water-geysers and ceilings, insulated doors and windows and long-life lightbulbs.

I. KEY FACTORS AFFECTING THE DECISION:

The applicant provided sufficient information in terms of Regulation 6 of Regulation No. 1183 for this Directorate to base a decision on.

This development proposal is consistent with the approved Greater Hermanus Sub-regional Spatial Development Framework (SDF), which proposes that this portion of land could be used for residential and recreational-use. This Directorate was involved in the formulation of this SDF and its approval. The compilation of the SDF involved a thorough environmental scan of the area and considered the local



environment at a strategic level. This Directorate is satisfied that the proposed use for this land took the environmental parameters into consideration.

The Overstrand Municipality has proposed to undertake the activity as a means of converting council-owned land into readily available funds for community upliftment projects and upgrading of local service infrastructure. The proposed up-market residential erven and golf course expansion would appear to be the most appropriate use of this land for this up-market area, considering the obligations of the Municipality to maximise its assets for the benefit of the entire Overstrand community. While this activity will incur the loss of open space/recreational areas for local residents and the in-filling of a small portion of a wetland, it will have the additional positive benefit of providing funding to clear the site of alien invasive vegetation and to rehabilitate the wetlands. It will also create the means to install a treated effluent water pipeline for the irrigation of various local school sportsfields, which will lead to the recycling of waste water and the replacement of using valuable potable water on those fields.

The development site comprises the existing golf course and the vacant lands adjacent to it. While most of this land is covered in fairways, greens and alien invasive vegetation, some parts have conservation-worthy patches of fynbos and wetlands, as well as some riparian elements. The most important of these elements are the wetlands. The proposed activity has taken due cognisance of these elements. The required EMPs will provide the structure to their protection and management.

The preparation of the development plan involved a great deal of general public, stakeholder and authority consultation. This Directorate commends the creation of a community committee to workshop the plans with the project team. The interested and affected parties raised a number of concerns, primarily regarding the loss of a recreational space, the provision of water and other services and the potential impacts on the wetland, traffic flows and routes, property prices, views and access to the Fernkloof Nature Reserve. In response, the development plan went through a succession of alternate layouts and components to address these concerns. This Directorate is satisfied that the final plan has taken due consideration of the comments, suggestions and objections made on the proposal, and that the proposed activity is sufficiently mitigated to be acceptable to this Directorate, when compared against the no-development alternative and the five previous development plans.

The Municipality is satisfied that there is sufficient water and sewerage treatment capacity to absorb this development into the town. The construction of the wastewater irrigation pipeline to the sportsfields will result in the release of a considerable amount of potable water previously used on the fields for other use within the town. The wastewater will also be used to irrigate the entire golf course, which will mean that less groundwater will need to be drawn from the boreholes.

This Directorate is satisfied that the activity is environmental acceptable in terms of the Environment Conservation Act and the National Environment Management Act, 1998 (Act No. 107 of 1998), provided that the conditions of this Authorisation are all complied with.

591
~~591~~
~~591~~

The public participation process undertaken entailed the following: Scoping was undertaken with various authorities and key parties during the initial stages of project planning. Formal scoping was initiated by notices placed in the press on 9 June 2000 and 16 June 2000. A public meeting was held on the 19 June 2000. Planning workshops were held on 3 August 2000, 31 August 2000, 28 September 2000 and 22 March 2001 whereby members of the general public were allowed to attend the workshops. The draft scoping report and initial assessment and the application for rezoning and subdivision were subsequently advertised for formal public review and comment on the 6 July 2001 and 13 July 2001. Numerous pre and post submission meetings were held.

J. DURATION AND DATE OF EXPIRY:

This authorisation shall lapse if the activity does not commence within two (2) years of the date of issue of this authorisation.

K. APPEAL:

In terms of Section 35 of the Environment Conservation Act, 1989 (Act No. 73 of 1989), formal, motivated appeals can be directed within thirty (30) days of the date of the issuing of this Record of Decision, to:

The Minister of Environmental Affairs and Development Planning
Western Cape Province
PO Box 15653
Vlaeberg
8018
Fax: (021) 483-6081

Appeals must comply with the provisions of regulation 11 of Government Notice No. R. 1183 of 5 September 1997, as amended.

If the appellant is not the applicant, the latter must be informed of the appeal within the appeal period referred to above and must provide the applicant with reasonable access to a full copy of the appeal, if requested.

A signed and certified Appeal Questionnaire, obtainable from the Minister's office at tel. (021) 483 3915, e-mail Gbrummer@pawc.wcape.gov.za, or URL http://westcape.wcape.gov.za/environmental_cultural_affairs/default.asp must accompany the appeal.

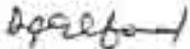
If any condition imposed in terms of this authorisation is not being complied with, the authorisation may be withdrawn after 30 days written notice to the applicant in terms of Section 22(4). Failure to comply with any of these conditions is also an offence and may be dealt with in terms of Sections 29, 30 and 31 of the Environment Conservation Act, 1989 (Act No. 73 of 1989) as well as any other appropriate legal mechanisms.



Provincial Government, Local Authority or committees appointed in terms of the conditions of the application or any other public authority or organisation shall not be held responsible for any damages or losses suffered by the developer or his successor in title in any instance where construction or operation subsequent to construction be temporarily or permanently stopped for reasons of non-compliance by the developer with the conditions of authorisation as set out in this document or any other subsequent document emanating from these conditions of authorisation.

Your interest in the future of our environment is greatly appreciated.

Yours faithfully



DIPOLELO ELFORD
CHIEF DIRECTOR: ENVIRONMENTAL AFFAIRS

DATE OF DECISION: 11/07/02

Copies to: Louis de Villiers (DeVilliers Brownlie Associates)
Christo Kannenberg (Planning Partners)
Duncan Heard (WCNCB - Breëde River Region)

Fax: (021) 644-263
Fax: (021) 418-0502
Fax: (028) 316-1040



Verwysing E17/2/2/3/AH8/Pin Erf 1253
 Reference Erf 4780, Farm 591/1, Hortonville
 Isalatwaa M/L/6/3/K18/OJ



Navier
 Enquiries B van Zyl
 Imibuzo

Datum
 Date
 Umhla **30 SEP 2003**

Departement van Omgewingsake en Ontwikkelingsbeplanning
 Department of Environmental Affairs and Development Planning
 ISebe leMicimbi yeNdalo esiNgqongileyo noCwangeiso loPhuhliso

TP1 - 09/2001
 TP

The Municipal Manager
 Overstrand Municipality
 P O Box 20
 HERMANUS
 7200

Attention: Mr R Kuchar

OVERSTRAND MUNICIPALITY: PROPOSED HERMANUS GOLF ESTATE : REMOVAL OF RESTRICTIONS: ERF 5308, HERMANUS; CLOSURE OF STREETS AND OPEN SPACES (REM ERF 1253; ERF 7531; PTN ERF 4780; PTN ERF 5308) AND APPEAL AGAINST SUBDIVISION AND REZONING (PTN REM ERF 1253; ERF 4780; FARM 591/1, CALEDON; ERF 5308)

1. Your reference is TP1-09/2001.
2. The Competent Authority for the administration of the Municipal Ordinance, 1974 (Ordinance 20 of 1974) has, in terms of section 137 of said Ordinance, granted permission for the closure of the portions of Public Open Space on Portions of Remainder Erf 1253, Erf 7531, Portion of Erf 4780 and portion of Erf 5308, Hermanus as reflected on Annexure G.
3. The Competent Authority for the administration of the Municipal Ordinance, 1974 (Ordinance 20 of 1974) has further, in terms of section 137 of said Ordinance, granted permission for the closure of the following portions of Road as indicated on Annexure H :
 - 3.1 Portion G of Contour Street.
 - 3.2 Portion H of Theron Street.
 - 3.3 Existing gravel road link (portion I) between Fernkloof Drive and Contour Street (link road to be realigned).
 - 3.4 Existing access road to Fernkloof Nature Reserve (portion J).
 - 3.5 A portion of Flat Street (portion K).

- 3.6 A portion of 11th Street (portion L).
- 3.7 A portion of road approximately 7,18 m wide between Flat and 11th Street in the north and Main Road/Mossel River Drive in the south (portion M).
- 4. The Competent Authority for the administration of the Land Use Planning Ordinance, 1985 (Ordinance 15 of 1985) has, in terms of sections 16 and 42 of said Ordinance approved the application for the rezoning of the consolidated property (Portions A,B,C,D,E,F,G,H,I,J,K,L,M and Erf 7531 indicated on Annexures H and F) from Public Open Space, Single Residential and Road to Subdivisional Area for the purpose of single residential, group housing (general residential zone), medium density residential (general residential zone), golf lodges (general residential zone), golf course and associated uses (private open space), public open space and road uses subject to the following conditions:
 - 4.1 That the applicant complies with the conditions of the environmental authorisation contained in the Record of Decision dated 11 July 2002, subject to possible amendment as a result of the outcome of the appeal to the Chief Director: Environmental Affairs.
 - 4.2 The proposed development must be generally in accordance with the proposed development plan, dated 1 October 2001 (Annexure B). A site development plan must be submitted to the municipality for approval before development may commence.
 - 4.3 The developer must compile an architectural manual that includes design criteria for all the proposed buildings after consultation with the Hermanus Heritage Committee, to be approved by the municipality.
 - 4.4 The developer must provide all municipal services for the development, to the satisfaction of the municipality.
 - 4.5 That the proposed development not be proceed with until the Council has approved a water resource development programme which indicates that sufficient water is available to support the proposed development.
 - 4.6 The profits and funds generated by the municipality through this development should be utilised in terms of a programme approved by Council and which should be to the benefit of the broader community.
 - 4.7 That following requirements with regard to traffic and traffic calming measures must be complied with, to the satisfaction of the municipality and the Department of Economic Affairs, Agriculture and Tourism: Transport Branch:
 - 4.7.1 Exclusive right turn lanes on Main Road must be developed at the intersections of Fairways Avenue, Sim Street, Berg en See access, Mossel River Drive, Theron Street and Fir Street.



- 4.7.2 Signalisation must be provided at the Main Road/Berg en See intersection and any of the above-mentioned intersections as warranted by the South African Traffic Signs Manual.
- 4.7.3 Sight distances on the inside of the horizontal curve on Fairways Avenue just north of the intersection of Musson Street must be improved.
- 4.7.4 A program for implementation and a conceptual design for the proposed improvements on Main Road must be submitted to the Department of Economic Affairs, Agriculture and Tourism: Transport Branch before the first phase of the project is undertaken.
- 4.7.5 A detailed investigation must be undertaken regarding the present access to the golf course, to the satisfaction of the Council and the Department of Economic Affairs, Agriculture and Tourism: Transport Branch. All the findings of this investigation must be implemented.
- 4.7.6 That the development on Precinct 2 only commence once the investigation regarding the possible realignment of Fairways Avenue in order to improve traffic flow by the elimination of the stop street at Moffat Street, is finalised. The final extent and boundaries of Precinct 2 should only be determined after the investigation has been finalised.
- 4.7.7 Council must endeavour to utilise the profits generated by the development for the early planning design and implementation of the following transport projects as identified in the Greater Hermanus Sub-Regional Spatial Development Framework (SDF):
 - 4.7.7.1 The CBD relief road.
 - 4.7.7.2 The TR28/1 parallel relief road/activity spine.
 - 4.7.7.3 Mountain Drive Bypass.
 - 4.7.7.4 An arterial management plan for Seventh Street, Voëlklip.
- 4.7.8 Any other issue with regard to traffic relating to the proposed development as identified by the municipality or the Department of Economic Affairs, Agriculture and Tourism: Transport Branch.
- 4.8 The type of fencing for the golf course and open spaces should be as unobtrusive as possible, to the satisfaction of the municipality. It should be of such a nature that the movement of small creatures is not restricted.
- 4.9 A vegetated culvert or culverts of suitable width should be constructed in a suitable position(s) to pass underneath the proposed Fernkloof Road extension, to link the two sides of the road and ensure the uninterrupted movement of small creatures. The positioning of the culvert(s) should be determined between the municipality and the Chief Directorate: Environmental Affairs of the Provincial Government.
- 4.10 A maximum of 20 golf lodges (10 each in Precincts 3 and 4) may be constructed. The final positioning of the lodges should be determined in conjunction with officials from the Chief Directorate: Environmental Affairs. All

[Handwritten signature]

the golf lodges should be single storied. The floor areas of all the lodges shall be restricted to a maximum of 250 m². Landscaping shall be done in terms of the landscaping plan as required by the Chief Directorate: Environmental Affairs and no individual fencing will be allowed around the units.

- 4.11 A 10 meter building line will be applicable between the developments on Precincts 3 and 4 and adjacent erven.
- 4.12 The Environmental Control Officer (appointed in terms of the environmental authorisation) must ensure that educational information on the wetlands is displayed in strategic positions, to educate the public to treat the wetlands with the necessary respect.
- 4.13 A trust fund for the rehabilitation and upkeep of the wetlands must be established for this purpose. A percentage of the income derived from the renting of the golf lodges must be deposited into this trust fund on a half yearly basis, from which the maintenance programme will be funded. The percentage must be determined between the municipality, the Botanical Society and the management of the golf club, on an annual basis.
- 4.14 The Environmental Control Officer should undertake environmental audits of the wetlands on a 3-yearly basis. These audits should be funded from the trust fund referred to above.
- 4.15 Access from the golf lodges next to Fairways Avenue to the wetlands should be restricted to a single clearly defined path, which is to link the units with the golf course and the clubhouse. Raised boardwalks should be provided wherever the wetland is crossed.
- 4.16 A network of pedestrian footpaths/boardwalks which provides access for the general public to the golf course should be incorporated into the site development plan, thereby linking the western and southern residential areas to Fernkloof Road, and to the Fernkloof Nature Reserve. Access control measures should be workshopped with the management of the golf club and surrounding public when the detailed planning takes place. The upkeep of these footpaths/boardwalks should be funded from the trust fund as set out above.
- 4.17 An agreement must be reached between Fernkloof Advisory Board and the municipality regarding a financial contribution to the Fernkloof Nature Reserve, for the establishment of additional facilities, or to extend the reserve boundaries, in lieu of land of the Fernkloof Nature Reserve being utilised for the proposed development.
- 3.18 The historical importance and practical value as windbreaks of the existing bluegum avenues should be investigated by the municipality and the Competent Heritage Resources Authority before taking a decision on their possible removal.
- 4.19 A mechanism to prevent the use of pesticides and to monitor the quality of the treated effluent water used for watering the greens, should be incorporated in

[Handwritten signature]

the Environmental Management Master Plan (a requirement of the environmental authorisation), to ensure that the wetlands do not become polluted. A mechanism should also be introduced to ensure that stormwater run-off from the development does not pollute the Flat Street wetlands.

- 4.20 The development must be done in conjunction with the water resource development programme of the municipality.
- 4.21 The above conditions do not exempt the developer or Council from compliance with any other legal requirement.
5. The Competent Authority for the administration of the Removal of Restrictions Act, 1967 (Act 84 of 1967), as amended, has also approved the application for the removal of restrictive title deed conditions B.2 – B.7 in Title Deed T. 13294 of 1969, applicable to Erf 5308, Hermanus, in terms of section 4(2) of the Act. The endorsement of the deed is being attended to and will be finalised shortly. Erf 5308 may only be subdivided once the title deed has been endorsed.
6. The appeals against the proposed development have also been dismissed by the Competent Authority. A copy of a letter to one of the appellants is attached for your information.

Yours faithfully



HEAD OF DEPARTMENT





Handwritten signature or initials.



[Handwritten signature]

[Faint, illegible text and graphics on the right margin, possibly a legend or title block.]

SearchWorks Report

Print Date:

2011/12/08 12:07 PM 349

Report Details

Search Date: 2011/10/14 10:52 AM
 Reference: Ronel
 Description: 1988/004458/07
 Type Of Search: CIPC Company

Summary Information

Company Name: CORNERCADE (Private Company (Pty) Ltd)
 Status: In Business
 Registration Number: 1988/004458/07
 Registration Date: 1988/08/05
 Directors: KLEYNHANS, MARIUS JAKOBUS (Active)
 KLEYNHANS, MINETTE (Active)
 KLEYNHANS, JEAN LAVINA (Active)
 KLEYNHANS, JOHANNES ADOLF (Deceased)
 Auditors: D M ADAMS (Current)
 D M ADAMS (Name Change)



Company Information

Company Name: CORNERCADE
 Short Name: -
 Company Type: Private Company (Pty) Ltd
 Tax Number: 9090397028
 Short Type: (Pty) Ltd
 CIPC Company Act Type: Company (Registered according to old CO Act)
 Company Registration Number: 1988/004458/07
 Old Company Registration Number: 88/04458/07
 Type Date: -
 Translated Name: -
 Registration Date: 1988/08/05
 Business Start Date: 1988/08/05
 Details Withdrawn from Public: False
 Status: In Business
 Status Date: 1988/08/05
 Principal Business Description: -
 Standard Industrial Classification: Private households, extraterritorial organisations, representatives of foreign governments and other activities not adequately defined
 Financial Year End: 2
 Financial Effective Date: 1988/08/05
 Country: 0
 Country of Origin: -
 Region: Western Cape
 Authorised Capital: -
 Authorised Shares: -
 Issued Capital: -
 Issued Shares: -
 Form Received Date: -
 Date on Form: -
 Conversion Number: -
 Registered Address: 20 HOPE STREET
 -
 HERMANUS
 Western Cape
 7100
 Postal Address: P O BOX 1810
 -
 HERMANUS
 Western Cape
 7200

Directors Information

Director 1 of 4

First Name: MARIUS JAKOBUS
 Surname: KLEYNHANS
 ID Number: 6504015023083
 Status: Active
 Appointment Date: 2009/10/16
 Director Type: Director
 Member Contribution: 0

Member Size 0
 Residential Address 14 INNESBROOKE VILLAGE
 FERNKLOOF ESTATE
 HERMANUS
 Western Cape
 7200
 Postal Address P O BOX 1810
 -
 HERMANUS
 Western Cape
 7200

Director 2 of 4

First Name MINETTE
 Surname KLEYNHANS
 ID Number 7103050000000
 Status Active
 Appointment Date 2009/10/16
 Director Type Director
 Member Contribution 0
 Member Size 0
 Residential Address TOBIAS HAINYEKO STREET
 SWAKOPMUND
 NAMIBIA
 -- Please Select --
 0000
 Postal Address P O BOX 1810
 -
 HERMANUS
 Western Cape
 7200

Director 3 of 4

First Name JEAN LAVINA
 Surname KLEYNHANS
 ID Number 4407100302085
 Status Active
 Appointment Date 2011/07/19
 Director Type Director
 Member Contribution 0
 Member Size 0
 Residential Address 23 CONTOUR ROAD
 -
 HERMANUS
 Western Cape
 7200
 Postal Address P O BOX 736
 -
 HERMANUS
 Western Cape
 7200

Director 4 of 4

First Name JOHANNES ADOLF
 Surname KLEYNHANS
 ID Number 4303315026082
 Status Deceased
 Appointment Date 1988/12/13
 Director Type Director
 Member Contribution 0
 Member Size 0
 Residential Address 23 CONTOUR STREET
 -
 HERMANUS
 Western Cape
 7200
 Postal Address P O BOX 1810
 -
 HERMANUS
 Western Cape
 7200

Auditors Information**Auditor 1 of 2**

Auditor Name D M ADAMS

History 4 of 14

Effective Date of Change: 2009/10/16
 Change Type: Auditor/Acc Officer Change
 Description: 26 HIGH STREET HERMANUS 7200 P O BOX 736 HERMANUS 7200 STATUS : CURRENT

History 5 of 14

Effective Date of Change: 2009/10/16
 Change Type: Directors/Member Change/Secretary/Trust/Both Dir And Office
 Description: Surname=KLEYNHANS Full ForeNames=MINETTE Id No=7103050000000 Status :ACTIVE Nature of Change=NEW APPOINTMENT

History 6 of 14

Effective Date of Change: 2009/10/16
 Change Type: Directors/Member Change/Secretary/Trust/Both Dir And Office
 Description: Surname=KLEYNHANS Full ForeNames=MARIUS JAKOBUS Id No=6504015023083 Status :ACTIVE Nature of Change=NEW APPOINTMENT

History 7 of 14

Effective Date of Change: 2009/10/16
 Change Type: Directors/Member Change/Secretary/Trust/Both Dir And Office
 Description: Surname=KLEYNHANS Full ForeNames=JOHANNES ADOLF Id No=4303315026082 Status :ACTIVE Nature of Change=ADDRESS CHANGE

History 8 of 14

Effective Date of Change: 2009/10/16
 Change Type: Auditor/Acc Officer Change
 Description: D M ADAMS 26 HIGH STREET HERMANUS 7200 P O BOX 736 HERMANUS 7200 STATUS : NAME CHANGE

History 9 of 14

Effective Date of Change: 2009/10/16
 Change Type: Directors/Member Change/Secretary/Trust/Both Dir And Office
 Description: -

History 10 of 14

Effective Date of Change: 2009/04/24
 Change Type: Directors/Member Change/Secretary/Trust/Both Dir And Office
 Description: -

History 11 of 14

Effective Date of Change: 2008/09/05
 Change Type: Auditor/Acc Officer Change
 Description: Change Record Name: = D M ADAMS Status: = Current

History 12 of 14

Effective Date of Change: 2007/01/25
 Change Type: Postal Address Change
 Description: P O BOX 358 HERMANUS 7200

History 13 of 14

Effective Date of Change: 2007/01/25
 Change Type: Registered Address Change
 Description: 17 ARUM STREET INDUSTRIAL AREA HERMANUS 7200

History 14 of 14

Effective Date of Change: 1997/08/31
 Change Type: Directors/Member Change/Secretary/Trust/Both Dir And Office
 Description: -

The data displayed above is provided by our data suppliers and is not altered by SearchWorks. Terms of Use are applicable to this information and can be found on www.SearchWorks.co.za. SearchWorks is not liable for any damages caused by this information.

SearchWorks Report

Print Date:

2011/12/08 08:24 AM

Report Details

Search Date: 2011/12/08 08:24 AM
 Reference: Alta
 Description: HERMANUS, 10131 (CTN)
 Type Of Search: Dots Barcode

Matter Information

Barcode: 080005087121
 Deeds Office: CAPE TOWN

Tracking Information

Lodgement	2011/11/03 09:46:07
Link Batches	2011/11/03 09:46:07
Data Prep	2011/11/03 10:37:02
Data Prep	2011/11/03 10:37:22
Assign to Examiner Level 1	2011/11/04 08:06:33
Return from Examiner	2011/11/07 09:04:17
Assign to Examiner Level 2	2011/11/08 10:50:17
Assign to Examiner Level 3	2011/11/08 10:51:49
At Prep	2011/11/10 14:30:23
Out of Deeds Prep	2011/11/14 11:04:03
INTO-EXECUTION	2011/11/15 07:09:47
Registration	2011/11/15 10:04:51 *
Numbering	2011/11/15 10:58:02
Final Check	2011/11/16 15:08:08
Data Capturing	2011/11/25 14:35:28

Person Information

Person 1 of 1

Person Name: CORNERCADE PTY LTD
 ID Number: 198800445807

Property Information

Property 1 of 1

Description: Town: HERMANUS Erf: 10131 Ptn: 0

The data displayed above is provided by our data suppliers and is not altered by SearchWorks. Terms of Use are applicable to this information and can be found on www.SearchWorks.co.za. SearchWorks is not liable for any damages caused by this information.

08/12/2011



Hoofweg 149 Main Road
Postbus / PO Box 69
Hermanus 7200
Tel : (028) 312 2007 / 312 3823
Faks / Fax : (028) 312 3394
Sel / Cell : 063 270 5657
E-mail / E-pos : voelklip@hermanus.co.za
www.voelklip-properties.co.za

NGC - Agents



18 February 2004

Rabcav Development Facilitators
PO Box 6272
WELGEMOED
7530

ATTENTION: MR CW GREEN

Dear Mr Green

**PROPOSAL CALL : MARKETING AND SALE OF RESIDENTIAL PROPERTIES
IN THE PROPOSED HERMANUS GOLF ESTATE**

With reference to your fax dated 17 February 2004 we would like to inform you with a degree of anticipation that we would be delighted and honoured to be part of your proposed co-ordinated sales team.

We will be awaiting further details regarding the process and are looking forward to working with you on this exciting project. Assuring you of our best possible service at all times.

Yours in Property

**MARIUS KLEYNHANS
VOELKLIP PROPERTIES**

HERMANUS MARKETING PROPOSALS RECEIVED

	ORGANISATION	CONTACT PERSON	ADDRESS	TELEPHONE	FAX	CELL	E-MAIL
1	Homenet Vesta - Hermanus	Conrad de Swardt	P O Box 1058, Hermanus, 7200	028 3122331	028 3122224		homenet@hermanus.co.za
2	Re/max Whale Coast	Wendell Meiring, Ken Slead, Sue Vermeulen	P O Box 1141, Hermanus, 7200	028 3163363	028 3161743		remax-whalecoast@reikormisa.net
3	Carit Estates Hermanus, Rona Legator Properties, Jan Cilliers Properties, Realty 1 Elk, Beach House Properties, Safrin	Beverly Newenham	P O Box 1441, Hermanus, 7200	028 3121102		829779219	
4	Voelklip Properties	Marius Kleythians	P O Box 89, Hermanus, 7200	028 3122007	028 3123394	832706887	voelklip@hermanus.co.za
5	Golf Resorts International	Allen Usher	P O Box 766, Melkboomstrand, Cape Town, 7437	021 5533122	021 5532893		info@golfrsresort.com
6	Pam Golding International	Louis van Niekerk	P O Box 53012, Kenilworth, 7745	021 7975300	021 7618932		
7	Hermanus Property Sales	David Leppan	153 Main Road, Hermanus, 7200	028 3130914	028 3122210		hps@hermanus.co.za
8	Durr Estates	J.A.L. (Riaan) van Zyl	P O Box 398 Kleinmond, 7195	028 2849966	028 2849966	823208183	riaan1@reikormisa.net
9	Ocean Estates International	Colleen Lowe	P O Box 51641, Waterfront, 8002	021 4172600	021 4180125	824527068	lowec@oceanestates.com
10	Engel & Volkers	Anthony Gerard	P O Box 23635, Claremont, 7735	021 6709860	021 6714365		projects@engelvolkers.co.za



24 November 2004

Mr Marius Kleynhans

Voelklip Properties
P O Box 89
Hermanus
7200

Fax: 028 3123394

Dear Agents

FERNKLOOF ESTATE – HOME OF HERMANUS GOLF

It's great to have you on board for the launch of this exciting project – the response has been overwhelming.

First things first: Remuneration

The fee of R250,000 (excluding VAT) per Agency put forward earlier this year still stands. 50% of this fee will be paid on the 28th February 2005 or 30 days after fulfilment of the suspensive conditions stated in the standard Offer to Purchase, whichever occurs later. The balance of the fee will be paid on 31st July 2005 or within 30 days after registration of transfer of the 100th plot, whichever occurs later.

We have had a vast number of queries relating to the registration and selling process particularly with regards to a purchaser having to register and be present at the launch when the selling process takes place. Whilst we have made it possible for potential purchasers to appoint someone by Power of Attorney to act on their behalf, in many cases, purchasers do not have any local contacts. In these instances, we would like to make the list of local agents available to them in order that they may make arrangements directly with someone from one of the agencies to act on their behalf. We trust you will be willing to supply this service and we will ensure that the necessary information is available on the web site.

We also have to bring to your attention the new Municipal Finance Act applicable to all Local Authorities that came into effect on 1 July 2004. In order to comply with this Act, all Offers to Purchase will remain open for a period of 7 days from the date of signature by the purchaser. During this period any member of the public who registered to partake in the process may submit a higher offer on any of the erven. This offer must be submitted in the form of a completed Offer to Purchase and payment of a 20% deposit. The first purchaser will then have 7 days after written notification of the higher offer in which to match the higher amount, failing which the first offer will be set aside and the deposit refunded.

To summarise the involvement of each Agency we confirm the following duties and responsibilities:

1. Attention at all briefing and information meetings.
2. Field enquiries with respect to the development.
3. Notify your own data base in respect of the development.
4. Assist individuals who wish to participate in the process but are unable to personally register and/or be present during the selling process.
5. Man a registration table on site between 10h00 and 19h00 on the 29th and 30th November 2004, and for golf club members, between 09h00 and 12h00 on the 2nd December 2004.
6. Assist respective purchasers and members of the public at the launch on the 2nd December 2004 between 09h00 and approximately 20h00.
7. Assist members of the public who registered to participate in the process to submit Offers to Purchase during the 7 day window period. These Offers must be forward to Clint Evans from our office to witness the documents and process further.
8. Offer any other assistance as required to facilitate a smooth and efficient sales process.

We have appointed Pam Golding as lead agent to assist in the co-ordination and control of the marketing and sales process and have authorised Louis van Niekerk and Chris Immelman to act on our behalf.

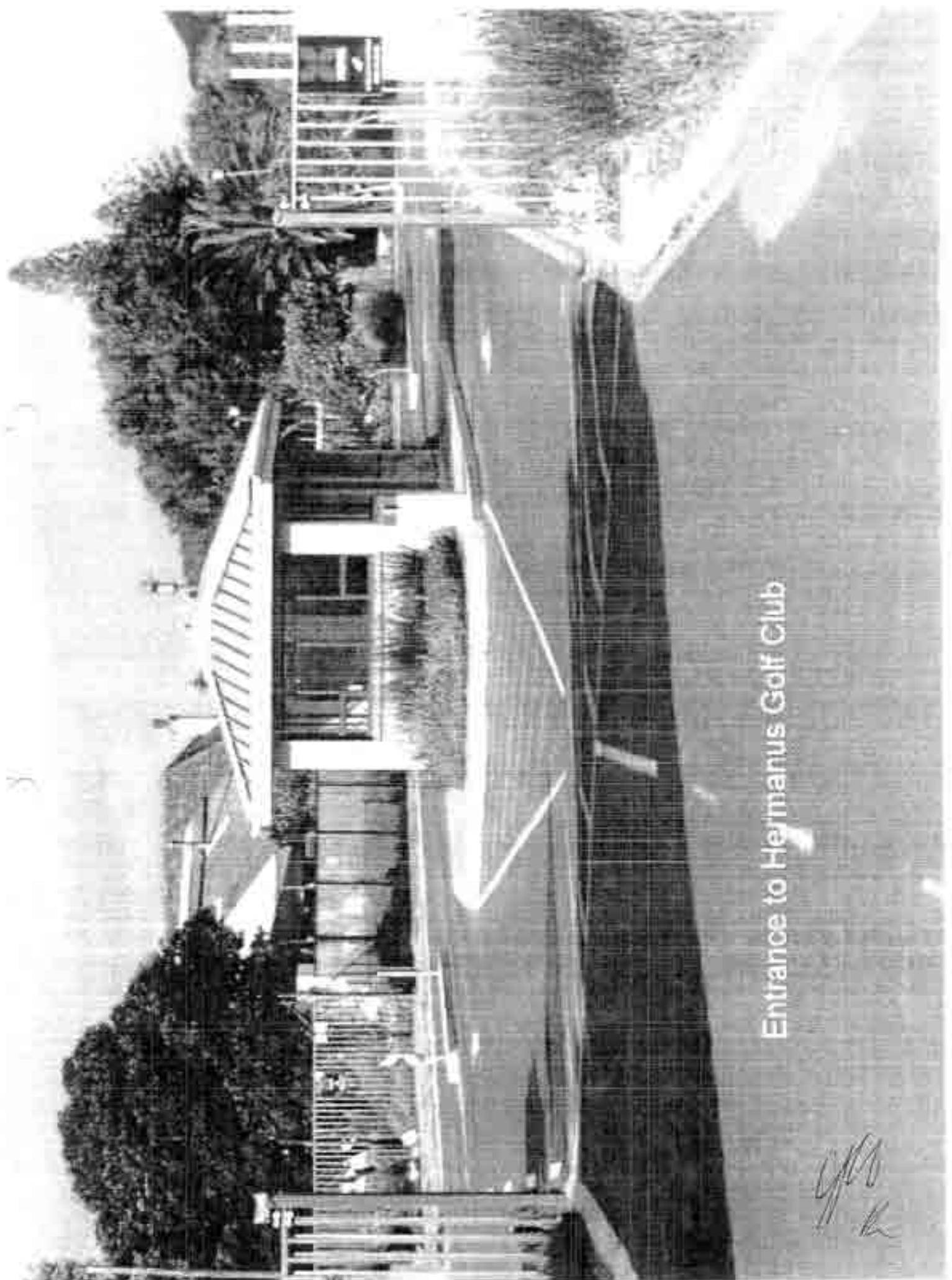
Please do not hesitate to contact me should you require further clarity on any of the above items or any other issue relating to this development.

We look forward to a successful launch and once again thank you for your participation and assistance.

Yours sincerely


 PP COLIN GREEN

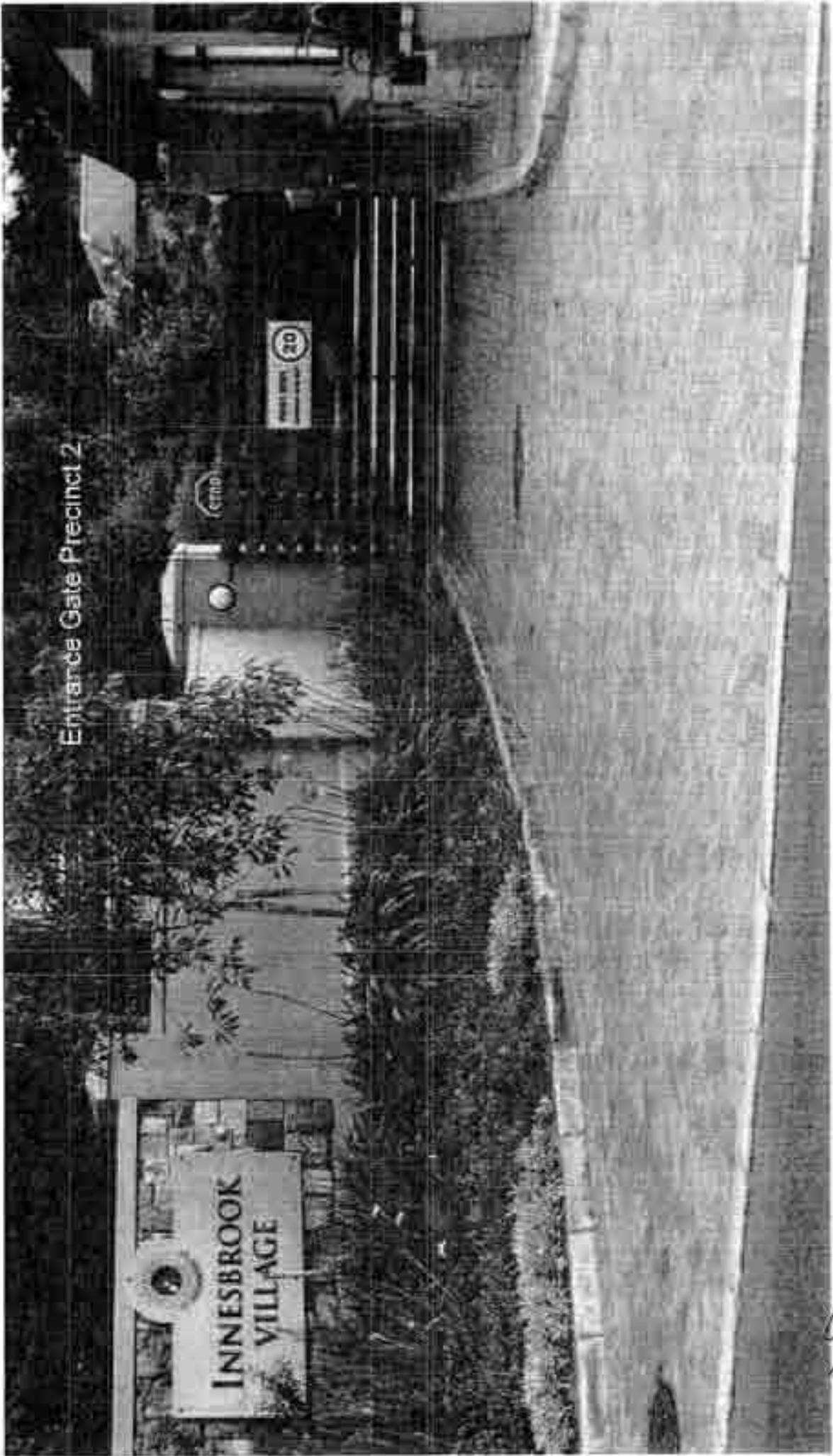




Entrance to Hermanus Golf Club

[Handwritten signature]

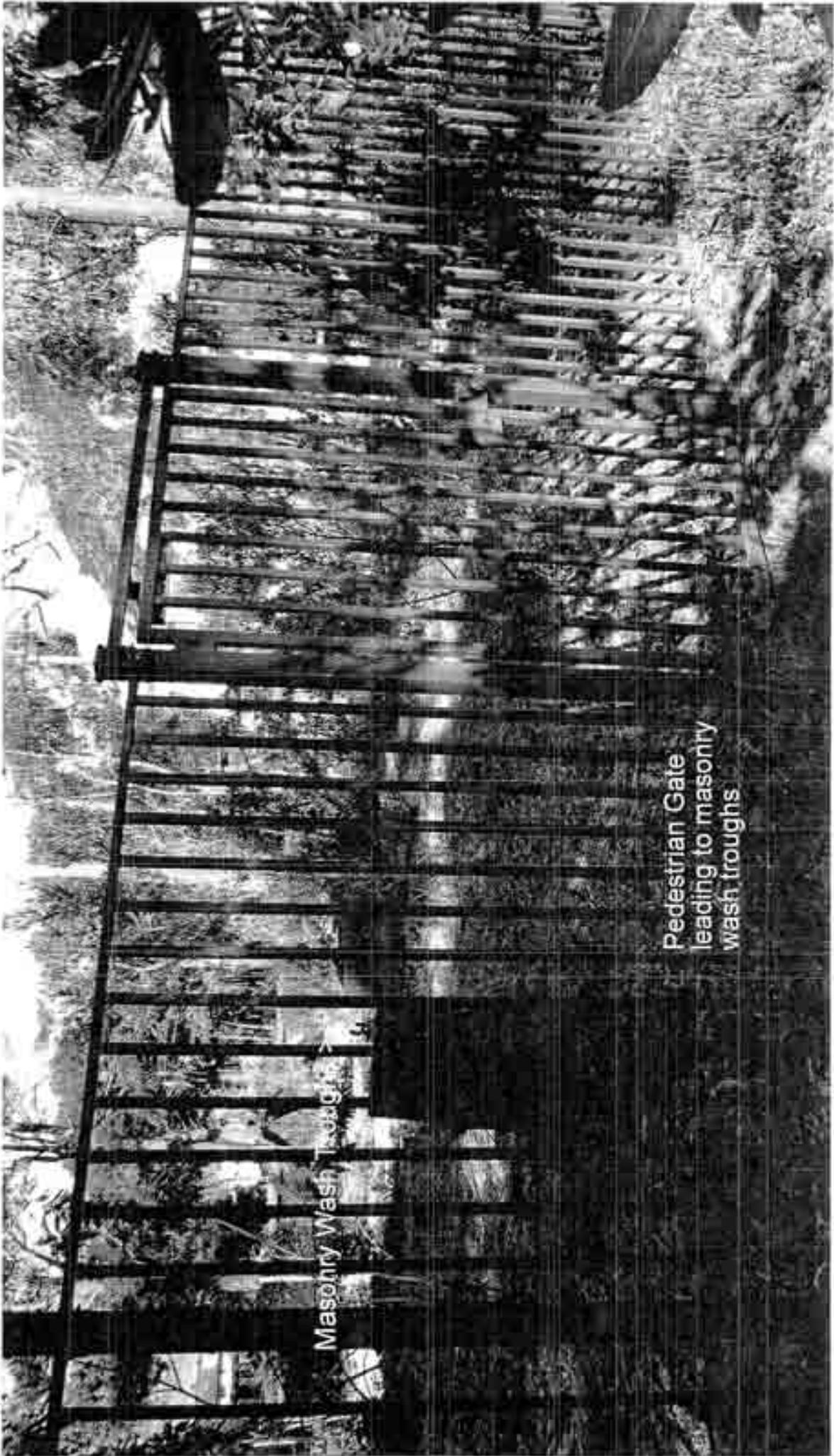
[Handwritten scribble]



Entrance Gate Precinct 2

[Handwritten initials]

ll



Pedestrian Gate leading to masonry wash troughs

Masonry Wash Trough

9/10
ll

HERMANUS GOLF CLUB

Pedestrian Access to the Hermanus Golf Course in terms of ROD Ref E17/2/2/3A paragraph 4.16.

I, the undersigned _____ ("the disc holder")

Identity number _____ (copy of ID document provided as proof)

of (address) _____

hereby request pedestrian access to the Hermanus Golf Course via pedestrian gate(s) # _____ and agree to be bound by the following conditions of access, which conditions I understand and consider to be fair and reasonable:

1. The access disc shall at all times remain the property of the Hermanus Golf Club and any access via this disc # _____ shall be at the **sole risk and responsibility** of the disc holder.
2. Upon becoming aware that the disc has been **lost/stolen/damaged**, the disc holder shall **immediately inform the HGC manager**, whereupon the disc shall immediately be invalidated for access.
3. Should the disc holder require a **replacement disc**, it shall be issued against payment of **R100** by the disc holder.
4. The **wetland areas** are **no go areas** and may not be entered under any circumstances. The wetlands may only be viewed from the demarcated boundaries thereof.
5. **Access** through the pedestrian gates to the **Clubhouse** must be via the **designated and sign posted link paths only**.
6. The Golf Course may be used for **recreational walking or jogging only**, avoiding tees, bunkers and greens and should, for safety reasons, only be used **outside of normal golfing hours** (early morning and late afternoon) when no golfing play is taking place or any golf players are visible.
7. **No pets** are allowed anywhere on the Golf Club property.
8. The use of **bicycles, skateboards, roller skates** or any other **similar items** are **strictly forbidden** on the Golf Club property.

IMPORTANT NOTICE

DANGER OF INJURY TO PERSONS AND DAMAGE TO PROPERTY

You will be entering private property and the right of admission is at all times reserved.

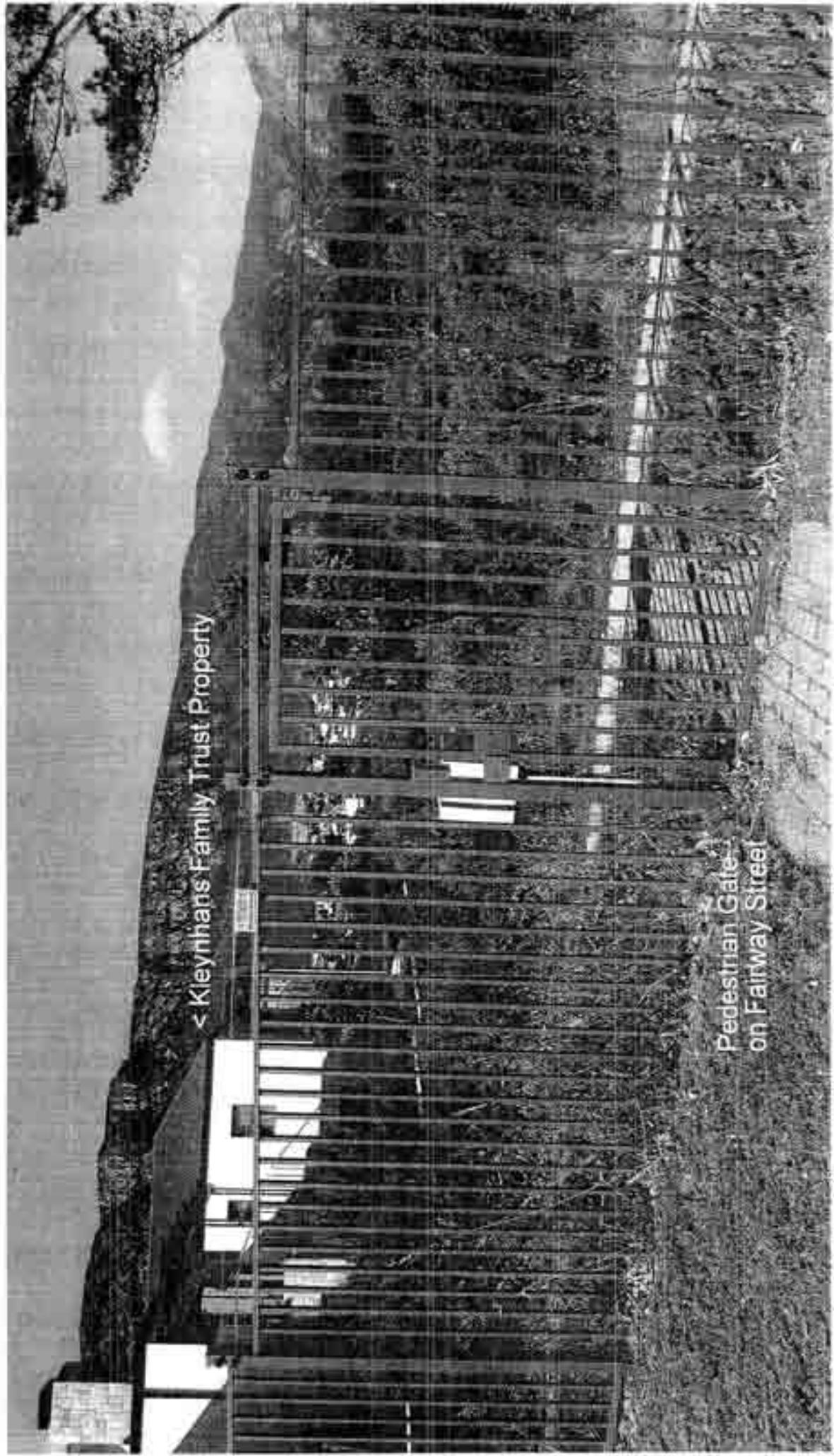
The Hermanus Golf Club and surrounds comprise an **active golf course** and residential estate (Fernkloof Estate) with **ongoing construction** on vacant properties. Therefore the presence anywhere on the Golf course exposes persons and property to damages caused by **flying golf balls, golf and construction vehicles, construction machinery and equipment, falling trees, maintenance and mowing equipment, hidden irrigation points, ditches and other activities normally associated with golfing and building construction**, and by entering the Golf Course or the Estate you accept these risks.

INDEMNITY

I hereby confirm that I shall enter the Hermanus Golf Course and surrounds **entirely at my own risk** and in doing so, **waive any claims** I may have against the Hermanus Golf Club and **indemnify the Hermanus Golf Club against all and or any claims** in respect of any **harm, loss, damage or injury**, including consequential loss, of whatsoever nature, sustained by me or any of my invitees, and minors under my or their supervision.

Access Disc # _____ received at a cost of R100.00.

Signature: _____ Date: _____



< Kleynhans Family Trust Property

Pedestrian Gate
on Fairway Street

9/16
12

3

HERMANUS GOLF CLUB

ARK23
Golf Club - Golf Club
33

MINUTES OF THE MEETING HELD BETWEEN REPRESENTATIVES FROM
RABCAV AND THE HERMANUS GOLF CLUB DEVELOPMENT COMMITTEE
AT FANCOURT ON TUESDAY 11 NOVEMBER 2003

PRESENT: J. A. Kleynhans (Chairman)
A. G. Runkel (Club President)
I. Pansegrouw
J. Reynell (Vice Captain)
H. A. de Klerk
A. Simpson
B. Cain
J. Rabie (Rabcav)
L. Viljoen (Rabcav)
C. Green (Rabcav)
H. White (General Manager)

1. WELCOME

Mr. Rabie welcomed all to the meeting and expressed his excitement with the whole project. He said that they would like to see a very special golf estate, to the benefit of all the parties, established in Hermanus.

2. CONDITIONS OF APPROVAL -
PLANNING & ENVIRONMENTAL

Mr. Viljoen started by addressing Mr. Kleynhans' concern with the fact that the Club does not to date have any official approval, in writing, from either the Council or the facilitators. Mr. Viljoen presented documentation approving the development to the meeting, both from an environmental and development planning side with the following conditions:

- Additional water source to be identified and approved by Council. Council is in the process of formulating this report.
- The fence that is to be erected around the course must be a see-through fence.
- Access to the wetlands must be given to the public.
- A maximum of 20 Golf Lodges can be built, single story, with a maximum floor space of 250 m².

gmb
llly

- A Trust Fund to be established, where a % of the income derived from the golf lodges are to be allocated for upgrade and maintenance of the wetland areas.

Mr. Viljoen said that the council are in the process of affirming the development plan, which they should have ready within the next two to three weeks. A plan as approved by Council was presented to all present showing the layout of the course and the nine different precincts of development on and around the course. All high-density housing has been removed and the total development reduced from 670 to approximately 350 properties. M. Viljoen said that a fence would be built right around the Estate, some 6km of fence. He went on to say that they would look at a similar fence to that of Fancourt or Steenburg, with brick pillars and palisade metal fencing. The existing homeowners in the Hermanus Heights to be approached individually, to arrange fencing of their properties.

3. MUNICIPALITY/RABCAV

Mr. Viljoen said that their responsibility to council is to add maximum value to the land, which the golf course forms the anchor of.

He said that the Development Committee must realize that the Golf Course development was originally designed to be a 9-hole development, but with persuasion from the club was changed to a 27-hole course. This change resulted in a 60-70% increase in course construction

Mr. Viljoen went on to say that the Council and the Club must see the whole package as a win-win situation. He was concerned that the Council would see the high cost of building the course as unnecessary spending of the Community's money. The Council therefore must be made aware of the reason why the construction of a 27-hole course, at a standard as high as envisaged, is vital to the success of the project.

4. GOLF CLUB APPROVAL PROCESS

Mr. Viljoen asked Mr. Kleynhans to expand on the road forward as far as the Golf Club is concerned.

Handwritten signatures and initials, including a large signature and the number '2' below it.

Mr. Kleynhans said that a Special General Meeting still has to be scheduled with the Hermanus Golf Club members to approve the development. He said that should RABCAV still want to launch the project on the 12th of December as previously discussed then a Special General Meeting would have to be scheduled for the 11th of December and notifications for the meeting will have to be sent out by the 25th of November 2003. He said that this would result in an extremely tight schedule. Mr. Rabie said that at this stage it is their intention to have an awareness campaign during December with the official launch being planned for middle February 2003.

Mr. Kleynhans said that the best way forward would be for the Development Committee and the facilitator to reach a Memorandum of understanding with a few conditions that would have to be met before the project can get underway. The members can therefore vote in favor of the development subject to some conditions that have to be met. The members from RABCAV agreed that this would be a favorable solution.

5. GOLF COURSE

a) Layout

Mr. Green said that the layout of the course has not changed from the last layout the Golf Club had received.

b) Specification

Mr. Green said that a total of 18 new greens would be constructed (15 new greens, 2 putting greens, 1 chipping green). Mr. Kleynhans said that he felt that in the interest of the course all 27 greens must be the same and therefore require the reconstruction of the remaining 12 old greens. Mr. Rabie agreed and said that this must and will be done. Mr. Viljoen said that the type of greens built can have a serious impact on cost and should be considered in order to be able to redo all the greens. He said that in consultation with Mr. Matkovich they said that they would recommend the possibility of constructing California University Specified greens rather than USPGA specified greens. He said that the USPGA specified greens sand is not readily available and will have to be imported from elsewhere in South Africa, and even then the quality of the sand is not correct. Mr. Rabie said that the green would be of the same construction as the 14th green at Steenberg. Mr. Viljoen said that the saving in cost could be between R18 000 and R40 000 per green should enough of the right soil be available. He said that Mr. Matkovich will have soil samples taken and will report back to them within the next two weeks.

c) Program

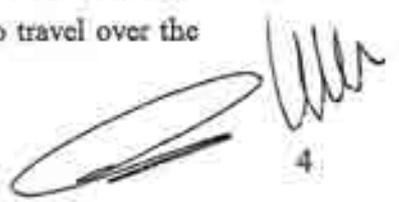
Mr. Viljoen said that Mr. Matkovich could start in February 2004 and hand over the course end of November 2004. Mr. Viljoen said that there was pressure put onto Mr. Matkovich that there will be 18 holes playable at all times during the development, he said that this would be possible, but there would be 2 to 4 temporary greens. Mr. Cain raised concern that they will be able to complete the course in the said time period. Mr. Viljoen said that Mr. Matkovich will be able to supply us with a time schedule for the duration of the course development, but will have to confirm whether it still applies when re-doing all 27 greens. Mr. Kleynhans reminded Mr. Viljoen that he (Mr. Viljoen) on two separate occasions, told the members that there will be 18 playable holes at all times. Mr. Viljoen said that in light of the development as far as all 27 greens being done is concerned, we should meet with Mr. Matkovich to discuss the matter further.

d) Design & Construction

Mr. Rabie said they would get plans of the course plus all the other information to all present as soon as possible after the meeting, including the rezoning details for the entire development and the new piece next to the Clubhouse. Mr. Kleynhans asked RABCAV to consider the option of registering servitude for the course instead of the traditional lease agreement. They said they would investigate and report back to the Committee.

Mr. Viljoen suggested to Committee that a lump sum figure be agreed on for the Construction and growing in of the course and Mr. Matkovich to contract to the Club rather than RABCAV. RABCAV will pay the Club and in turn the Club will pay Mr. Matkovich. The reasons he gave were that the Club could benefit by possibly changing certain design features or construction details, could free money for other areas and it will also cut out the Club having to come to RABCAV who then has to go to Mr. Matkovich. He felt that the Club dealing directly with Mr. Matkovich would make things run a lot smoother. Mr. Kleynhans said the Committee would consider this.

Mr. Simpson expressed his concern that after construction of the course has been completed the civil works going on next to the course could damage work already done on the Course and wanted to know who would be in charge of all these works? Mr. Green said that RABCAV would be responsible for the civil works contractors, but said that this project is unique, because all the precincts are accessible from the outside, therefore machinery will not have to travel over the course.



e) Grow-in

Hermanus Golf Club will be responsible for the growing in of the course after construction under the supervision of Mr. Matkovich, which they will be compensated for.

f) Implements

Mr. Viljoen read through the list of machinery required by the Club for maintenance on the course. He asked the Committee to obtain prices as soon as possible.

g) Club wish list

Mr. Kleynhans listed the following items to be considered by RABCAV as items the Club would like to see addressed:

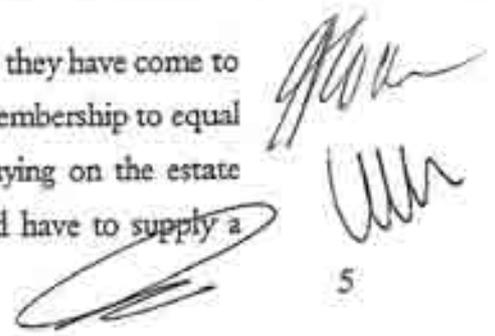
- All the greens must be of the same standard
- Cart paths on the course must be established and uniform
- Extension to equipment storage facility as required to accommodate additional equipment.
- Driving range to be looked at in terms of length.
- Golf Cart Storage will not be sufficient to store additional carts
- Trees to be planted and landscaping to be done on the Course
- Pumping of water should water not come from the dam

Mr. Kleynhans asked whether the water pipeline will still be built and whether the Club will get water from the dam and only after the dam is empty get from the pipeline. Mr. Viljoen said that the Club would receive water from the dam, which will be supplemented by water from the pipeline should the dam run dry.

In order to get an indication of the quality of the course; Mr. Kleynhans asked if Boshenmeer Golf Estate was scored 10 out of ten, where would RABCAV see Hermanus. The reply from Mr. Rabie was that they see Hermanus as a 10 out of 10, on par with Boshenmeer. Mr. Kleynhans stressed that any decisions regarding the development can only come from the development committee and any questions must be directed to the General Manager.

6. **MEMBERSHIP**

Mr. Viljoen said that after discussions between the partners they have come to the conclusion that they need to increase the amount of membership to equal the amount of properties (350). They felt that people buying on the estate would insist on being members and therefore they would have to supply a

Handwritten signatures and a circled number 5.

membership with every property. Mr. Rabie made a suggestion that the Committee considers maybe giving a mixture of different memberships to different homeowners. Issues like whether the membership is attached to a person or property and how many memberships are available for chalets are still to be discussed. Mr. Kleynhans asked for the amount of plots bordering the course to be forwarded to Committee for the Committee to consider the request.

7. TRAFFIC: ACCESS AND ENTRANCE TO PARKING AREA

Mr. Viljoen said that they are currently in the process of looking at the feasibility of where an entrance and an exit could be established to allow for better flow and access control to and from the Club. The Committee indicated that in their opinion the entrance should be opposite Berg & See with the exit where the entrance is now.

8. PARKING AREA UPGRADE

Mr. Viljoen indicated that the car park due to it's current state and the poor first impression it creates is a priority. The parking area must be done as soon as possible. The Committee agreed.

9. MARKETING

Mr. Viljoen said that they would like to start with an awareness campaign at the Club during December 2003. They would like to erect an information kiosk next to the Clubhouse on the halfway house side and one in the entrance to the Club. The purpose of this is to gather names of interested buyers and in order to invite them to the launch middle February. Mr. Viljoen said that this way members could be given priority by inviting those members who indicated that they are interested first.

Mr. Kleynhans said that it would be advisable to first get members approval for the project before having the awareness campaign. He said that the Committee would report back to RABCAV regarding the positioning of the kiosk.

Mr. Green said that the phasing of the different precincts are still to be finalized. Mr. Rabie said that the plots would range between R450 000 and R1000 000 and the price of a golf lodge in the region of R2 400 000. The lodges will be sold to end users and investors and will be run similar to the Fancourt scenario, where golfers can rent accommodation and services. Mr. Kleynhans said that during earlier negotiations the club were promised 5 Chalets next to the clubhouse, which according to their pricing is worth R12 000 000. Mr. Kleynhans went on to say that the club is in principal not particularly interested in these lodges. He said that it would be far more beneficial to the club if moneys to the value of the golf lodges were allocated to the improvement of the course, which is the club's primary source of income. Mr. Rabie acknowledged the request.

Mr. Green said that the precincts would in all probability be managed by having 9 different homeowners associations, which report to a main homeowners association. Mr. Green went on to say that the building restrictions and style would be made available at a later stage. Mr. Cain said that we must make sure that the houses are far enough from the fairways. Mr. Green said that the layout only allows for houses on one side of the fairway, similarly to the Hermanus Heights houses bordering the course.

10. GENERAL

Mr. Kleynhans thanked the members from RABCAV for their generosity and positive attitude and re-iterated that the project must be a win-win situation for all involved. Mr. Rabie thanked the Committee for coming and said that he is hugely optimistic about the project and felt that it will only enhance the Club and Hermanus.

11. CLOSE OF MEETING

Meeting was closed at 16h00.



(1)

fit Golf Course - Gues vms 370 **ANNEX 4**

**RECORD OF THE MEETING HELD WITH THE HERMANUS GOLF CLUB
DEVELOPMENT COMMITTEE AT FANCOURT
ON 11 NOVEMBER 2003**

<u>PRESENT:</u>		<u>REPRESENTING:</u>	<u>FAX NO:</u>	<u>E-MAIL:</u>
Leslie Viljoen	(LV)	Rabcav	021 913 4538	cavcor@iafrica.com
John Rabie	(JR)	Rabcav	021 762 7025	Johnr@rabie.co.za
Colin Greer	(CG)	Rabcav	021 762 7025	coling@rabie.co.za
Brian Cain	(BC)	Hermanus Golf Club	028-312 3423	
Ian Pansegrouw	(IP)	Hermanus Golf Club	028-314 0397	imp@itec.co.za
Alex Simpson	(AS)	Hermanus Golf Club	021-975 3285	
Harry White	(HW)	Hermanus Golf Club	028-312 2333	harry@hgc.co.za
Toni de Klerk	(TdK)	Hermanus Golf Club	028-312 2185	t.deklerk@attorneys.law.za
Hannes Kleynhans	(JK)	Hermanus Golf Club	028-312 1262	noragem@hermanus.co.za
John Reynell	(JRI)	Hermanus Golf Club	028-312 4074	
Tony Runkel	(TR)	Hermanus Golf Club	028-312 1845	

1.0 WELCOME

1.1 JR welcomed everyone and stated that the intention of the meeting was to brief the committee members on all aspects relating to proposed development. This would equip the committee members with all relevant information in order that they were able to report back to their members. JR handed over to LV.

2.0 CONDITIONS OF APPROVAL – PLANNING AND ENVIRONMENTAL

2.1 LV confirmed that the official planning and environmental approvals for the development had been approved.

It was stated that some of the conditions of approval were applicable to the club. These included:

- Water programme to be provided
LV stated that the relevant studies had been completed and the information was at hand but needed to be ratified by the Council.
- Fence around the golf course
It was confirmed that the entire golf course and estate would be fenced using a combination of solid wall with palisade infill panels, and palisade only sections. The palisade fence would generally be used where the estate interfaced with existing residential properties.
- Public access to the estate:
This condition of approval required public access to be provided subject to the management rules of the golf club. An example of where this had successfully been incorporated was at the Bellville golf course.
- Site Development Plan to be provided.
LV confirmed that the Council Mayoral Committee had accepted that the approved plan was the Site Development Plan. This interpretation still needed to be firmed up with the

authorities.

- Number of opportunities
LV stated that 690 opportunities had been approved but due to a change in market demand a maximum of 450 were anticipated. The current development proposals included approximately 360 opportunities.
- Fencing around the outer perimeter.
LV confirmed that the entire estate would be fenced / walled and controlled entrances would be provided to each development parcel. It was recorded that there would possibly be no fencing in front of the properties in Hermanus Heights which had golf course access. However, consensus would need to be reached with all residents to ensure that their front boundaries were secure.
- Golf lodges
It was recorded that the approval allowed a maximum of 20 single storey golf lodges of 250m2 each.

0 MUNICIPALITY / RABCAV OBLIGATIONS

3.1 LV confirmed that Rabcav's appointment was to add maximum value to the Council's land holdings. It was stated that the golf course formed the anchor to the development and that the development opportunities created significant benefits for the golf club. It was noted that the initial concept included the creation of a satellite 9 holes but this had been amended to include three loops starting and returning at the clubhouse. This resulted in a significant increase in costs which did not yet have the support of the Local Authority. LV cautioned the way in which the proposal was packaged to the Council and stated that it should be a win-win situation.

4.0 GOLF CLUB APPROVAL PROCESS

- 4.1 HK stated that at this point in time the members had many unanswered questions. The development committee would need to have as much information as possible and that the notice of the Special General Meeting would need to go out 17 days in advance of the meeting. This meant that notices would need to be posted on 25 November in order for the SGM to take place on 11 December. The awareness campaign could then proceed from 12 December.
- 4.2 HK suggested that a memorandum of understanding be agreed between Rabcav and the golf club which would record the objectives and conditions to be fulfilled.

5.0 GOLF COURSE

- 5.1 The layout was briefly discussed and it was confirmed that current layout included three returning nines which involved additional modifications to the existing course.
- 5.2 Specification
The different specifications for the greens were discussed. It was stated that according to the golf course designers, Matkovich and Hayes, the material on site was suitable for California spec greens and that this specification was more than adequate for the golf course. It was agreed that all 27 greens should be of the same specification.
- 5.3 Programme
LV stated that the marketing period would be shorter than originally anticipated and it was felt that it would be possible to do the entire development in one go. Matkovich and Hayes had confirmed that during the construction period 18 holes would be playable but this would entail some inconvenience and possibly some temporary greens.

5.4 Grow-in
It was confirmed that the grow-in would be handled by the club under the supervision of Matkovich and Hayes.

5.5 Budget
LV confirmed that a budget had been prepared by Matkovich and Hayes and this was in the process of being firmed up. LV proposed that once the total scope of the work and budget had been agreed, Matkovich and Hayes should be appointed by the club to carry out the work. This would put the club in control of the finances and the work to be carried out and would eliminate the problems associated with Rabcav being an intermediary.

5.6 Implements
It was confirmed that the list of implements was still the same. It was requested that this list be priced.

5.7 Club wish list
The club wish list included the following:

- All greens be the same standard
- Cart paths be constructed
- Parking area be extended and formalised
- Entrance be upgraded and gates provided
- Implements be provided and storage facilities for additional carts be provided

5.8 After some discussion it was agreed that the objective was to create a golf course and estate comparable to Boschenmeer Golf Estate.

5.9 It was confirmed that the club would take title to the land occupied by the current club house as well as the extension which had been negotiated by Rabcav. HK requested whether it would be possible to obtain more land on the other side of the current erf.

5.10 HK suggested that instead of extending the lease for the golf club a servitude be registered over the course. It was agreed that this would need to be investigated and a legal opinion obtained.

5.11 Club membership
HK stated that originally 150 memberships had been agreed. LV stated that after further investigations and additional marketing research it had been concluded that memberships needed to be made available to all buyers in the estate. In this regard it was noted that where existing members bought properties they would not require new memberships. The club would need to look at the existing constitution and consider this request. Rabcav to confirm the number of memberships required.

5.12 Access and Exit to the Club
It was confirmed that separate access and exit to the golf club had been looked at and that the resolution of the traffic issues was a requirement of the planning approval.

5.13 Parking upgrade area
It was confirmed that the existing parking area would be expanded and formalised.

6.0 MARKETING

6.1 LV confirmed that it would be desirable to have an awareness campaign over the December period subject to approval by the members

6.2 It was stated that a sales and information cabin would be required and it was proposed that a temporary structure be erected adjacent to the clubhouse where the erf was to be extended.

6.3 LV stated that in order to reduce the risk of the development a number of pre-sales would be required. The intention was to give members a first opportunity subject to statutory requirements and Municipal ordinance. HW confirmed that 1300 notices had been sent out to the golf club members enquiring whether they were interested in purchasing a plot.

6.4 It was confirmed that the intention was to sell off a pre-approved price list but that no prices had yet been agreed.

7.0 PHASING

7.1 CG stated that some of the development parcels would require more infrastructure and that these would form the later phases to the development. The first phases requiring less infrastructure were Precincts 1, 2, 3, 4 and 5.

8.0 GENERAL

8.1 It was confirmed that architectural guidelines would be formulated to control the aesthetics of the homes and that a homeowners' association would be formed to which each property owner would belong.

8.2 The golf lodges were briefly discussed and it was confirmed that the intention was to sell these properties to end-users for the purpose of creating serviced apartments possibly managed by a single entity. The number of memberships for the golf lodges would need to be established.

8.3 It was confirmed that Rabcav would assess the wish list and try and accommodate as much as possible and that a previous proposal whereby the club would participate in the lodges in some way would fall away.

8.4 The extent of the proposed tree planting on the new part of the golf course was discussed. Rabcav to confirm the extent of the proposed tree planting with Matkovich and Hayes.

8.5 HK stated that the club would still want to draw its water from the existing dam subject to capacity and thereafter treated effluent would be used.

8.6 It was confirmed that the way forward would be for Rabcav to finalise a proposal together with a specification and budget and then to sit down with Matkovich and Hayes and the club to agree on the various components.

9.0 CLOSURE OF MEETINGS

9.1 With nothing further to discuss LV thanked the committee members for their time and input and the positive spirit in which the discussions had taken place.





8 June

2009

The Mayor
 Overstrand Municipality
 Magnolia Street
 HERMANUS

**MEMORANDUM OF AGREEMENT : OVERSTRAND MUNICIPALITY / FEMPOA :
 FENCING FERNKLOOF ESTATE**

At a meeting of the trustees of the Fernkloof Estate Master Property Owners' Association ("FEMPOA") held on 30 May 2009 it was unanimously decided that the FEMPOA would not to enter into any agreement with the Overstrand Municipality ("OM") in terms of which the FEMPOA would take over the obligations of the OM regarding the completion of the fencing of the Fernkloof Estate and the premises of the Hermanus Golf Club.

At the aforesaid trustee meeting it was decided that the OM be placed on terms regarding the obligation of the OM to complete the aforesaid fencing.

Life-Wire have advised that it is possible to complete the aforesaid fencing on or before 30 September 2009.

Accordingly and in terms of the decision taken at the aforesaid trustee meeting the OM is hereby given notice that the OM must complete the aforesaid fencing by 30 September 2009, failing which the members of the FEMPOA shall be entitled to take legal steps against the OM for the obtaining of a court order to compel the OM to complete the aforesaid fencing. Should the latter be necessary, the OM will be held liable for the cost of such legal action on the highest possible scale and this letter will inter alia be used in support of the latter.

Yours faithfully

IA KRIGE

CHAIRMAN

FERNKLOOF ESTATE MASTER PROPERTY OWNERS' ASSOCIATION

ATTORNEYS
CONVEYANCERS



PROKUREURS
AKTEBESORGERE

VAT Reg. No./BTW Reg. Nr. 4090233861
Your Ref/U Verw: I Krige
Our Ref/Ons Verw: MCHIN/dt/DM-Ferndloof

10 June 2009

Mr Izak Krige
Ferndloof Master Property Owners' Association
Hermanus

By electronic mail: izak.krige@insekom.co.za

Dear Sir

**DRAFT MEMORANDUM OF AGREEMENT: OVERSTRAND MUNICIPALITY / FEMPOA
RE: FENCING FERNDLOOF ESTATE**

We are acting herein on behalf of the Overstrand Municipality and refer to your letter regarding the above, dated 8 June 2009, and addressed to our client.

This letter is addressed to you in your personal capacity as well as your capacity as chairman of the FEMPOA.

Your aforesaid letter came as a surprise to our client, especially the statement that "... it was unanimously decided that the FEMPOA would not enter into any agreement with the Overstrand Municipality...".

At the very outset of the negotiations when you, unsolicited, approached our client to provide the funds to enable the FEMPOA to erect the fence, you assured us that you had a mandate from the FEMPOA trustees to enter into such an agreement with our client. You expressly told written on a number of occasions that you were duly authorised by the majority of the trustees to enter into the agreement.

All negotiations in this regard were settlement negotiations and done in good faith and without prejudice. It was stated on a number of occasions that our client's rights shall remain reserved until an agreement was reached, i.e. signed by both parties.

It now appears as if you did not have the mandate you professed to have. In this regard you will be held personally liable for any damages suffered by our client as a result of your actions and representations.

Our instructions are to advise that our client does not accept liability to erect the fence and will therefore not do so.

Yours faithfully,

CHIN INCORPORATED
Per: M CHIN
mchin@lawhermanus.co.za

CHIN INGELYF/INCORPORATED REG. NO. 2006/028966/21
HQ HOUSE 6 DIRIG UYSSTRAAT/STREET 1591 HERMANUS 7200
☎028 - 313 2450 ☎028 - 313 2455 attorneys@lawhermanus.co.za
DIREKTEUR/DIRECTOR : M L C CHIN B.AUR LLB LL.M.
KONSULTANT/CONSULTANT : H E LOUW BA LLB (EINDOMONTWIKKELING/PROPERTY DEVELOPMENT)
KANTOORBESTUURDER/OFFICE MANAGER : RONEL DAVIDOWITZ

~~376~~

376

**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)**

CASE NUMBER: 12755/11

In the matter between:

MARIUS KLEYNHANS First Applicant
In his capacity as Trustee for the time
being of the Kleynhans Family Trust

HEATHER KLEYNHANS Second Applicant
In her capacity as Trustee for the time
being of the Kleynhans Family Trust

CORNERCADE (PTY) LTD Third Applicant

SHIRLEY MILLICENT KOSTER Fourth Applicant

TIELMAN NIEUWOUDT AGGENBACH Fifth Applicant

and

OVERSTRAND MUNICIPALITY Respondent

CONFIRMING AFFIDAVIT

I, the undersigned,

ROYDON NIELS PYBUS

do hereby make oath and state as follows:



1. I am an adult male retired businessman of 88 Fernkloof Drive, Hermanus. I am also the current Club Captain of the Hermanus Golf Club.
2. I have been a member of the Hermanus Golf Club for the past 25 or so years. The property on which I reside (formally known as Erf 5826) was acquired by the Pybus Family Trust on 12 May 1997 and I have been living there for the past 6 years.
3. As an active member of the Hermanus Golf Club and resident of Hermanus Heights I have had at all relevant times, since the early planning phases, maintained a keen interest in the Fernkloof Estate development.
4. I refer to the answering affidavit deposed to in this matter by ALFRED RIAAN KUCHAR, which I have read, and with the contents of which I agree. I specifically confirm that what is said therein in relation to me (in paragraph 63.12 thereof), the establishment of the Fernkloof Estate and the security arrangements that are in place at the main entrance to the Hermanus Golf Club (in paragraph 63.1 thereof) is true and correct.
5. Without derogating from the generality of my aforesaid confirmation I, in particular wish to state that:
 - 5.1. I am in agreement with the correctness of the facts analysis in paragraph 5 of the affidavit in relation to the direct and substantial interest which the individual owners of the erven



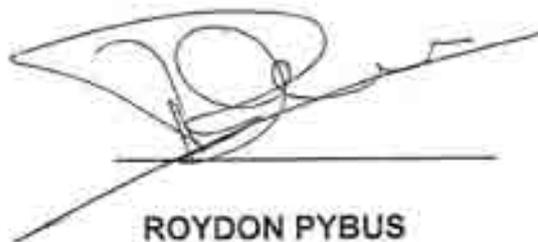
which the Applicants seek to fence out, has in the outcome of this litigation;

- 5.2. the property of the Pybus Family Trust, like the other affected properties in Hermanus Heights and in the Main Road area, was historically not fenced off and at all relevant times enjoyed golf course access and frontage;
- 5.3. the suggestion, during the initial stages of the planning phase, that the entire golf course should be fenced in was seriously opposed by owners of existing surrounding properties;
- 5.4. as is also borne out by the notes that appear on the Boundary Structures Key Plan, Annexure "ARK7", by December 2004 (when the agreements of sale pertaining to the Fernkloof Estate properties were signed by prospective purchasers) it was public knowledge that it had in the interim been resolved that the properties which are described by Mr. Kuchar as "*the Hermanus Heights and Main Road properties*" were not going to be fenced off;
- 5.5. I personally attended the sale - and purchased one of the properties on offer - and confirm that a copy of the plan itself was on display at the venue where the sale took place;
- 5.6. in order to render golf course access from the outside secure, the owners of the Hermanus Heights and Main Road properties



were individually required to fence or secure their properties on the street- and lateral sides to the satisfaction of the Respondent and the developer on its behalf;

- 5.7. the individual home owners (myself included) duly complied by improving their respective properties to the satisfaction of the Respondent;
- 5.8. the fencing issue became acrimonious during or about the course of 2008 and caused a rift between members of the Hermanus Golf Club;
- 5.9. despite settlement negotiations which involved the Respondent, the Hermanus Golf Club, the various property owners associations, as represented by the Fernkloof Estate Master Property Owners Association, the Hermanus Heights property owners and the Main Road property owners, the issues could not be resolved.



ROYDON PYBUS

Sworn to and signed in my presence at Hermanus on this 9th day of December 2011 by the deponent who declared that he:

- (a) knows and understands the contents of this affidavit;
(b) has no objection to the taking of the prescribed oath;



(c) considers the oath to be binding on his conscience;

380

and uttered the words: "I swear that the contents of this declaration are true, so help me God."



COMMISSIONER OF OATHS

Almero J.H. Oosthuizen
B.Com CA (SA)
Commissioner of Oaths
9 On College / P. O. Box 115
Hermanus, 7200

Almero J.H. Oosthuizen
B.Com CA (SA)
Commissioner of Oaths
9 On College / P. O. Box 115
Hermanus, 7200

**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)**

CASE NUMBER: 12755/11

In the matter between:

MARIUS KLEYNHANS

First Applicant

In his capacity as Trustee for the time
being of the Kleynhans Family Trust

HEATHER KLEYNHANS

Second Applicant

In her capacity as Trustee for the time
being of the Kleynhans Family Trust

CORNERCADE (PTY) LTD

Third Applicant

SHIRLEY MILLICENT KOSTER

Fourth Applicant

TIELMAN NIEUWOUDT AGGENBACH

Fifth Applicant

and

OVERSTRAND MUNICIPALITY

Respondent

CONFIRMING DECLARATION

I, the undersigned,

MAGARETHA LOUISA CHRISTINA CHIN

do hereby solemnly declare:



1. I am an attorney and director of the firm Chin Incorporated, with offices at MQ House, 6 Dirkie Uys Street, Hermanus, acting herein on behalf of the Respondent.
2. I have read the answering affidavit of Alfred Riaan Kuchar and confirm its correctness in all respects where reference is made to me.



MAGARETHA LOUISA CHRISTINA CHIN

Solemnly declared and signed in my presence at Hermanus on this 9th day of December 2011 by the deponent who declared that she:

- (a) knows and understands the contents of this declaration;
- (b) objects to taking the prescribed oath; and
- (c) considers the declaration to be binding on her conscience.


COMMISSIONER OF OATHS

Almero J.H. Oosthuizen
B.Com CA (SA)
Commissioner of Oaths
9 On College / P. O. Box 115
Hermanus, 7200

serve

383

BOX 135

IN THE HIGH COURT OF SOUTH AFRICA

WESTERN CAPE HIGH COURT, CAPE TOWN

CASE NUMBER : 12755/2011

In the application of :

MARIUS KLEYNHANS

In his capacity as Trustee for the time being of
The Kleynhans Family Trust

1st APPLICANT

HEATHER KLEYNHANS

In her capacity as Trustee for the time being of
The Kleynhans Family Trust

2nd APPLICANT

CORNERCADE (PTY) LTD

3rd APPLICANT

SHIRLEY MILLICENT KOSTER

4th APPLICANT

TIELMAN NIEUWOUTD AGENBAG

5th APPLICANT

and

OVERSTRAND MUNICIPALITY

RESPONDENT

FILING NOTICE

DOCUMENT FILED :

Confirming Affidavit of Colin Green

Dated at Cape Town this 14th day of DECEMBER 2011

CHIN INC
HERMANUS

c/o Vanderspuy Cape Town
Attorneys for Respondent



VANDERSPUY
P C Neethling
021 419 3522
paulan@vdslew.co.za

per.

384

(Ref. PC Neethling/MM/ar/CHI1/0028)
4th Floor
14 Long Street
Cape Town
P O Box 1701
Cape Town
DX : 53 Cape Town
(Tel. 419-3622)
(FX: 418-1329)

To: THE REGISTRAR
High Court
CAPE TOWN

and to: MICHAEL RANGE & ASS
Attorney for Applicants
Hermanus
c/o Strauss Daly Inc
15th Floor
The Terraces
34 Bree Street
CAPE TOWN
Ref: L Malherbe



IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NUMBER: 12755/11

In the matter between:

MARIUS KLEYNHANS First Applicant
In his capacity as Trustee for the time
being of the Kleynhans Family Trust

HEATHER KLEYNHANS Second Applicant
In her capacity as Trustee for the time
being of the Kleynhans Family Trust

CORNERCADE (PTY) LTD Third Applicant

SHIRLEY MILLICENT KOSTER Fourth Applicant

TIELMAN NIEUWOUDT AGGENBACH Fifth Applicant

and

OVERSTRAND MUNICIPALITY Respondent

CONFIRMING AFFIDAVIT

I, the undersigned,

COLIN GREEN

do hereby make oath and say that:

UWV *LA*

1. I am an adult male businessman and director of Rabie Property Group (Pty) Ltd, of Suite G18, Colosseum, Century Way, Century City, Cape Town
2. The facts contained in this affidavit are true and correct and are within my personal knowledge.
3. During the years 2000 to approximately June 2011 I was the duly appointed Development Manager of Rabcav Joint Venture (hereinafter "Rabcav") for the development of the residential estate known as the Fernkloof Estate, which was carried out by Rabcav for and on behalf of the Respondent. Throughout this period I was intimately involved in all the phases of the development (from the initial planning stages right through to the eventual marketing and physical implementation of the development itself).
4. I have read the answering affidavit deposed to by Alfred Riaan Kuchar on behalf of the Respondent and confirm the correctness thereof insofar as it makes reference to me and Rabcav and relates to all the various aspects of the Fernkloof Estate development and in particular also, the fencing issues, alluded to therein.


COLIN GREEN



Sworn to and signed in my presence at CAPE TOWN on this 12th day of DECEMBER 2011 by the deponent who declared that he:

- (a) knows and understands the contents of this affidavit;
- (b) has no objection to the taking of the prescribed oath;
- (c) considers the oath to be binding on his conscience;

and uttered the words: "I swear that the contents of this affidavit are true, so help me God."

COMMISSIONER OF OATHS

CHARMAINE TRUTER
 ADMITTED ATTORNEY
 COMMISSIONER OF OATHS
 SUITE G 18 THE COLOSSEUM
 CENTURY WAY
 CENTURY CITY 7446

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

388

CASE NO: 12755/2011

In the matter between:

MARIUS JAKOBUS KLEYNHANS
in his capacity as Trustee for the
time being of The Kleynhans Family Trust

FIRST APPLICANT

and

HEATHER KLEYNHANS
in her capacity as Trustee for the
time being of the Kleynhans Family Trust

SECOND APPLICANT

CORNERCADE (PTY) LTD

THIRD APPLICANT

SHIRLEY MILLICENT KOSTER

FOURTH APPLICANT

TIELMAN NIEUWOUDT AGENBAG

FIFTH APPLICANT

AND

OVERSTRAND MUNICIPALITY

WESTERN CAPE HIGH COURT
GENERAL OFFICE
2012-03-26
OOR OOR OOR OOR OOR
OOR OOR OOR OOR OOR
OOR OOR OOR OOR OOR

RESPONDENT

NOTICE IN TERMS OF RULE 35(14)

KINDLY TAKE NOTICE THAT the Applicant, for purposes of filing a replying affidavit, require the Respondent to make available for inspection within 5 (five) days the following documentation which are relevant to a reasonable anticipated issue in the application, and allow a copy to be made thereof, namely:

1. The Resolution by the Respondent to authorise Mr. A R Kuchar to depose to an opposing affidavit on behalf of the Respondent, as is referred to in paragraph 1 of the opposing affidavit.
2. The agreement between "Rabcav Joint Venture" and the Respondent to develop the Hermanus Golf Estate on behalf of the Respondent, as is referred to in paragraph 5.1 of the opposing affidavit by the Respondent.
3. The council resolution to rebrand the "Hermanus Golf Estate" after approval to the name "Fernkloof Estate", as is referred to in paragraph 5.1 of the opposing affidavit.
4. The lease agreement in place with the Hermanus Golf Club until 6 December 2006, as is referred to in paragraph 5.2 of the opposing affidavit.
5. The original Deed of Servitudes registered in favour of the Respondent in terms of the lease agreement in place with the Hermanus Golf Club until 6 December 2006, as is referred to in paragraph 5.2 of the opposing affidavit.
6. The Deed of Sale between the Respondent and the Hermanus Golf Club, as is referred to in paragraph 5.2 of the opposing affidavit.
7. The Annexures and Schedules referred to and attached to the Deed of Sale between the Respondent and the Hermanus Golf Club, as is referred to in paragraph 5.2 of the opposing affidavit.

8. A diagram of the Remainder Erf 9935, Hermanus as was registered in the name of the Hermanus Golf Club on 22 May 2007, as is referred to in paragraph 5.2 of the opposing affidavit.
9. The Environmental Management Plan or "EMP" as is referred to in Condition 16 of the Annexure marked "ARK10" and referred to in paragraph 22 of the opposing affidavit.
10. The Environmental Audit Report as is referred to in Condition 17 of the Annexure marked "ARK10" and referred to in paragraph 22 of the opposing affidavit.
11. The council resolution of the Respondent on the detailed investigation regarding access to the golf course and its findings, as is provided for in Condition 4.7.5 of the Annexure marked "ARK11" and referred to in paragraph 22 of the opposing affidavit.
12. The council resolution regarding the establishment of the Trust fund and the annual percentage payment as is provided for in Condition 4.13 of the Annexure marked "ARK11" and as is referred to in paragraph 22 of the opposing affidavit.

13. Copy of all environmental audits of the wetlands as is provided for in Condition 4.14 of the Annexure marked "ARK11" and as is referred to in paragraph 22 of the opposing affidavit.
14. Minutes of the meetings where the Hermanus Heritage Committee approved the "Boundary Structures Key Plan" marked as annexure "ARK7" and as is referred to in paragraph 37 of the opposing affidavit.
15. Copy of the marketing material, which contains the plan of the Annexure, marked "ARK7" and as is referred to in paragraph 40 of the opposing affidavit.
16. Copy of the agreement concluded between the Respondent and property owners in terms of which "the existing property owners that previously enjoyed open frontage onto the golf course land should be accommodated and that no fence would be erected on the boundary between their properties and the golf course land..." as is referred to in paragraph 36 and 15 of the opposing affidavit.
17. The council resolution where it was resolved that "the existing property owners that previously enjoyed open frontage onto the golf course land... should be accommodated and that no fence would be erected on the boundary between their properties and the golf course land..." as is referred to in paragraph 36 and 15 of the opposing affidavit.

18. The council resolution where the Respondent accepted the "Boundary Structures Key Plan", marked as annexure "ARK7", during or about August 2004 and as is referred to in paragraph 37 of the opposing affidavit, together with a copy of such accepted plan.
19. The council resolution where the Respondent approved the "Boundary Structures Key Plan", marked as annexure "ARK7", for building purposes on 7 March 2006 and as is referred to in paragraph 37 of the opposing affidavit, together with a copy of such approved plan.
20. Copy of the document which confirms the "security arrangement" as the basis for the statement "This is comparable with the security arrangement that is in place at the Hermanus Heights and Main Road properties..." as is referred to in paragraph 63.2 of the opposing affidavit.
21. Copy of the security assessment and all related reports undertaken by Respondent and/or Rabcav to ensure the alleged "adequate barrier against entry" as is referred to in paragraph 75.7 of the opposing affidavit.
22. Copy of the council resolution where the decision has been taken "not to fence out the Hermanus Heights and Main Road properties", as is referred to in paragraph 82 of the opposing affidavit.

23. Copies of all minutes of meetings held with representatives of the Hermanus Heights and Main Road property owners, as is referred to in paragraph 84 of the opposing affidavit.
24. Copy of the council resolution adopted by the Respondent confirming the Respondents satisfaction with the security of the Hermanus Heights and Main Road properties and specifically that "Individual home owners improved their respective properties to the satisfaction of the Respondent", as is referred to in paragraph 84 of the opposing affidavit.
25. Copy of the correspondence and/or decision received by the Respondent from the Hermanus Golf Club confirming that "individual home owners improved their respective properties to the satisfaction of the Respondent and the Hermanus Golf Club", as is referred to in paragraph 84 of the opposing affidavit.
26. Copy of the council resolution adopted by the Respondent to enter into settlement negotiations with the Hermanus Golf Club and the Fernkloof Estate Masters Property Owners Association, as is referred to in paragraph 85 of the opposing affidavit.
27. Copy of the council resolution adopted by the Respondent to sign and offer the settlements agreements for acceptance to the Hermanus Golf Club and the Fernkloof Estate Masters Property Owners Association, as is referred to in paragraph 86 of the opposing affidavit.

DATED AT HERMANUS ON THIS 15th DAY OF MARCH 2012

394

Per M Range

MICHAEL RANGE & ASSOCIATES

Attorneys for Applicant

Hermanus

C/o Strauss Daly Inc.

15th Floor

The Terraces

34 Bree Street

Cape Town

Ref: L Malherbe

TO: THE REGISTRAR

High Court

CAPE TOWN

AND TO: CHIN INC.

12B Hope street

HERMANUS

Attorneys for Respondent

C/o Van Der Spuy Cape Town

4th Floor

14 Long Street

Cape Town

Ref: PC Neethling/ CH/1/0028



[Handwritten signature]

15h 50.

15/3/2012



IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NUMBER: 12755/11

In the matter between:

MARIUS KLEYNHANS First Applicant
In his capacity as Trustee for the time
being of the Kleynhans Family Trust

HEATHER KLEYNHANS Second Applicant
In her capacity as Trustee for the time
being of the Kleynhans Family Trust

CORNERCADE (PTY) LTD Third Applicant

SHIRLEY MILLICENT KOSTER Fourth Applicant

TIELMAN NIEUWOUDT AGGENBACH Fifth Applicant

and

OVERSTRAND MUNICIPALITY Respondent

**RESPONDENT'S REPLY TO APPLICANTS' NOTICE IN TERMS
OF RULE 35(14)**

BE PLEASED TO TAKE NOTICE THAT the Respondent responds as follows
to the Applicants' Notice in terms of Rule 35(14)

1. The Respondent hereby places on record that the Applicants' purported reliance on the provisions of rule 35(14) in application proceedings renders the notice in question nugatory.

2. Without in any way admitting that it required to do so, the Respondent, however, hereby furnishes copies of the following documents (and where applicable, responds as follows):

2.1. Ad paragraph 1

Delegation by Executive Mayor, dated 8 December 2011.

2.2. Ad paragraph 2

Development Facilitation Agreement between Greater Hermanus Municipality and RABCAV and addendum thereto, dated 30 November 2001.

2.3. Ad paragraph 3

There was no Council resolution to this effect.

2.4. Ad paragraph 4

Agreement of lease - Municipality of Hermanus and Hermanus Golf Club dated 16 June 1994.

2.5. Ad paragraph 5

The servitudes are identified in Deed of Transfer No T 38434/2007.

2.6. Ad paragraphs 6 and 7

Deed of Sale - Overstrand Municipality and Hermanus Golf Club (dated 6 December 2006), addendum thereto (dated 27 April 2007) and annexures.

2.7. Ad paragraph 8

Plan No 7209/2005, as approved by the Surveyor General on 6 February 2006.

2.8. Ad paragraph 9

Hermanus Golf Estate Environmental Management Plan (dated 29 November 2004).

2.9. Ad paragraphs 10 and 13

The documents concerned are not readily to hand and the whereabouts of the documents is also not known.

2.10. Ad paragraphs 11, 12, 17 and 22

Resolutions of the Executive Committee of the Respondent dated 19 February 2002 (as read with approved Development Plan, Annexure "ARK12" to the respondent's opposing affidavit). Letters of the Director-General, Department of Economic Affairs, Agriculture & Tourism, Transport Branch addressed to the Respondent (dated 19 October 2001 and 7 January 2002 respectively).

2.11. Ad paragraph 14

Minutes of the Aesthetic and Heritage Conservation Committee relating to meetings held on 23 February 2006 and 30 March 2006 respectively.

2.12. Ad paragraph 15

The marketing material referred generally to plans, images, pamphlets, photographs, newspaper advertisements, logos, branding material and the like. Included in the marketing material

was a framed plan titled "Boundary Structures Key Plan" which has since been destroyed (as alluded to and explained in paragraphs 37 to 40 of the opposing affidavit filed on behalf of the Respondent).

2.13. Ad paragraph 16

There is no such written agreement.

2.14. Ad paragraphs 18 and 19

As the approval of fencing is a building control matter, there was no Council resolution.

2.15. Ad paragraph 20

Paragraph 63.2 of the Respondent's opposing affidavit makes no reference to a specific document.

2.16. Ad paragraphs 21 and 25

Paragraphs 75.2 and 84 of the Respondent's opposing affidavit make no reference to a specific document. The assessment concerned consisted of on-site inspections and verbal meetings and discussions with relevant property owners. To the extent that it might be of relevance, the Applicants are referred to a document which

purports to be minutes of a meeting between the Development Committee of the Hermanus Golf Club and the Northern Boundary Committee held on 16 May 2006.

2.17. Ad paragraph 23

2.17.1. Most of the meetings were held between the Hermanus Golf Club and the property owners concerned. Rabcav was also involved in certain of these meetings. To the best of the Respondent's knowledge no official minutes were kept of the meetings concerned.

2.17.2. To the extent that these might pertain to the issue concerned, the Respondent, however, makes available the following documents:

2.17.2.1. Minutes of meeting between the Development Committee and the Northern Boundary Committee held on 16 May 2006 (also referred in paragraph 2.16 above);

2.17.2.2. Letter Hermanus Golf Club addressed to "Dear Homewoner", dated 27 June 2006;

- 2.17.2.3. Letter Hermanus Golf Club to Northern Boundary Owners Committee, dated 19 September 2006;
- 2.17.2.4. Extract from letter to the Manager of the Respondent, dated 18 February 2008;
- 2.17.2.5. Letter Live Wire Electric Fencing, dated 31 October 2008; and
- 2.17.2.6. Document titled "Proposal for Property Owners on Northern Boundary of Hermanus Golf Course (undated);

2.18. Ad paragraphs 24, 26 and 27

As these were administrative matters no Council resolutions were required.

DATED AT CAPE TOWN THIS 16th DAY OF APRIL 2012.

CHIN ATTORNEYS
Attorneys for Respondent



M CHIN
12 Hope Street
HERMANUS

P/a

VAN DER SPUY CAPE TOWN INC
18 Lower Burg Street 14 Long Street
CAPE TOWN
(Ref P Neethling/ar/CH1/0028)

TO: THE REGISTRAR
High Court
CAPE TOWN

AND TO: MICHAEL RANGE & ASS
Applicants' Attorneys
C/o
STRAUSS DALY INC
15th Floor
34 Bree Street
CAPE TOWN
(Ref. L Malherbe)



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)**

CASE NUMBER: 12755/11

Monday, 14 May 2012
Before the Honourable Judge President, Mr Justice Hlophe

In the matter between:

MARIUS KLEYNHANS	First Applicant
In his capacity as Trustee for the time being of the Kleynhans Family Trust	

HEATHER KLEYNHANS	Second Applicant
In her capacity as Trustee for the time being of the Kleynhans Family Trust	

CORNERCADE (PTY) LTD	Third Applicant
-----------------------------	-----------------

SHIRLEY MILLICENT KOSTER	Fourth Applicant
---------------------------------	------------------

TIELMAN NIEUWOUDT AGGENBACH	Fifth Applicant
------------------------------------	-----------------

and

OVERSTRAND MUNICIPALITY	Respondent
--------------------------------	------------

DRAFT ORDER

Having heard counsel for the parties and by agreement between the parties

IT IS ORDERED THAT

1. The application is postponed to Thursday, 7 June 2012 for hearing in the Fourth Division.
2. The question of costs shall stand over for later determination.

BY ORDER OF THE COURT

COURT REGISTRAR

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case no: 12755/11

In the matter between:

MARIUS KLEYHANS

First Applicant

in his capacity as Trustee for the time
being of The Kleynhans Family Trust

HEATHER KLEYNHANS

Second Applicant

in her capacity as Trustee for the time
being of The Kleynhans Family Trust

CORNERCADE (PTY) LTD

Third Applicant

SHIRLEY MILLICENT KOSTER

Fourth Applicant

TIELMAN NIEUWOUDT AGENBAG

Fifth Applicant

AND

OVERSTRAND MUNICIPALITY

Respondent

**NOTICE OF APPLICATION
(MOTION TO STRIKE OUT)**

BE PLEASED TO TAKE NOTICE that Respondent intends at the hearing of this matter to apply to this Honourable Court for the striking out of the portions of the founding affidavit of **MARIUS JAKOBUS KLEYHANS**, dated 21 June 2011 and the supporting affidavits of **HEATHER KLEYNHANS** (dated 23 June 2011), **MINETTE KLEYNHANS** (dated 22 June 2011) **SHIRLEY MILLICENT KOSTER** (dated 24 June 2011) and **TIELMAN NIEUWOUDT**

AGENBAG (dated 21 June 2011) to which reference is made below, on the grounds that such portions of the affidavits in question are inadmissible in evidence or otherwise irrelevant to the resolution of the matter:

1. AD THE FOUNDING AFFIDAVIT OF MARIUS JAKOBUS KLEYHANS

1.1. Paragraph 20

1.2. Paragraph 21

1.3. Paragraph 22

1.4. Paragraph 23

1.5. Paragraph 28

1.6. Paragraph 29

1.7. Paragraph 42

1.8. Paragraph 43

1.9. Paragraph 44

1.10. Paragraph 45

1.11. Paragraph 46

1.12. Paragraph 47

1.13. Paragraph 48

1.14. Paragraph 49

1.15. Paragraph 56

1.16. Paragraph 58

1.17. Paragraph 63 (the first sentence thereof)

2. AD THE SUPPORTING AFFIDAVIT OF HEATHER KLEYNHANS

2.1. Paragraph 4

2.2. Paragraph 6

2.3. Paragraph 7

3. AD THE SUPPORTING AFFIDAVIT OF MINETTE KLEYNHANS

3.1. Paragraph 4

3.2. Paragraph 6

3.3. Paragraph 7

4. AD THE SUPPORTING AFFIDAVIT OF SHIRLEY MILLICENT KOSTER

4.1. Paragraph 5

4.2. Paragraph 7

4.3. Paragraph 8

5. AD THE SUPPORTING AFFIDAVIT OF TIELMAN NIEUWOUDT AGENBAG

5.1. Paragraph 4

5.2. Paragraph 6

5.3. Paragraph 7

TAKE NOTICE FURTHER THAT Respondent will pray for an order directing such Applicant(s) as may oppose this application to pay the costs thereof.

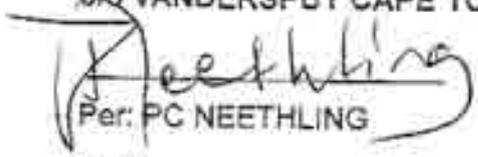
DATED AT Cape Town THIS 23rd DAY OF MAY 2012.

CHIN INC

Attorneys for Respondent

HERMANUS

c/o VANDERSPUY CAPE TOWN


Per: PC NEETHLING

4th Floor

14 Long Street

CAPE TOWN

Ref P Neethling

TO:

THE REGISTRAR

Western Cape High Court

CAPE TOWN

AND TO:

MICHAEL RANGE & ASSOC

Attorney for Applicants

HERMANUS

c/o

STRAUSS DALY INC



15th Floor

The Terraces

34 Bree Street

CAPE TOWN

Ref.: L Malherbe

RECEIVED COPY HERE OF
THIS: 23 MAY 2012
TIME: 
ALSILLIES STRAUSS DALY INC

BOX 135

ON THE ROLL: 7/8/12

IN THE HIGH COURT OF SOUTH AFRICA

WESTERN CAPE HIGH COURT, CAPE TOWN

CASE NUMBER : 12755/2011

In the application of :

MARIUS KLEYNHANS1st APPLICANTIn his capacity as Trustee for the time being of
The Kleynhans Family Trust**HEATHER KLEYNHANS**2nd APPLICANTIn her capacity as Trustee for the time being of
The Kleynhans Family Trust**CORNERCADE (PTY) LTD**3rd APPLICANT**SHIRLEY MILLICENT KOSTER**4th APPLICANT**TIELMAN NIEUWOUDT AGENBAG**5th APPLICANT

and

OVERSTRAND MUNICIPALITY

RESPONDENT

FILING NOTICE

DOCUMENT FILED :

Respondent's Heads of Argument

(Motion to strike out)

Dated at Cape Town this 24TH day of MAY 2012

CHIN INC

VANDERSPUY
PC Neethling
021 418 3622
paulan@vdsiaw.co.za

12 Hope Street
HERMANUS

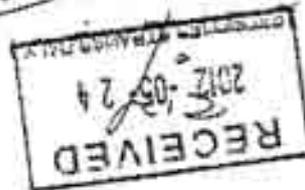
c/o Van der Spuy Cape Town
Attorneys for Respondent

per. 

(Ref: PC Neethling/MM/ar/CHI1/0028)
4th Floor
14 Long Street
Cape Town
P O Box 1701
Cape Town
DX : 53 Cape Town
(Tel. 419-3622)
(FX: 418-1329)

To: THE REGISTRAR
High Court
CAPE TOWN

and to: MICHAEL RANGE & ASS
Attorney for Applicants
Hermanus
c/o Strauss Daly Inc
15th Floor
The Terraces
34 Bree Street
CAPE TOWN
Ref: L. Malherbe



412

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case no: 12755/11

In the matter between:

MARIUS KLEYNHANS

First Applicant

In his capacity as Trustee for the time
being of The Kleynhans Family Trust

HEATHER KLEYNHANS

Second Applicant

in her capacity as Trustee for the time
being of The Kleynhans Family Trust

CORNERCADE (PTY) LTD

Third Applicant

SHIRLEY MILLICENT KOSTER

Fourth Applicant

TIELMAN NIEUWOUDT AGENBAG

Fifth Applicant

AND

OVERSTRAND MUNICIPALITY

Respondent

**RESPONDENT'S HEADS OF ARGUMENT
(MOTION TO STRIKE OUT)**

(Postponed for hearing in the Fourth Division on Thursday 7 June 2012)

INTRODUCTION

1. Applicants have applied for an order directing the Respondent to ensure that the Fernkloof Estate in Hermanus ("the Estate") is fully protected by electrified fencing

designed to prevent unauthorised access to the Estate.¹ In effect this Court is being asked to order the Respondent *in forma specifica* to erect an electrified fence, of unspecified make-up and design, along certain portions of the northern and southern boundaries of the Hermanus Golf Course which have not hitherto been fenced.

2. The relief sought by Applicants amounts to the enforcement of agreements of purchase and sale entered into between them (as purchasers) and Respondent (as seller) of certain erven in the estate. The sales took place pursuant to a special auction procedure described in the papers but the details of which are largely irrelevant to the resolution of the dispute between the parties.
3. Respondent's attitude is that on various grounds the application ought to be dismissed outright. Before turning to the merits two points *in limine* must first be resolved.
 - 3.1. Firstly, the lion's share of the content of the main founding affidavit (deposed to by Marius Jakobus Kieynhans) is susceptible of being struck out on the grounds that it is inadmissible in evidence or otherwise irrelevant to the resolution of the matter. The same applies to the various supporting affidavits filed, which do little more than refer back to the founding affidavit. An order striking out these passages will accordingly be sought at the outset of the hearing of this matter.
 - 3.2. Secondly, Applicants have failed to join a large number of persons who have a substantial and direct interest in the subject-matter and outcome of the litigation – in the sense that if the application succeeds their properties stand to be fenced out.² These include (apart from certain owners of properties within the Estate itself) the Hermanus Golf Club and 58 third parties whose properties share a common boundary with the golf club.³

1 Answering affidavit para 4.

2 Answering affidavit paras 4 and 6.

3 See generally answering affidavit para 5.

- 4. Although the date of the hearing was arranged on the understanding that Applicants would file replying papers, they have to date not done so. This Honourable Court will be asked to dismiss their application on this basis alone (the possibility of such an order being recognised in, for example, Consolidated Practice Note 50(3)). At any rate, the well-known *Plascon-Evans* rule⁴ applies, and with even more vigour than usual, since Applicants have not placed any version before the Court to refute the allegations made in the answering affidavit and those allegations therefore stand uncontradicted.
- 5. It is foreshadowed that Applicants will ask this Honourable Court to exercise its inherent discretion (which arises if one assumes for the moment that one is not dealing with a case of non-joinder) to grant an order affording certain affected persons an opportunity to either consent to any judgment which this Honourable Court might make or to join in the proceedings on some or other basis. The non-viability of such a procedure in the circumstances, particularly from a timing point of view, will be addressed below.

RESPONDENT'S MOTION TO STRIKE OUT

- 6. Respondent will apply at the outset of the hearing to have large portions of the founding papers struck out on the grounds that the allegations in question constitute inadmissible evidence or are otherwise irrelevant to the resolution of the matter.
- 7. The Supreme Court of Appeal has recently re-affirmed that evidence concerning the subjective intention of the parties, their prior negotiations and discussions and what they understood certain references in their contract (*a fortiori* in promotional material not forming part of the contract) to mean, is inadmissible. (See Van Aardt v Galway 2012 (2) SA 312 (SCA) 318 para 9 and the authorities collected there.)⁵ Based on this point alone great portions of the founding papers are inadmissible in evidence and therefore deserving of being struck out.⁶ It deserves to be

4 According to which the Applicants (who seek final relief on motion) can only succeed if the facts stated by the Respondent together with the admitted facts in the Applicants' affidavits, justify the relief sought – see Answering affidavit para 7.
 5 See also Answering affidavit para 49.
 6 See for examples the paragraphs in the Founding affidavit mentioned in the heading to paragraph 70 of

emphasised that the court in Van Aardt re-affirmed that proceedings should not be conducted on the basis of letting in inadmissible material tendered by the parties, leaving the process of sorting of the wheat from the chaff for argument, judgment or a court of appeal.

8. Certain other offending passages in the founding papers⁷ may or may not come under the point described in Van Aardt, but even if they do not they are at any rate irrelevant to the resolution of the dispute between the parties on general principles and, again, liable to be struck out for that reason. It is trite that Rule 6(15) does not envisage a *numerus clausus* of grounds for the striking out of objectionable matter and that, along with inadmissible evidence, irrelevance, regardless of the underlying reason, is such a ground. (See Cilliers, Nel & Loots Herbstein & Van Winsen The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa 5th ed Juta 2009, vol I, page 446 and 447).
9. Moreover, apart from the fact that direct evidence of the parties' intentions (including actual negotiations and similar statements) is inadmissible, and cannot covertly be admitted under the cloak of supposedly being part of the "context", it is at any rate trite that even evidence led with the purpose of generally contextualising a document, or in order to establish the factual matrix within which it came into existence, must be used "*as conservatively as possible*" (KPMG Chartered Accountants (SA) v Securefin Ltd and another 2009 (4) SA 399 (SCA) 409 para 39.) Here, having regard to the evidence of this nature proffered by Applicants, any exercise involving recourse to "context" could never be performed conservatively, as it must, since Applicants' claims in connection with prior representations allegedly made to them in relation to the fencing of the Estate go absolutely to the root of their claims. There is therefore no scope at all for allowing such evidence.
10. At any rate, Applicant's case is on the facts not supported by the general factual matrix surrounding the conclusion of the deeds of sale (see for example Mkhize v Umyoti Municipality and others 2010 (4) SA 509 (KZP) 517 para 17) or the principle that an agreement must as far as possible be interpreted in such a way that it will

the Answering affidavit.

7 As set out in the notice of application to strike out.

have business efficacy and yield a commercially sensible meaning. (See Ekurhuleni Metropolitan Municipality v Germiston Municipal Retirement Fund 2010 (2) SA 498 (SCA) 501 para 13.)

- 11. The foregoing outcome, being the result of the application of general principles, is confirmed by the express provisions of the relevant deeds of sale, which explicitly contractually preclude⁸ Applicants from relying on any extraneous representation allegedly made to them – whether in connection with the fencing of the Estate or otherwise.⁹ Applicants simply cannot escape the consequences of the following clauses in the standard conditions of sale comprised in the sales of properties to Applicants (emphasis supplied):

"19.1 No alteration, cancellation, variation of, or addition hereto shall be of any force or effect unless reduced to writing and signed by all parties to this agreement or their duly authorised representatives.

19.2 This document contains the entire agreement between the parties and no party shall be bound by any undertakings, representations, warranties, promises or the like not recorded in the agreement.

19.3 No indulgence, leniency or extension of time which any party may grant or show to any other party shall in any way prejudice or preclude the party granting or showing such indulgence, leniency or extension of time from exercising any of its rights in the future."

- 12. Significantly, even on the high-water mark of Applicants' case in this respect – namely their reliance of the (draft) "Estate Rules" annexed to the relevant sale agreements – they are not entitled to the relief sought since the relevant "Rules" clearly could not have been and were not intended to impose any contractual obligation on the Respondent.¹⁰

8 Answering affidavit para 31.
 9 Answering affidavit para 70.
 10 Answering affidavit para 45.

13. In ABSA Bank Limited v Swanepoel 2004 (6) SA 178 (SCA) 181 the court said the following in this connection: "[6] At its simplest, a contract is an enforceable promise to do or not do something. But when parties record an agreement in writing, they often add provisions that do not embody such promises. A contract may have a preamble. It may contain 'recordals' and 'recitals'. It may document prior events, or record the parties' future intentions. It may contain clarificatory or explanatory statements. The parties may place on record matters that bear on the interpretation of what they have undertaken. It is therefore wrong to approach a written contract as though every provision is intended to create contractual obligations. [7] It may be difficult to determine whether a written provision is intended to embody a promise to do or not do something, or whether, without itself constituting an undertaking, it merely bears upon what the parties have undertaken.... But the question whether a contractual provision has operational content is fundamental to the ambit of the obligations the parties undertake, and it precedes the application of rules designed to establish the proper interpretation of their undertakings. Only once it is determined that a provision was intended to have contractual effect will the Court try to interpret it so as to give it business efficacy. If it was not so intended, those rules of interpretation do not come into play. No 'business meaning' can be conjured out of a clause that was not intended to have contractual effect at all."

NON-JOINDER

14. Reference has already been made to Applicants' failure to effect the joinder as parties of a large number of persons. Such joinder was necessary in the circumstances. It is submitted that on this basis alone the application ought to be dismissed. Applicants at all times were or must have been aware of the relevant facts and their informed decision not to join those persons as parties therefore amounted to a waiver. (See Mpupa v MEC, Department of Social Development, Eastern Cape 2008 (1) SA 287 (CKH) 292 para 16.2.)
15. At any rate, even assuming that a curially-overseen joinder of some sort (as is apparently envisaged by Applicants) could validly be effected (which is not

conceded to be the case), the instigation of such a procedure would not be appropriate unless this Honourable Court first pronounces on Respondents' motion to strike out (unless of course it dismisses Applicants' application outright).

16. The founding papers as they stand contain a great deal of irrelevant, inadmissible and argumentative material. Unless the offending passages are struck out, any further respondents who may eventually join in the proceedings:
 - 16.1. Will have to deal with and respond to those allegations, potentially also (like the present Respondent) by way of an application to strike out.
 - 16.2. Will, apart from the objectionable nature of the contents of the founding papers, at any rate have to deal with a much greater volume of papers than is necessary or appropriate.
17. The joining-in of further parties (particularly the multitude of parties here envisioned) will result in litigation, and associated paperwork, of mammoth proportions. Given this premise, and bearing in mind that each additional Respondent would be entitled in its answering papers to respond to *the whole* of Applicants' allegations, it is clearly in the public interest and in line with the dictates of common sense that the papers first be shorn of irrelevant and objectionable material (by granting Respondent's motion to strike out), so that the volume of the founding papers can be reduced as far as possible before a veritable sea of respondents is invited to consider and respond to the allegations therein.
18. This is so especially because many of the allegations in the founding papers are (to put it euphemistically) likely to aggravate and provoke and, consequently, evoke extremely detailed answers by way of contradiction from a variety (possibly tens) of additional Respondents. Such answers are further likely to incorporate voluminous and emotive responses to already irrelevant material. This will add geometrically to the logistical and time pressures involved as well as expense and inconvenience already inherent in such a procedure as applied to a case such as the present. It is also likely to result in a piecemeal adjudication of the matter, which would be

undesirable on general principles and would offend against the *ut sit finis litium* principle

- 19. It is submitted that in the circumstances it would be an irresponsible exercise of this Honourable Court's discretion if the founding papers as they stand were to be made the basis of an invitation to the interested parties to join in the proceedings. Such a procedure should only be embarked upon, if at all, once the offending allegations have been struck out.

THE MERITS GENERALLY

- 20. Respondent's attitude is therefore that the application (a) should be dismissed on the papers as they stand because no case for the relief sought has been made out, alternatively (b) at any rate cannot otherwise be determined on the merits before the curial joinder procedure expected to be requested by Applicants (on the assumption that they actually bring such an application and that this Honourable decides to grant it) has been implemented – which in turn ought not to occur before the offending passages in the founding affidavits have been struck out. As an alternative to (a), this Honourable Court is therefore requested to order the striking out of those passages.

- 21. Assuming, however, that the matter were ripe for decision on the merits (otherwise than in the form of an outright dismissal based on the grounds set out earlier), the application at any rate ought to fail on the merits for the reasons that follow.

- 21.1. Applicants have simply not proved the existence of an executory contractual term which subjects Respondent to an obligation to erect a fence of any kind around any part or anywhere on the Estate.¹¹

- 21.2. Moreover, the Applicants' claims have prescribed¹² since by 22 November 2005, more than three years before the issuing of the application (on 27 June

¹¹ Answering affidavit para 19 also paras 44, 45 and 55 (the latter dealing with the nature of the "Estate Rules".

¹² See generally answering affidavit paras 7 to 18.

2011),¹³ the entire set of facts which Applicants as claimants must prove in order to succeed had already been in place.¹⁴

A DE V LA GRANGE SC

C R CILLIERS

Respondent's Counsel
Chambers
Cape Town
24 May 2012

13 Answering affidavit para 10.
14 Answering affidavit para 16.

RESPONDENT'S LIST OF AUTHORITIES

Decided cases

- ABSA Bank Limited v Swanepoel 2004 (6) SA 178 (SCA)
- Ekurhuleni Metropolitan Municipality v Germiston Municipal Retirement Fund 2010 (2) SA 498 (SCA)
- KPMG Chartered Accountants (SA) v Securefin Ltd and another 2009 (4) SA 399 (SCA)
- Mkhize v Umvoti Municipality and others 2010 (4) SA 509 (KZP)
- Mpupa v MEC, Department of Social Development, Eastern Cape 2008 (1) SA 287 (CKH)
- Van Aardt v Galway 2012 (2) SA 312 (SCA)

Commentaries

- Cilliers, Nel & Loots Herbstein & Van Winsen The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa 5th ed Juta 2009

CASE NUMBER: 12755/2011

In the matter between:

MARIUS JAKOBUS KLEYNHANS
in his capacity as Trustee for the
time being of the Kleynhans Family Trust

FIRST APPLICANT

and

HEATHER KLEYNHANS
in her capacity as Trustee for the
time being of the Kleynhans Family Trust

SECOND APPLICANT

CORNERCADE (PTY) LTD

THIRD APPLICANT

SHIRLEY MILLICENT KOSTER

FOURTH APPLICANT

TIELMAN NIEUWOUDT AGENBAG

FIFTH APPLICANT

AND

OVERSTRAND MUNICIPALITY

RESPONDENT

FILING SHEET

TAKE NOTICE that First Applicant herewith files First Applicant's Replying Affidavit

DATED at HERMANUS on this 25th day of MAY 2012.

MICHAEL RANGE & ASSOCIATES
PER:

M RANGE
Attorneys for Applicants
HERMANUS
C/o Strauss Daly Inc
15th Floor, The terraces
34 Bree Street
CAPE TOWN
Ref: L Malherbe

AND: THE REGISTRAR
HIGH COURT
CAPE TOWN

AND TO: CHIN INC
C/o Van der Spuy Cape Town
Attorneys for Respondent
(Ref. P C Neethling/ar/CH1/0028
4th floor,
14 Long Street,
CAPE TOWN
Tel: 419/3622
Fax: 418/1329

erl
25.5.2012.
10h45

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

424

CASE NO: 12755/2011

In the matter between:

MARIUS JAKOBUS KLEYNHANS
In his capacity as Trustee for the
time being of The Kleynhans Family Trust

FIRST APPLICANT

and

HEATHER KLEYNHANS
In her capacity as Trustee for the
time being of the Kleynhans Family Trust

SECOND APPLICANT

CORNERCADE (PTY) LTD

THIRD APPLICANT

SHIRLEY MILLICENT KOSTER

FOURTH APPLICANT

TIELMAN NIEUWOUDT AGENBAG

FIFTH APPLICANT

AND

OVERSTRAND MUNICIPALITY

RESPONDENT

REPLYING AFFIDAVIT

I, the undersigned,

MARIUS JAKOBUS KLEYNHANS

do hereby make oath and say:

- 1 I am a Trustee for the time being of the First Applicant together with my wife, Heather Kleynhans. I am duly authorised to depose to this affidavit on behalf of the Trust.
- 2 The facts disposed to herein are within my own personal knowledge, unless the context indicates otherwise, and are, to the best of my knowledge and belief, true and correct. To the extent that legal submissions are advanced, they are made on the basis of advice received from my legal representatives, which advice I believe to be true and correct.
- 3 I have perused the answering affidavit deposed to by the Respondent and the confirmatory affidavits filed in support thereof. I wish to reply to the allegations contained therein as set out herein under.
- 4 I endeavour in this replying affidavit to group together the various topics in the answering affidavit under specific headings so as to avoid prolixity and repetition.
- 5 To the extent that I do not specifically deny any allegations in the answering papers, which are at variance with the facts deposed to in the founding papers, I record that the answering papers are denied and I reassert the correctness of the factual position as contained in the founding papers.



FIRST POINT *IN LIMINE* – NON JOINDER OF NECESSARY PARTIES

- 8 It will be argued at the hearing that the grounds upon which the Respondent relies for asserting that necessary parties have not been joined is misplaced.
- 7 It will however become evident from what is stated in this affidavit that there are a number of other reasons why it would not be desirable for this Honourable Court to hear this matter without first affording certain persons an opportunity to indicate:
 - 7.1 whether or not they consent to be bound by the judgment of the Court; or
 - 7.2 prefer to be joined as parties to this application.
- 8 In this regard I am advised that this Honourable Court can mero moto set in motion a procedure whereby such parties are afforded an opportunity to either consent to be bound by the judgment of the Court or be joined as parties thereto.
- 9 The Applicant will request at the hearing that such a procedure be followed in this matter and that the hearing on the merits be post-poned pending finalization of that procedure.
- 10 I proceed now to deal with the interests of the respective parties:

The interests of residents in the different precincts of the Fernkloof Estate

- 11 The owners and occupiers of homes within the different precincts of the Fernkloof Estate (the Estate) will, I am sure, be appalled by the Respondent's suggestion that if a fence is to be constructed around the estate it should be done around each of the individual precincts and not around the perimeter of the entire Estate including the golf course land.

- 12 In this regard I am sure that they will agree with me that one of the primary reasons for living in the Estate is to enjoy the benefit that unfenced properties adjacent to a golf course provide (on the assumption of course that the promised security is indeed provided).
- 13 This does not apply to residents in two of the precincts in the estate that have already been individually fenced off (the fenced precincts). In the case of the fenced precincts, it was made very clear from the outset that they would be fenced off and even in those precincts were purchased on that basis.
- 14 In the circumstances it is imperative for the residents in all of the other precincts to be given an opportunity to become parties to these proceedings should they wish to do so.
- 15 This is especially so since it has become clear from the Respondent's response to the Applicants' Notice in terms of Rule 35(14) ("The Rule 35(14) response") that all of the resolutions and approvals for the rezoning of the land in question envisaged that the residential precincts will form an integral part of a rezoned Golf Course Estate as opposed to them each comprising separate and distinct estates that are located "at the *Hermanus Golf Course*" as the Respondent is now contending. This applies to
 - 15.1 The Respondents approval of the Development in terms of LUPO on 19 February 2002;
 - 15.2 The Record of Decision (the ROD), issued by DEAPD on 11 July 2002; and
 - 15.3 The Subdivision and Re-zoning, issued by DEAPD on 30 September 2003

- 16 Condition 16.2 of the ROD (which is an integral part of the rezoning) makes it clear that a *"surrounding fence around the activity"* is contemplated.
- 17 Paragraph A of the ROD stipulates, *"the activity entails the creation of the Hermanus Golf Estate on the current Hermanus golf course property and adjacent properties..."*
- 18 The Hermanus Golf Estate is then described as comprising various elements. Included in these are all of the residential units in all of the envisaged precincts.
- 19 There is no resolution by the Respondent to alter the nature of the development and neither has there been any amendment of the aforementioned approvals and re-zoning.
- 20 The attempt in the answering affidavit to distinguish the individual precincts from the Hermanus Golf Estate that was envisaged and approved by the relevant authorities from the outset is accordingly disingenuous.
- 21 The same applies to the contention that there is no obligation on the Respondent to fence the entire activity as defined in the ROD.
- 21.1 In terms of paragraph 16 of the ROD, the Respondent and Rabcav were obliged to compile and to submit an acceptable Master and precinct level operational phase Environmental Master Plan (the EMP) before any of the units could be occupied dealing, inter alia, with the aforementioned *'surrounding fence around the activity'*.
- 21.2 A copy of this EMP dated 29th November 2004 was provided by the Respondent in the Rule 35(14) Response.
- 21.3 The issue of fencing is dealt with in a summary of issues and concerns which is part of the EMP. Table 10 deals with fencing and confirms that:

"For security and safety reasons, the entire outer perimeter of the redeveloped golf course will be fenced. The actual type of fence/walling to be used will be determined during the detailed planning stage."

21.4 In view of the foregoing it was clearly a condition of the rezoning that the whole of the activity as defined (ie the entire Estate including all of the precincts as well as the golf course land) should be fenced off and not the precincts individually.

22 All occupants of land in the re-zoned area are accordingly entitled to insist on this zoning condition being complied with regardless of whether or not they have concluded a contract with the Respondent for the acquisition of land in the re-zoned area.

23 In view of the stance taken up by the Respondent in the answering affidavit all of the occupants in the precincts accordingly have an interest in this matter and it is imperative that they be afforded an opportunity, should they so desire, of participating in these proceedings.

The interests of the Hermanus Golf Club

24 I agree that the Hermanus Golf Club (the Club) has a real and substantial interest in the outcome of these proceedings.

25 This interest does not arise on the basis contended for by the Respondent but arises from the following facts:

25.1 According to the Respondent, the plan that formed an integral part of the sale contained the following legend in relation to the fence in the relevant area that has not yet been fenced along the northern and southern boundary (referred to herein as 'the unfenced portion'):

"By mutual agreement by owners open frontage is first option as long as integrity of security is maintained to satisfaction of house owners/golf course"

- 25.2 The Rule 35(14) response makes it clear that to date there is no agreement between the Club and the property owners adjacent to the unfenced portion and neither is there any indication that the integrity of security has been maintained to the satisfaction of the Club.
- 25.3 In the absence of first option being achievable the Club is clearly also entitled to insist on the construction of a fence in front of the properties in question. The integrity of security is for obvious reasons of extreme importance to the members of the Club and to everybody else that makes use of the golf course.
- 25.4 The Rule 35(14) response contains documents emanating from the Club which reveal that:
- 25.4.1 the Club has tried on a number of occasions to reach a satisfactory agreement with the relevant property owners so as to ensure that the integrity of security of the golf course is maintained to its satisfaction but to date no such agreement has been reached;
- 25.4.2 the Club has not been willing to take over the Respondent's obligations to deal with the issue.
- 26 On 6 December 2006 the Respondent sold the golf club land to the Club. A copy of the Deed of Sale was provided in the Rule 35(14) response.

27 Clause 8.1 of the Deed of Sale provides that sale is subject to the conditions of the establishment of the township imposed or to be imposed by the local authority. Clause 10.2 of the agreement places an obligation on the Club to comply with all relevant conditions/requirements of:

27.1 the DEADP of 11 July 2002;

27.2 the Sub-division and rezoning Issued by DEADP on 30 September 2003;
and

27.3 the GC-OEMP

28 In this manner the Respondent tried to transfer the obligations that it had in relation to the development, including providing the surrounding fence around the property onto the Club.

29 The Rule 35(14) response makes it clear that after the sale was concluded the Club acknowledged that it had a contractual duty *"to erect a fence along the entire length of its external border"*.

30 It will be argued at the hearing that there is no contractual nexus between the Applicants and the Club, which they can enforce in order to compel the Club to perform this obligation.

31 This notwithstanding the Club may have an interest in the outcome of this matter by virtue of the obligations that it has undertaken to the Respondent in terms of the Deed of Sale.

Joinder of property owners on the Northern and Southern boundaries of the Estate

- 32 I deny that the owners of properties on these boundaries of the Estate have a direct and substantial interest in any order that the Court might make, or that such an order cannot be sustained or carried into effect without prejudicing them.
- 33 I am advised that in the absence of a servitude or the acquisition of prescriptive rights there is nothing that precludes the owner of an adjacent property from constructing a fence on his land.
- 34 This is made clear in Table 11 of the aforementioned summary of issues and concerns that were contained in the EMP that was submitted in accordance with condition 16 of the ROD of 11 July 2002 and in which it is stated that *"views are not a legal right"*.
- 35 The high water mark of the Respondent's case in this regard is that the properties in question *"were historically not fenced out and at all relevant times enjoyed golf course access and open frontage onto the golf course land"*.
- 36 I believe that the Respondent has been deliberately vague in using the word *historically* as it knows that none of the owners in question have enjoyed open frontage long enough for them to have acquired any kind of prescriptive right not to be fenced off.
- 37 In this regard it is clear from documents included in the Rule 35(14) response that the Golf Course was previously fenced and that the Club was expressly given the right to fence off the relevant owners in the lease agreement that was in existence before the property was sold to the Club.
- 38 The Rezoning scheme regulations referred to in paragraph 5.14 of the answering affidavit also makes it clear that the properties along the northern border can be fenced off. This rezoning in any event pre-dates the rezoning

of the Estate and which relates to an adjoining property that is now subject to its own zoning conditions.

- 39 The statement, with reference to ARK 7, that prior to December 2004 it had already been resolved that the properties known as the Hermanus Heights and Main Road properties were not going to be fenced off, is simply not true. In this regard the Rule 35(14) response makes it very clear that there was never any such decision and/or resolution. I will deal with this issue more fully below.
- 40 In fact ARK 7 was never given to prospective purchasers and even if it was the legend thereon that refers to these properties does not bear out that a decision of the kind contended for was ever taken by the Respondent.
- 41 At best the legend provides that non-fencing of the properties in question is a *"first option"* which obviously falls away when it becomes evident (as it now has) that the integrity of security cannot be maintained to the satisfaction of house owners in the Estate and the Club.
- 42 The Respondents papers read with the Rule 35(14) response makes it clear that this has not been achieved.
- 43 The Applicants have also never suggested that the fence should be constructed on land that belongs to these owners. In fact the EMP makes it clear that boundary fences are to be set back 1,5 meters from the boundary.
- 44 In the premises the fence must obviously be set back onto land owned or controlled by the Respondent or in respect whereof it has an entitlement to erect a fence.
- 45 In these circumstances I do not agree that the northern and southern boundary owners have a direct and substantial interest in these proceedings.

46 Having said this, I will however have no objection to these property owners being afforded an opportunity to respond to a notice inviting them to indicate whether or not they wish to be joined in these proceedings and, if so, to provide the basis for that entitlement so that the Honourable Court can exercise its discretion to decide whether or not to join them *mero motu* as parties to these proceedings.

SECOND POINT IN LIMINE – THE APPLICANTS CLAIMS HAVE PRESCRIBED

- 47 It will be argued at the hearing that the Respondent, who bears the onus to prove that the Applicants' claim have prescribed, has misconstrued the test that must be applied in deciding when prescription commenced to run in respect of the debt that is the subject matter of this application.
- 48 In this regard it will be argued at the hearing that the prescription of such a debt only commences to run after a reasonable time has elapsed from the date upon which the agreement from which it emanates was concluded.
- 49 In the instant case it is common cause that the relevant Deeds of Sale were concluded in November 2005. In its answering affidavit the Applicant does not however address the question as to what is or is not a reasonable time for the performance of its obligation to fence the entire property including that portion which is the subject matter of this application (the unfenced portion).
- 50 In the result it will be argued that the Respondent has not discharged the onus that it bears to prove that the Applicants' claim for specific performance have prescribed.
- 

51 I am in any event advised that in determining what is a reasonable time for performance of the debt in question (ie fencing the unfenced portion) all relevant factors must be taken into account and in this regard it will be evident from the Respondent's papers that:

51.1 an extremely complex and time consuming procedure was envisaged in relation to the fencing of the unfenced portion;

51.2 fencing of this portion was conditional and had to be preceded by a process of consultation with a large number of property owners located on this boundary (some of whom are not permanent residents of Hermanus) and the exploration of other suitable options to see whether the integrity of security could be achieved by other means;

51.3 clearly the obligation to fence the unfenced portion was envisaged only as a last resort and would only arise when it became evident that the integrity of security could not be maintained by other means to the satisfaction of the house owners in the Estate and the Club;

51.4 a reasonable time would have to elapse in order to see if it was possible to put measures in place so as to ensure that the integrity of the security was not compromised without fencing the unfenced portion of the Estate.

51.5 It is common cause on the papers that the Respondent was still doing work on portions of the security fence in late 2010.

52 During the period November 2009 and September 2010, the Respondent in fact spent R300 00,00 (Three Hundred Thousand Rand) on inter alia 260 meters of palisade fencing on the southern boundary and a further R150 000,00 (One Hundred Fifty thousand Rand) was earmarked to be spent on identified problem areas in the fence around the boundary of the Estate. The Respondent further acknowledged its responsibilities as late as September

2010 by spending an amount of approximately R450 000,00 (Four Hundred Fifty Thousand Rand) to fulfil its obligations in fencing the perimeter and in the performance of its obligation to secure the Estate.

53 In view of the foregoing, it must be concluded that the Respondent reasonably required until at least September 2010, in order to perform its obligations to fence the unfenced portion of the Estate and prescription cannot have commenced to run before that date.

54 I am in any event advised that:

54.1 by continuing to take steps to secure the perimeter of the Estate, including trying to prevail upon others to do so on the basis of an admitted obligation, the Respondent has both tacitly and expressly acknowledged that it has a contractual duty to perform the obligation which is the subject matter of the application;

54.2 the running of prescription has accordingly been interrupted; and

54.3 prescription commences to run afresh from September 2010, alternatively from 19th May 2009.

55 In the circumstances I deny that the debt, which is the subject matter of this application, has prescribed.

56 In the alternative and in any event, it is evident from the Respondent's papers that (notwithstanding the Respondent's contentions to the contrary) the Applicant is in any event entitled to claim that there must be a surrounding fence around the entire Estate in terms of the conditions of authorization that were imposed when the application to create the Estate was granted and when the rezoning was approved.

57 I am advised that this is a right that can be relied upon and enforced in perpetuity and until such time as the zoning conditions are amended.

RESPONDENT'S OBLIGATION TO FENCE THE PERIMETER OF THE ESTATE

58 The Respondent does not deny that it has constructed a fence around almost the entire estate except for the unfenced portion.

59 In the process it has spent millions of Rand in an endeavour no doubt to provide the occupants of this upmarket Estate with the secure lifestyle that they were promised.

60 It is thus beyond comprehension that the Respondent now contends that it has no obligation to provide a fence that surrounds the Estate.

61 In this regard it will be evident from the Rule35 (14) response, that one of the very reasons for creating this development as a secure golf estate was to optimise on the revenue that could thereby be generated inter alia so as to channel funds into projects benefitting the historically disadvantaged people of Hermanus.

62 Surely it is not the Respondent's case that it has wasted millions of Rand constructing a fence that surrounds the bulk of the Estate without it having been under any obligation to do so with funds that it was otherwise obliged to have used for the benefit of this needy segment of our community.

63 It is also not disputed that the Respondent has kept a substantial sum of money in readiness so as to fulfil its said obligation. Why it is doing this if it has no duty to fence the Estate defies comprehension.

- 64 In paragraph 46 of the Answering Affidavit the deponent says "*the respondent has already performed whatever contractual obligations it had in respect of providing fencing to the Fernkloof Estate*".
- 65 The Respondent does not however take this Honourable Court into its confidence and explain from where these *contractual obligations* arise.
- 66 In the premises its denial that it has a contractual obligation to provide a fence that surrounds the Estate is a bare denial that cannot prevail.
- 67 In paragraph 22 of the answering affidavit the deponent contends that neither the ROD nor the LUPO approvals contain provisions that oblige it to provide a fence that surrounds the Estate.
- 68 This is simply not true because, as already mentioned, condition 16.2 of the ROD makes it very clear that there will be a "*surrounding fence around the activity*" and it is to this fence that reference is made in condition 4.8 of the LUPO approval.
- 69 A perusal of the answering affidavit indicates that the Respondent apparently relies on a decision taken subsequent to these approvals and in terms whereof it was "*resolved*" to no longer erect a fence around the activity (ie the Estate) but to specifically exclude the unfenced portion.
- 70 In this regard the deponent, in paragraph 82 of the answering affidavit, says that "*the decision not to fence out the Hermanus Heights and Main Road properties had been taken quite some time before the agreements of sale were signed by or on behalf of the Applicants*".
- 71 Once again the deponent does not take this Honourable Court into his confidence and state when, where or by whom this "*decision*" was taken.
- 

- 72 The Rule 35(14) response reveals that there was in fact never any such decision taken by the Respondent or by anybody else with the necessary authority to amend the conditions of approval of the development.
- 73 In the premises the deponent to the answering affidavit has, it would appear deliberately, misled this Honourable Court in relation to a crucial aspect of this case.
- 74 The Respondents reliance on ARK7 is also misplaced. As will be explained more fully below, it is not true that this is the plan that was included in the contract documents.
- 75 The statement in paragraph 15 of the Answering Affidavit *"that the Respondent had no intention of erecting a fence along the boundary of the golf course land"* at the time that the erven in the Estate were sold, is startling in the extreme.
- 76 If this is true, then this intention was most certainly never made clear to purchasers of erven in the Estate (as is contended in paragraph 15 of the Answering Affidavit) and, if it had, purchasers, including myself, would most certainly not have purchased erven in the Estate, at least not at the prices that were paid for them.
- 77 If what the deponent now says is true, then it would be fair to conclude that each and every one of the purchasers was deliberately misled by the Respondent and/or the Developer as to an incredibly important attribute of the Estate at the time of the conclusion of the agreements pursuant whereto they acquired erven in the Estate and that they acted to their detriment as a consequence thereof by either purchasing erven in the Estate or by paying much more for them than they otherwise would have.

78 The Respondent's attempt to distinguish between the Fernkloof Estate and the golf course land and the suggestion that cumulatively the precincts do not comprise the Estate that is referred to in the deed of sale is also contrived in the extreme.

79 The Rule 35(14) response contains many references that belie this suggestion.

5

80 It now transpires that the contract documents may well have been skilfully crafted so as to mislead purchasers into believing that they were buying into a secure golf estate when (if the deponent to the answering affidavit is stating the facts correctly) in truth and in fact it was never the Respondents intention to provide same.

81 I am advised that in construing the terms of the agreement it is not the Respondents subjective intention that will prevail but rather its intention as expressed in the contract and in this regard I repeat what is said in the founding affidavit.

82 It bears emphasis that the legend on ARK 7 and the other plans do not convey that the Hermanus Heights and Main Street properties are not going to be fenced out.

83 What they provide for is no more than an option not to do so *"as long as the integrity of security is maintained to satisfaction of house owners/golf course"*.

84 The Respondent does not say that the house owners as represented by either FEMPOA or their respective property associations are satisfied that the integrity of security has been maintained to their satisfaction. I have already dealt with the position of the Club.

- 85 Given the number of breaches of security to houses in that area as recorded in the answering affidavit, I would be most surprised if either the house owners or the Club were to express their satisfaction with the current security arrangements.
- 86 The documents contained in the Rule 35(14) response in fact reveal that despite numerous negotiations no agreement has to date been reached between the relevant parties as to the implementation of satisfactory measures to ensure that the integrity of security is maintained to the satisfaction of house owners and the golf course.
- 87 The report attached to the founding affidavit makes it clear that the integrity of security is not being maintained along the unfenced portion and accordingly it is clear that the first option is simply not achievable and that the unfenced portion must now be fenced.
- 88 Having said this I do wish to place on record that in the spirit of good neighbourliness I personally would have no objection to this Honourable Court ordering that the fence in question should be constructed on the street side of the properties in question provided only that the integrity of security is adequately maintained.
- 89 As to the nature of the fence along the unfenced portion, I agree that it should be as unobtrusive as possible just so long as the integrity of security is properly maintained. In this regard the height and type of fence that surrounds the rest of the Estate and the security arrangements at access points is obviously what everybody has in mind and regards as being satisfactory.
- 90 Provided such security is provided I personally have no preference as to precisely where the fence it is to be constructed.
- 

SAFETY & SECURITY

- 91 The Respondent correctly states that I was an estate agent at the time of the sale of the erven and directly involved in the marketing thereof as a part of the sales team of the Fernkloof Estate. It is because of this fact that I can state emphatically that it was part of the marketing plan of the developer to promote the Estate as a secure residential development on the Hermanus golf course. The promotional material provided to agents most certainly never disclosed or suggested that the security of the development could be compromised by certain portions of the estate that will have open frontage without any fencing.
- 92 I can state truthfully that the alleged Boundary Key Structure Plan (ARK 7), was never disclosed to me before or after the sale of the erven in the Estate, whether in my capacity as selling agent or buyer.
- 93 The Hermanus golf course has in the past been fenced. The relief that the Applicants ask for is nothing new in a historical sense. A letter by the then President of the Hermanus Golf Club dated 14 June 2006 states that the golf course had previously been fenced off for safety reasons. A copy of aforesaid letter is attached hereto marked "MJK 1R".
- 94 The statements by the Respondent in paragraph 36 of its Opposing affidavit are made without any supporting documentation or proof. The Respondent in fact admits in Paragraph 2.14 of the Rule 35 (14) response that there are no written agreements with northern and southern boundary owners, which precludes fencing the unfenced portion.
- 

95 I categorically deny that the Hermanus Golf Estate development was never envisaged as a high security development. I was part of the marketing team that sold erven precisely on that basis and I also bought my property for that very same reason. The fact that electric fencing has been installed in the perimeter fencing already undertaken by the Respondent is proof of the level of security envisaged. I am affected by the lack of security at the northern and southern boundaries of the Estate and only wish for the Respondent to install electrical fencing not just at some places on the estate boundaries but around the entire Estate.

96 I also deny that the security arrangements that are in place at the Hermanus Heights and Main Road properties are at all satisfactory. In this regard I refer to what I have said in the founding affidavit and will if necessary request that this Honourable Court conduct an inspection in loco so as to resolve this issue.

97 In the Rule 35(14) response the Respondent provides documents of what the Club has required to ensure that adequate security measures are in place but it provides no proof that the owners of the properties in question have agreed to these measures.

98 The Respondent fails to produce any documentation or confirmation of any agreement or arrangement that a security system has been put in place at each adjacent residence on the Estate's boundary, which secures the golf course, and therefore all the residents, from outside access. It is because of this lack of security arrangements that fencing of the unfenced portion has become the only remaining option.

99 Public access gates and historic artefacts have no bearing on the security issues at hand. Clearly these are all supposed to be locked and petty omissions in this regard are irrelevant to this case.

100 I deny the statements in paragraph 66 and 67 regarding my position on the compromised security situation at the Estate in relation to the referred website.

101 I have no knowledge of and I do not have an internet website at www.fernkloofproperties.com and definitely do not advertise the Estate on that website.

PLANS PROVIDED TO PURCHASERS

102 The plans that were provided to purchasers of erven in the Estate were threefold:

102.1 The first plan was, as referred to in paragraph 48 of my founding affidavit, part of the bundle of documents given at registration as a buyer. This plan is described in the legend/key as "Landscape Elements" and indicates the various precincts with a solid line indicating a solid perimeter around the boundary of the Estate. Other than for this solid boundary line no other boundary detail is legible from the legend/key, which cannot be read.

102.2 The only plan attached to the sale documentation is Annexure A to the Standard Conditions of Sale and attached as Annexure "C" to the Applicants founding affidavit. Annexure "A" describes it as a "Plan of Land Comprising Fernkloof Estate Development". This plan is dated 23 September 2004 and indicates the boundaries of the development with a broken line. The legend/key thereto does not indicate any fencing detail and merely describes it as "Estate Boundary". The sale documentation does not

indicate or state anywhere that any portion of the perimeter of the Estate will not be fenced.

102.3 The Respondent provided the third plan to all purchasers of erven in the Estate after signing the legal documentation. Each buyer received a compact disk, which contained various folders named applications, legal pdf documents, site plan and arch guidelines. The folder named site plan and arch guidelines contained an introductory page with contact details, a site development plan with enlarged plans for each precinct showing the specific erven and an architectural design guideline. A copy of the aforesaid development plan and detailed plans for precincts 1 & 2 are attached hereto marked respectively "MJK 2R", "MJK 3R" and "MJK 4R".

103 The "Development plan", being annexure "MJK 4R", shows a clear and solid border around the estate with the various precincts indicated thereon. The legend/key to this plan is also illegible and nowhere is it indicated that certain portions will have open frontage on the golf course. The enlarged plans of the precincts also do not indicate anything other than a solid line, which I accepted to be the perimeter fence. Annexures "MJK 3R" clearly borders the northern boundary of the Estate and the boundary is clearly indicated with a solid line as is "MJK 4R", being precinct 2 were I live.

CONDUCT NOT AUTHORISED BY RESPONDENT'S COUNCIL

104 The Respondent alleges in Paragraph 5.1 of the answering affidavit that after the approval, the development was rebranded from "Hermanus Golf Estate" to "Fernkloof Estate" implying that this somehow altered the nature of the development.

105 In paragraph 2.3 of the Rule 34(14) response it is however made clear that such rebranding was never approved by a resolution of the Respondent. It will be argued at the hearing that the nature of the development could not be altered without the necessary authorization including a council resolution to that effect.

106 The alleged agreement concluded between the Respondent and property owners, that is referred to in paragraph 36 and 15 of the opposing affidavit, in terms of which *"the existing property owners that previously enjoyed open frontage onto the golf course land should be accommodated and that no fence would be erected on the boundary between their properties and the golf course land..."* is also not supported by any resolution of the Respondent's council.

107 The same applies to the decision that is referred to in paragraph 82.

108 In paragraph 2.18 of the Rule 35(14) response, the Respondent confirms that there is no resolution adopted by the Respondent confirming that the Respondent is satisfied with the security of the Hermanus Heights and Main Road properties as alleged in paragraph 84 of the opposing affidavit.

BOUNDARY KEY STRUCTURES PLAN

109 The Boundary Structures Key Plan (ARK 7) appears to be at the heart of the Respondent's opposition to this application. I dispute its validity and relevance to this application.

110 The Respondent's allegation that ARK7 was accepted by the Respondent during or about August 2004 and approved for building purposes on 7 March 2006, is denied.

111 In this regard the Respondent confirms, in Paragraph 2.14 of the Rule 35 (14) response, that there is in fact no Council resolutions approving ARK 7.

112 It is thus clear that the Council of the Respondent has at no stage considered, debated or decided on the acceptability of ARK 7 and has never approved of its use as a plan of the development.

113 The Respondent also does not say that ARK 7 was ever discussed or deliberated with the Club or that it ever agreed to it.

114 All of the correspondence emanating from the Club provided in the Rule 35(14) response confirms that the entire Estate will be fenced in if acceptable security arrangements cannot be achieved for the unfenced portion and confirms that the negotiations to find an alternative solution are done in a spirit of good neighbourliness and do not emanate from any entitlement on the part of adjoining owners not to be fenced off.

115 The Fernkloof Estate Masters Property Owners Association (FEMPOA), representing the property owners in the estate, did not exist at the time that ARK 7 was allegedly agreed and approved. The Respondent also does not say that ARK 7 was subsequently agreed to by FEMPOA or by any of the other precinct property owner associations.

116 The Respondent's allegation that ARK 7 was workshopped with the Heritage Committee is inconclusive. The minutes of the Heritage committee dated 23 February 2006 and 30 March 2006, referred to in Paragraph 2.11 of the Rule 35 (14) response, does not refer anywhere to ARK 7, but only to plans for the positioning of gatehouses and palisade fencing for Fairways avenue and

Precincts 8 & 9. The Respondent accordingly provides no proof that the Heritage Committee approved or accepted ARK 7.

117) As mentioned ARK 7 was never disclosed to me as agent prior to the sale of even or in my capacity as purchaser when I signed the sale documentation.

118 Based on what the deponent says in his affidavit as to the Respondent's intention at the time of the sale it may well be that ARK 7 was deliberately withheld and not disclosed to potential buyers by the Respondent and/or the Developer.

OUTSTANDING DOCUMENTS

119 On 17 April 2012 the Respondent filed a response to the Applicants Notice in terms of Rule 35(14).

120 A perusal of the Rule 35(14) response reveals that there are a number of additional documents that are relevant in this matter and that the Applicants have not yet had sight of.

121 These include the following:

121.1 The Draft Scoping Report, the Initial Assessment and as well as the Application for Rezoning and Subdivision of the Estate;

121.2 All minutes of the meetings of the planning committee and the community committee referred to in the Development Facilitation Agreement;

121.3 The applications for removal of restrictions, including the supporting documents;

121.4 The advertisements pertaining to the aforementioned application/s;

121.5 The objections that were received, especially those in relation to the fencing off of the Estate and including the objections that are referred to in the ROD of 11th July 2002 under the heading "KEY FACTORS AFFECTING THE DECISION";

121.6 The Final Scoping Report;

121.7 All draft and final Development Plans, including:

121.8 the Development Plan that was approved by the Respondent and that became the development "blueprint";

121.9 The Development Plan that is referred to in paragraph 3 of the letter from DEADP to the Respondent dated 19 October 2001;

121.10 The Development plan that was approved and that is referred to in the minute of the meeting of 19 February 2002;

121.11 The Development Plan referred to in the ROD of 11th July 2002 under the heading "KEY FACTORS AFFECTING THE DECISION";

337

121.12 The proposed Development Plan referred to in paragraph 4.1 and the Development Plan referred to in paragraph 4.2 thereof as Annexure B to the letter dated 30 September 2003 from the DEADP to the Respondent but was not included;

121.13 The General Layout Plan that is Annexure 1D to the EMP of 29 November 2004 (although the EMP with all of its other annexures was

provided in the Rule 35(14) response was provided this plan was omitted.)

121.14 The Appeals that are referred to in the letter dated 14th October 2003 from the DEADP to the Respondent dated 14th October 2003 as well as all documents pertaining thereto;

121.15 The Environmental Audit Report as is referred to in Condition 17 of the Annexure marked "ARK10" and the environmental audits of the wetlands as is provided for in Condition 4.14 of the Annexure marked "ARK11" - This report is essential to confirm *inter alia* adherence to condition 16.2 of Record of Decision, marked "ARK10".

343

121.16 All minutes of all meetings at which the fencing of the Estate as well as access to the golf course was workshopped either by the Respondent or the Rabcav internally or with third parties.

121.17 The Council resolution of the Respondent on the detailed investigation regarding access to the golf course and its findings, as is provided for in Condition 4.7.5 of the Annexure marked "ARK11" and referred to in paragraph 22 of the opposing affidavit. (The Respondent in its Reply in terms of Rule 34(14), paragraph 2.10 refers to council resolutions and correspondence prior to the approval granted by the Department of Environmental and Cultural Affairs and Sport for the creation of the Hermanus Golf Estate, dated 11 July 2002. The Respondent does not provide the record of this detailed investigation obligated by the Department.)

345

121.18 The Council resolution regarding the establishment of the Trust fund and the annual percentage payment as is provided for in Condition 4.13 of the Annexure marked "ARK11" and as is referred to in paragraph 22 of

343

1
D.

the opposing affidavit is also not provided. (The Respondent in its Reply in terms of Rule 34(14), paragraph 2.10 refers to council resolutions and correspondence prior to the approval granted by the Department of Environmental and Cultural Affairs and Sport for the creation of the Hermanus Golf Estate, dated 11 July 2002. The Respondent does not provide proof of the establishment of the Trust fund or its reports as required by the Department.)

M31
121.19 The council resolution where it was resolved that "the existing property owners that previously enjoyed open frontage onto the golf course land... should be accommodated and that no fence would be erected on the boundary between their properties and the golf course land..." as is referred to in paragraph 36 and 15 of the opposing affidavit. (The Respondent in its Reply in terms of Rule 34(14), paragraph 2.10 refers to council resolutions and correspondence prior to the ROD. No council resolution is provided confirming the aforesaid statements on behalf of the Respondent nor the alleged approved annexure "ARK7", which is dated August 2004, more than two years after the approval by the Department.)

121.20 The council resolution where the decision has been taken "not to fence out the Hermanus Heights and Main Road properties", as is referred to in paragraph 82 of the opposing affidavit. (The Respondent in its Reply in terms of Rule 34(14), paragraph 2.10 refers to council resolutions and correspondence prior to the approval granted by the Department of Environmental and Cultural Affairs and Sport for the creation of the Hermanus Golf Estate, dated 11 July 2002. No council resolution or any supporting documentation is provided confirming the aforesaid statement behalf of the Respondent. The Respondent merely states that the decision had been taken quite some time before the agreements of sale were signed by or on behalf of the Applicants.)

121.21 The minutes of the meetings where the Hermanus Heritage Committee approved the "Boundary Structures Key Plan" marked as annexure "ARK7" and as is referred to in paragraph 37 of the opposing affidavit is also not provided. (The Respondent in its Reply in terms of Rule 34(14), paragraph 2.11 refers to minutes, which does not resolve for the approval of the alleged plan "ARK7" and this alleged plan is nowhere mentioned. The minutes record that: " Mr Clint Evans, for Fernkloof Estate, presented the reasons for this decision. Precincts 8 & 9 have been sold out to purchasers for the security promised.")

121.22 Examples of the alleged annexure "ARK 7" that were allegedly used in the marketing material used to promote and sell erven in Fernkloof Estate. (The Respondent in its Reply in terms of Rule 34(14), paragraph 2.11 merely states that the plan marked "ARK 7" was framed and has since been destroyed. The Respondent has not provided any of the marketing material to which reference is made in the answering affidavit.

121.23 The Respondent has not provided any documentation to substantiate its averments in paragraph 63.2 of the Opposing affidavit. (The Rule 34(14), response in paragraph 2.15 is evasive and counters that no specific document is referred to. The Respondent was required to produce the document, which confirms the alleged security arrangements in place at the Hermanus Heights and Main Road properties. No documentation is supplied where these owners were allegedly informed of the alleged security arrangements, what security measures are expected of them and the consequences of not adhering thereto. The lack of such

806

documentation casts doubt as to the truthfulness of the allegations by the Respondent.)

121.24 The Respondent does not provide any documentation to substantiate its averments in paragraph 65.7 of the Opposing affidavit. (The Rule 34(14), response in paragraph 2.16 is again evasive and alleges that no specific document is referred to. The Respondent was required to produce documentation of all alleged security assessments and related reports to ensure that the Hermanus Height and Main Road properties ensure an adequate barrier against entry. No documentation is supplied to confirm that these properties were assessed for its security risks, whether owners were advised of possible security breaches or any remedial security measures suggested to owners to be taken to ensure the alleged "adequate barrier against entry". The lack of any documentation in this regard casts doubt as to the truthfulness of the allegations by the Respondent.)

310 ?

121.25 The Respondent does not provide any documentation to substantiate its averments in paragraph 84 of the Opposing affidavit that the Hermanus Golf Club was satisfied with the improvements of individual homeowners of their properties. The Respondent in the Rule 34(14) response, paragraph 2.16, refers to minutes of a meeting, which addressed a proposal for the residents of the northern boundary to "buy in" to the Frenkloof Estate, and is not related to the document required. The Respondent does not provide any correspondence or minutes where the Hermanus Golf Club confirms its satisfaction with the security arrangements of any adjacent property owner. The lack of any documentation in this regard is proof that the Respondent and/or its agents acted on their own accord and that the Hermanus Golf Club did not approve the alleged security arrangements.

121.26 The Respondent does not provide any minutes of the alleged meetings Rabcav held with representatives of the Hermanus Heights and Main Road property owners, as is referred to in paragraph 84 of the opposing affidavit. (The Respondent in the Rule 34(14) response, paragraph 2.17 confirms that to its knowledge no official minutes were kept of the meetings concerned. The documentation that it has provided makes no reference at all to Rabav.)

121.27 It appears as if the Respondent has servitudes and or that there are areas that do not belong to the golf course abutting the unfenced portions and upon which a fence could be constructed. Documents relating to these areas are also required including all documents authorising the closure of these areas. (In this regard it appears as if the Respondent has grossly exaggerated the position by stating that there are 58 private properties bordering the unfenced portion when in truth and in fact there are only 23 such properties.)

122 Until such time as the Applicants have been provided with the aforementioned documents they are simply not in a position to deal more fully with the allegations that are contained in the answering affidavits.

123 In the result an application will be made when this matter is heard calling upon the Respondent to discover the above documents and to make them available for inspection by the Applicants and their legal representatives.

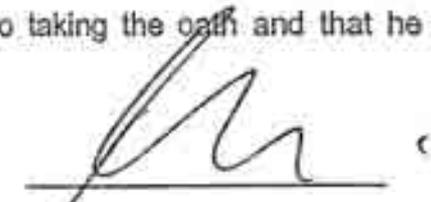
124 The Applicants' right to amplify their reply is accordingly reserved until after the documents in question have been provided and any other interested parties have responded to the application.

DATED AT HERMANUS ON THIS 7 TH DAY OF MAY 2012



MARUIS JAKOBUS KLEYNHANS

I hereby certify that on the 7 th day of MAY 2012 at HERMANUS and in my presence at the Deponent declared that he knows and understands the contents of this Affidavit, has no objection to taking the oath and that he considers the oath as binding on his conscience.



COMMISSIONER OF OATHS

Full Names: IGNATIUS STEYN VAN NOORDWYK
COMMISSIONER OF OATHS
~~PRACTISING ATTORNEY P.R.A.~~
101 WARRINGTON PLACE
HARBOUR ROAD
HERMANUS

Rank: _____

Number: _____

Station: _____





Hermanus Golf Club

P O Box 313, Main Road, Hermanus 7200

Tel: (028) 3121954/5 - Pro Shop: (028) 3122271 -

Fax: (028) 3122333 - E-Mail: manager@hgc.co.za

Website: <http://www.hgc.co.za>

Reference: Letter from President to NBR

14 June 2006

Dear Homeowner

ANNEXURE "B"

Many years ago the Golf Club was obliged because of vandalism, trespass and unauthorised use of the course as well as concerns of members for their safety, to fence off the course from the 18th green to the west and north as far as the 12th green. This move effectively secured the course from pedestrian traffic from the Village to Hermanus Heights.

As time went by dwellings were erected on our perimeter and in some instances permission was sought and give to owners that, "provided they denied access through their property to the course", that portion of the fence on their frontage could be removed. In all instances the Club reserved their rights.

These decisions are documented in minutes of Club Committee meetings and were all in reference to properties along the 15th and 16th fairways. No other dispensations are documented.

Since the acceptance of the M.O.U and the commencement of work to upgrade and extend our golf course, residents on the Northern boundary (mainly on the current 6th hole) have seen the proposed, and agreed to, fence in front of their erven as a threat to the value and ambiance of their property. The Committee of the Club has sympathy with these views.

Fernkloof Estate and its erven were marketed as a secure and gated access lifestyle consisting of several pockets of land in and around the course. As such fencing is obligatory.

Several meetings have been held by representatives of the Northern and Western homeowners so as to ensure their perceived rights.

At this stage the solution is that these people form themselves into a housing precinct subservient to the Main Homeowners Association and thereby do away with the necessity of fencing in front of their properties.

This would not only retain property values but also increase it as we confidently expect our golf course to rise rapidly in the rankings, and with the planned botanical plantings and wetland extensions will create a most desirable environment.

The Golf Club feels strongly that such dispensation should come at a price and have, through the Development Committee, indicated an approximate figure to initiate negotiation procedures provided that all boundary residents agree to become part of the Fernkloof Estate.

President: A.G. Runkel - Captain: D.H. Esterhuysen - Vice-Captain: B.H. Cain - Treasurer: H.N. Kleinloof
Committee: G.J. Conradie, R.J. Kelder, G du Plooy, D Pringle, M.E. du Plessis, J. du Toit
General Manager: Hsin Papenfus - Course Manager: Raymond Burt - Club Professional: Julian Shaw

Funds raised in this manner will accrue to the Golf Club for exclusive use in upgrading the Clubhouse and facilities to a standard in keeping with the perceived status of the course. This can only increase the value of any Estate property.

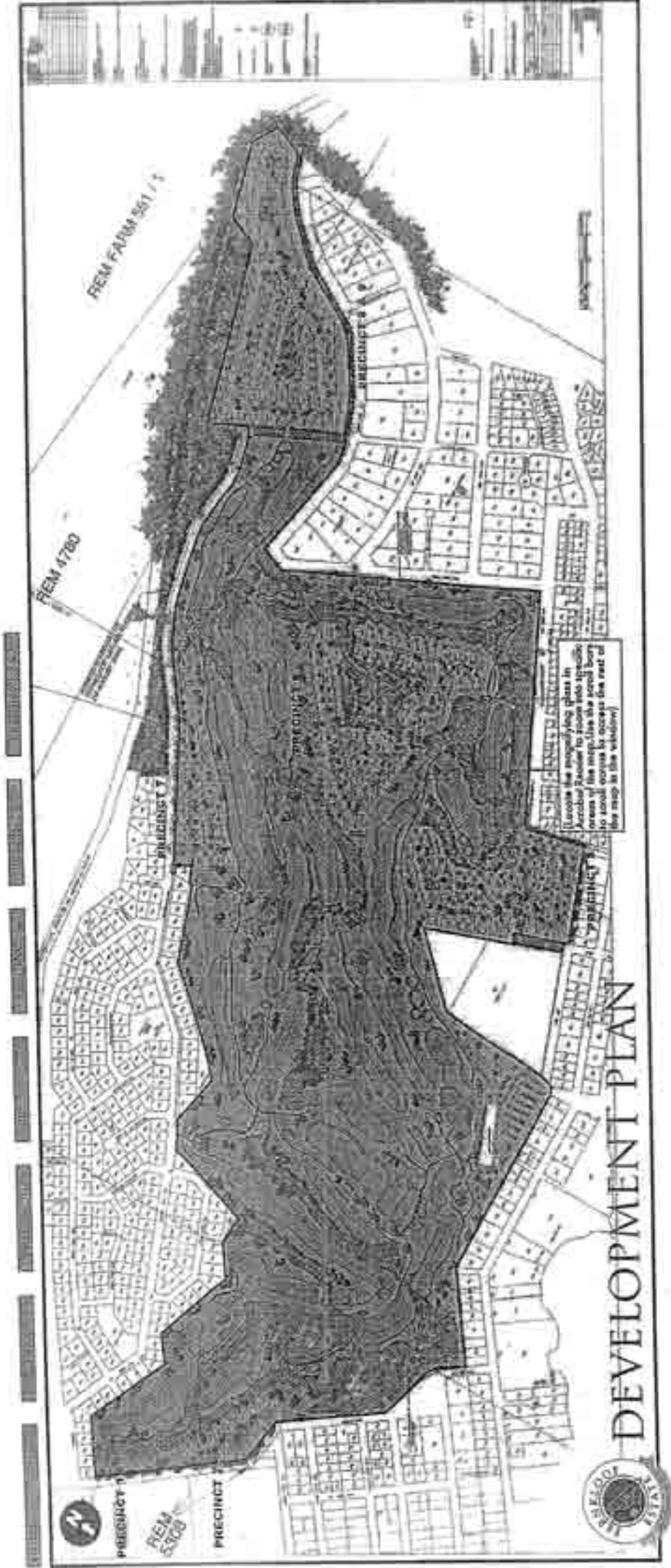
The Club would be pleased if you could consider this proposal favourably and establish a platform for final negotiations.

Yours sincerely,

AG Runkel
President

"MJK2K

458



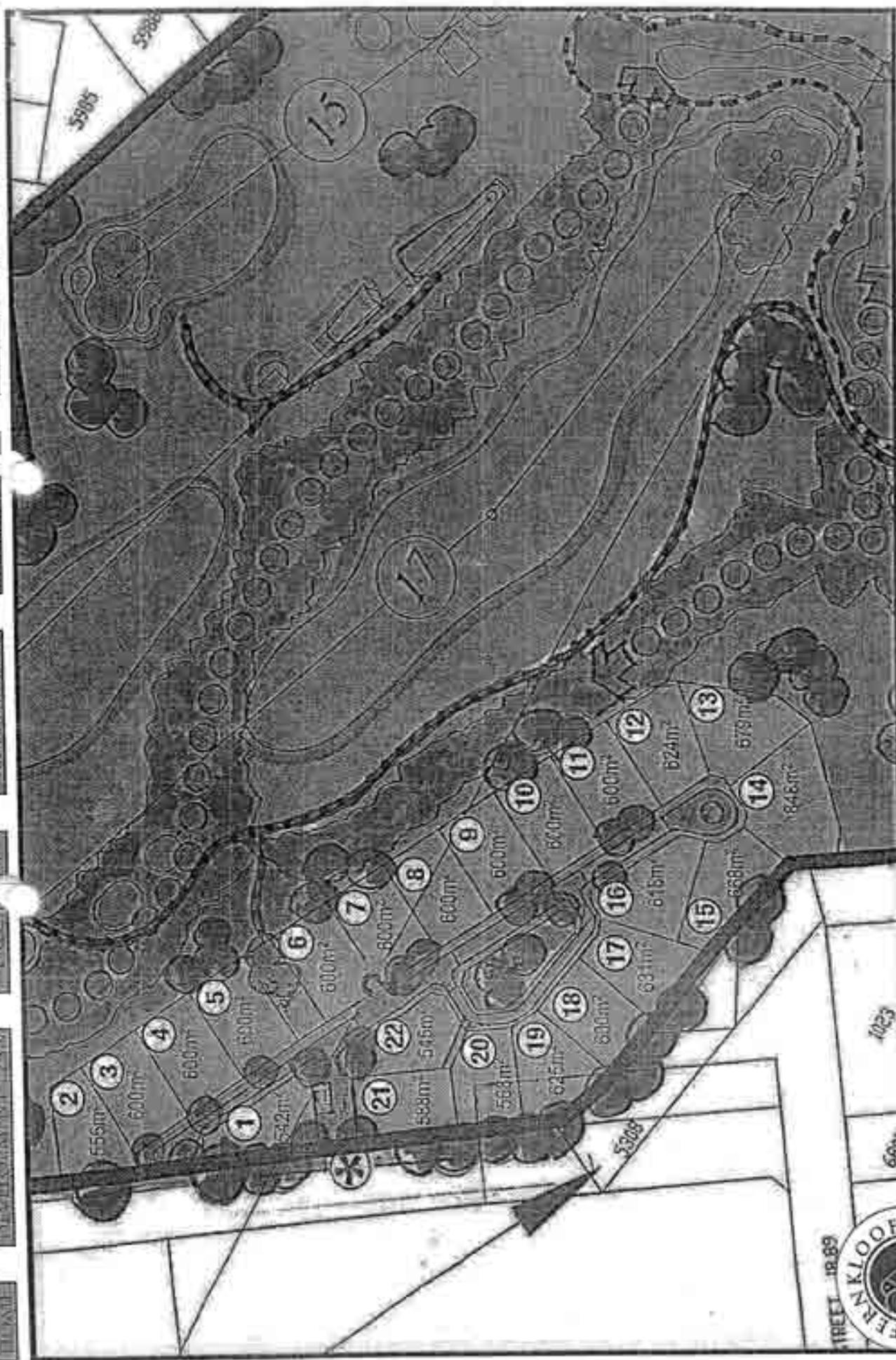
DEVELOPMENT PLAN



Handwritten marks or initials at the bottom right of the page.

" MJK 4R "

400



(Locate the magnifying glass in Acrobat Reader to zoom into specific areas of the map)

PRECINCT 2



STREET 1023

1023

60

In the matter between:

MARIUS JAKOBUS KLEYNHANS
in his capacity as Trustee for the
time being of the Kleynhans Family Trust

FIRST APPLICANT

and

HEATHER KLEYNHANS
in her capacity as Trustee for the
time being of the Kleynhans Family Trust

SECOND APPLICANT

CORNERCADE (PTY) LTD

THIRD APPLICANT

DIRLEY MILLICENT KOSTER

FOURTH APPLICANT

TIELMAN NIEUWOUDT AGENBAG

FIFTH APPLICANT

AND

OVERSTRAND MUNICIPALITY

RESPONDENT

FILING SHEET

TAKE NOTICE that Applicants Affidavit re Interlocutory Applications and Joinder is filed herewith.

DATED at HERMANUS on this 28th day of MAY 2012.

MICHAEL RANGE & ASSOCIATES
PER: 

M RANGE
Attorneys for Applicants
HERMANUS
C/o Strauss Daly Inc
15th Floor, The terraces
34 Bree Street
CAPE TOWN
Ref: L Malherbe

AND: THE REGISTRAR
HIGH COURT
CAPE TOWN

AND TO: CHIN INC
12 Hope Street,
HERMANUS
C/o Van der Spuy Cape Town
Attorneys for Respondent
(Ref. P C Neethling/ar/CH1/0028
4th floor,
14 Long Street,
CAPE TOWN
Tel: 419/3622
Fax: 418/1329

el
M. Chin
29.5.12 @ 9h40

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NO: 12755/2011

463

In the matter between

MARIUS JAKOBUS KLEYNHANS

FIRST APPLICANT

in his capacity as Trustee for the time being
of The Kleynhans Family Trust

and

HEATHER KLEYNHANS

in her capacity as Trustee for the time being
of the Kleynhans Family Trust

SECOND APPLICANT

and

CORNERCADE (PTY) LTD

THIRD APPLICANT

and

SHIRLEY MILLICENT KOSTER

FOURTH APPLICANT

and

TELMAN NIEUWOUDT AGENBAG

FIFTH APPLICANT

AND

OVERSTRAND MUNICIPALITY

RESPONDENT

APPLICANTS AFFIDAVIT
RE - INTERLOCUTORY APPLICATIONS AND JOINDER



MARIUS JAKOBUS KLEYNHANS

464

do hereby make oath and say:

- 1 I am the deponent to the Founding and Replying Affidavits in this matter and I am duly authorised to depose to this affidavit on behalf of the Applicants.
- 2 The facts disposed to herein are within my own personal knowledge, unless the context indicates otherwise, and are, to the best of my knowledge and belief, true and correct.
- 3 To the extent that legal submissions are advanced, they are made on the basis of advice received from my legal representatives, which advice I believe to be true and correct.

BACKGROUND

- 4 The need for this affidavit has arisen because of certain new developments that I need to bring to this Honourable Court's attention.
- 5 Its purpose is threefold:
 - 5.1 Firstly, it is filed in support of two applications that the Applicants need to bring at this stage of the proceedings one of which is for condonation and the other relating to the discovery of documents.
 - 5.2 Secondly, it is filed in response to an application that has been brought by the Respondents to strike out certain portions of the founding affidavits; and
 - 5.3 Thirdly, it deals briefly with the question of the joinder of other parties to these proceedings.
- 6 Each of these matters will be dealt with under separate headings below.



APPLICATION FOR CONDONATION

- 7 I have been advised that the Respondent has filed Heads of Argument in this matter calling upon this Honourable Court to dismiss the application because the Applicants did not file their Replying Affidavit timeously.
- 8 I find this most disconcerting since the Respondent as well as its legal representatives are aware that the filing of the Applicants' Replying Affidavit was deliberately held back on the advice of Advocate Alan Nelson SC pending the outcome of the settlement negotiations to which reference is made in the Practise Note that was filed of record in this matter.
- 9 These negotiations commenced during April 2012 and only came to an end on 24TH May 2012.
- 10 I deposed to the Replying Affidavit as far back as the 7TH May 2012, and a copy thereof was furnished to the Respondent, under cover of correspondence from my attorneys containing *inter alia* settlement proposals, at 14h16 on 7 May 2012.
- 11 At the time the Respondent's legal representatives were advised that on Advocate Nelson's advice the Applicants' Replying Affidavit would not be filed until it became evident that a settlement could not be reached in this matter.
- 12 Advocate Nelson expressed the view that it would be counter-productive to a settlement were the Applicants to file the Replying Affidavit due regard being had to the serious allegations that are made in it.
- 13 In this regard I refer to the allegations in the Replying Affidavit that the Respondent appears to have deliberately misled purchasers of erven in the Fernkloof Estate into believing that they were purchasing property (at a premium price) in a fully fenced and secure golf estate when in truth and in fact it now transpires that it was never the Respondent's intention to fully secure the Estate. I am advised that, if established, this would constitute fraud entitling not only the Applicant but also all other purchasers that purchased erven in the Estate to claim the damages that they have sustained as a consequence thereof.




14 It bears emphasis that Advocate La Grange SC was at all times made aware of Advocate Nelsons aforementioned view and the reason for delaying the filing of the Replying Affidavit and he was in agreement that it should be held back pending the outcome of the settlement negotiations.

15 In view of the above it comes as a great surprise to me to learn that the point is now taken by the Respondent in Heads of Argument filed by Advocate La Grange SC, that the Application should be dismissed due to the fact that the Applicants' Replying Affidavit was not filed timeously.

16 As mentioned, although the Replying Affidavit was only formally served on 25 May 2012 on the Respondent, the Respondant and its legal advisors have been in possession of it for a considerable period of time now and they will have had more than enough time to deal with it.

17 It also bears mention that when the Applicants were called upon to grant the Respondents an indulgence to file their Answering Affidavits out of time. The Applicants, on the advice of Advocate Nelson, had no hesitation doing so notwithstanding that we are all anxious that the security issue should be resolved as soon as possible.

18 In the premises it is unfortunate that the Respondent is now resorting to technicalities in order to have the Application dismissed.

19 The Replying Affidavit raises a number of vitally important points demonstrating, I believe, that the Respondent has not been truthful with this Honourable Court in a number of important respects. It also points to a number of important documents that the Applicants wish to inspect before further ventilating the issues in a supplementary Replying Affidavit.

20 I believe that the interests of justice dictate that the late filing of the Replying Affidavit should for these reasons be condoned and that the Applicants should be allowed to proceed with the Application notwithstanding that their Replying Affidavit was filed out of time and is currently still incomplete.

21 I accordingly ask that the late filing of the Replying Affidavit be condoned and that the relief prayed for in the draft order annexed hereto and marked "A" be granted.

22. It will be argued at the hearing that the Answering Affidavit read with the Respondent's Rule 35 (14) response raises more questions than answers.
23. In the Answering Affidavit the Respondent admits that it had a contractual duty to fence at least a considerable portion of the Fernkloof Estate and alleges that it has fully complied with its obligations in that regard.
24. The Respondent does not however take this Honourable Court into its confidence and state from where that obligation arises.
25. The Respondent states that at approval stage the development was referred to as the *Hermanus Golf Estate* and this is obviously the activity for which approval was granted by the relevant authorities.
26. In this regard the approval that was granted to develop the region ("ARK 10") makes it clear that there will be "a surrounding fence around the activity" (i.e. around the entire Hermanus Golf Estate).
27. According to the Respondent, the development was however subsequently, on some undisclosed date, "rebranded" as the "*Fernkloof Estate*", and at which stage it apparently no longer comprising a development of the whole of the Hermanus Golf Estate, but rather the development of "*nine separate and distinct pockets of land*" ... "*situated at the Hermanus Golf Club*".
28. In paragraph 21 of the Answering Affidavit the deponent says that the Deeds of Sale, pursuant whereof land was acquired in the Estate, provide that the sales are "*subject to all existing conditions of title, the conditions of approval and any further conditions that the competent authorities may impose with the approval of the subdivision of the land comprising the development and/or the subdivision of the property*".
29. In the Rule 35 (14) Notice, documents were accordingly sought that would enable the Applicants to ascertain if there were any alterations or amendments to the aforementioned approval and in terms whereof the nature of the development and/or the conditions of its approval were changed.



- 4
- 468
- 30 No such documents were however forthcoming and a number of important documents relating to the approval of the development have still not been provided.
- 31 It will also be evident from a reading of the Answering Affidavit that the Respondent relies on a "decision" that was apparently taken not to fence the unfenced portions and to "agreements" that were apparently concluded with the owners of adjacent properties to that effect.
- 32 To date the Respondents have however also not produced any documents to substantiate that any such decision was taken by it or that there is any agreement of the kind referred to.
- 33 In view of the above a number of documents have been identified in the Replying Affidavit that the Applicant requires in order to reply fully to the allegations that have been made in the Answering Affidavit.
- 34 Although the Applicants desperately seek an order for specific performance and this most decidedly remains their first option, they are currently also considering other options and depending on what proper discovery reveals they may very well apply to introduce alternate claims based on deliberate (i.e. fraudulent) misrepresentation.
- 35 Obviously the proper disclosure of all material documents is imperative in order for the Applicants (as well as any other interested party) to be properly advised in this regard.
- 36 In the premises this Honourable Court is requested to direct the Respondents to make available for inspection and copying the documents that are contained in the schedule annexed to the draft order marked "A".

THE JOINING OF INTERESTED PARTIES

- 37 The Respondent in its Answering Affidavit raised the issue of joinder and I have responded thereto in my Replying Affidavit.
- 

38 I deny that the Applicants ought to have foreseen that the parties in question ought to have been joined when the Application was launched. In this regard the following is relevant:

38.1 The Respondent's stance regarding the fencing-off of individual precincts only became evident when its opposing affidavit was filed.

38.2 The interest of the Hermanus Golf Club only became evident to the Applicants when "ARK 7" was filed and the Deed of Sale pursuant whereunto the Golf Club land was sold, was provided in the Rule 35(14) response by the Respondent, and

38.3 The Applicants are still at a loss as to the basis upon which it is alleged that the adjoining property owners have a real and substantial legal interest in the outcome of the proceedings although they have no objection to any of them, that can demonstrate such an interest, being joined as parties in these proceedings.

39 The Applicants appreciate that it may be both complex and costly to devise a mechanism that secures the joinder of all interested parties to these proceedings.

40 The Applicants pray that these difficulties will not preclude this Honourable Court from *mero moto* exercising its discretion to make an appropriate order that will safeguard the interests of all concerned.

APPLICATION TO STRIKE OUT

41 There are obvious reasons why the Respondent would prefer this case to be dealt with on the sanitized version of the papers that its application to strike-out contemplates.

42 The Applicants, on the other hand, believe that it is premature to deal with this application at this stage of the proceedings, for the following reasons:

- 42.1 The issues pertaining to the conditions of approval of the subdivision of the land in question (as well as any amendments thereto) have not yet been fully thrashed out in the papers.
- 42.2 Depending upon what the further documents reveal, the Applicants, as well as other purchasers of even in the Estate, may very well in these proceedings be including claims for relief in the form of claims for damages for fraudulent misrepresentation depending upon what the documents reveal.
- 42.3 The allegations that the Respondent seeks to have struck out are not only relevant to provide the contextual setting in which the sale agreements must be construed but they are also most certainly relevant to the issues currently being considered and in relation to which the papers have not yet been finalized.
- 42.4 There is also absolutely no reason why interested parties should not be provided with all of the relevant facts in order that they can properly consider their positions.
- 42.5 The Respondent's desire to have these facts (which it does not dispute) excised from the record smacks of a cover-up. It is also contrary to the new theme of openness and accountability that underscores the Constitution and all of the legislation that governs the conduct of administrative bodies such as the Respondent. In this regard full argument will be presented to the Honourable Court at the hearing of this matter.

POSTPONEMENT

- 43 In view of the need for further discovery, possible amplification of the Replying Affidavits and amendments to the relief claimed as well as the importance of affording other interested parties an opportunity to become parties to these proceedings (should they so wish), it is unfortunately unavoidable that this matter must be postponed.
- 

- 44 As mentioned in the founding papers I still travel a great deal for business purposes and on average do not spend more than 10 to 14 days a month with my family in the Fernkloof Estate. I am extremely anxious for the safety of my wife and children on the presently unsecured Fernkloof Estate, especially when I am not there.
- 45 I am sure that the other Applicants, as well as many of the residents and owners in the Fernkloof Estate, that are anxiously awaiting the outcome of these proceedings, share my feelings.
- 46 In the result I humbly request that in postponing this matter a mechanism be found to expedite these already protracted proceedings to the greatest extent possible.

CONCLUSION

- 47 I have been advised that this Honourable Court has a wide discretion in deciding how best to ensure that persons that have a real and substantial interest in these proceedings are joined and/or at the very least that they are afforded an opportunity to state whether or not they wish to be joined as parties.
- 48 I have been advised that the enclosed draft order on the question of joinder has, as far as possible, been based on precedents in other matters. I stress that it merely contains a suggestion in this regard.
- 49 I accordingly pray that at the hearing of this matter this Honourable Court will make an order in accordance with the draft that is annexed hereto and marked Annexure "A", or such other order as it deems appropriate.

DATED AT Swakopmund

ON THIS 28 TH DAY OF MAY 2012



MARUIS JAKOBUS KLEYNHANS



I hereby certify that on the 28th day of MAY 2012 at Swakopmund and
 in my presence at the Deponent declared that he knows and understands the contents
 of this Affidavit, has no objection to taking the oath and that he ~~considers~~ the oath as
 binding on his conscience.

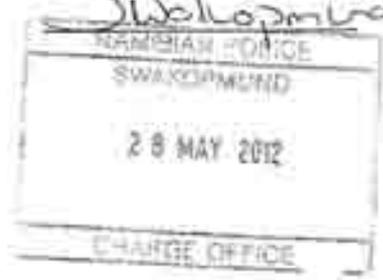

 HELENA NGHOENDA
 COMMISSIONER OF OATHS

Full Names: Helena Nghoenda

Rank: Lt/031

Number: 03739

Station: Swakopmund





IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NO: 12755/2011

In the matter between:

MARIUS JAKOBUS KLEYNHANS

FIRST APPLICANT

In his capacity as Trustee for the
time being of The Kleynhans Family Trust

and

HEATHER KLEYNHANS

in her capacity as Trustee for the
time being of the Kleynhans Family Trust

SECOND APPLICANT

CORNERCADE (PTY) LTD

THIRD APPLICANT

SHIRLEY MILLICENT KOSTER

FOURTH APPLICANT

TIELMAN NIEUWOUDT AGENBAG

FIFTH APPLICANT

AND

OVERSTRAND MUNICIPALITY

RESPONDENT

DRAFT ORDER

Having heard the parties, the following order is made:

474

CONDONATION

1. The Applicants' failure to file their Replying Affidavits is hereby condoned.
2. The Applicants are granted leave to supplement their Replying Affidavits herein within twenty-one days after compliance by the Respondent with the order made by this Court in terms of Rule 35(11) and to which reference is made in paragraph 3 hereof.

DISCOVERY

3. In terms of Rule 35(11) the Respondent is hereby ordered to produce under oath such documents or tape recordings in its power or control relating to any matter in question in these proceedings, including but not limited to the documents that are referred to in Annexure "CO 1" hereto.

POSTPONEMENT AND JOINDER

4. The application is postponed sine die in order to allow the applicants to demonstrate what the stand of the parties referred to in Annexure "CO2" hereto is in relation to these proceedings.

SS
d.

5. In this regard the Applicants shall ascertain from the various parties referred to in Annexure "CO2" whether they are prepared to file with this Court a written consent to be bound by this Court's judgment notwithstanding the fact that they have not been cited as parties.

6. If such consents to abide this Court's judgement are not filed by 31 October 2012 or if at any time prior thereto the Applicants' attorney intimates in writing to the Registrar of this Court that such consents cannot be obtained, this Court will give such directions as to the course the proceedings will then have to take.

APPLICATION TO STRIKE OUT

7. The Respondent's application to strike out is deferred for later determination when the merits of the Application are heard.

COSTS

8. Costs are reserved for later determination.

BY ORDER:

DATE:



In the matter between:

MARIUS JAKOBUS KLEYNHANS
in his capacity as Trustee for the
time being of the Kleynhans Family Trust

FIRST APPLICANT

and

HEATHER KLEYNHANS
in her capacity as Trustee for the
time being of the Kleynhans Family Trust

SECOND APPLICANT

CORNERCADE (PTY) LTD

THIRD APPLICANT

SHIRLEY MILLICENT KOSTER

FOURTH APPLICANT

TELMA NIEUWOUDT AGENBAG

FIFTH APPLICANT

AND

OVERSTRAND MUNICIPALITY

RESPONDENT

ANNEXURE "CO 1"

The documents to be discovered as per Clause 3 of the Draft Order are as follows:

1. The documents listed and identified in paragraphs 121.1 to 121.27 of Respondents
Replying Affidavit, dated 7 May 2012.

BY ORDER:

DATE:



CASE NUMBER: 12755/2011

in the matter between:

MARIUS JAKOBUS KLEYNHANS
in his capacity as Trustee for the
time being of the Kleynhans Family Trust

FIRST APPLICANT

and

HEATHER KLEYNHANS
in her capacity as Trustee for the
time being of the Kleynhans Family Trust

SECOND APPLICANT

CORNERCADE (PTY) LTD

THIRD APPLICANT

SHIRLEY MILLICENT KOSTER

FOURTH APPLICANT

TIELMAN NIEUWOUDT AGENBAG

FIFTH APPLICANT

AND

OVERSTRAND MUNICIPALITY

RESPONDENT

ANNEXURE "CO 2"

The parties as are intended, per Clause 4 of the Draft Order are as follows:

1. THE HERMANUS GOLF CLUB; and
2. THE OWNERS and/or RESIDENTS of the individual erven in the Fernkloof Estate; and
3. THE PROPERTY OWNERS as are referred to in Paragraph 5.10 of Respondents Answering Affidavit, as per the Schedule thereto, marked "ARK 5".

BY ORDER:

DATE:

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case no: 12755/11

In the matter between:

MARIUS KLEYHANS

First Applicant

in his capacity as Trustee for the time
being of The Kleynhans Family Trust

HEATHER KLEYNHANS

Second Applicant

in her capacity as Trustee for the time
being of The Kleynhans Family Trust

CORNERCADE (PTY) LTD

Third Applicant

SHIRLEY MILLICENT KOSTER

Fourth Applicant

TIELMAN NIEUWOUDT AGENBAG

Fifth Applicant

AND

OVERSTRAND MUNICIPALITY

Respondent

**NOTICE OF APPLICATION
(MOTION TO STRIKE OUT)**

BE PLEASED TO TAKE NOTICE that Respondent intends at the hearing of this matter to apply to this Honourable Court for the striking out of the portions of the replying affidavit of **MARIUS JAKOBUS KLEYNHANS**, dated 7 May 2012 to which reference is made below, on the grounds that such portions of the affidavit are irrelevant to the resolution of the matter and, where applicable, also on the further grounds specified below:

1. Paragraph 6 (on the grounds that it is not only bad in law but is inconsistent with the paragraphs following upon it, in particular with the conclusions stated in paragraph 14 and 23, as well as 31)

2. Paragraph 11 (irrelevance)
3. Paragraph 12 (irrelevance)
4. Paragraph 15 (inappropriate and prejudicially vague and unspecific references to Respondent's "Rule 35(14)" response; departure from case made out in founding papers)
5. Paragraphs 16 to 23 (departure from case made out in founding papers)
6. Paragraph 25 (Given the concession stated in paragraph 24, the precise manner in which the interest of the Hermanus Golf Club to be joined in the proceedings, arose, is clearly irrelevant)
7. Paragraph 25.2, 25.3, 25.4.1 and 25.4.2 (general irrelevance, as well as inappropriate and prejudicially vague and unspecific references to Respondent's "Rule 35(14)" response)
8. Paragraph 26, 27 and 28 (general irrelevance as well as departure from case made out in founding papers)
9. Paragraph 29 (general irrelevance, as well as inappropriate and prejudicially vague and unspecific references to Respondent's "Rule 35(14)" response)
10. Paragraph 30 (general irrelevance)
11. Paragraphs 33, 34, 35 and 36 (irrelevance – precise nature and scope of particular subjective rights which the parties in question may or may not have is not relevant to the issue whether they are entitled to insist on being joined in the proceedings)
12. Paragraph 37 (irrelevance, as well as inappropriate and prejudicially vague and unspecific reference to Respondent's "Rule 35(14)" response)
13. Paragraph 38 (irrelevance)

14. Paragraph 39 (the second sentence thereof) (inappropriate and prejudicially vague and unspecific reference to Respondent's "Rule 35(14)" response)
15. Paragraph 41 (irrelevance as well as departure from case made out in founding papers)
16. Paragraph 42 (vagueness of reference)
17. Paragraph 51.2 and 51.3 (irrelevance, departure from case made out in founding papers)
18. Paragraph 52 (irrelevance)
19. Paragraph 56 (departure from case made out in founding papers)
20. Paragraph 58, 59 and 60 (irrelevance)
21. Paragraph 61 (irrelevance, as well as inappropriate and prejudicially vague and unspecific reference to Respondent's "Rule 35(14)" response)
22. Paragraph 62 (speculation and irrelevance)
23. Paragraph 63 (irrelevance)
24. Paragraphs 64, 65 and 66 (misconstruing of onus of proof and accordingly irrelevant)
25. Paragraph 72 (prejudicially vague and unspecific reference to Respondent's "Rule 35(14)" response)
26. Paragraph 75 (irrelevance)
27. Paragraph 76 (irrelevance / inadmissible evidence of parties' negotiations and pre-contractual state of mind)

- 28. Paragraph 77 (inadmissible evidence in relation to matters excluded by explicit contractual provisions)
- 29. Paragraph 79 (vague and unspecific reference to Respondent's "Rule 35(14)" response)
- 30. Paragraph 80 (irrelevance and inadmissibility; clash with exclusionary provisions contained in the contracts referred to)
- 31. Paragraph 82 (irrelevance)
- 32. Paragraph 84 (irrelevance; misconstruing of onus of proof)
- 33. Paragraph 85 (irrelevance; speculation; inadmissible hearsay)
- 34. Paragraph 86 (vague and unspecific reference to Respondent's "Rule 35(14)" response)
- 35. Paragraph 87 (irrelevance; departure from case made out in founding papers)
- 36. Paragraph 89 (irrelevance)
- 37. Paragraph 91 (irrelevance)
- 38. Paragraph 93 (irrelevance)
- 39. Paragraph 94 (irrelevance)
- 40. Paragraph 95 (irrelevance)
- 41. Paragraph 96 (irrelevance)
- 42. Paragraph 97 (irrelevance)

43. Paragraph 98 (the first sentence thereof) (irrelevance)
44. Paragraph 98 (the second sentence thereof) (departure from case made out in founding papers)
45. Paragraph 102.2 (the last sentence thereof) (irrelevance)
46. Paragraph 102.3 and 103 (irrelevant on Applicants' own version – see the first sentence of paragraph 102.3)
47. Paragraph 114 (vague and unspecific reference to Respondent's "Rule 35(14)" response; departure from case made out in founding papers)
48. Paragraphs 119 to 124 (call for general discovery, in application proceedings, without properly motivated application; irrelevance to case as made out in founding papers)

TAKE NOTICE FURTHER THAT Respondent will pray for an order directing such Applicants) as may oppose this application to pay the costs thereof.

DATED AT Cape Town THIS 30th DAY OF MAY 2012.

CHIN INC

Attorneys for Respondent

Per:  _____

HERMANUS

c/o

VAN DER SPUY CAPE TOWN

4th Floor

14 Long Street

CAPE TOWN

TO:

THE REGISTRAR

Western Cape High Court

CAPE TOWN

AND TO:

MICHAEL RANGE & ASSOC

Attorney for Applicants

HERMANUS

c/o

STRAUSS DALY INC

15th Floor

The Terraces

34 Bree Street

CAPE TOWN

Ref.: L Malherbe



BOX 135

ON THE ROLL: 7/6/12

IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE HIGH COURT, CAPE TOWN

CASE NUMBER : 12755/2011

In the application of :

MARIUS KLEYNHANS 1st APPLICANT
In his capacity as Trustee for the time being of
The Kleynhans Family Trust

HEATHER KLEYNHANS 2nd APPLICANT
In her capacity as Trustee for the time being of
The Kleynhans Family Trust

CORNERCADE (PTY) LTD 3rd APPLICANT

SHIRLEY MILLICENT KOSTER 4th APPLICANT

TIELMAN NIEUWOUDT AGENBAG 5th APPLICANT

and

OVERSTRAND MUNICIPALITY RESPONDENT

FILING NOTICE

DOCUMENT FILED :

Affidavit of A R Kuchar.

Dated at Cape Town this 4TH day of JUNE 2012

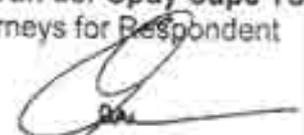
CHIN INC
12 Hope Street
HERMANUS

RECEIVED
2012-06-04
DALE LIEB STRAUSS BANY

VANDERSPUY
PC Neethling
021 419 3622
paulah@vdslew.co.za



c/o Van der Spuy Cape Town
Attorneys for Respondent

per 

(Ref. PC Neethling/MM/ar/CHI1/0028)
4th Floor
14 Long Street
Cape Town
P O Box 1701
Cape Town
DX : 53 Cape Town
(Tel. 419-3622)
(FX: 418-1329)

To: THE REGISTRAR
High Court
CAPE TOWN

and to: MICHAEL RANGE & ASS
Attorney for Applicants
Hermanus
c/o Strauss Daly Inc
15th Floor
The Terraces
34 Bree Street
CAPE TOWN
Ref: L Malherbe



486
[Stamp]

**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)**

Case no: 12755/11

In the matter between:

MARIUS KLEYNHANS

First Applicant

in his capacity as Trustee for the time
being of The Kleynhans Family Trust

HEATHER KLEYNHANS

Second Applicant

in her capacity as Trustee for the time
being of The Kleynhans Family Trust

CORNERCADE (PTY) LTD

Third Applicant

SHIRLEY MILLICENT KOSTER

Fourth Applicant

TIELMAN NIEUWOUDT AGENBAG

Fifth Applicant

AND

OVERSTRAND MUNICIPALITY

Respondent

AFFIDAVIT

I, the undersigned,

ALFRED RIAAN KUCHAR

do hereby make oath and say that:

1. I am an adult male and Senior Manager: Town Planning and Property

[Page 1 of 3]

[Handwritten Signature]
Tew

Administration, Overstrand Municipality. I am also the deponent to the answering affidavit delivered in this matter.

2. The facts set out herein are true and correct and, save where the contrary is indicated – in which event I verily believe such contents to be true and correct – are within my personal knowledge.
3. Where I make legal assertions I do so on the basis of advice received from Respondent's legal representatives and in the belief that such advice is correct.
4. The purpose of this affidavit is to answer the allegations contained in the further affidavit filed by Applicants on 28 May 2012, which accompanies what is effectively a substantive application (for postponement) on their part. Applicants have in such affidavit also incorporated by reference certain parts of their own replying affidavit, deposed to on 7 May 2012 and filed belatedly on 25 May 2012. To the extent possible, given the time constraints involved, I shall deal herein also on a provisional basis with such parts of the replying affidavit.
5. Respondent will, however, subsequently also apply, at the appropriate juncture, and once the case Respondent has to meet has been properly delineated in the papers, to file a further (fourth) set of affidavits in response to Applicants' replying affidavit.
6. Notice has already been given to Applicants of Respondent's intent to apply at the hearing for the striking out of a host of passages contained in the founding papers, mainly on the basis that they are inadmissible in evidence or otherwise irrelevant to the resolution of the matter. A similar application has followed in respect of offending passages in the replying affidavit. Some of the aspects covered in the present affidavit may fall away in part (but not entirely) depending on which of the offending passages this Honourable Court may eventually strike out. They are nevertheless dealt with herein out of an abundance of caution.
7. I wish to re-iterate that First Applicant's replying affidavit was filed belatedly (on 25 May 2012), which prejudiced Respondent in the conduct of this matter and

A
Tw3

amongst other things meant that Respondent was compelled to file heads of argument (on 24 May 2012) without the benefit of replying papers. I shall deal with this more fully below, in discussing the additional affidavit subsequently filed by Applicants.

8. I am advised that based on this (coupled with Applicants' failure to date to file heads of argument, either in the main application or in respect of Respondent's impending application for striking-out alluded to above), Applicants' application may be dismissed outright, or struck from the roll, and this Honourable Court will be requested at the hearing to make such an order.
9. Where I fail to respond to any particular allegations in Applicants' further affidavit (or their replying affidavit), such allegations are nonetheless generally denied to the extent that they clash with what I said in the answering affidavit or with the contents of the present affidavit generally. I therefore do not deal in full or at all – to mention but two examples – with the non-joinder aspect or the prescription issue.

ALLEGATIONS OF FRAUD OR DECEIT ON THE PART OF RESPONDENT

10. I shall deal later on a paragraph-by-paragraph basis with the further affidavit filed by Applicants on 28 May 2012. However, I wish to point out at the outset that, in paragraph 13 thereof, First Applicant refers back to what he said in Applicants' replying affidavit where he made allegations to the effect that Respondent deliberately misled Applicants, as well as prospective purchasers of erven in the Estate generally, in connection with what they would be buying into. (Similar allegations of fraud are repeated in for example paragraphs 19 and 34 of the affidavit under reply.)
11. In this regard I refer the Honourable Court generally to paragraphs 40, 75 to 77 (wherein the replying affidavit alleges that "*each and every one of the purchasers*" was "*deliberately misled*" by the Respondent (and/or the Developer) in relation to an "*incredibly important attribute of the Estate*"), 80, 92 (where First Applicant alleges outright that "ARK 7" was never disclosed to him, whether in his capacity as selling

agent or buyer), 117 and 118 (where First Applicant falsely alleges that "ARK 7" was "*deliberately withheld and not disclosed to potential buyers*").

12. In the affidavit under reply, moreover, he goes further than merely repeating the frankly mendacious allegations in question, by employing the straight-forwardly defamatory term "*fraud*". Respondent must be given a chance to clear its name. As I shall show below, it is Applicants who are trying to suppress the truth and mislead the Court.
13. This is so particularly in the context of the joinder procedure envisaged by Applicants, assuming that this Honourable Court should decide to allow it, would obviously be facilitated by not only the striking out of the relevant passages in the Applicants' papers but also by the setting straight of the record as far as the credibility of Applicants' and Respondent's respective versions regarding what was and was not disclosed to potential buyers of properties in the Fernkloof Estate is concerned. It stands to reason that it would not be in the interests of the parties, this Honourable Court or the administration of justice generally if baseless accusations of dishonest (fraudulent) conduct levelled at a public body like Respondent were allowed to be disseminated, unanswered, among a large body of persons, each of which (assuming they are to be joined) might have the procedural right to deal with such allegations in detail. I wish to make it clear that Respondent's view is not that such a joinder procedure ought to be followed. It is that Applicants' application is fatally flawed because of the non-joinder and should be dismissed.
14. The allegations in paragraph 13 of the affidavit under reply are denied. In particular the allegation that Respondent perpetrated a fraud (or anything remotely approaching it) on anyone is utterly rejected.

THE PROCESS IN TERMS OF WHICH THE ERVEN WERE SOLD

15. In order to set the scene for the application referred to, it is necessary to say something more about the process in terms of which erven in the Estate were sold.

To the extent that the factual aspects of the process and the venue in question as described below are not within my own personal knowledge, they have been reliably related to me by a number of persons, including Mr Colin Green, and I accordingly believe them to be true. I am informed that Mr Green, who was intimately involved with the process, will in due course depose to a confirmatory affidavit in this regard.

16. In the brief description that follows, reference will be made to a video recording of the process. Should it be required, arrangements will be made for the video material to be made available for viewing by this Honourable Court. The main importance of this material is that it demonstrates objectively that First Applicant is simply not telling the truth where he alleges that Respondent (or the developer who acted on its behalf) deliberately withheld or failed to disclose the information in question to Applicants or to other potential buyers of erven in the Estate.

17. Registration (which was mandatory for participation in the rest of the sale process) took place over a period of two days. The culmination of the process was a lottery type draw (one for golf club members and one for the rest of the public) over a further two day period, in terms of which around 324 extremely eager purchasers were drawn from the prospective purchasers who registered (approximately 1,500 in number). The sale of municipal land is strictly regulated by the Local Government Municipal Finance Management Act (56 of 2003) and because the traditional tender process was not feasible under the circumstances, this process was devised as an appropriate alternative solution. There was much excitement all round, with the sentiments attendant upon a buyers' market prevailing, and the process became a social event. A host of estate agents (including First and Second Applicant), which were rewarded to the tune of R250,000 per agency for their efforts, were present to guide aspiring buyers through the process and to explain the details to them.

18. Aspiring buyers whose names were drawn, were allowed to select a stand (erf) on a first drawn, first served basis. Each particular selection was identified by means of a coloured pin placed on the relevant demarcated erf on the scale model of the

h
TWS

Estate, which was housed in what could be called the "selection area" of the venue (a huge marquee tent). A plot selected in this way effectively constituted a first opportunity for the relevant buyer to purchase that plot, subject to compliance with the rest of the process, which, inter alia, entailed completion and signature of the relevant sale agreement, immediate payment of a 20% deposit on the purchase price, and approval of the transfer by the Respondent's Council.

19. Apart from the aforementioned scale model, the selection area also featured a variety of plans, photographic location displays, architectural guidelines and other information material placed in prominent positions along the screens set up in close proximity around the scale model to form the selection area. Prominent among these, and conspicuously situated either side of a very large aerial image of the development and surrounding areas, were large blown-up and clearly visible versions of:

19.1. A framed version of the "*Boundary Structures Key Plan*" (65cmH x 90cmW – framed), attached as annexure "ARK 7" to my answering affidavit and discussed at length in that affidavit (see for example paragraphs 15 and 30). In the interests of complete accuracy I should make it clear that "ARK 7" is a non-replica copy of the framed version of the plan as it was displayed on the screen (the "wall" of the selection area) which differs slightly from the framed displayed version. The differences are insignificant, very minor and completely irrelevant to the points in issue in the present case. In what follows I shall simply refer to "versions" of "ARK 7" without repeating the distinction which I have just mentioned.

19.2. The main significance of "ARK 7" is two-fold:

19.2.1. Firstly, the relevant wording ("*By mutual agreement by owners open frontage is first option as long as integrity of security is maintained to satisfaction of house owners / golf course owners*"), is destructive of Applicants case, in that it confirms that in principle and in terms of the deeds of sale there would not be fencing of the kind and in the

places now demanded by Applicants.

- 19.2.2. Secondly, as will be explained below, the framed version of ARK 7 was not only prominently displayed and available to be consulted by all persons who entered the selection area during the entire duration of the process (which must include all or virtually all of those who registered), but the video material proves that both First and Second Applicant were regularly in close proximity to ARK 7 (as well as the framed version of ARK 12 referred to below), and could not, especially in view of First Applicant's declared interest in the security aspects of the estate, have failed to see it. Their protestations to the contrary are clearly false. More importantly, and irrefutably, the fact that ARK 7 was so prominently displayed completely destroys Applicants' mendacious contentions to the effect that it was deliberately withheld from prospective purchasers.
- 19.3. The second document displayed in the selection area, near the framed version of ARK 7 and to the right of a viewer facing the screen against which it was displayed, was a framed version of ARK 12, (72cmH x 170cmW – framed) to which reference is also made in the answering papers (see for example paragraph 22.4, where it is made clear that ARK 12 also did not provide for the fencing now in issue). This plan bore the same legend as ARK 7, quoted above, and was a larger version of a plan (annexed as Annexure B to Applicants' founding affidavit) included in the information pack given to participants upon registration.
20. In order to place the true facts vividly before this Honourable Court I attach as "RK1.1" to "RK1.9" a number of print-outs of still images from the video material already mentioned. If they are collectively considered a clear image is gained of the lay-out of the selection area, of how prominently the framed versions of "ARK 7" and "ARK 12" were displayed, and how close these plans were to the table housing the scale model visited by every purchaser, and accessible to all registered potential purchasers for the entire duration of the process. The images prove that

First Applicant's claim that "ARK 7" was deliberately withheld from or not disclosed to potential purchasers is a lie.

- 20.1. RK1.1 shows the selection area, with the scale model of the development in the foreground and the framed versions of "ARK 7" and "ARK 12" appearing in the background.
- 20.2. RK1.2 again shows the layout of the selection area, with the framed version of "ARK 7" in the background.
- 20.3. RK1.3 provides a close-up view of the framed version of "ARK 7", as displayed in the selection area, giving a clear impression of its size and its general conspicuousness.
- 20.4. RK1.4(a) and (b) – these smaller images show additional views indicating how the framed version of "ARK 7" was displayed in the selection area and used for information and discussion purposes.
- 20.5. RK1.5 shows the framed version of "ARK 12" as it was displayed in the selection area. On the extreme right of the image, at the edge of vision, the front part of the face of a person can be seen. The person is clearly looking at "ARK 12".
- 20.6. RK1.6 shows an alternative view of the framed version of "ARK 12". Again there are persons in close proximity to the plan.
- 20.7. RK1.7 shows First Applicant (on the right), in the company of a person who is presumably a client, in the selection area.
- 20.8. RK1.8 shows (amongst other things) First Applicant (on the far left, in the background) and Second Applicant in the foreground (on the right), with the framed version of "ARK 7" also in the background.

~~494~~

- 20.9. **RK1.9** shows a prospective purchaser in the selection area. He is holding and looking at a copy of the plan included in the information pack provided to prospective purchasers (a copy of which was attached as Annexure B to the founding affidavit).
21. I should add that the original framed versions of "ARK 7" and "ARK 12" - that is, the versions displayed in the selection area, were removed from the venue when the marquee tent was dismantled after the draw, to the on-site sales office of Pam Golding Properties and prominently displayed there during the development period until Tracy Quincy Properties became the accredited sales agent for the Master Property Owners Association of Fernkloof Estate. The originals were then entrusted to this agency and are still in existence and on display on its current premises next to the Hermanus Golf Club. Copies of photos reflecting this, taken on 31 May 2012 and close-ups taken on 2 June 2012, are attached as "RK2" (as displayed on current premises), "RK3" (framed version of ARK7), "RK3(a)" (close-up of open frontage as per legend) and "RK3(b)" (close-up of legend) and "RK4.1" (framed version of ARK12) "RK4.2" (right half of ARK12 bearing information and legend) "RK4.2(a) to (i)" (close-up sections of information and legend from top to bottom). These photos show the placement of the plans, the relative size thereof as well as the clear legibility of the legend in issue.

DEPARTURE FROM CASE MADE OUT IN FOUNDING PAPERS GENERALLY

22. In the founding affidavit Applicants seek to make out a case for the relief sought on the sole basis that the relevant deeds of sale supposedly contain a term obliging Respondent to erect an electrified fence around the hitherto unfenced portions of the Estate.
23. That this is so is clear from the summary of the relief claimed by Applicants contained in paragraphs 12 to 17 of the founding affidavit. It is also clear, to mention but one further example, from paragraph 41 of the founding affidavit.
24. To the extent that the founding affidavit deals with other matters, these are not only

h
Tew

generally speaking irrelevant but pre-suppose the existence of an obligation on the part of the Respondent to do what Applicants claim it should do. No other source for the alleged obligation is suggested.

25. A perusal of the replying affidavit, on the other hand, shows that Applicants' case has undergone a virtually complete transformation. (I wish to re-iterate that Respondent, although it reserves the right to respond properly to the replying affidavit at a later stage, has been obliged by Applicants' affidavit of 28 May 2012 to deal, provisionally and as best it can, with the contents of the replying affidavit.)
26. In the first place, the references in the replying affidavit to the underlying deeds of sale (on which Applicants exclusively relied in their founding papers) are few and far between. The scattered references to the supposed obligation on the Respondent (allegedly arising from the deeds of sale) are few in number and, as regards content, are not substantive but are indeed speculative, argumentative and irrelevant to such a degree that they are for the most part liable to be struck out. They show that Applicants are continuing to espouse their original cause of action only half-heartedly, if at all (compare also the dithering apparent from paragraph 34 of the affidavit under reply). This is true generally of the portion of the replying affidavit commencing at paragraph 58 and running through to (approximately) paragraph 77. Some examples may illustrate what I mean:
- 26.1. Paragraph 58, where the irrelevant fact is mentioned that the Respondent has constructed a fence around *"almost the entire estate except for the unfenced portion"*;
- 26.2. Paragraph 59, where irrelevant references are made to what Respondent has spent so far;
- 26.3. Paragraph 61 (references to the benefiting of historically disadvantaged persons);
- 26.4. Paragraph 63 (irrelevant references to the amount of money at Respondent's

disposal).

27. Secondly, it appears that the contractual basis for Applicants' claims, as originally advanced, has now been superseded by a reliance on what effectively amounts to a statutory or regulatory basis supposedly justifying the relief sought. I am advised that a departure of this kind is not to be tolerated and that an applicant should be kept to the issues as pleaded by him – particularly where, as here, the new grounds sought to be advanced could, in the absence of amendment, never justify the relief sought (being effectively an order of specific performance arising from contracts).
28. Thirdly, there is another theme sought to be grafted onto Applicants' case through the medium of the replying affidavit. Applicants' contentions in this regard are based largely on annexure ARK 7 to the answering papers (the "*Boundary Structures Key Plan*"). I shall not repeat what I said in connection with this in the answering affidavit, and above, except to confirm that I stand thereby. Applicants, however, have homed in on the following wording appearing on ARK 7 (as well as on ARK 12 and on the plan annexed as Annexure B to the founding affidavit - and, as indicated above, also on the framed versions of ARK7 and ARK12) and are seeking to construct from it an alternative basis for the relief sought by them: "*By mutual agreement by owners open frontage is first option as long as integrity of security is maintained to satisfaction of house owners / golf course owners.*"
29. Applicants place reliance on this in for example paragraphs 25, 41, 42, 82 to 87 of the replying affidavit (where the conclusion is sought to be reached that "*the unfenced portion must now be fenced*") and 114. In conjunction with paragraphs in which the alleged inadequacies of the Estate from a security perspective are set out (see for example paragraphs 96 and 98 of the replying affidavit), Applicants now appear to contend that the legend appearing on the documents referred to above justifies the order sought in their notice of motion.
30. This not only constitutes an impermissible departure from its case as originally pleaded (see above), but it is also internally inconsistent because even if Applicants' new contentions in this regard were to be taken at face value, this would at best

oblige Respondent to take part in *bona fide* future negotiations on this score which would not necessarily have any outcome, much less a distinct or enforceable outcome in favour of Applicants. (I should mention yet another obstacle to accepting Applicants' contentions in this regard at face value, which is that, in the circumstances, Respondent could at any rate have no conceivable role to play in any such negotiations. As made clear by the legend on which Applicants seek to place reliance, the matter would be one purely between the golf course owners and the home owners. The development period is over and the golf course has been transferred to the Club.) Put differently, the very contentions that Applicants seek to advance here show that Applicants do not have a right that would justify the relief sought by them but, at the very best for them, an inchoate hope which may or may not eventually transform into a legally enforceable right. The new case effectively advanced by Applicants is that the cause of action on which they seek to rely is still incomplete.

APPLICANTS' SUPPOSED STATUTORY/QUASI-STATUTORY RIGHT TO THE ERECTION OF THE FENCE

31. Based on what I have said in the answering affidavit (and what I shall say below) it is clear that Applicants' reliance on the above-mentioned documents is misplaced. Applicants' *modus operandi* (which also explains their generalised request for discovery in paragraph 121 of the replying affidavit) is apparently to trawl through any official documentation containing zoning or environmental approvals and the like that have the remotest connection with the Estate (or the area in which it is situated). Their approach then proceeds, without regard to the nature or status of the document in question, to pounce on any reference it may contain to a "fence", and finally to use the latter as the basis for an argument that the document in question somehow not only obliges Respondent to erect the fencing now demanded by Applicants but also to make such alleged obligation enforceable at the instance of Applicants.
32. Needless to say Respondent rejects the above approach as well as the consequences alleged to flow from it. As already mentioned Respondent will, if



necessary, deal with the details of Applicants allegations in this regard at a later stage.

THE FURTHER AFFIDAVIT FILED BY APPLICANTS

33. I now turn to deal with the further affidavit filed by Applicants on 28 May 2012.

Ad paragraph 2

34. For reasons set out elsewhere in this affidavit and to the extent necessary I deny that the facts in Applicants' further affidavit are true and correct.

Ad paragraphs 4 to 6

35. The contents are noted.

Application for condonation

Ad paragraph 7

36. The contents are noted.

Ad paragraphs 8, 9 and 10

37. It is acknowledged that the filing of the replying affidavit was deliberately held back pending the outcome of settlement negotiations.

38. However, the settlement negotiations failed and came to an end when, on 15 May 2012, Respondent's attorney wrote to Applicants' attorney to inform him (a) of the fact that the settlement offer was not accepted and (b) that the replying affidavit would, in light of the approaching court date, be awaited on or before close of business on Thursday 17 March 2012. A copy of the e-mail in question is attached as "RK5".

Handwritten signature/initials

39. I therefore deny that the settlement negotiations came to an end only on 24 May 2012, as alleged in paragraph 9 of Applicants' further affidavit.
40. I should add that no additional time was needed by Applicants to finalise the replying affidavit when they were informed on 15 May 2012 that there would be no settlement. The reason is that, as acknowledged in paragraph 10 of Applicants' further affidavit, the document had been finalised for some time and there was accordingly nothing in the way of its being filed immediately.
41. The above is confirmed by an e-mail dated 18 May 2012 emanating from Respondent's attorney (attached as "RK6") which contained the following self-explanatory passage (emphasis supplied):
- "We confirm that when the extension date of 7 June 2012 was arranged, it was on the strength of your advices to writer that you would be filing the applicants' replying affidavit exactly as provided to us on a without prejudice basis. You also advised that, should the respondent decide not to accept the applicants' settlement offer, you will be filing your replying papers immediately upon being notified thereof."*
42. Applicants failed to comply with their earlier undertaking referred to in the underlined words. Respondent's legal representatives were therefore entitled in their heads of argument to refer to the fact that the reply was still outstanding – particularly since this obviously had the potential to prejudice Respondent, on whose behalf heads of argument had to be drawn without the benefit of replying papers.
43. Since Applicants could not have thought that settlement negotiations were still continuing after 15 May 2012, it is not clear why they delayed the filing of the replying affidavit until 25 May 2012, or on what basis they thought the matter would advance in the meantime.
44. In this regard it is perhaps necessary to refer to an exchange of letters between the parties' legal representatives which occurred on 24 May 2012. Respondents legal

representatives first learnt of the advice of Adv Nelson SC, as mentioned in paragraph 8 of the affidavit under reply, on Sunday 20 May (senior counsel for Respondent) and Monday 21 May 2012 (Respondent's attorney). The invitation to have the matter mediated was immediately (on 21 May 2012) rejected by way of a letter, a copy of which is attached as "RK7".

45. This elicited, on 24 May 2012, a fax from Applicants' attorneys in which the request that the matter be mediated was repeated. A copy is attached as "RK8". The contents of this fax are self-explanatory. Most importantly, in the present context, the subject-matter it dealt with was whether or not the matter ought or would be subjected to mediation. Significantly, nothing to the effect that the matter was still subject to settlement negotiations was (or could in the light of "RK5" be) said therein.
46. This was confirmed by the reply to the above letter dispatched on the same day by Respondent's attorney. (A copy is attached as "RK9".) This letter is also self-explanatory. The invitation to have the matter mediated was again declined and it was pointed out in paragraphs 14 and 15 thereof that what Applicants seemed to be asking for was not mediation, or a continuation of the (terminated) settlement negotiations in the strict sense – which if successful would put an end to the litigation – but negotiations (using the word in the ordinary sense) in connection with matters which Applicants themselves still regarded as open-ended, which did not form part of the case made out in their papers, and had not been reduced to a settlement proposal of any kind.

Ad paragraph 11

47. I have already explained that it was made clear to Applicants on 15 May 2012 already that Respondent was not amenable to settling on the terms proposed and was awaiting the formally filed version of the replying affidavit by 17 May 2012 – which was quite reasonable because all that Applicants' legal representatives had to do was perform the mechanical act of filing it.

Ad paragraph 12

- 48. These allegations are noted, but they take Applicants' case no further.
- 49. I point out that Applicants themselves accept that the replying affidavit contains serious allegations. As already explained, these allegations are not only serious but also false.

Ad paragraph 13

- 50. For the reasons already given these allegations are denied.
- 51. What beggars belief is that First Applicant, far from having second thoughts about the rash and ill-considered accusations he has falsely levelled at Respondent in the replying affidavit, has seen fit to compound his transgression by repeating those allegations in even stronger terms, this time even using the straight-forwardly defamatory term "*fraud*".

Ad paragraph 14

- 52. I am not in a position to comment on behalf of senior counsel for Respondent and in the circumstances it is at any rate unnecessary for me to do so except to record that it is undesirable and unseemly for a litigant to attempt to drag in counsel for either party into the evidential aspects of the proceedings.
- 53. As I have already explained the agreement referred to was that the replying affidavit could be held back only until the termination of the settlement negotiations (which as I have explained occurred on 15 May 2012), not thereafter.

Ad paragraph 15

- 54. I note that the deponent claims to have been taken by surprise.

Handwritten signature/initials

- 55. In the circumstances, however, such surprise is either not genuine or (if and to the extent it is genuine) not excusable.
- 56. In particular it is not clear how Applicants expected Respondents to prepare for the hearing of the matter (and file heads of argument and so forth) without the benefit of replying papers.

Ad paragraph 16

- 57. In the circumstances the inference is irresistible that Applicants were abusing the procedure instigated by them. The abuse lay not in the act (seen in isolation) of providing Respondent with an affidavit on a no-prejudice basis, but in deliberately not filing it on the pretext that settlement negotiations were still continuing after 15 May 2012.
- 58. Respondent may well have had sufficient time to ponder the contents of the affidavit informally supplied by Applicants, but this was a meaningless advantage in the circumstances. There was no guarantee that a replying affidavit would indeed eventually be filed (failing which Respondent could of course not refer to the contents of the affidavit). Nor could there, in the nature of things, have been any certainty that the affidavit, even if eventually filed, would correspond precisely with the version informally supplied.
- 59. It will be submitted, on the contrary, that it is Applicants instead who have derived a benefit from the procedure they adopted.

Ad paragraph 17

- 60. It is not clear why these allegations are relevant at this stage of the proceedings.
- 61. At any rate, the deponent has conveniently and significantly failed to bring the following to the attention of this Honourable Court:

Twist

61.1. The answering affidavits were filed only 9 days out of time (on 9 December 2011);

61.2. A similar concession was made by Respondent in favour of Applicants, approximately at the end of January 2012, in connection with the filing of (as Respondent expected at the time) their replying affidavit. They, however, missed the extended deadline granted by Respondent in this connection without even bothering to ask for a further extension. The next document filed by them, on 15 March 2012, was a notice purportedly in terms of Rule 35(14) – but in substance a notice in terms of Rule 35(12).

Ad paragraph 18

62. A matter is either capable of being dismissed on the papers as they stand, or not. Describing the point as a technicality takes the matter no further and is a transparent attempt to divert attention away from the poverty of Applicants' case.

63. At any rate, asking for an order that the matter be dismissed outright is not the only string to Respondent's bow.

63.1. The possibility of the outright dismissal was mentioned mainly out of consideration for Applicants, simply in order to forewarn them that such dismissal is a possibility in the circumstances. (Incidentally, the possibility arises also on the basis that no heads of argument have yet been filed on behalf of Applicants, and is not confined to their failure to file replying papers timeously.

63.2. Respondent is fully prepared to and will argue the merits of the matter if necessary, including the aspects relating to non-joinder and prescription.

63.3. There are also the applications for striking out.

Ad paragraph 19

64. The allegation that Respondent has *"not been truthful"* with this Honourable Court is rejected, for reasons already given.
65. I take umbrage in particular at the reference that is made here to *"a number of vitally important points"*, in the unspecified plural, as if Respondent were guilty of a whole variety of supposed transgressions in this respect. Even on Applicants' own papers this is not the case.

Ad paragraphs 20 and 21

66. The contents are noted.
67. It is not clear what is meant by the reference to the replying affidavit still being *"incomplete"*. An affidavit is either before the court or it is not.
68. I note that Applicants' approach seems to be that they are free to add to, amplify or qualify their papers as the case goes on and that Respondent simply has to cope as best it can. This is apparent from the fundamental change which their case has undergone (see above) and from the fact that they clearly (but without justification) expected Respondent to respond to an informally provided replying affidavit (which might never have been filed) as if it had been properly filed all along.

Discovery of documents

69. In order to keep my response to these paragraphs as brief as possible I refer this Honourable Court to what I have already said in connection with Applicants' purported reliance, at this stage, on regulatory approvals. The documents sought to be relied on are either not relevant at all to the dispute between the parties and/or, to the extent they may in a wide sense be relevant, tend to support Respondent's case rather than Applicants'.

- 70. It is clear that Applicants are effectively asking for an order of general discovery. I am advised that they would be entitled to this only if exceptional circumstances were present making such discovery desirable. This is not the case, especially since the relief sought is for specific performance of agreements that have been reduced to writing and constitute the sole memorial of the relationship between the parties.
- 71. Applicants have not made out a case in this respect either and are clearly merely on a so-called fishing expedition in an attempt to create an alternative (and as yet unpleaded) case out of thin air. I am advised that this constitutes an abuse of the discovery procedure, which is intended to assist a party in conducting and proving his case, not to compel his opposing litigant to assist him in making out a case where he has failed to make out a case even on a provisional basis.

Ad paragraph 22

72. From Respondent's application for striking out it is clear that Applicants have misconstrued the nature of what they call the "Rule 35(14) response". Documents that have been discovered in terms of the applicable rule (which is actually Rule 35(12)) are not thereby automatically incorporated into the record. They do not become evidence unless introduced via an affidavit that refers to the relevant passages and to which the relevant documents are annexed. This misconception on the part of Applicants taints every generalised reference they make to Respondent's "Rule 35(14) response", not least because the vagueness of the references prejudices Respondent.

73. At any rate, it is not clear:

- 73.1. what it meant by the suggestions that the "Rule 35(14) response raises more questions than answers";
- 73.2. how or on what basis Applicants suggest this advances their case; and

Handwritten initials/signature

73.3. ultimately, how Respondent is expected to respond to such a meaningless and irrelevant statement.

Ad paragraph 23

74. The allegations herein are noted. They are, however, irrelevant to Applicants' case.

Ad paragraph 24

75. It is denied that Respondent has not taken this Honourable Court into its confidence.

76. For reasons set out elsewhere in this affidavit, it is clear that it is Applicants who have not only not taken the Court into their confidence, but have deliberately misled the Court – precisely by calling Respondent's honesty into question without any basis for doing so and in full knowledge of this fact.

77. The suggestion that Respondent is obliged or expected to explain to the Court the source of its obligations in this regard is misconceived.

78. Applicants appear to regard the present litigation as a game in which each side tries to score points off the other in any way it can. In adopting this attitude they appear to have forgotten or ignored the fact that it is they, as Applicants, who have to prove the existence of an obligation (on the part of Respondent) which would justify the relief sought by them. They have put up no case in support of the existence of such an obligation, yet now appear to expect Respondent to prove that no such obligation exists.

Ad paragraphs 25 to 33

79. It is difficult to discern the gist of Applicants' allegations in these paragraphs, which at any rate clearly do not advance their case any further.

Handwritten initials/signature

80. I stand by what I said in this connection in the answering affidavit, except for repeating that Respondent will, if necessary, file further affidavits in response to the replying affidavit at a later stage, once it becomes clear what Applicants' case is.

Ad paragraph 34

81. Applicants appear to be unaware of the realities and rigours of the litigation which they have instituted. On the one hand they seek an order of specific performance (which is the only case they have even attempted to make out on the papers), but on the other they clearly wish to keep their "options" open – insisting moreover on general discovery (to which they have no automatic right in motion proceedings like the present) in order to give them the potential safety net of a completely different cause of action, although not identified and at any rate still inchoate, which has nothing to do with their case as pleaded.
82. Clearly, Applicants have not done their homework and are now trying to use the discovery procedure to achieve a purpose for which it was never intended.
83. The flawed nature of Applicants' claims for discovery is shown by the very allegations made elsewhere in their papers, to the effect that Respondent has misled and defrauded them (and other owners of properties in the Estate). Applicants have already accused Respondent of fraudulent conduct and in their minds there could be no conceivable need to examine the question further.

Ad paragraphs 35 and 36

84. For reasons given above I deny that Applicants have a right to discovery as alleged by them.

The joining of interested parties

Paragraph 37

85. I shall not say much about the issue of non-joinder, particularly since Applicants' further allegations in this regard do not really take the matter further. Respondent persists in its attitude as set out in the answering affidavit. I repeat that Respondent's view is that the application ought to be dismissed on the grounds of non-joinder.

Paragraph 38

86. I repeat that Applicants ought, for the reasons given in the answering affidavit, to have foreseen that the relevant parties ought to have been joined. I am advised that this point will be the subject of legal argument at the hearing, if necessary.

86.1. In connection with paragraphs 38.1 and 38.2, the question is not when "*Respondent's stance regarding the fencing-off of individual precincts*" subjectively became apparent to Applicants, but whether on objective grounds Applicants ought to have foreseen that the persons in question might be regarded as having a direct and substantial interest in the subject-matter or outcome of the litigation.

86.2. It is not clear why Applicants are at a loss to understand what has clearly been stated in the answering affidavit. At any rate, I stand by what I said there.

Ad paragraphs 39 and 40

87. I submit that the acknowledgement contained in para 38 (which is correct as far as it goes) that it would be "*both complex and costly to devise a mechanism that secures the joinder of all interested parties in these proceedings*" is fatal to Applicants' case.

Handwritten signature/initials

88. It is in the public interest that the baseless accusations of dishonesty that have been made against Respondent be removed from the papers before those allegations are circulated among a veritable sea of co-respondents. Moreover, there remains the matter of the paragraphs that deserve to be struck out of Applicants' papers (hence the applications to do so). It will be argued that it is precisely because of factors like those mentioned, namely cost and complexity, that the offending paragraphs should first be struck out before a multitude of further parties are invited to respond to those allegations. It is precisely if this is not done that costs would escalate and the complexity may become impenetrable.
89. At any rate, it is clear from the very prayer in paragraph 40 that Applicants themselves are not sure how to craft the "*appropriate order*" and unjustifiably wish to burden this Honourable Court with difficulties they – as parties driving the litigation – ought to have surmounted themselves.

Application to strike out

Ad paragraph 41

90. Applicants purport to acknowledge that Respondent has an interest in the striking out of the offending passages, but then seek to play down the effect thereof by failing to articulate such interest. The resulting implication, namely that Applicant's interest in this regard is not worthy of recognition, is rejected.
91. At any rate, Respondent will press ahead as far as the striking-out is concerned.

Ad paragraph 42

92. The allegation that it is premature to deal with the striking-out aspect is denied.

Ad paragraph 42.1

93. It is not clear why Applicants consider the "*issues pertaining to the conditions of the*

sub-division of the land in question as relevant. These issues were raised for the first time in the replying affidavit. I have already dealt with this point above. They are irrelevant to the case which Applicants sought to make out in the founding papers.

Ad paragraph 42.2

- 94. Again, it is not clear how the *"further documents"* or other documents referred to could ever be relevant to a striking-out application. It seems that reference is being made here to further allegations that may be included in the papers in the future, at which the application for striking-out is not and cannot be directed. It is directed at the allegations that have already been included in Applicants' papers.
- 95. I note again that there is a reference to *"fraudulent misrepresentation"* which can in the circumstances only be directed at Respondent. As I have said many times before, Respondent denies any suggestion that it acted fraudulently towards anyone.

Ad paragraph 42.3

- 96. It is denied that the allegations which are to be struck out on the basis in question can ever constitute admissible evidence. Legal argument will be advanced at the hearing to the effect that direct evidence of the parties' negotiations and pre-contractual statements generally can never be admitted, not even as part of the so-called *"context"* – particularly in light of the wording of the deeds of sale regarding representations extraneous to those agreements.
- 97. It is not clear what is meant by the *"issues currently being considered"* and the supposed unfinalised state of the papers. Applicants must stand or fall by the case they have made out.
- 98. At any rate the allegations which Applicants wish not to have struck out at this stage (on the grounds that it would be premature to do so) are not relevant to any of the

Handwritten initials/signature

unspecified future "issues" either. One gains the impression that Applicants wish to avoid a situation where the allegations they have already made are dealt with on their intrinsic merits and their relevance (or otherwise) to the case made out in the founding papers.

Ad paragraph 42.4

- 99. I stress that Respondent will press for an outright dismissal of the application based on non-joinder.
- 100. However, should this Honourable Court in the alternative allow some form of joinder, the parties in question ought to be provided with all relevant facts, but no more. The very reason why Respondent will apply for the offending paragraphs to be struck out is that they are irrelevant to the resolution of the dispute between the parties.

At paragraph 42.5

- 101. I deny these allegations; in particular, I deny:
 - 101.1. The generalised statement to the effect that "*these facts*" are not disputed by Respondent.
 - 101.2. That the application for striking-out is a "cover-up". I interpose to note that the only "cover-up" confronting this Honourable Court here is Applicants' averments in the paragraph under reply. It is unclear in particular how Applicants can suggest that the application for striking-out is driven by ulterior motives. I am advised that our courts have recently again confirmed that evidence of the parties' negotiations and pre-contractual statements generally (with which the founding papers are replete) are simply inadmissible in evidence. There is simply no basis on which Applicants can expect or demand that allegations of this nature should remain in the papers.

[Handwritten signature]
[Handwritten initials]

101.3. The generalised reference to the Constitution and to "all of the legislation that governs administrative bodies such as the Respondent" is clearly nothing more than an attempt to create atmosphere. It is significant that the deponent does not refer to any particular provision of the Constitution or the "legislation" in question. Again, moreover, Applicants are trying to introduce a new case (such as it is) and departing from the case they attempted but failed to make out in their founding papers.

Postponement

Ad paragraph 43

- 102. I have already dealt with the matter of Applicants' claims to discovery.
- 103. The reference to the "possible amplification of the Replying Affidavits" indicates that they are on a so-called fishing expedition.
- 104. Mere threats to amend such as are contained in the paragraph under reply take the matter no further. Their only consequences are to prejudice Respondent (who is compelled to deal with the allegations levelled at it) and to show that Applicants have gone about the litigation the wrong way.
- 105. I have already dealt with the matter of joinder. I wish to point out that the comments made here confirm that Applicants themselves now realise that joinder ought to have taken place. This is fatal to their case.
- 106. For reasons I have given elsewhere Respondent will persist in claiming that the application ought to be dismissed outright – and, if not, that the offending passages in Applicants' papers first be struck out before the issue of joinder can sensibly be dealt with.
- 107. No basis has been laid for a postponement. Applicants have abused the process of this Honourable Court and a postponement will only compound matters. What

K
Thurs

should occur is that Applicants' claims should be dismissed.

Ad paragraph 44

- 108. These allegations are noted. They are irrelevant to the dispute between the parties.
- 109. First Respondent has again, as in the founding and replying papers, seen fit to complain of the supposed inadequate security at the Estate. It is necessary for me to refer to what I said in the answering affidavit and explain what occurred in connection with the website to which I referred there.
- 110. In paragraphs 100 and 101 of the replying affidavit First Applicant disclaims any knowledge of the website www.fernkloofproperties.com and claims not to have advertised the Estate on such website.
- 111. Except for the irrelevant factor that I inadvertently used the name of an apparently non-existent or at any rate inoperative website (www.fernkloofproperties.com) I otherwise stand by what I said in this regard in the answering affidavit, wherein the content of the relevant website, as it then read, was accurately described. The correct address of the relevant website had all along been www.fernkloofestate.com, and what I said in my answering affidavit related to the web address just mentioned. This is proved by a print-out made at the time, on 12 October 2011, of which a copy is attached as "RK10". The print-out also shows that this website is the home page of the business "FERNKLOOF ESTATE HERMANUS PROPERTY SALES CC".
- 112. The home page of www.fernkloofestate.com, currently contains amongst others the following passage:

"The estate is surrounded by magnificent mountains and incredible natural scenery. Every effort has been made to make the Estate ecologically friendly with fynbos gardens and wetlands offering natural habitat to various endangered birds and other species. With adequate security ensuring privacy and only 5 minutes from the

*h
TWS*

centre of Hermanus, Fernkloof Estate is the ideal place to raise a family, go on holiday or spend your golden years in peace and tranquillity."

113. What is immediately apparent and significant is that the wording is largely similar to the wording that originally appeared on the same site. Equally significant is that certain changes have, however, been made to the wording (there is, for example, no longer a reference to "24 hour" security.) One surmises that these changes may have been prompted by what I said in this connection in the answering affidavit.

114. Clicking on the tab labelled "Contact Us" on www.fernkloofestate.com causes the following to appear:

*"Heather Kleynhans Cell: +27 (0)83 285 2777 Fax: +27 (0)865293693
Postal Address: P.O Box 89 Hermanus 7200 info@fernkloofestate.com
Fernkloof Estate Hermanus Property Sales CC CC Registration number:
2006/165367/23."*

115. Copies of print-outs of screen-shots from the website, as alluded to above, are attached as "RK11(a)" and "RK11(b)".

116. The "Contact Us" details are clearly a reference to Second Applicant. The close corporation referred to is one in which First Applicant also holds an interest (as pointed out in paragraph 28 of my answering affidavit). At any rate, even if the latter is not the case, it is clear that First Applicant is still involved (or at any rate that Second Applicant is involved) in a website that continues to make advertising claims, in relation to the security position at the Estate, which are completely at odds with the case made out in Applicants' founding papers, replying papers and the paragraph under reply.

117. The important point is that in denying involvement with www.fernkloofproperties.com (which may be true considered in isolation), First Respondent was clearly not taking this Honourable Court into its confidence. He was hiding behind my inadvertent misdescription of the website which, in substance, Applicants had all along been

*h
TWS*

involved with – www.fernkloufestate.com. I reiterate that the website still, to this day, advertises the Estate as having adequate (albeit not 24 hour) security.

Ad paragraph 45

- 118. The deponent has no basis for commenting on the purported views of owners/residents in the Estate who are not parties to the application. His remarks in this regard are speculative, irrelevant and constitute inadmissible hearsay.
- 119. With reference to the attitude of Applicants themselves, it is not clear what the deponent is trying to say here. On the one hand he claims that they are anxiously awaiting the outcome of the proceedings, but on the other (in paragraph 43, dealt with above) he requests that the matter be postponed. One unavoidably gains the impression that Applicants are unsure of their own case and do not know what they want or how to proceed.

Ad paragraph 46

- 120. I repeat what I have just said. The deponent claims that the matter ought to be expedited, but at the same time asks for a postponement (see above) and for the exceptional and time-consuming step of further discovery (see above).
- 121. The reference to the need for finding a "mechanism" is instructive. It is clear that Applicants have painted themselves into a corner, procedurally and substantively, and now expect this Honourable Court to adopt the role of *deus ex machina* and extricate Applicants from difficulties of their own making.
- 122. It is submitted that the most appropriate mechanism for the resolution of the present dispute – and the most expeditious to boot – is for the application to be dismissed outright.

h
Tues

Ad paragraphs 47 to 49

123. Take note of these remarks.

124. I repeat what I have already said in connection with the issue of non-joinder.

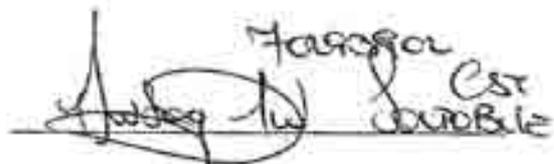


ALFRED RIAAN KUCHAR

Sworn to and signed in my presence at Heemarus on this 03 day of JUNE 2012 by the deponent who declared that he:

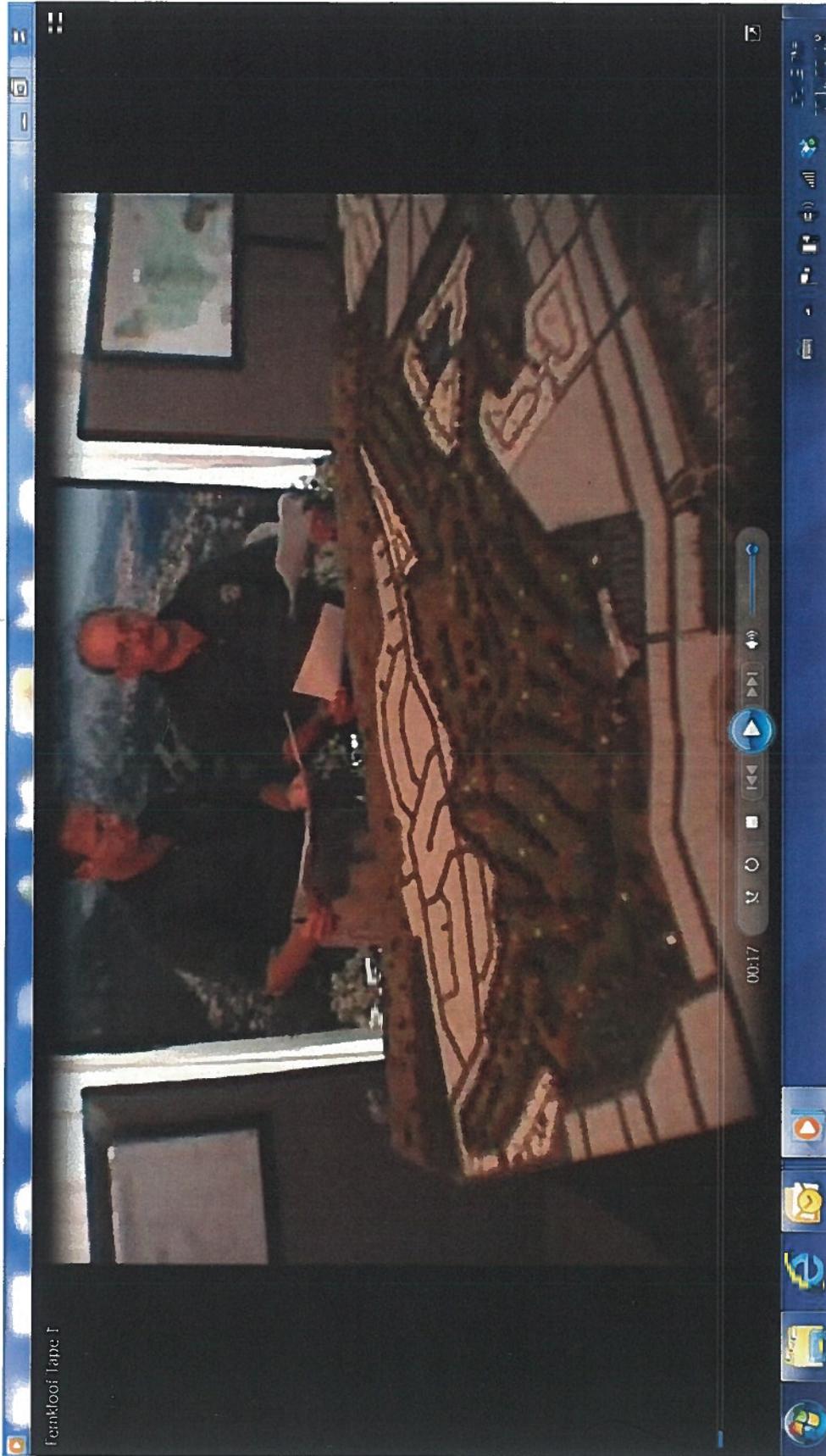
- (a) knows and understands the contents of this affidavit;
- (b) has no objection to the taking of the prescribed oath;
- (c) considers the oath to be binding on his conscience;

and uttered the words: "I swear that the contents of this declaration are true, so help me God."

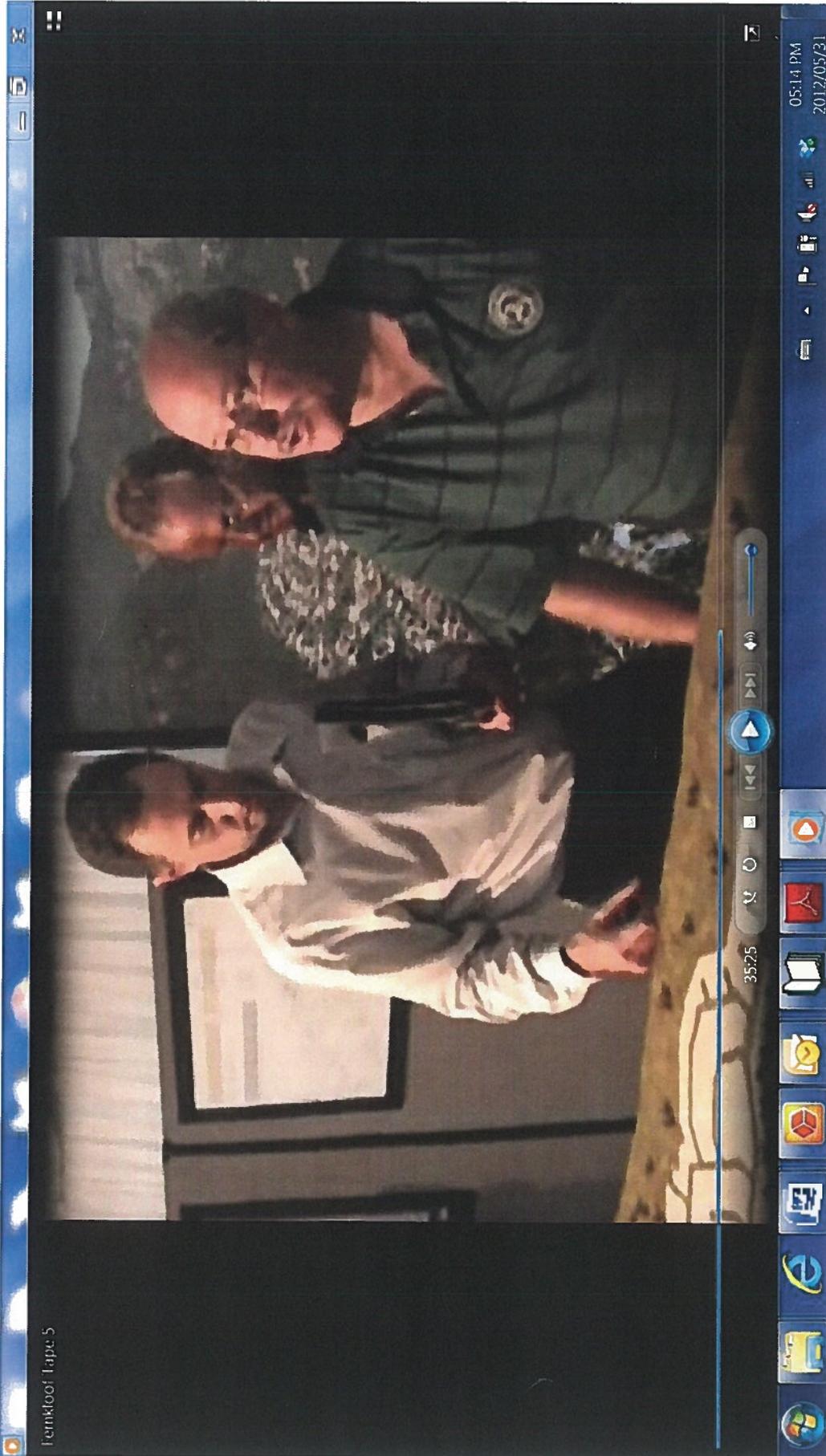


COMMISSIONER OF OATHS
Hembela Winnifred
Soubrie
61 MAN ROOG
Heemarus.

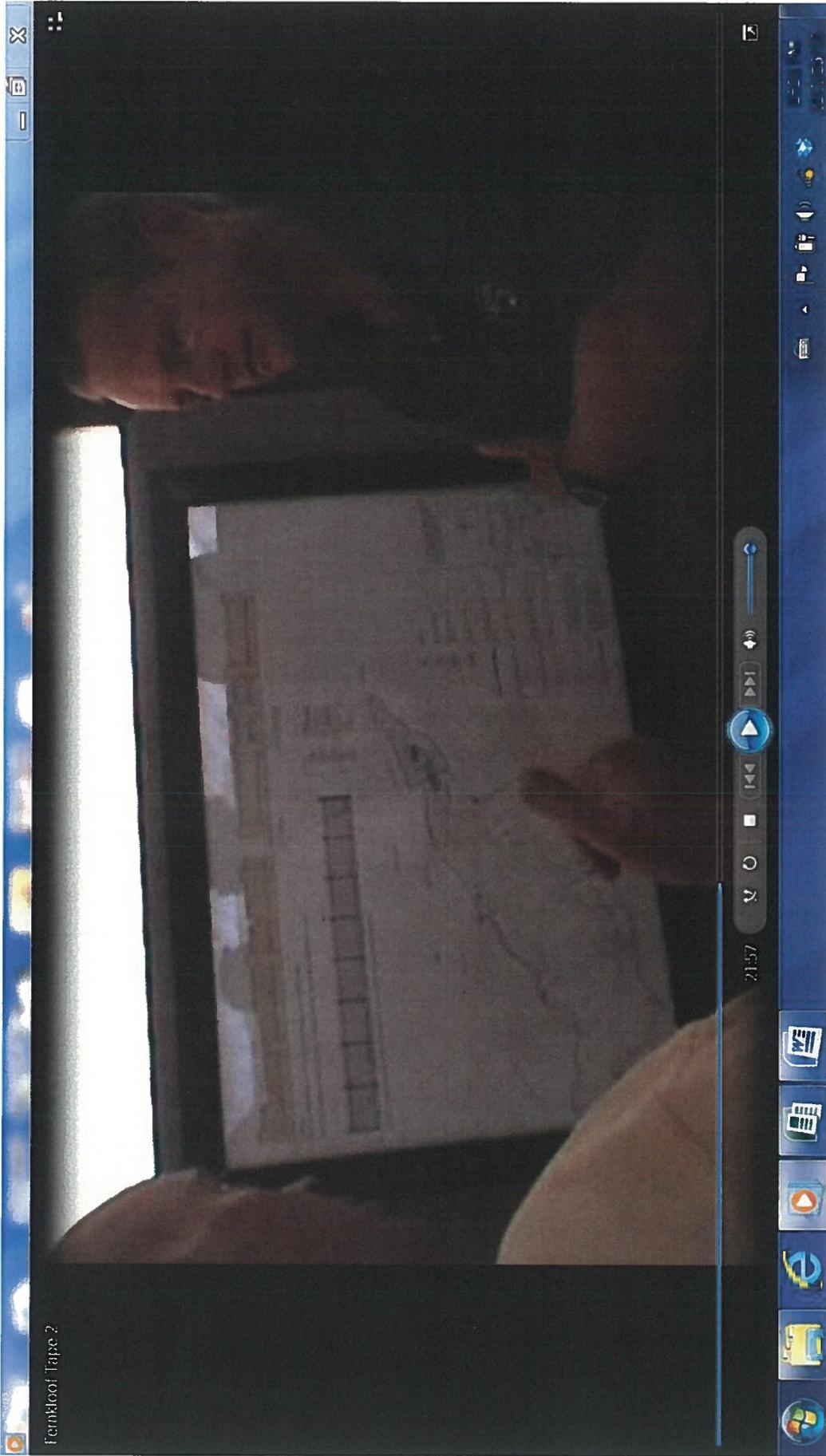
Handwritten initials



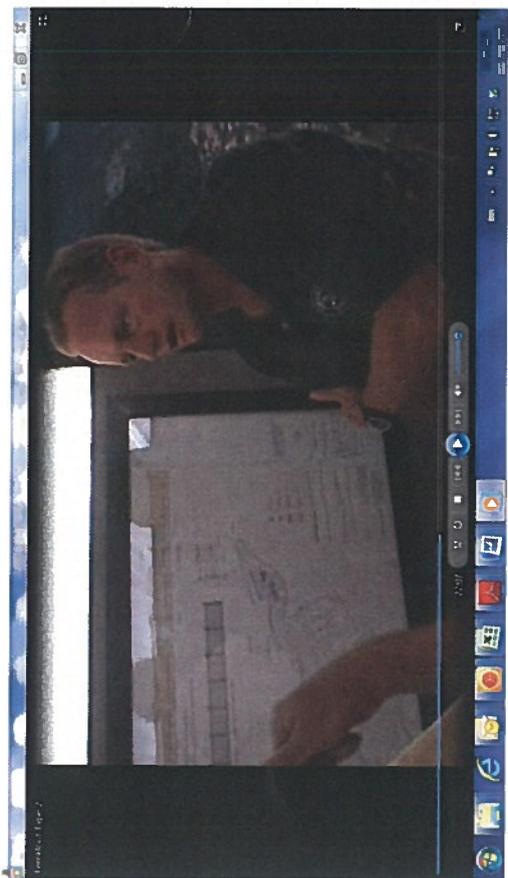
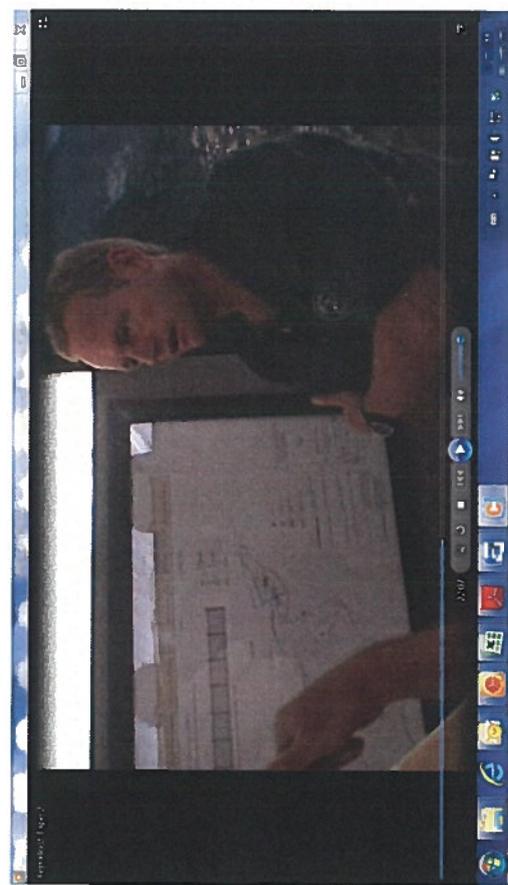
LAYOUT OF MAIN SELECTION AREA – DEPICTING MODEL OF DEVELOPMENT AND FRAMED COPIES OF ANNEXURES
“ARK 7” AND “ARK 12” IN BACKGROUND



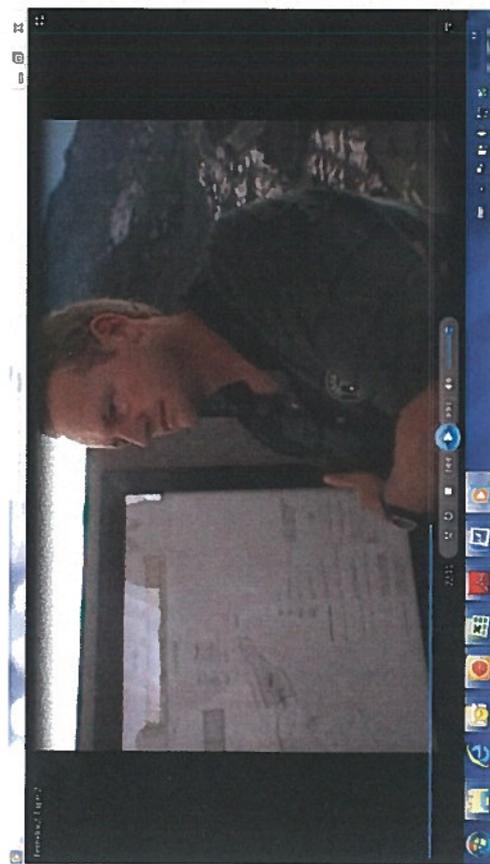
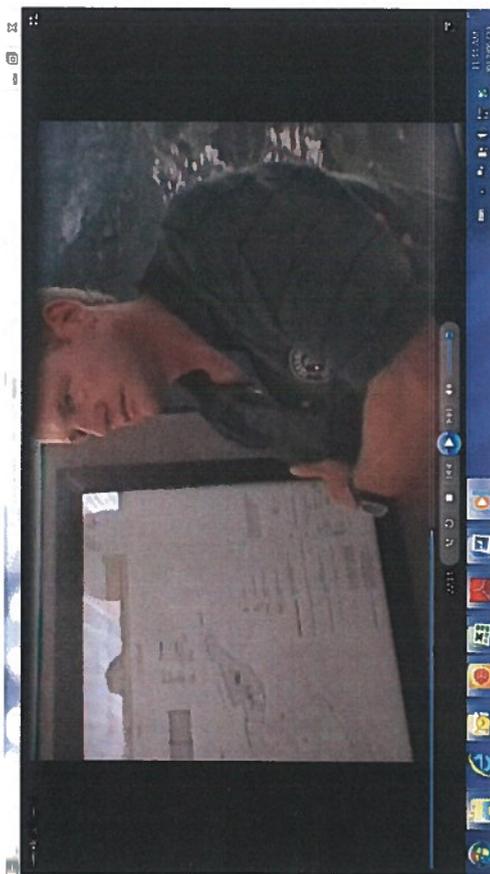
LAYOUT OF SELECTION AREA – FRAMED COPY OF ANNEXURE “ARK7” IN BACKGROUND



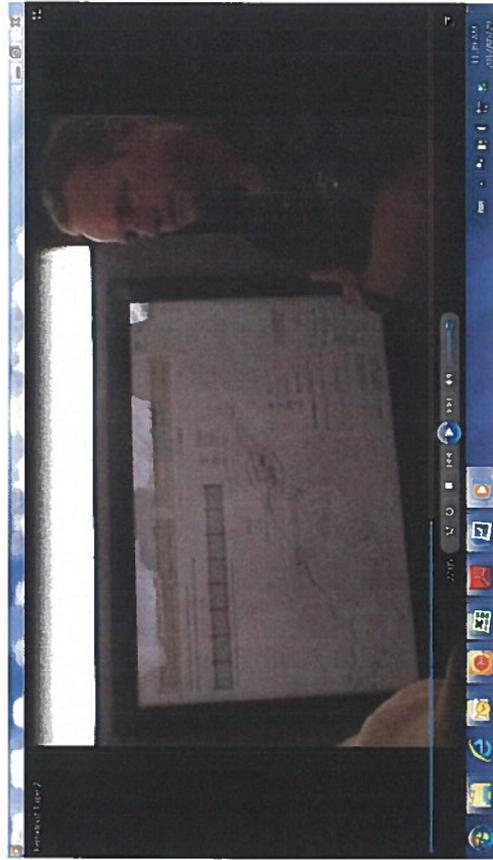
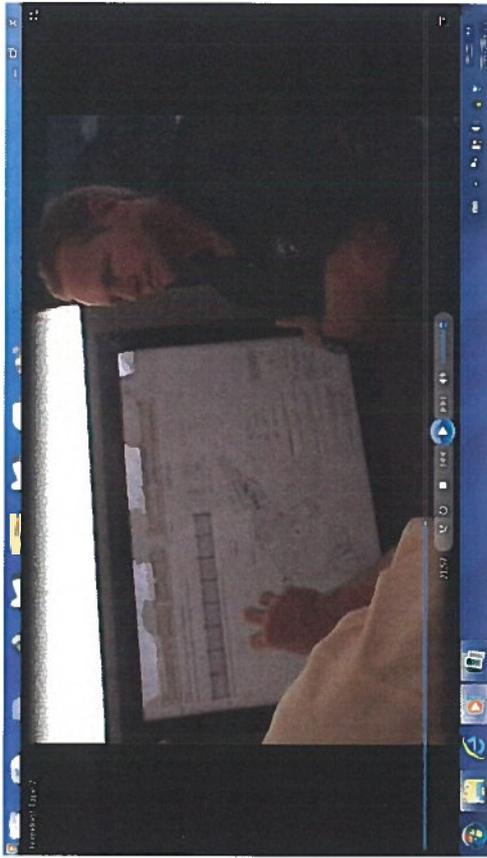
FRAMED COPY OF ANNEXURE "ARK 7" IN SELECTION AREA - CLOSER VIEW



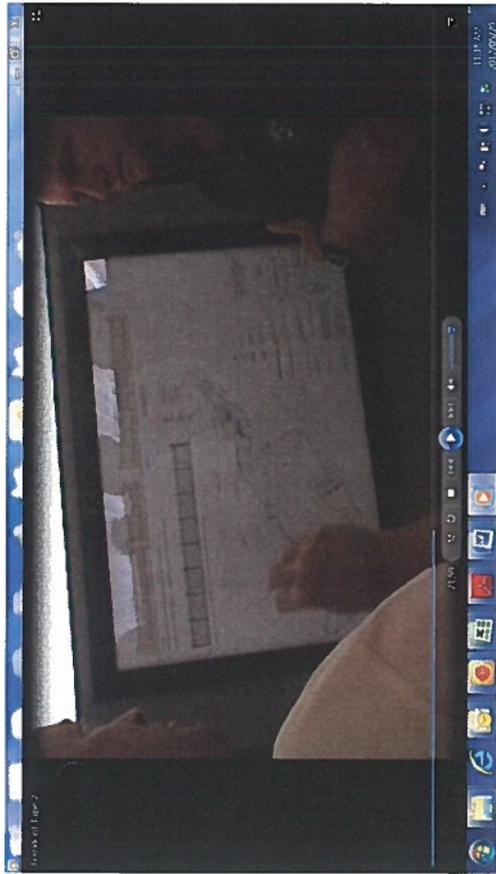
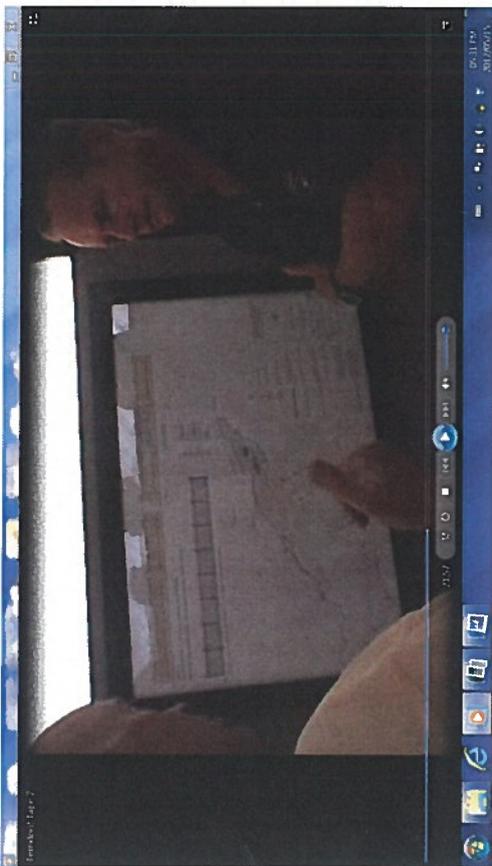
FRAMED VERSION OF "ARK 7" ON DISPLAY IN SELECTION AREA

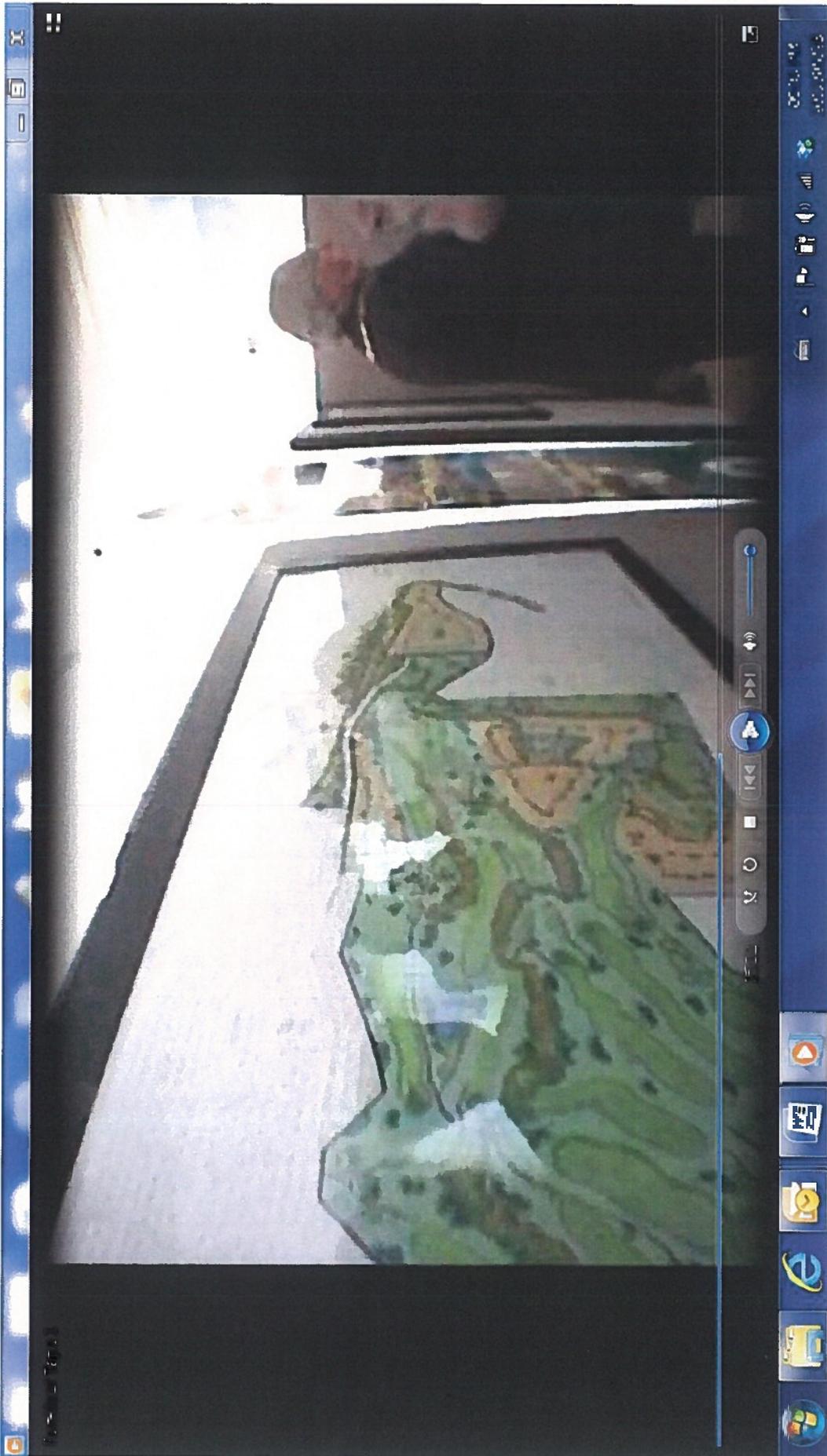


001

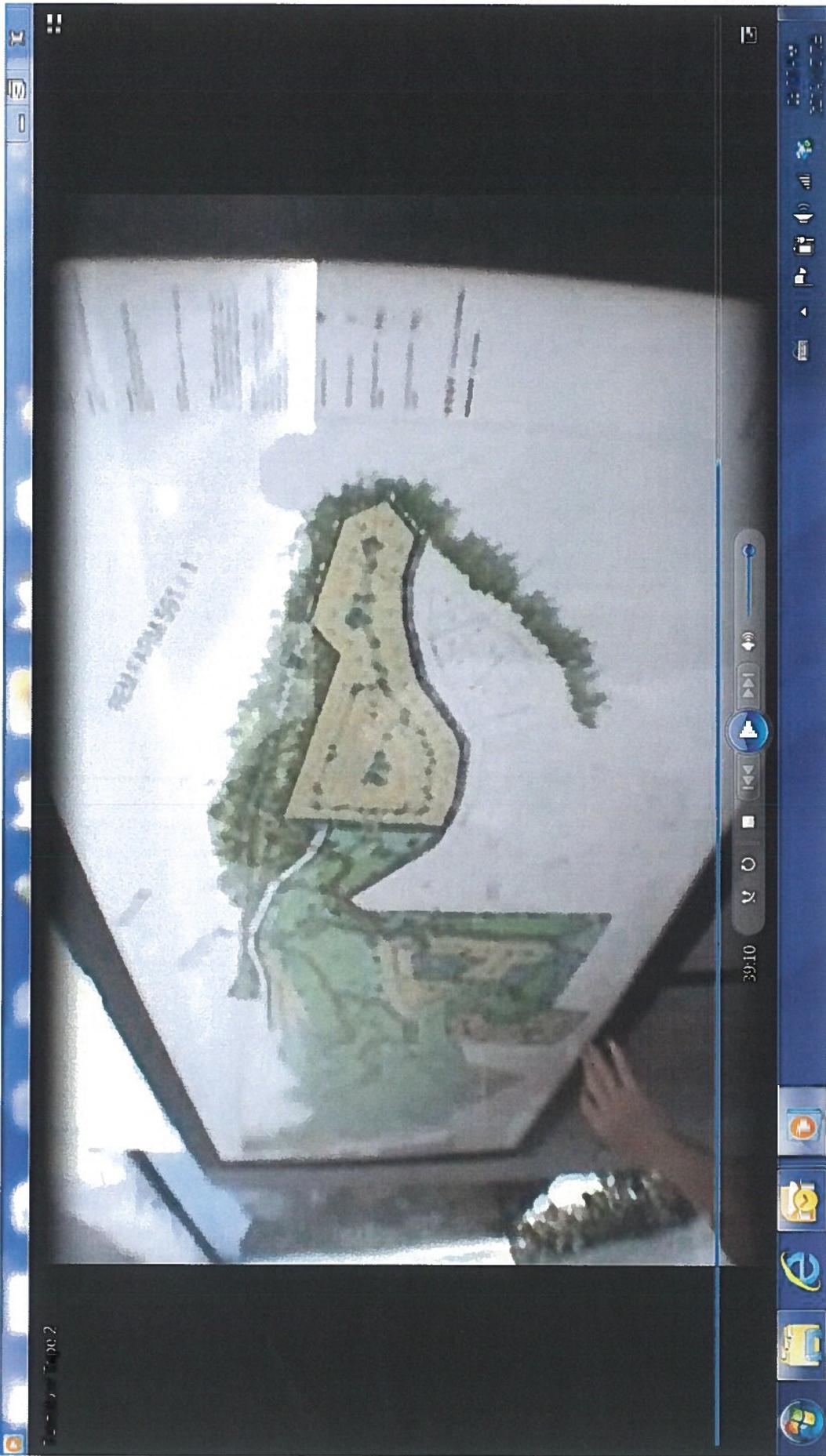


FRAMED VERSION OF ANNEXURE "ARK 7" ON DISPLAY IN SELECTION AREA

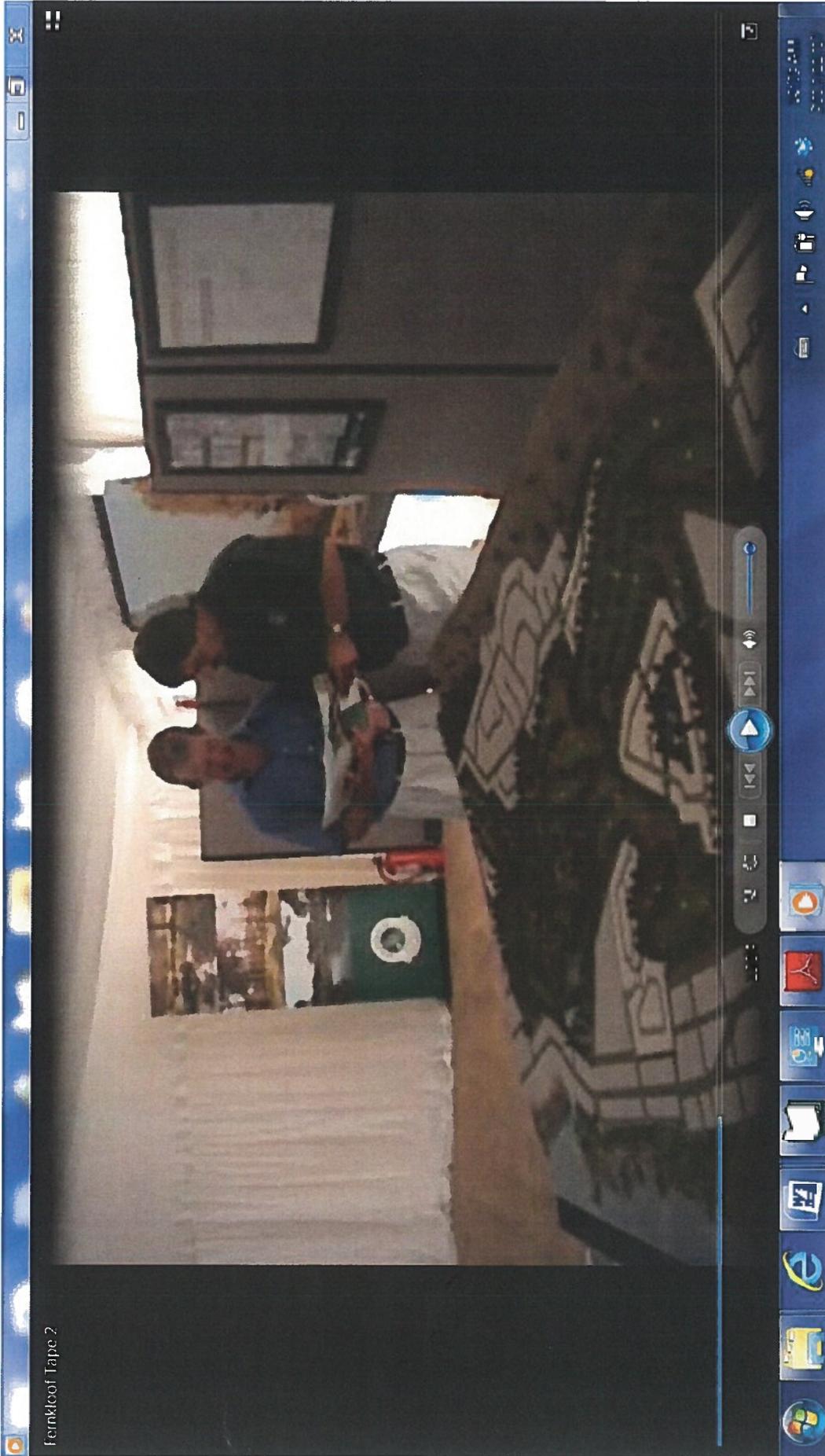




FRAMED COPY OF ANNEXURE "ARK12" ON DISPLAY IN SELECTION AREA



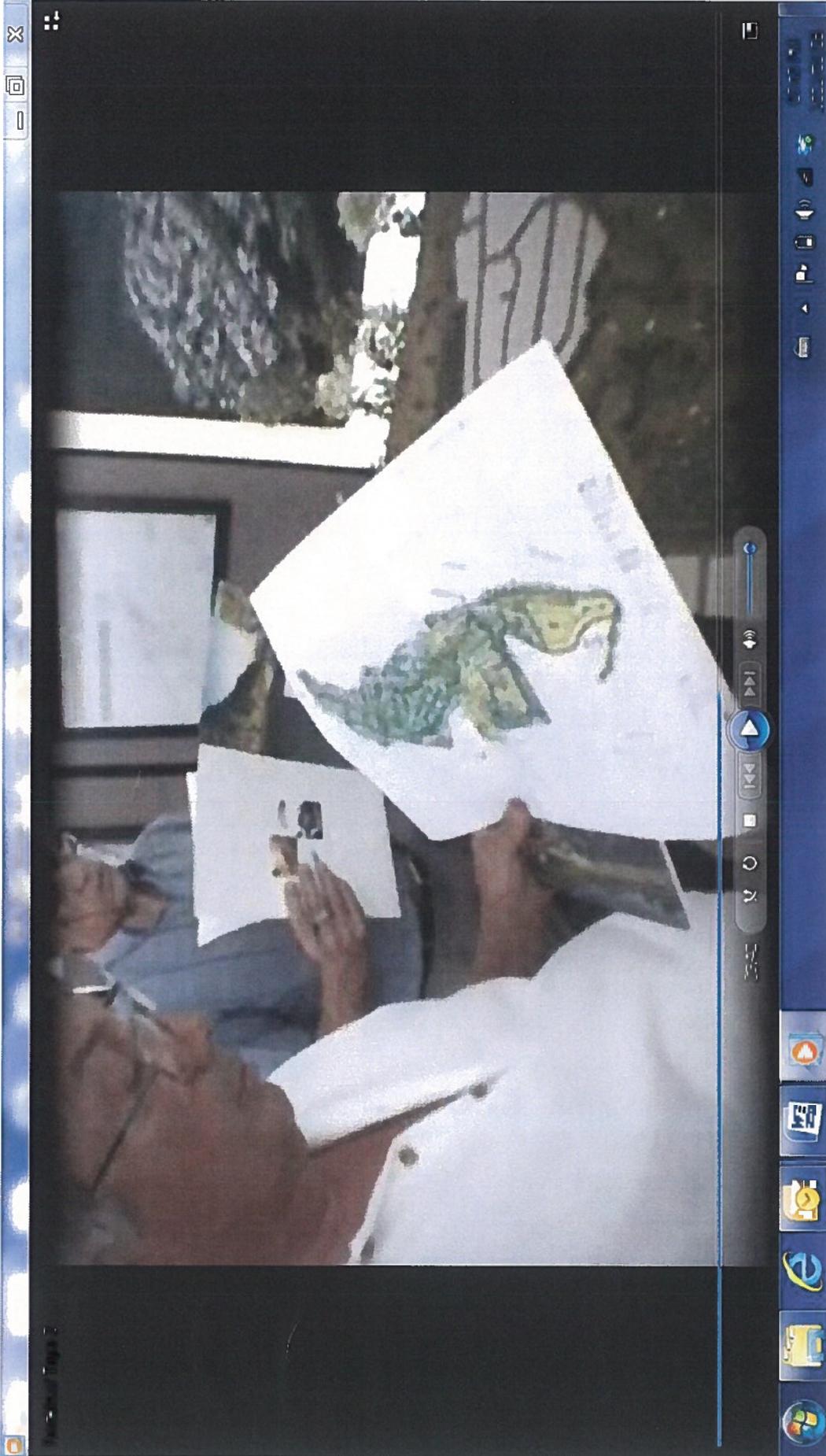
FRAMED COPY OF ANNEXURE "ARK12" ON DISPLAY



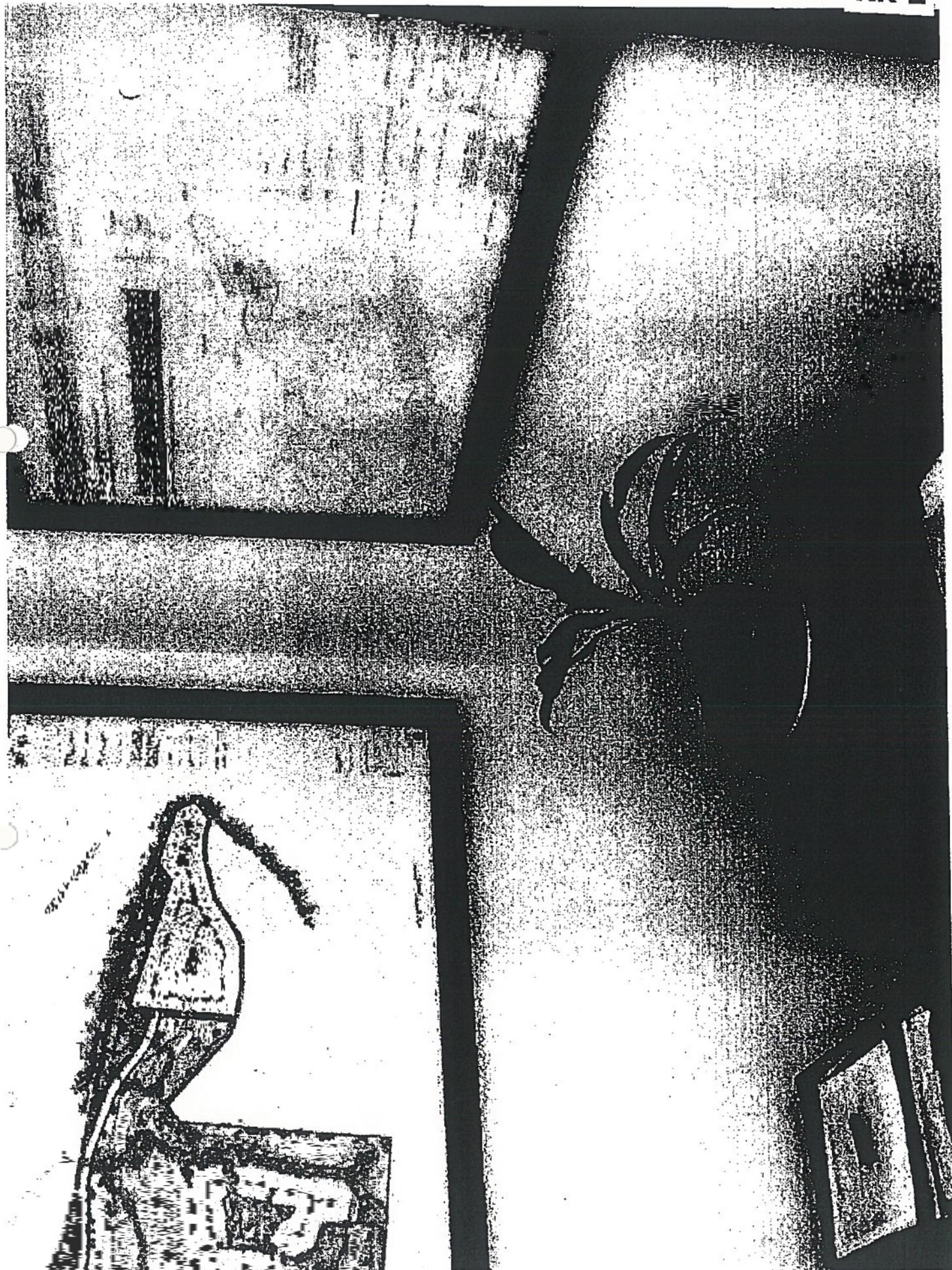
MR MARIUS KLEYNHANS (ON THE RIGHT) IN COMPANY OF CLIENT IN SELECTION AREA



MRS HEATHER KLEYNHANS (FRONT RIGHT) AND MR MARIUS KLEYNHANS (FAR LEFT) IN MAIN SELECTION AREA WITH FRAMED COPY OF ANNEXURE "ARK 7" IN BACKGROUND



CLIENT WITH COPY OF PLAN AS ORIGINALLY INCLUDED IN INFORMATION DOCUMENTATION (ANNEXURE B TO THE FOUNDING AFFIDAVIT)



W.S.

2.1m HIGH MASONRY WALLS AND PILLARS
WITH PALISADE FENCE INSERTS
DETAIL C



EXISTING BOUNDARY STRUCTURES TO REMAIN



2.1m HIGH TEMPORARY PALISADE FENCING
MAY BE REMOVED ONCE PROPERTY OWNER
HAS SECURED PROPERTY TO SATISFACTION
OF MASTER PROPERTY OWNERS ASSOCIATION



BY MUTUAL AGREEMENT BY OWNERS
OPEN FRONTAGE IS FIRST OPTION AS
LONG AS INTEGRITY OF SECURITY IS
MAINTAINED TO SATISFACTION OF HOUSE
OWNERS/GOLF COURSE OWNERS



TERMINO TITEL

E

JOB NO.
TABLA No.

7576

DATE
DATUM

AUGUS

SCALE
ESCALA

1:300

DESIGNED
DISEÑADO

BC

DRAWN
DIBUJADO

BC

CHECKED
REVISADO

BC

APPROVED
Aprobado

BC

CLIENT
CLIENTE

RK 3(b)
530





PROPOSED REVISIONS TO
EXISTING LAYOUT PLAN
FOR REM FARM 591 / 1

NO.	DESCRIPTION	DATE
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44
45
46
47
48
49
50



2.1m HIGH STEEL PALISADE FENCING WITH
CONCRETE GROUND BEAM
DETAIL A



2.1m HIGH MASONRY WALL WITH MASONRY COLUMNS
DETAIL B



2.1m HIGH MASONRY WALL WITH MASONRY COLUMNS
DETAIL B



2.1m HIGH MASONRY WALLS AND PILLARS
WITH PALISADE FENCE INSERTS
DETAIL C



EXISTING BOUNDARY STRUCTURES TO REMAIN



EXISTING BOUNDARY STRUCTURES TO REMAIN



2.1m HIGH TEMPORARY PALISADE FENCING
MAY BE REMOVED ONCE PROPERTY OWNER
HAS SECURED PROPERTY TO SATISFACTION
OF MASTER PROPERTY OWNERS ASSOCIATION



BY MUTUAL AGREEMENT BY OWNERS
OPEN FRONTAGE IS FIRST OPTION AS
LONG AS INTEGRITY OF SECURITY IS MAINTAINED TO
SATISFACTION OF HOUSE
OWNERS/GOLF COURSE OWNERS

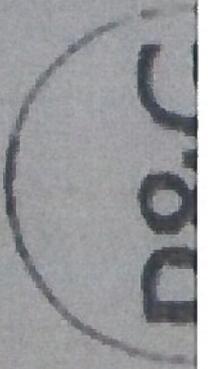
OPEN FROM PAGE IS FIRST OPTION AS
LONG AS INTEGRITY OF SECURITY IS MAINTAINED
SATISFACTION OF HOUSE
OWNERS/GOLF COURSE OWNERS



ENTRANCE DETAILS

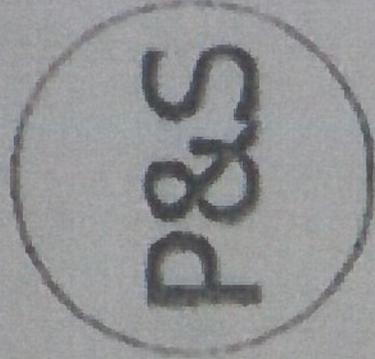


PEDESTRIAN ACCESS



PEDESTRIAN & GOLF CART

PEDESTRIAN AND SERVICE
ACCESS

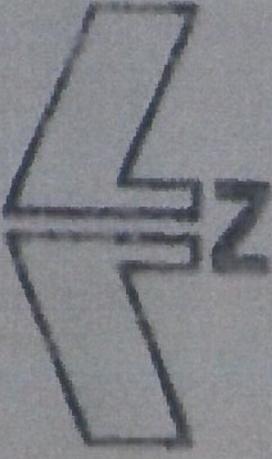


ECOLOGICAL CORRIDORS



CART PATHS





FOR BOUNDARY STRUCTURES
DRAWING REFER TO P.P.
DWG. No 7576. 201

PROJECT
PROJECT

HERMANUS GOLF COURSE

DRAWING TITLE
EXISTING TITLE

LANDSCAPE ELEMENTS

LANDSCAPE ELEMENTS

540
RK 4.2(h)

REVISION
BY/DATE

DRAWING No.
TAKING No.

210

COMPUTER NO.

DATE
DATUM

SIGNATURE for PT
HAND DURING THIS BY

JOB No.
TASK No.

7576

OCT. 2001

DATE
DATUM
SCALE
SCALE

DESIGNED
CHECKED
DRAWN
DETAILS
CHECKED
PROJECT
APPROVED
CORRECTIONS

CLIENT

PLANNING PARTNERS BEPLANNINGSVENNOTE

STATEN - EN FÖRENING AV SVENSKA, NORSKA OCH DANSKA PLANERINGSPROFESSORER OCH FÖRELÄSNARE
SOM HAR FÖRETAGIT EN FÖRENING I SVERIGE, NORDEN OCH I ÖVRIGA EUROPA



EN FÖRENING AV SVENSKA, NORSKA OCH DANSKA PLANERINGSPROFESSORER OCH FÖRELÄSNARE
SOM HAR FÖRETAGIT EN FÖRENING I SVERIGE, NORDEN OCH I ÖVRIGA EUROPA

Mariki Chin

From: Mariki Chin [mchin@lawhermanus.co.za]
 Sent: 15 May 2012 09:11 PM
 To: 'Range Law'
 Cc: 'attorneys@lawhermanus.co.za'; 'ADV A DE V LA GRANGE SC'; 'Coenie Groenewald'; 'Riaan Kuchar'; 'dlakey@overstrand.gov.za'
 Subject: Overstrand Municipality - Gaynhans et al - Fermkloof Estate
 Importance: High

Dear Mr. Range

We refer to the above and the applicants' settlement offer to the respondent. Our instructions are to advise that the offer is not accepted.

In view of the court date of 7 June 2012, we await filing and service of the applicants' reply to the respondent's answering affidavit, if any, on or before close of business on Thursday, 17 March 2012.

We have instructed our correspondents to ensure that the missing copy of the respondent's answering affidavit in the court file, is replaced. In this regard, Ms Ansie Rathbone of VanderSpuy will liaise with Lisa of Strauss Daly.

Yours faithfully,

mariki chin
 chin incorporated / attorneys and conveyancers
 registration number : 2006/028966/21

(We have moved offices and were obliged to cancel Telkom due to unacceptable delays and poor service. Please note our new details in red.)

129 Hope Street | P O Box 1591 | HERMANUS | 7200

C 082 854 8906 F 086 759 1400 mchin@lawhermanus.co.za

director : M L C Chin BA Jur LLB LLM (Contract Law, Property Law, Administrative Law and High Court litigation)

in association with : H P Viljoen BA LLB LLD (Leiden) (Labour Law and Public Law)

consultant : H E Louw BA LLB (Property Development)

office manager : Ronel Davidowitz C 082 570 0326 F 086 759 1401 rda@lawhermanus.co.za

CONFIDENTIALITY NOTICE: This message (including attachments) is intended for the person/entity to whom it is addressed and may contain privileged and confidential information. Should the reader hereof not be the intended recipient, kindly notify us immediately by return e-mail and delete the original message.

 Please consider the environment - do you really need to print this e-mail?



From: Mariki Chin [mchin@lawhermanus.co.za]
 Sent: 18 May 2012 11:17 AM
 To: 'Range Law'
 Cc: 'attorneys@lawhermanus.co.za'; 'ADV A DE V LA GRANGE SC'; 'Coenie Groenewald'; 'Riaan Kuchar'; 'Ansie Hymen'
 Subject: FW: Overstrand Municipality - Kleynhans et al - Fernkloof Estate

Dear Mr Range

We note that you have not filed any replying papers as to date.

We confirm that when the extension date of 7 June 2012 was arranged, it was on the strength of your advices to writer that you would be filing the applicants' replying affidavit exactly as provided to us on a without prejudice basis. You also advised that, should the respondent decide not to accept the applicants' settlement offer, you will be filing your replying papers immediately upon being notified thereof.

We reserve the right to request a further postponement should we not be ready on 7 June 2012 to address any issues flowing from said reply, whether filed exactly as provided to us or otherwise.

All our rights remain reserved.

Yours faithfully,

mariki chin

chin Incorporated / attorneys and conveyancers

registration number : 2006/029966/21

(We have moved offices and were obliged to cancel Telkom due to unacceptable delays and poor service. Please note our new details in red.)

12B Hope Street | P O Box 1591 | HERMANUS | 7200

C 082 854 8906 F 086 759 1400 mchin@lawhermanus.co.za

franchisee : M I C Chin BA Jur LLB LLM (Contract Law, Property Law, Administrative Law and High Court Litigation)

in association with : H P Viljoen BA LLB LLB (Labour Law and Public Law)

consultant : H E Loow BA LLB (Property Development)

office manager : Ronel Davidowitz C 082 570 0926 F 086 759 1401 attorneys@lawhermanus.co.za

CONFIDENTIALITY NOTICE: This message (including attachments) is intended for the person/entity to whom it is addressed and may contain privileged and confidential information. Should the reader hereof not be the intended recipient, kindly notify us immediately by return e-mail and delete the original message.



Please consider the environment - do you really need to print this e-mail?

From: Mariki Chin [mailto:mchin@lawhermanus.co.za]

Sent: 15 May 2012 09:11 PM

To: 'Range Law'

Cc: 'attorneys@lawhermanus.co.za'; 'ADV A DE V LA GRANGE SC'; 'Coenie Groenewald'; 'Riaan Kuchar'; 'dlakey@overstrand.gov.za'

Subject: Overstrand Municipality - Kleynhans et al - Fernkloof Estate

Importance: High

Dear Mr. Range

We refer to the above and the applicants' settlement offer to the respondent. Our instructions are to advise that the offer is not accepted.

In view of the court date of 7 June 2012, we await filing and service of the applicants' reply to the respondent's answering affidavit, if any, on or before close of business on Thursday, 17 March 2012.

We have instructed our correspondents to ensure that the missing copy of the respondent's answering affidavit in the court file, is replaced. In this regard, Ms Ansie Rathbone of VanderSpuy will liaise with Lisa of Strauss Daly.

Yours faithfully,

Mariki Chin

RK 7

544

From: Mariki Chin [mchin@lawhermanus.co.za]
Sent: 21 May 2012 12:53 PM
To: 'Range Law'
Cc: 'ADV A DE V LA GRANGE SC'; 'cclillers@rwweb.co.za'; 'Coenig Groenewald'; 'dlakey@overstrand.gov.za'; 'Riaan Kuchar'; 'Paula Neethling'
Subject: Overstrand Municipality - Keynhans et al RE farmkloof Estate - MEDIATION
Importance: High
Follow Up Flag: Follow up
Flag Status: Flagged

Dear Mr Range

We refer to communication between the parties' counsel over the weekend and advocate Nelson's invitation to submit the matter for mediation.

After due consideration and discussion with our client, we believe that the matter is not suitable for mediation and herefore decline the invitation.

Yours faithfully,

mariki chin

chin incorporated / attorneys and conveyancers

registration number : 2006/028966/21

(We have moved offices and were obliged to cancel Telkom due to unacceptable delays and poor service. Please note our new details in red.)
12B Hope Street | P O Box 1591 | HERMANUS | 7200

C 082 854 6906 F 086 759 1400 mchin@lawhermanus.co.za

director : M L C Chin BA LLB LLM (Contract Law, Property Law, Administrative Law and High Court Litigation)

in association with : H P Vlooyen BA LLB LL.D (Leiden) (Labour Law and Public Law)

consultant : H E Louw BA LLB (Property Development)

office manager : Ronel Davidowitz C 082 570 0326 F 086 759 1401 ronel@lawhermanus.co.za

CONFIDENTIALITY NOTICE: This message (including attachments) is intended for the person/entity to whom it is addressed and may contain privileged and confidential information. Should the reader hereof not be the intended recipient, kindly notify us immediately by return e-mail and delete the original message.



Please consider the environment - do you really need to print this e-mail?

Handwritten initials/signature in the bottom right corner.

Mariki Chin

RK 8

545

From: fax.received@web-com.co.za
Sent: 24 May 2012 10:03 AM
To: mchin@lawhermanus.co.za
Subject: Fax Message Received: 028 3122554 [0283122554] 028 3122554
Attachments: Fax01211804.PDF



Received Fax

Attached please find a fax that was received with the following detail:

e-mail Address	mchin@lawhermanus.co.za
on Fax Number	0867591400
Number of pages	3

The message was received from (*information supplied only if it was supplied by the remote fax machine)

From Fax Number	faxreceived@fax2email.co.za
Fax Remote ID	028 3122554

Fax Status: Any status other than RECEIVED OK - SUCCESS implies that the system ran into errors while receiving the fax.

Receive Status	SUCCESS
Last Result	RECEIVED OK

MICHAEL RANGE & ASSOCIATE

ATTORNEYS AT LAW
PROKUREURS
AMAGQWETHA

ONS VERW /
OUR REF MR/AM/

WARRINGTONARHADE 101
101 WARRINGTON PLACE
HERMANUS, 7200

U VERW /
YOUR REF

POSBUS 548 / P O BOX 548
HERMANUS, 7200

DATUM /
DATE 24 MAY 2012

TEL: (028) 312 - 0106/7
FAX: (028) 312 - 2554
E-POS/E-MAIL:
litigation@rangolaw.co.za

MESSRS CHIN INCORPORATED
P.O. BOX 1591
HERMANUS
7200

FOR ATT: MARIKI CHIN
BY TELEFAX: 086 759 1400

Dear Sirs,

RE: M KLEYNHANS / OVERSTRAND MUNICIPALITY
REFERRAL OF THIS MATTER TO MEDIATION

We refer to the above and to your letter dated 21st May 2012 in which you advised the writer that:

"After due consideration and discussion with our client, we believe that the matter is not suitable for mediation and therefore decline the invitation." (my emphasis)

We have now had an opportunity to discuss your response with our client who has just returned from abroad and have instructions to respond to your letter in the following terms:

1. Advocate Nelson is of the view that your belief that this matter *"is not suitable for mediation"* is not only incorrect but it is, with respect, also irrelevant, since the decision as to whether or not to submit this matter to mediation should be a decision that is taken by your client, properly constituted.
2. Advocate Nelson has advised our client that this matter is perfectly suited for mediation for a number of reasons, including that:
 - (a) Mediation is well suited for the resolution of disputes of the kind that have arisen between our clients;

u
TWS

- (b) In this matter there are strong indications on the papers that there are needs and concerns that are in fact not only capable, but in fact well suited for resolution by mediation;
 - (c) In fact, the note on the drawing which your client asserts formed part of the contract document provides in terms that *"open frontage is first option as long as integrity of security is maintained to satisfaction of house owners/golf course."*
 - (d) The weighing of options and the seeking satisfactory solutions that address the concerns of parties (such as the integrity of security of the area where they live) are the very kind of issues that mediation is best designed to resolve to the mutual satisfaction of all the parties;
 - (e) To date your client has made no effort whatsoever to determine whether or not the integrity of security has or has not been maintained to the satisfaction of our clients and yet if we understand your letter correctly it has declined an opportunity to even explore these issues by way of mediation.
 - (f) There is a recognised category of disputes that are not capable of being resolved by mediation and this is most certainly not one of them.
 - (g) In its Answering Affidavit your client has contended that there are a large number of people that must be joined as parties to the proceedings.
 - (h) If this matter proceeds to litigation on the basis proposed by your client, legal costs will escalate at an alarming rate.
 - (i) As a public body your client has a responsibility to, at the very least, explore other ways of resolving issues between the parties instead of proceeding with what is going to be extremely costly litigation;
3. Our clients have considered their own position in the light of Advocate Nelson's advice and have as a result taken the decision to agree to refer the matter to mediation should your client also agree thereto.
4. We are accordingly instructed to ask your client to re-consider its decision not to refer this matter to a mediator so that an attempt can at least be made to ascertain whether or not this matter can be resolved in that manner. If it cannot then of course the litigation will proceed as is always the case when mediations do not succeed in providing a solution that is satisfactory to the parties.
5. Please also be advised that if your client persists in its current attitude we have instructions to:
- (a) bring this letter to the attention of the Court that hears the matter when the issue of costs is decided;

*R
Twee*

- (b) adduce expert evidence to establish that this dispute was indeed one that ought to have been referred to mediation at this stage of the proceedings;
 - (c) request the Court to exercise its discretion in relation to costs due regard being had to your clients refusal to agree to the referral of this matter to mediation and in regard whereto our client will seek the following order:
 - I. If it succeeds in its application – an order that your client pay the difference between its party and party and attorney and client costs; and
 - II. If it does not succeed – an order that your client pay all of the costs that are incurred from the date of your clients formal rejection of the formal invitation to refer this matter to mediation as contained in this letter, such costs to include all of the costs incurred by the parties that are joined in these proceedings.
6. We are not aware of the identity of the person at the Municipality that is responsible for having instructed you to advise us that this matter should not be referred to mediation and it is of course not our function to furnish that person with legal advice.
7. Nevertheless we believe that it may be constructive if you were to remind him or her that if they persist in taking up the attitude evidenced in your letter under reply they could very well be personally liable for any costs that are wasted as a result of this litigation.
8. We repeat that this letter is written "on the record" and will if the need arises be brought to the courts attention at the appropriate time.
9. If we do not hear from you by the close of business on Friday 25th May 2012, we shall assume that notwithstanding the above your client persists in its refusal to submit this matter to mediation. If you need more time please let me know.

Yours faithfully,
MICHAEL RANGE & ASSOCIATES

M RANGE

Handwritten initials: *LR*
TWS

Mariki Chin

RK 9

From: Mariki Chin [mchin@lawhermanus.co.za]
 Sent: 24 May 2012 03:36 PM
 To: 'Range Law'
 Cc: 'attorneys@lawhermanus.co.za'
 Subject: KLEYNHANS - OVERSTRAND re Fernkloof Estate
 Attachments: 20120524153251971.pdf

Importance: High

Attached please find a letter for the attention of Mr. Range.

Yours faithfully

mariki chin
 chin incorporated / attorneys and conveyancers

registration number : 2006/028956/21

(We have moved offices and were obliged to cancel Telkom due to unacceptable delays and poor service. Please note our new details in red.)

128 Hope Street | P O Box 1591 | HERMANUS | 7200

C 082 854 6906 F 086 759 1400 mchin@lawhermanus.co.za

director : M L C Chin BA LLB LLM (Contract Law, Property Law, Administrative Law and High Court litigation)

> association with I H P Vloos BA LLB LLD (Leiden) (Labour Law and Public Law)

consultant : H E Louw BA LLB (Property Development)

office manager : Ronel Davidowitz C 082 570 0326 F 086 759 1401 attorneys@lawhermanus.co.za

CONFIDENTIALITY NOTICE: This message (including attachments) is intended for the person/entity to whom it is addressed and may contain privileged and confidential information. Should the reader hereof not be the intended recipient, kindly notify us immediately by return e-mail and delete the original message.



Please consider the environment - do you really need to print this e-mail?

Handwritten initials or signature in the bottom right corner.

ATTORNEYS
CONVEYANCERS



PROKUREURS
AKTEBESORGER

VAT Reg. No./BTW Reg. Nr. 4090233661
Your Ref./U Verw: MR/AM
Our Ref./Ois Verw: MCHN/dt/OMK/F

24 May 2012

Messrs Michael Range & Associate

By electronic mail: litigation@rangelaw.co.za

Dear Sirs

**MARIUS KLEYNHANS et al / OVERSTRAND MUNICIPALITY
re REFERRAL TO MEDIATION**

1. We refer to your fax of 24 May 2012, of which the tenor is that our client (Respondent) ought to submit to mediation in respect of the above matter.
2. We reply as follows on behalf of our client, whose rights remain reserved. Like your fax, this letter is not written on the usual "without prejudice" basis, and may be made available to the court at the hearing of the matter on 7 June 2012.
3. Nothing contained in this letter (or not dealt with in this letter) should be construed as an acceptance or admission of any of the statements or allegations in your fax. It is recorded that the issues remain as per the papers exchanged so far between the parties. We also record that to date, and in breach of their undertaking to do so, Applicants have failed to file replying affidavits.

CHIN GEINKORPOREER/INCORPORATED REG. NO. 2006/028906/21
 12B HOPE STR ES 1591 HERMANUS 7200
 ☎082 570 0326 ☎086 759 1400 attorneys@lawhermanus.co.za

Direkteur / Director : MLC CHIN B.Jur LLB LLM
 In assosiasie met / In association with HP Viljoen BA LLB LLD [Leiden] (Arbeidsreg on Publiekreg / Labour Law and Public Law)
 Konsultant / Consultant : HE Louw BA LLB (Eiendomsontwikkeling / Property Development)
 Kantoorbestuurder / Office manager : Renli Davidowitz

Handwritten signature/initials

4. Our response to the detailed contents of your letter is as follows.

Ad paragraph 1

- 5. The correctness of Respondent's view that the matter is not suitable for mediation is not a question in respect of which Respondent need defer, with all due respect, to the views of opposing counsel.
- 6. The proposition that the view of a litigating party on the question whether the matter in question is suitable for mediation is somehow not relevant, is rejected. A party who honestly holds the view that in a given set of circumstances mediation is not viable (such as Respondent) surely cannot be expected to defer in this regard to the mere contrary wishes and claims of the opposing parties.
- 7. As regards the comments in connection with decision-making on the part of Respondent, it is not for Applicants or yourselves as their legal advisors to second-guess the instructions proceeding from Respondent. At any rate, we deny any suggestion or implication that our instructions are not underlain by properly authorised decisions on the part of Respondent.

Ad paragraph 2

- 8. We repeat that our client does not consider the matter to be suitable for mediation.
- 9. At any rate in practical terms the question is not whether a matter is theoretically suitable for mediation but whether the party/ies in question regard it in this light. Lack of consensus in this regard necessarily means that mediation cannot occur.
- 10. There is no legal basis for compelling Respondent to submit to mediation, nor is there any legal basis for adverse costs consequences (whether as alluded to in your letter or otherwise) to follow upon the mere refusal by a party to submit to mediation - particularly where, as here, such refusal is reasonable. Respondent denies that the agreements in question entitle Applicants to the relief sought. Short of a mediator making a new contract for the

[Handwritten signature]
[Handwritten initials]

parties (which is surely not what Applicants suggest should happen), there is simply nothing to serve as subject for the proposed mediation.

Ad paragraph 2(a)

11. The supposed reason is devoid of content and amounts to begging the question.

Ad paragraph 2(b)

12. The supposed reason is likewise devoid of content and amounts to begging the question.
13. Where precisely, we might ask rhetorically, are the "strong indications on the papers" to which reference is made? (In this regard we remind you that Applicants have not filed replying papers and that Respondent's answering papers therefore stand uncontradicted.)
14. The reference to "needs and concerns" is significant. This is open-ended language suggestive of the notion that the parties must still negotiate with a view to (possibly) coming to some or other arrangement. The language used is destructive of the only case which Applicants have attempted to make out on the papers filed to date, namely that the historic agreements of sale entitle Applicants to the relief sought.
15. If your clients' view is indeed that the parties must still come to agreement on certain issues, Respondent will consider taking part in any such negotiations. This would, however, involve *negotiation* in the ordinary sense, not mediation. The latter concept implies that there is an already existing and well-defined dispute between the parties, whereas the former does not (and, in addition, of course does not require the presence of a mediator).

Ad paragraph 2(c) and (d)

16. We refer to what we have said in connection with your paragraph 2(b), which applies here *mutatis mutandis*.

h
Tues

17. The phrase quoted (regarding the meaning and relevance of which no concessions are hereby made) creates the impression that the supposed mediation would involve resolution of the question whether the time has not perhaps come to accept that "open frontage" can no longer be regarded as a "first" or valid "option", based on the supposed continuing security concerns, and that the unstated other option or options implied by the quoted phrase must now be explored further, possibly (but not necessarily) eventually culminating in some or other agreement of as-yet unspecified content.
18. This would not only leave the matter in the air, and fitted to negotiation rather than mediation (see above), but would also constitute a drastic departure from the case which Applicants attempted to make out in their founding affidavits (the only set of affidavits they have filed so far). If this is indeed what Applicants now suggest, they are of course welcome to withdraw their application in its current form (attended by the usual costs implications) and bring a fresh application in whatever manner and on whatever basis they may be advised to.

Ad paragraph 2(e)

19. We refer to what we have said in connection with your paragraph 2(c) and (d), which applies here *mutatis mutandis*.
20. Respondent's view is that, as matters stand, and on the papers that have been filed to date, it is simply not obliged to "determine whether or not the integrity of security has or has not been maintained ...". This question is irrelevant to the resolution of the application due to be heard on 7 June. Indeed, evidence in connection therewith would be inadmissible - which is one of the reasons for the striking-out application of the proposed bringing of which Respondent has recently given notice.

h
TWS

Ad paragraph 2(f)

- 21. We do not wish to be drawn into a debate about the existence or otherwise of a category of disputes as referred to, namely disputes that are recognised as not being capable of resolution by mediation.
- 22. We wish merely to point out that merely not falling into any such category would not necessarily suffice to make a particular dispute positively suitable for mediation (or, *a fortiori*, to make mediation compulsory). Otherwise all disputes would either be clearly suitable or clearly unsuitable for mediation and such matters could be resolved simply by having mechanical regard to the contents of the supposed categories – which would be quite unrealistic.

Ad paragraph (g)

- 23. These statements are noted.
- 24. The very need to join the persons in question is by itself an insuperable obstacle to mediation. Even if Respondent were amenable to having the matter mediated (which is not the case), mediation would simply not be possible unless (as in the case of the court application) all interested parties have been given an opportunity to join in the mediation proceedings.

Ad paragraph (h)

- 25. You are reminded that your clients (not Respondent) are in the position of *dominus litis*. The litigation is driven by Applicants, not Respondent.
- 26. The possibility that *“legal costs will escalate at an alarming rate”* if Applicants persist with the application would be due not to any action on the part of Respondent, but due to the necessity of joining a multitude of parties in the circumstances. This state of affairs may be unfortunate for Applicants but it is not something for which Respondent can be blamed.

Handwritten signature/initials

- 27. The resolution of the apparent difficulty would have lain, we suggest, in Applicants' realising that their case and the relief sought by them are unrealistic, partly for the very reason now complained of in your fax. If your clients nevertheless persist with the application, they must accept all the consequences of such a step - including the inevitable applicability of the law in relation to the necessary joinder of parties.
- 28. At any rate, if the matter were to be mediated, this would lead to the incurral of additional costs which could be avoided if the matter were to be litigated in the ordinary courts.

Ad paragraph (f)

- 29. For reasons described above Respondent denies that it is the party responsible for driving the litigation forward. As its very procedural designation suggests, Respondent is merely defending an application brought by others - being your clients.
- 30. One of the ways in which Respondent will try to prevent the further escalation of costs is precisely by asking the court, at the hearing of the application on 7 June 2012, to dismiss the application outright (based in part on your clients' failure to file replying affidavits as agreed, or to file heads of argument as required).
- 31. As already indicated, Respondent will consider participating in further negotiations if, as appears from your fax and as described above, Applicants have completely changed the basis of their claims. As it is, however, the application brought by Applicants remains and will be opposed by Respondent.

Ad paragraphs 3 and 4

- 32. We repeat what we have already said about the suitability of the matter for mediation (namely, that it is not suitable). Significantly, the concluding part of your paragraph 3 recognises (correctly) that mediation is not a viable solution if one of the parties does not believe the matter to be suitable for mediation and on that basis has reasonably declined to participate in mediation proceedings.

Handwritten initials/signature

Ad paragraph 5(a)

33. We have no objection to your bringing your fax to the attention of the court; indeed, we invite you to do so. As already stated, the present letter may be made available to the court on a similar basis.

Ad paragraph 5(b)

34. Your clients will no doubt act as they are advised. We record our view that there is absolutely no basis in law for the procedure you suggest (partly because evidence of the nature referred to would be utterly inadmissible for a number of reasons), and Respondent will oppose any attempt by Applicants to implement such a procedure.

Ad paragraph 5(c)

35. The statements in this paragraph are noted.
36. Your suggestion, both in general and in its particulars, is rejected.
37. Respondent reserves its right to apply, at the hearing of the matter, for a suitable order as to costs against Applicants (such costs to include the costs of two counsel, where employed), bearing in mind amongst other things:
- 37.1. Applicants' failure to file replying affidavits or heads of argument;
- 37.2. The inclusion by Applicants of irrelevant and immaterial matter in the founding affidavits, to such a degree that Respondent was advised to bring an application for striking out the relevant passages;
- 37.3. Applicants' groundless yet persistent attempts to compel Respondent to submit to mediation (as evidenced by your very fax under reply), instead of attending instead to the demands of the court application which they themselves brought and are persisting with.

5
TWS

Ad paragraph 6

- 38. It is indeed not your function to provide our client with legal advice.
- 39. As already explained, and with respect, it is also not your function to second-guess our instructions from our client.

Ad paragraph 7

- 40. These remarks are noted.
- 41. We deny that there is a basis in law for the threat made, and record that it is our view that it is your clients, not ours, that are running the risk of adverse costs orders.

Ad paragraph 8

- 42. The status of your fax is acknowledged. As already noted the present letter will or may be dealt with on the same basis, as it is also "on the record".

Ad paragraph 9

- 43. We record that in the circumstances our client stands by its assertion that the matter is not suitable for mediation.
- 44. You are reminded that the "matter" to which you refer is the product of your clients' wide-ranging and largely irrelevant founding papers, as read with Respondent's answering papers (to which no replies have been filed). Even on the assumption that the matter is in principle suitable for mediation (which is **not** conceded), the offending passages in Applicants' papers would, at the very least, have to be struck out first before the issues, suitably defined and abridged, could be laid before a mediator. The issue of the necessary joinder of other parties (see above) would also first have to be resolved.

✓
TWS

45. Your clients are invited, in light of their apparent change of tack as discussed above, to withdraw their application in its current form. In the absence of such a withdrawal (or amendment, assuming that were possible in the circumstances - given that affidavits had already been filed on behalf of you client) Respondent remains compelled to resist the application in its present form.

Yours faithfully,



CHIN INCORPORATED
Per: M CHIN
mchin@lawhermanus.co.za

h
TWS

[Home](#)[Contact Details](#)

559

Fernkloof Estate

Hermanus, South Africa

Situated in the quiet suburb of Eastcliff, the Hermanus Golf Club has spectacular views of the mountains. It is a private golf course, with a well-appointed clubhouse and friendly staff.

Indigenous Cape fynbos is found throughout the course, with trees providing comfortable shade as you negotiate the intricacies of the course. Read more about the Hermanus Golf Club the "[About the Area](#)" page.

Main Menu

Fernkloof Estate

News & Events

April, 01, 2008

Fernkloof Estate Hermanus Property Sales CC launches its new website showcasing Fernkloof Estate - the epitome of luxury living. Hurry! Click on the [development map](#) to reserve your spot in paradise!

[| read more](#)

Welcome to Fernkloof Estate

Fernkloof Estate Hermanus Property Sales CC is proud to announce the availability of a limited number of exclusive homes in the coastal town of Hermanus in the Western Cape. Comprising of six unique villages adjacent to the spectacular soon-to-be 27-hole Hermanus Golf Course, **Fernkloof Estate** sets a new standard in luxurious seaside living.

The estate is surrounded by magnificent mountains and incredible natural scenery and is situated in the quiet suburb of Eastcliff. With **24 hour security** ensuring privacy and only five minutes from the centre of Hermanus, Fernkloof Estate is the ideal place to raise a family, go on holiday or spend your golden years in **peace and tranquility**.

For the home of your dreams, contact Fernkloof Estate Hermanus Property Sales CC for more information about this once in a lifetime opportunity.

[more](#)



The Development Map

Click on a precinct on the map to view the listed properties within that precinct as well as a more detailed map.

[Precinct 1](#)[Precinct 2](#)[Precinct 5](#)[Precinct 6](#)[Precinct 7](#)[Precinct 8](#)

[more](#)

- HOME
- ABOUT THE AREA
- PHOTO GALLERY
- CONTACT US

fernkloof estate

- SALES
- DEVELOPMENT MAP
- ARCHITECT GUIDELINES
- LEGAL DOCUMENTS

news & events

February, 06, 2012
Hurry! Click on the development map to reserve your spot in paradise!
[Read more](#)

Information to Fernkloof Properties

Fernkloof Estate Properties is proud to announce the availability of a limited number of exclusive homes and vacant plots in the coastal town of Hermanus in the Western Cape. Comprising of 5 unique villages adjacent to the spectacular 27 hole Hermanus Golf course, Fernkloof Estate sets a new standard in luxurious seaside living.



The estate is surrounded by magnificent mountains and incredible natural scenery. Every effort has been made to make the Estate ecologically friendly with fynbos gardens and wetlands offering natural habitat to various endangered birds and other species. With adequate security ensuring privacy and only 5 minutes from the centre of Hermanus, Fernkloof Estate is the ideal place to raise a family, or on holiday or spend your golden years in peace and tranquility.

For the home of your dreams, [contact Fernkloof Properties](#) for more information about this once in a lifetime opportunity.



the development map III

Click on a precinct on the map to view the listed properties within that precinct as well as a more detailed map.

DEVELOPMENT MAP



Internet Explorer browser window showing the website <http://www.fernkloof-estat...>. The page title is "Ferkloof Estate | C...".

The website content includes:

- A navigation menu with "Home" and "Contact Details".
- A main image of a golf ball on a tee.
- The logo "fernkloof properties" with the tagline "FERNKLOOF ESTATE HERMANUS PROPERTY SALES CC".
- A "main menu" with links: HOME, ABOUT THE AREA, PHOTO GALLERY, CONTACT US.
- A "fernkloof estate" section with links: SALES, DEVELOPMENT MAP, ARCHITECT GUIDELINES, LEGAL DOCUMENTS.
- A "contact details" section for Heather Kleynhans:
 - Cell: +27 (0)82 285 2777
 - Fax: +27 (0)82 529 3893
 - Postal Address: P.O. Box 88 Hermanus 7205
 - www.fernkloofestate.com
 - Ferkloof Estate Hermanus Property Sales CC
 - CC Registration number: 2006/165367/12

The Windows taskbar at the bottom shows the time as 10:06 PM on 2012/05/28.

RK 11(b)
561

BOX 135

ON THE ROLL: 7/8/12

IN THE HIGH COURT OF SOUTH AFRICA

WESTERN CAPE HIGH COURT, CAPE TOWN

CASE NUMBER : 12755/2011

In the application of :

MARIUS KLEYNHANS

1st APPLICANT

In his capacity as Trustee for the time being of
The Kleynhans Family Trust

HEATHER KLEYNHANS

2nd APPLICANT

In her capacity as Trustee for the time being of
The Kleynhans Family Trust

CORNERCADE (PTY) LTD

3rd APPLICANT

SHIRLEY MILLICENT KOSTER

4th APPLICANT

TIELMAN NIEUWOUDT AGENBAG

5th APPLICANT

and

OVERSTRAND MUNICIPALITY

RESPONDENT

FILING NOTICE

DOCUMENT FILED :

Confirmatory Affidavit of Roydon Niels Pybus; and

Confirmatory Affidavit of Colin Green

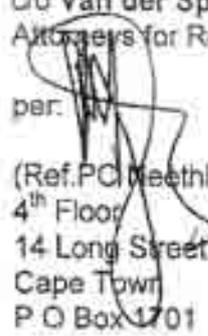
Dated at Cape Town this 5th day of JUNE 2012

CHIN INC
12 Hope Street

VANDERSPUY
PC Neethling
021 419 3622
paulian@vdslaw.co.za

HERMANUS

c/o Van der Spuy Cape Town
Attorneys for Respondent

per. 

(Ref. PC Neethling/MM/ar/CHI1/0028)
4th Floor
14 Long Street
Cape Town
P O Box 1701
Cape Town
DX : 53 Cape Town
(Tel. 419-3622)
(FX: 418-1329)

To: THE REGISTRAR
High Court
CAPE TOWN

and to: MICHAEL RANGE & ASS
Attorney for Applicants
Hermanus
c/o Strauss Daly Inc
15th Floor
The Terraces
34 Bree Street
CAPE TOWN
Ref: L Malherbe


a 11/23
RECEIVED
2012-06-05
SALSILLIES STRAUSS DALY

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case no: 12755/11

In the matter between;

MARIUS KLEYNHANS

First Applicant

in his capacity as Trustee for the time
being of The Kleynhans Family Trust

HEATHER KLEYNHANS

Second Applicant

in her capacity as Trustee for the time
being of The Kleynhans Family Trust

CORNERCADE (PTY) LTD

Third Applicant

SHIRLEY MILLICENT KOSTER

Fourth Applicant

TIELMAN NIEUWOUDT AGENBAG

Fifth Applicant

AND

OVERSTRAND MUNICIPALITY

Respondent

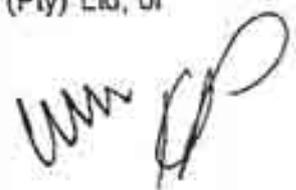
CONFIRMATORY AFFIDAVIT

I, the undersigned,

COLIN GREEN

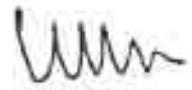
do hereby make oath and say that:

1. I am an adult male businessman and director of Rable Property Group (Pty) Ltd, of



Suite G18, Colosseum, Century Way, Century City, Cape Town.

- 2. The facts contained in this affidavit are true and correct and are within my personal knowledge.
- 3. I have already deposed to an affidavit in this matter and confirm my historic involvement with the development of the Fernkloof Estate as described therein.
- 4. I have read the additional affidavit deposed to in this matter by **ALFRED RIAAN KUCHAR** on 3 June 2012. I confirm the correctness of what is said in paragraphs 15 to 21 thereof. In particular I confirm the correctness of what is said there in connection with the process in terms of which the erven were sold, the description and lay-out of the sales venue (including the selection area), and the location and prominence of display of the framed versions of ARK 7 and ARK 12.

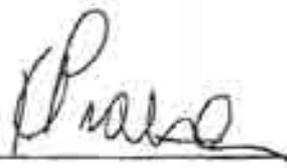


COLIN GREEN

Sworn to and signed in my presence at Cape Town on this 14th day of JUNE 2012 by the deponent who declared that he:

- (a) knows and understands the contents of this affidavit;
- (b) has no objection to the taking of the prescribed oath;
- (c) considers the oath to be binding on his conscience;

and uttered the words: "I swear that the contents of this declaration are true, so help me God."



COMMISSIONER OF OATHS
KIM JACQUELINE PISTOR
 ADMITTED ATTORNEY
 COMMISSIONER OF OATHS
 SUITE G 18 THE COLOSSEUM
 CENTURY WAY
 CENTURY CITY 7446

56/6

**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)**

CASE NUMBER: 12755/11

In the matter between:

MARIUS KLEYNHANS First Applicant
In his capacity as Trustee for the time
being of the Kleynhans Family Trust

HEATHER KLEYNHANS Second Applicant
In her capacity as Trustee for the time
being of the Kleynhans Family Trust

CORNERCADE (PTY) LTD Third Applicant

SHIRLEY MILLICENT KOSTER Fourth Applicant

TIELMAN NIEUWOUDT AGGENBACH Fifth Applicant

and

OVERSTRAND MUNICIPALITY Respondent

CONFIRMATORY AFFIDAVIT

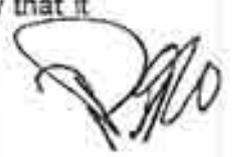
I, the undersigned,

ROYDON NIELS PYBUS

do hereby make oath and state as follows:



1. I am an adult male businessman of 88 Fernkloof Drive, Hermanus. I am also the current Club Captain of the Hermanus Golf Club, but depose to this affidavit in my personal capacity and not on behalf of the Club.
2. I have already, on 9 December 2011, deposed to an affidavit in this matter. I stand by what I said therein but would like to add the following with reference to the further affidavit that has been deposed to in the meantime (on 3 June 2012) by Mr Kuchar, which I have read.
3. As explained in paragraph 5.5 of my previous affidavit I personally attended the sale and purchased one of the properties on offer. I confirm that a copy of the plan itself was on display at the venue where the sale took place.
4. In the process of choosing my erf and before signing the sale agreement I, amongst other things, asked the person assisting me with the signature of the documents (I am not sure who this was anymore), about the security and fencing arrangements. He directed me to the Boundary Structures Key Plan, prominently displayed near the model of the development.
5. I had a vested interest in a fence not being erected in front of my home on the northern boundary. It was in fact public knowledge that such a fence would not be erected in front of the affected properties, as pointed out in my previous affidavit. I went to the plan and saw that it



was indeed recorded that by mutual agreement open frontage would be first option. Thereafter I signed the sale agreement.

- 6. As explained in my previous affidavit, the fencing issue became acrimonious during or about the course of 2008 and caused a rift between members of the Hermanus Golf Club. Mr. Hannes Kleynhans, First Applicant's father, who was the chairman of the development Committee of the Hermanus Golf Club at the time, was resolutely bent on having a fence erected in front of the boundary properties. The boundary property owners threatened with litigation (namely that they would get an injunction if a fence were to be erected).

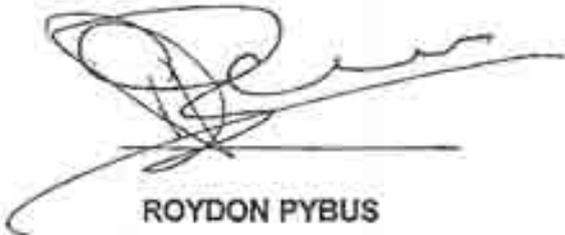
- 7. As already alluded to, despite settlement negotiations which involved the Respondent, the Hermanus Golf Club, the various property owners associations, as represented by the Fernkloof Estate Master Property Owners Association, the Hermanus Heights property owners and the Main Road property owners, the issues could not be resolved. During April 2009, while the negotiations were still ongoing, Mr. Hannes Kleynhans was tragically murdered in his home.

- 8. After his death and the eventual failure of settlement negotiations, relative peace and tranquillity was restored at the golf club. I noted with concern the possibility of joinder as raised in the applicants' papers. I hope that no such joinder procedure will be embarked upon, because I believe that it might jeopardise the friendly atmosphere



A handwritten signature in black ink, appearing to be 'D. J. ...', is located at the bottom right of the page. The signature is written over a horizontal line that spans the width of the page.

currently prevailing in the club. I also strongly disagree with the allegations to the effect that the Respondent has acted fraudulently. Circulating the founding papers in their present form among owners of properties in the Estate may cause a great and completely unnecessary rift.



ROYDON PYBUS

Sworn to and signed in my presence at Hermanus on this 5th day of JUNE 2012 by the deponent who declared that he:

- (a) knows and understands the contents of this affidavit;
- (b) has no objection to the taking of the prescribed oath;
- (c) considers the oath to be binding on his conscience;

and uttered the words: *"I swear that the contents of this declaration are true, so help me God."*



COMMISSIONER OF OATHS

Almero J.H. Oosthuizen
B.Com CA (SA)
Commissioner of Oaths
9 On College / P. O. Box 115
Hermanus, 7200

BOX 135

ON THE ROLL: 7/6/12

IN THE HIGH COURT OF SOUTH AFRICA

WESTERN CAPE HIGH COURT, CAPE TOWN

CASE NUMBER : 12755/2011

In the application of :

MARIUS KLEYNHANS 1st APPLICANT
In his capacity as Trustee for the time being of
The Kleynhans Family Trust

HEATHER KLEYNHANS 2nd APPLICANT
In her capacity as Trustee for the time being of
The Kleynhans Family Trust

CORNERCADE (PTY) LTD 3rd APPLICANT

SHIRLEY MILLICENT KOSTER 4th APPLICANT

TIELMAN NIEUWOUDT AGENBAG 5th APPLICANT

and

OVERSTRAND MUNICIPALITY RESPONDENT

FILING NOTICE

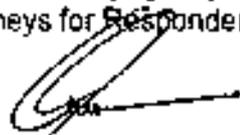
DOCUMENT FILED :

Confirmatory Affidavit of Tracy Quincey.

Dated at Cape Town this 5th day of JUNE 2012

CHIN INC
12 Hope Street
HERMANUS

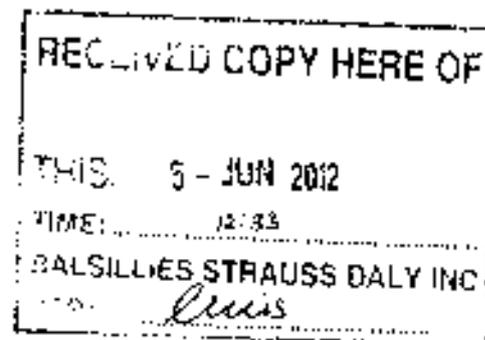
c/o Van der Spuy Cape Town
Attorneys for Respondent

per: 

(Ref. PC Neethling/MM/ar/CH1/0028)
4th Floor
14 Long Street
Cape Town
P O Box 1701
Cape Town
DX : 53 Cape Town
(Tel. 419-3822)
(FX: 418-1329)

To: THE REGISTRAR
High Court
CAPE TOWN

and to: MICHAEL RANGE & ASS
Attorney for Applicants
Hermanus
c/o Strauss Daly Inc
15th Floor
The Terraces
34 Bree Street
CAPE TOWN
Ref: L Malherbe



IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case no. 12755/11

In the matter between:

MARIUS KLEYNHANS First Applicant
in his capacity as Trustee for the time
being of The Kleynhans Family Trust

HEATHER KLEYNHANS Second Applicant
in her capacity as Trustee for the time
being of The Kleynhans Family Trust

CORNERCADE (PTY) LTD Third Applicant

SHIRLEY MILLICENT KOSTER Fourth Applicant

TIELMAN NIEUWOUDT AGENBAG Fifth Applicant

AND

OVERSTRAND MUNICIPALITY Respondent

CONFIRMATORY AFFIDAVIT

I, the undersigned,

TRACY QUINCEY

do hereby make oath and say that:

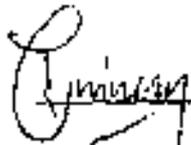
1 I am an adult female estate agent, owner of the name and style "Quincey

S B

Properties" in Hermanus.

2. The facts set out herein are true and correct and are within my personal knowledge.
3. I have read the additional affidavit deposed to in this matter by **ALFRED RIAAN KUCHAR** on 3 June 2012. I confirm the correctness of what is said in paragraphs 15 to 21 thereof. In particular I confirm the correctness of what is said there in connection with the process in terms of which the erven were sold, the description and lay-out of the sales venue (including the selection area), and the location and prominence of display of the framed versions of "ARK 7" and "ARK 12" as contemplated in paragraph 19 of the Kuchar affidavit, and attached and subsequently dealt with as "RK 3" and "RK 4.1".
4. In addition, and in order to explain why I am in a position to depose to this affidavit, I should make the following clear:
 - 4.1. I was involved with Pam Golding Properties and was the lead agent for the project, both as at the time of the sales and for some time thereafter.
 - 4.2. I was present at the venue both during the registration period as well as during the sales period. In fact I was intimately involved in organising the launch as a whole and also frequented the selection room.
 - 4.3. I can confirm generally that any client or prospective purchaser who had any question about whether and how the Fernkloof Estate would be fenced would, as a matter of course, typically have been referred and directed (by the estate agent to whom such person had addressed his or her questions) to "RK3" as displayed in the selection room.
 - 4.4. As is evident from "RK4.2", "RK4.1" itself – the framed plan that was displayed in the selection area – bore the following legend: "For boundary structures drawing refer to P.P. DWG No 7576 201." The latter is a reference to "RK 3", which was on display a few meters away.

- 4.5. To my knowledge, the basis on which even in the Estate were sold (and marketed) is and was at all times as described in the Kuchar affidavit.
- 4.6. I also confirm that my understanding of the legend on "RK 3", dealt with at length in Kuchar's affidavit, is and was at all material times in line with the meaning of such legend as described in such affidavit
5. With respect to paragraph 21 of the Kuchar affidavit in particular I confirm the correctness of what is said there. In addition I confirm the following:
- 5.1. The reference to Tracy Quincey Properties is to the estate agency, Quincey Properties, now managed by my son In Hermanus.
- 5.2. I confirm that the original framed versions of "RK 3" and "RK 4.1" hung at the above-mentioned premises until early June 2012 when they were removed by members of Respondent's legal team for the purposes of being photographed.
- 5.3. Prior to this, but after the sales draw, these plans were kept in an on-site sales office (a container) but were fortunately salvaged when the on-site office was destroyed.



TRACY QUINCEY

**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)**

CASE NO: 12755/2011

In the matter between:

MARIUS JAKOBUS KLEYNHANS
in his capacity as Trustee for the
time being of The Kleynhans Family Trust

FIRST APPLICANT

and

HEATHER KLEYNHANS
in her capacity as Trustee for the
time being of the Kleynhans Family Trust

SECOND APPLICANT

CORNERCADE (PTY) LTD

THIRD APPLICANT

SHIRLEY MILLICENT KOSTER

FOURTH APPLICANT

TIELMAN NIEUWOUTD AGENBAG

FIFTH APPLICANT

AND

OVERSTRAND MUNICIPALITY

RESPONDENT

APPLICANTS' HEADS OF ARGUMENT

INTRODUCTION

1. It will be evident from a reading of these heads of argument and those filed on behalf of the Respondents that, whilst the parties are *ad idem* that the matter cannot proceed in the absence of certain parties (the interested parties), they have very different views as to how this matter should be dealt with.
2. In essence the Applicants, who are *dominus litis*, seek a postponement of the matter so that the issues can be properly ventilated at a hearing that is attended by all interested parties, after proper discovery has taken place and the papers have been finally settled.
3. The Respondent on the other hand moves for an order dismissing the application at this stage already on what, it is respectfully submitted, are somewhat startling grounds.
4. In the alternative the Respondent, at this stage already, seeks what is essentially a gagging order that will result in the matter proceeding without all of the material facts being placed before the court that eventually decides the matter.

Applicants' contentions as to how the matter should proceed

5. **The Applicants ask for an order in terms of Rule 35(11) calling upon the Respondent to make discovery under oath of all documents in its power or under its control relating to the matters in issue in these proceedings.**
6. **The Applicants have indicated that after discovery has been made, they intend to supplement their replying affidavits and they will probably also amend the relief claimed to also include an alternative claim for damages.**
7. **This claim will be couched in the alternative to the Applicants' claim for specific performance that the Respondent be ordered to ensure that the Femkloof Estate (the Estate) is fully protected by electrified fencing.**
8. **In this regard the Applicants have repeatedly stated that they are intent on proceeding with this claim as their preferred option given the importance that they place on the safety of their families.**
9. **It is clear from a reading of the replying affidavit that the alternative claim will be based on a fraudulent misrepresentation and/or a deliberate non-disclosure by the Respondent and/or its servants or agents that it was never the Respondents intention to erect a fence around the Estate.**

10. That this was the Respondent's true intention only became evident to the Applicants when the Respondent's answering affidavits were filed.
11. The Applicants are understandably loath to formulate this claim until proper discovery has been made of all relevant documents and all of the salient facts are known to them and to their legal advisors.
12. As far as the interested parties are concerned, the Applicants contend that it would be just and equitable for this Honourable Court to issue what is on of the standard type of orders that are made in matters such as this.
13. In this regard our Courts have frequently in the past exercised an inherent jurisdiction to afford third parties, that can demonstrate that they do indeed have a direct and substantial interest in proceedings, an opportunity to either join as parties to the proceedings or to indicate that they will abide the decision of the Court.
14. Applicants accordingly ask that the matter be postponed sine die so that:
 - 14.1 discovery as aforesaid can take place;
 - 14.2 replying affidavits can be supplemented;
 - 14.3 the relief claimed by them can be amended to include an alternate claim for damages; and

4.

14.4 such measures as this Honourable Court deems appropriate, in order to safeguard the position of interested parties, can be implemented.

Respondent's contentions as to how the matter should proceed

15. It appears from the Respondent's Heads of Argument, as well as two interlocutory applications that have recently been filed, that the Respondent seeks an order at this stage:

15.1 striking out substantial portions of the Founding and Replying Affidavits;

15.2 opposing the relief proposed by the Applicant's in order to safeguard the position of interested parties;

15.3 asking for an order dismissing the application on the grounds of non-joinder, because the Applicants (provisional) relying affidavits were filed out of time and on the basis that the claim (as presently formulated) has prescribed; and

15.4 by necessary implication therefor, also opposing the application for an order in terms of Rule 35(11) and for a postponement of the matter.

16. It is submitted that it would be a grave miscarriage of justice to grant the Respondent the relief that it seeks at this stage of the proceedings and that the preferable option would be to deal with the matter on the basis proposed by the Applicants.

17. As for costs it is submitted that the Respondent should pay the costs that have been incurred as a consequence of it opposing the relief sought by the Applicants as well as the wasted costs that have been incurred in dealing with its applications for striking out and dismissal of the Application.

DISCOVERY

18. It is trite that proper discovery is an essential feature of a litigant's right to a fair trial and that the Court can make a discovery order in application proceedings¹.

19. In this regard Rules 35(11), read with Rule 35(13), gives this Honourable Court the necessary jurisdiction to make the discovery order that the

¹Herbststein and Van Wassen, -The Civil Practice of the Supreme Court of South Africa, Fourth edition, at page 608

Applicants seek at this stage of the proceedings. These rules provide as follows:

Rule 35 (11) - "The court may, during the course of any proceeding, order the production by any party thereto under oath of such documents or tape recordings in his power or control relating to any matter in question in such proceeding as the court may think meet, and the court may deal with such documents or tape recordings, when produced, as it thinks meet."

Rule 35 (13) – "The provisions of this rule relating to discovery shall mutatis mutandis apply, in so far as the court may direct, to applications."

20. It will be argued with reference to papers, as well as to the Respondents response to a Notice that was issued in terms of Rule 35(14), that there are many important documents relating to this matter that have not yet been made available to the Applicants².

21. Until these documents have been made available, the Applicants are simply not in a position to:

² Significantly the "response" was not in the form of a discovery affidavit.

21.1 reply fully to the allegations that have been made by the Respondent in the answering affidavits; and

21.2 make informed decisions as to how to proceed further in this matter, *inter alia*, as regards the formulation of the alternative relief that they are entitled to claim.

22. The Applicants accordingly ask for an order in terms of Rule 35(11) that the Respondent be ordered to produce under oath such documents or tape recordings in its power or control and that relates to any matter in question in these proceedings, including but not limited to the documents that are referred to in Annexure "CO 1" to the draft order that has been filed of record.

POSTPONEMENT AND JOINDER

23. It is trite that in terms of its inherent jurisdiction, the Court has a discretion to *mero motu* require the joinder of parties in any proceedings that have been instituted.³

³ See SA Steel Equipment Co (Pty) Ltd and Others v Lurek (Pty) Ltd 1951 (4) SA 167 (T) at 172-3; Toekies Butchery (Edms) Bpk on Appeal v Steffen 1974 (4) SA 771 (T) at 774; Smith v Conelect 1987 (3) SA 689 (W) at 694

24. In **HARDING v BASSON AND ANOTHER** 1995 (4) SA 499 (C) at 501, **VAN REENÉN AJ** (as he then was) held as follows as regard the reason for the exercise of this discretion:

" A Supreme Court will exercise its discretion to order the joinder of a party, inter alia, to ensure that all persons interested in the subject-matter of the dispute and whose rights may be affected by the judgment of the Court are before it to avoid a multiplicity of actions and to avoid a waste of costs (see SA Steel Equipment Co (Pty) Ltd v Lureik (Pty) Ltd (supra at 172H-173A))"

25. The following extract from the judgement of **FAGAN AJA** in **AMALGAMATED ENGINEERING UNION v MINISTER OF LABOUR** 1949 (3) SA 637 (A) at 659-660, is also pertinent in this regard:

"Indeed it seems clear to me that the Court has consistently refrained from dealing with issues in which a third party may have a direct and substantial interest without either having that party joined in the suit or, if the circumstances of the case admit of such a course, taking other adequate steps to ensure that its judgment will not prejudicially affect that party's interests. There may also, of course, be cases in which the Court can be satisfied with the third party's waiver of his right to be joined, e.g.

*if the Court is prepared, under all the circumstances of the case, to accept an intimation from him that he disclaims any interest or that he submits to judgment.*⁴

26. In *AFRISUN MPUMALANGA (PTY) LTD v KUNENE NO AND OTHERS* 1999 (2) SA 599 (T) at 610, *SOUTHWOOD J*, stated the following with in regard to the circumstances in which the Court should exercise its discretion to join interested parties:

"In United Watch & Diamond Co (Pty) Ltd and Others v Disa Hotels Ltd and Another 1972 (4) SA 409 (C) at 415E-H *Corbett J*, as he then was, stated the relevant principles as follows:

*"It is settled law that the right of a defendant to demand the joinder of another party and the duty of the Court to order such joinder or to ensure that there is waiver of the right to be joined (and this right and this duty appear to be co-extensive) are limited to cases of joint owners, joint contractors and partners and where the other party has a direct and substantial interest in the issues involved and the order which the Court might make (see *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A); *Koch and Schmidt v Alma Modehuis (Edms) Bpk* 1959 (3) SA 308 (A)).*

In Henri Viljoen (Pty) Ltd v Awerbuch Brothers 1953 (2) SA 151 (O), *Horwitz AJP* (with whom *Van Blerk J* concurred) analysed the concept of such a "direct and substantial interest" and after an exhaustive review of the authorities came to the conclusion that it connoted (see at 169)

⁴ This judgement also illustrates the dangers of not dealing with issues of joinder at the appropriate time.

" . . . an interest in the right which is the subject-matter of the litigation and . . . not merely a financial interest which is only an indirect interest in such litigation".

This view of what constitutes a direct and substantial interest has been referred to and adopted in a number of subsequent decisions, including two in this Division (see Brauer v Cape Liquor Licensing Board 1953 (3) SA 752 (C) - a Full Bench decision which is binding upon me - and Abrahamse and Others v Cape Town City Council 1953 (3) SA 855 (C)), and it is generally accepted that what is required is a legal interest in the subject-matter of the action which could be prejudicially affected by the judgment of the Court (see Henri Viljoen's case supra at 167)."

Joinder is a matter for the Court to decide even if the parties to the relevant litigation do not raise the point or insist on the joinder of another party: Toekies Butchery (Edms) Bpk en Andere v Stassen 1974 (4) SA 771 (T) at 774G–H; Harding v Basson and Another 1995 (4) SA 499 (C) at 501D–E.

A court will order the joinder of another party to ensure that all the parties interested in the subject-matter of the dispute and whose rights may be affected by the judgment of the court are before it to avoid a multiplicity of actions and to avoid a waste of costs (Harding v Basson and Another (supra at 501I–J))".

27. In this matter the Respondent has identified three different groups that may have an interest in the outcome of these proceedings, namely:

- 27.1 The owners of erven in the Estate;⁵
- 27.2 The Hermanus Golf Club;⁶ and
- 27.3 The owners of adjoining properties whose properties may have to be "fenced off" in the event of the Court granting an order for specific performance.⁷

28. The Applicants agree that:

- 28.1 the owners (as well as the residents) of erven in the different precincts on the Estate;⁸ and
 - 28.2 the Hermanus Golf Club⁹
- must be joined as parties to the proceedings.

29. The Applicants do not however concede that the property owners on the Northern and Southern boundaries of the Estate necessarily have an interest in the right which is the subject-matter of the litigation in this matter.¹⁰

30. In this regard it is contended that such rights (ie not to be fenced off) can only arise as a result of:

- 30.1 a contractual servitude;

⁵ Answering Affidavit paragraph 5.16, Record page 277

⁶ Answering Affidavit paragraph 6, Record page 277

⁷ Answering Affidavit paragraphs 5.9; 5.10; and 6, Record page 277

⁸ Replying Affidavit, paragraphs 11 to 23

⁹ Replying Affidavit, paragraphs 24 to 31

¹⁰ Replying Affidavit, paragraphs 32 to 45

- 30.2 acquisitive prescription; or
 - 30.3 the Estate development zoning conditions,
- none of which have been established in this instance.¹¹

31. The Applicants have however made it clear in their replying affidavits that they have no objection to these property owners being afforded an opportunity to say whether or not they have such an interest so as to place this Honourable Court in a position to properly exercise its discretion in deciding whether or not to join them as parties to these proceedings.¹²

32. It is submitted that the potential disadvantages attendant upon not affording such parties an opportunity to state their interest¹³ exceeds the advantages of taking a final decision as to their interest on the papers that are currently before court.

33. Prudence accordingly dictates that these property owners be afforded an opportunity to state their position before the matter proceeds further.

34. A perusal of the cases in which the Court has been faced in similar situations reveals that two possible routes have been followed:

¹¹ See *Klippoortje Estates and Tramway Co., Ltd., v The Government* 1905 TS 342 at 348 where INNES states that the right to fence ones property is a common law right. See also the comments in the last paragraph of *Re v Keelay* 1947 (2) SA 1167 (GW)

¹² Replying Affidavit, paragraph 46.

¹³ As to which see the references to the *Collins and Toffie* cases in *Amalgamated Engineering Union V Minister of Labour* 1949 (3) SA 637 (A) at 659 where the Court of Appeal sent matters back to the trial court to be dealt with afresh because third parties "might be affected".

34.1 In certain instances the Court has simply left it up to the Applicant's attorney to establish what the attitude of interested parties is and to report back to the Court in that regard, after which the Court decides how the matter should be dealt with further;¹⁴

34.2 In other instances, the Court has made use of a Rule Nisi calling upon interested parties to show cause, if any why they should or should not be joined as parties to the proceedings.¹⁵

35. In this matter the Draft Order follows the procedure used by the Supreme Court of Appeal and proposes that the application should be postponed sine die in order to allow the applicants to demonstrate what the stand of the parties in question are in relation to these proceedings.

36. Due regard being had to the uncertainties surrounding the position of the third category of persons referred to above it may however be more appropriate for the Court to make use of a Rule Nisi in order to:

36.1 first afford these persons an opportunity to state the basis upon which they believe that they have a direct and substantial interest in the rights that are the subject matter of this application;

36.2 before directing that they should be joined as interested parties in these proceedings.

¹⁴ See for example *Pretorius v Slabbert* 2000 (4) SA 935 (SCA)

¹⁵ See for example *Harding v Basson and Another* 1995 (4) SA 499 (C)

APPLICATIONS TO STRIKE OUT

37. **The Respondent has recently launched two applications to strike out many of the allegations made in the founding and replying papers.**

38. **It is submitted that these applications should be dismissed on two grounds**

39. **Firstly, it is submitted that:**

39.1 **the appropriate time to consider applications to strike out will be after all of the issues in this matter have crystalized and necessary parties have been joined;**

39.2 **the applications to strike out are accordingly premature; and**

39.3 **should for that reason be dismissed.**

40. **Secondly, and only in the event of the Honourable Court finding that the striking out applications are not premature, the Applicants contend that they are in any event without merit and ought for that reason also to be dismissed with costs.**

41. In support of its contention that the allegations in question should be struck out the Respondent relies on the following:

41.1 The parole evidence rule as re-stated in *Van Aardt v Galway* 2012 (2) 312 (SCA) 318 para 9, that evidence concerning the subjective intention of the parties, their prior negotiations and discussions and what they understood certain references in their contract to mean, is inadmissible.¹⁶

41.2 The contention that some of the allegations are "*irrelevant to the resolution of the dispute between the parties and, again, liable to be struck out for that reason*"¹⁷

41.3 That "*contextual evidence*" must be used "*as conservatively as possible*" and that this cannot be done in this instance since "*Applicants' claims in connection with prior representations allegedly made to them in relation to the fencing of the Estate go absolutely to the root of their claims*"¹⁸

42. Each of these grounds are dealt with under separate sub-headings below.

¹⁶ Respondents Heads of Argument para 7

¹⁷ Respondents Heads of Argument para 8

¹⁸ Respondents Heads of Argument para 9

THE PAROLE EVIDENCE RULE

43. In *Johnston v Leal* 1980(3) SA 927 A, Corbett JA said the following in relation to this rule:

"It is clear to me that the aim and effect of this rule is to prevent a party to a contract which has been integrated into a single and complete written memorial from seeking to contradict, add to or modify the writing by reference to extrinsic evidence and in that way to redefine the terms of the contract...."

To sum up, therefor, the integration rule prevents a party from altering, by the production of extrinsic evidence, the recorded terms of an integrated contract in order to rely on the contract as altered."

44. It will be evident from a perusal of the paragraphs that the Respondent's seek to have struck out that not a single one of them seeks to *contradict, add to or modify the writing* and neither are the Applicants seeking to *redefine the terms of the contract*.
45. Instead, the paragraphs in question are designed to facilitate the proper interpretation of the terms of the contract in so far as they relate to the fencing of the Estate. Evidence that is adduced for this purpose is clearly admissible.

46. The technique consistently adopted was summarised as follows by Joubert JA in *Coopers and Lybrand v Bryant* 1995(3) SA 761 A at 762E to 768E

" According to the 'golden rule' of interpretation the language in the document is to be given its grammatical and ordinary meaning, unless this would result in some absurdity or repugnancy or inconsistency with the rest of the instrument...The mode of construction should never be to interpret the particular word or phrase in isolation (in vacuo) by itself...The correct approach to the application of the 'golden rule' of interpretation after having ascertained the literal meaning of the word or phrase in question is, broadly speaking to have regard;

(1) to the context in which the word or phrase is used with its interrelation to the contract as a whole, including the nature and purpose of the contract...;

(2) To the background circumstances which explain the genesis and purpose of the contract, ie to matters probably present to the minds of the parties when they contracted...;

(3) To apply extrinsic evidence regarding the surrounding circumstances when the language of the document is on the face of it ambiguous, by considering previous negotiations and correspondence between the parties, subsequent conduct of the parties showing the sense in which they acted on the document, save direct evidence of their own intentions."

[EMPHASIS ADDED]

Evidence concerning the subjective intention of the parties

47. The only evidence of the subjective intention of a party that is contained in the affidavits that have been filed of record in this matter is (ironically) contained in paragraphs 15; 36; 41; 61; 82; and 84 of the Answering Affidavit.
48. This evidence has been introduced by the Respondent and relates to the its alleged intention at the time of the conclusion of the Deeds of Sale.
49. So for example it is stated in paragraph 41 of the Answering Affidavit that *"there was no intention on the part of the Respondent (as seller and developer) to fence out the Hermanus Heights and Main Road properties."*
50. This evidence is directly in conflict with the express terms of the Deeds of Sale including the legend to the plan that Respondent contends formed part of the Deed of Sale. This statement is accordingly parole evidence that ought to be struck out.

51. The Applicants do not however object to the introduction of this evidence for the following reasons:

51.1 It is trite that the parole evidence rule can never serve to exclude evidence of misrepresentation or fraud¹⁹;

51.2 When seen in the context of the representations that were admittedly made by the Respondents prior to the sales being concluded, the aforementioned evidence of the Respondent's subjective intention, strongly suggests that it was in fact guilty of a deliberate misrepresentation and/or a fraudulent non-disclosure when the sales were concluded; and

51.3 Subject to what a discovery order in terms of rule 35(11) may reveal, these allegations will in all probability underpin the alternative relief that the Applicants propose seeking in this matter.

Nature and purpose of the contract

52. The following paragraphs which the Respondent seeks to have struck out deal with the nature and purpose of the contract:

¹⁹ See Christie, *The Law of Contract in South Africa*, 3rd edition, page 214

- 52.1 Founding Affidavit paragraphs 20; 21; 22; 23; 46; 47; 48; and 49
- 52.2 Replying Affidavit paragraphs 11; 12; 15; 16 to 22

Matters probably present to the minds of the parties when they contracted

53. The following paragraphs which the Respondent seeks to have struck out deal with matters probably present to the minds of the parties when they contracted:

- 53.1 Founding Affidavit paragraphs 20; 21; 22; 23; 42; 43; 44; 45; 46; 47; 48; 49; and 63
- 53.2 Replying Affidavit paragraphs 33 to 38; 56; 61; 91 to 95; 102.2 last sentence; 121.1 to 121.22

Evidence of surrounding circumstances

54. Given the interpretation that the Respondents seek to place on the wording of the contract they cannot possibly contend that evidence of surrounding circumstances may not be adduced.

Evidence of previous negotiations and correspondence

55. The following paragraphs which the Respondent seeks to have struck out contain evidence of previous negotiations and correspondence:

55.1 Founding Affidavit paragraphs 42; 43; 44; 45; 46; 47; and 48;

Evidence of subsequent conduct

56. The following paragraphs which the Respondent seeks to have struck out contain evidence of subsequent conduct:

56.1 Founding Affidavit paragraphs 28; 29; 56; and 58;

56.2 Replying Affidavit paragraphs 25 to 29; 41; 42; 52; 58 to 66; 84 to 87; 96 to 98; 102.3; 103; 114; 121.23 to 121.25

Misrepresentation and fraud

57. As previously mentioned, the parole evidence rule cannot be invoked to exclude evidence of misrepresentation or fraud.

58. The following paragraphs which the Respondent seeks to have struck out contains material evidence which (when seen in the light of the Respondent's self-proclaimed intention at the time that it concluded the Deeds of Sale) contains evidence which is pertinent in this regard:

58.1 Founding Affidavit paragraphs 20; 21; 22; 23; 28;29; 42; 43 – 49; 56; 58; 63;

58.2 Supporting Affidavit Heather Kleynhans paragraphs 4;6 and 7;

- 58.3 Supporting Affidavit Minette Kleynhans Kleynhans paragraphs 4,6 and 7;
- 58.4 Supporting Affidavit Shirley Millicent Koster paragraphs 5; 7 and 8;
- 58.5 Supporting Affidavit Tileman Nieuwoud Agenbach paragraphs 4 ,6 and; 7;
- 58.6 Replying Affidavit paragraphs 11; 12; 15 to 23; 36; 39; 41; 52; 58 to 65 ;72 to 80; 91; 95; 102.2 last sentence; 102.3; 103; and 121.

ALLEGATIONS ALLEGEDLY IRRELEVANT TO THE RESOLUTION OF THE DISPUTE BETWEEN THE PARTIES

59. A consideration of the allegations in the founding and replying affidavits reveal that they all fall into one or more of the aforementioned categories of admissible evidence. There is accordingly no basis upon which they can be struck out.

60. It is in any event made clear in the replying affidavit that the Applicants intend to amplify their replying affidavit and that they will in all probability include an alternative claim for damages. It is accordingly not appropriate to strike out allegations the significance of which are already evident and will become especially pertinent at a later stage.²⁰

²⁰ Compare the remarks of Thring J in *Rail Commuters' Action Group and others v Transnet Ltd and others* 2006 (6) SA 68 (C) which although made with reference to pleadings is equally relevant here given that the matter may well be referred for the hearing of oral evidence depending upon the further conduct of the matter and in which event the affidavits will probably stand as the pleadings in the matter.

61. It is evident from the second application to strike out allegations in the replying affidavit that the Respondent is desperately seeking to remove allegations from the papers that do not advance its case. So for example the Respondent seeks to strike out allegations pertaining to:

61.1 Allegations that are relevant to the question of prescription;²¹

61.2 The reasons why the owners and occupiers of homes in the Estate as well as the Hermanus Golf Club should be joined as interested parties;²²

61.3 The reasons why the Northern and Southern property owners may in fact not have a direct and substantial interest in the proceedings;²³

61.4 Allegations relating to the conditions that were imposed when the development of the Estate was approved;²⁴

61.5 Allegations that reveal that these conditions were never amended by a decision properly taken by the Respondent or any other appropriate authority;²⁵

²¹ 2nd Application to strike out paragraphs 52 and 56

²² 2nd Application to strike out paragraphs 6; 11; 15; 16-23; 25-30

²³ 2nd Application to strike out paragraphs 33- 42

²⁴ 2nd Application to strike out paragraphs 15; 16-23; 27 ; 34; 38; 102.3; 103 and 121

²⁵ 2nd Application to strike out paragraphs 19; 39; 72; 121.19; 121..20; 121.21

61.6 Allegations relating to the non-disclosure of the Respondent's true intention at the time of the conclusion of the Deeds of Sale and the inferences that must be drawn therefrom, due regard being had to the misrepresentations that were made prior to the conclusion of the Deeds of Sale (and which the Respondent also seeks to have struck out).²⁶

61.7 Allegations of the effect that these misrepresentations had on purchasers of erven in the Estate;²⁷

61.8 Allegations relating to the Respondent's subsequent conduct and how these belie its version of the agreement between the parties.²⁸

61.9 Allegations made with reference to the Respondent's response to the Rule 35(14) notice and the inferences that should be drawn therefrom;²⁹ and

61.10 Allegations relating to further documents that the Applicants believe are relevant and that ought to be discovered under oath before they complete their reply to the Respondent's answering affidavits.³⁰

²⁶ 2nd Application to strike out paragraphs 75 to 80.

²⁷ 2nd Application to strike out paragraphs 11; 12; 76, 77

²⁸ 2nd Application to strike out paragraphs 28; 52; 58 - 63

²⁹ 2nd Application to strike out paragraphs 15; 25.2 -25.4; 29; 37; 39; 61; 72; 29; 86 and 114

³⁰ 2nd Application to strike out paragraphs 119 to 124

62. A consideration of the categories into which each of the aforementioned allegation fall makes it manifestly clear that all of the allegations are most certainly relevant to the disputes that have arisen between the parties.

CONTEXTUAL EVIDENCE MUST BE USED CONSERVATIVELY

63. The Respondents contend that "*contextual evidence*" must be used "as conservatively as possible".

64. That much is trite and has already been dealt with above. The Respondent has however not applied the rule correctly.

65. This ground for striking out has been dealt with under the heading of Parole Evidence Rule and the submissions made are not repeated.

CONCLUSION RE STRIKING OUT

66. It is respectfully submitted that there is accordingly no basis for granting the striking out applications and they should accordingly be dismissed with costs.

DISMISSAL FOR LATE FILING OF REPLYING AFFIDAVIT

67. The arguments advanced under this head have been dealt with fully in the affidavit that has been filed of record in this matter.

PRESCRIPTION

68. There are three grounds upon which the Applicants rely for asserting that their claims for specific performance have not prescribed. These are dealt with under separate sub-headings.

The Respondents have not discharged the onus of proving that the claim for specific performance has prescribed

69. In **DELOITTE HASKINS & SELLS CONSULTANTS (PTY) LTD v BOWTHORPE HELLERMAN DEUTSCH (PTY) LTD 1991 (1) SA 525 (A)** at 532-3, VAN HEERDEN JA said the following

*"Section 12(1) of the Prescription Act 68 of 1969 provides that 'prescription shall commence to run as soon as the debt is due'. This means that there has to be a debt immediately claimable by the creditor or, stated in another way, that there has to be a debt in respect of which the debtor is under an obligation to perform immediately. See *The Master v I L Back & Co Ltd and Others 1983 (1) SA 986 (A)* at 1004, read with *Benson and Others v Walters and Others 1984 (1) SA**

73 (A) at 82. It follows that prescription cannot begin to run against a creditor before his cause of action is fully accrued, ie before he is able to pursue his claim (cf *Van Vuuren v Boshoff* 1964 (1) SA 395 (T) at 401)."

70. In **MINISTER OF TRADE AND INDUSTRY v FAROCEAN MARINE (PTY) LTD** 2006 (6) SA 115 (C) at 122, WAGLAY J said:

" [32] Generally speaking, a debt arising from a contract becomes 'due' according to the terms of the contract, or, in the absence of an express stipulation, within a reasonable time. A debt may thus, in terms of its contract, become due, and hence claimable, only after the occurrence of some event and the determinant should always be the intention of the parties."

71. Where prescription is raised as a defence, it is the Respondent who bears the onus of establishing, as a matter of probability, that prescription commenced to run and had expired before the application was instituted. The Respondent must accordingly allege and prove the facts from which it can be concluded that the claim has prescribed.³¹

³¹ See *Gericke v Sack* 1978 (1) SA 821 (A) at 827-8

72. This includes alleging and proving the date of the inception of the period of prescription.³²
73. The Respondent, who bears the onus to prove that the Applicants' claims have prescribed, has misconstrued the test that must be applied in deciding when prescription commenced to run in respect of the debt that is the subject matter of this application.
74. The prescription of a debt such as that which is the subject matter of this application only commences to run after a reasonable time has elapsed from the date upon which the agreement from which it emanates was concluded.
75. In the instant case it is common cause that the relevant Deeds of Sale were concluded in November 2005. In its answering affidavit the Applicant does not however address the question as to what is or is not a reasonable time for the performance of its obligation to fence the entire property including that portion which is the subject matter of this application (the unfenced portion).
76. In the result the Respondent has not discharged the onus that it bears to prove that the Applicants' claim for specific performance have prescribed.

³² *Naidoo No and Others v Naidoo and Another* 2010 (5) SA 514 (KZP) at 5151-517G, SWATN J

77. In determining what is a reasonable time for performance of the debt in question (ie fencing the unfenced portion) all relevant factors must be taken into account and in this regard it will be evident from the Respondent's papers ³³ that:

77.1 an extremely complex and time consuming procedure was envisaged in relation to the fencing of the unfenced portion;

77.2 fencing of this portion was conditional and had to be preceded by a process of consultation with a large number of property owners located on this boundary (some of whom are not permanent residents of Hermanus) and the exploration of other suitable options to see whether the integrity of security could be achieved by other means;
³⁴and

77.3 clearly the obligation to fence the unfenced portion was envisaged only as a last resort and would only arise when it became evident that the integrity of security could not be maintained by other means to the satisfaction of the house owners in the Estate and the Club;

77.4 a reasonable time would have to elapse in order to see if it was possible to put measures in place so as to ensure that the integrity of

³³ Replying Affidavit Paragraphs 36-38

³⁴ Answering Affidavit Paragraphs 79 and 84

- 77.5 the security was not compromised without fencing the unfenced portion of the Estate.
78. It is common cause on the papers that the Respondent was still doing work on portions of the security fence in late 2010³⁵.
79. During the period November 2009 and September 2010, the Respondent in fact spent R300 00,00 (Three Hundred Thousand Rand) on inter alia 260 meters of palisade fencing on the southern boundary and a further R150 000,00 (One Hundred Fifty thousand Rand) was earmarked to be spent on identified problem areas in the fence around the boundary of the Estate. The Respondent further acknowledged its responsibilities as late as September 2010 by spending an amount of approximately R450 000,00 (Four Hundred Fifty Thousand Rand) to fulfil its obligations in fencing the perimeter and in the performance of its obligation to secure the Estate.³⁶
80. In view of the foregoing, it must be concluded that the Respondent reasonably required until at least September 2010, in order to perform its obligations to fence the unfenced portion of the Estate and prescription cannot have commenced to run before that date.
81. The Respondent has accordingly not discharged the onus of proving that the Applicants claims have prescribed.

³⁵ Founding Affidavit Paragraph 24; Answer paragraph 46 and 48-50; Replying Affidavit Paragraph 52

³⁶ Replying affidavit Paragraph 52

Interruption of the running of prescription

82. Section 14 of the PRESCRIPTION ACT 68 OF 1969 deals with the interruption of prescription. It provides that:

"14 (1) The running of prescription shall be interrupted by an express or tacit acknowledgement of liability by the debtor.

14 (2) If the running of prescription is interrupted as contemplated in subsection (1), prescription shall commence to run afresh from the day on which the interruption takes place or, if at the time of the interruption or at any time thereafter the parties postpone the due date of the debt from the date upon which the debt again becomes due."

83. The Respondent does not dispute that it continued to take steps to secure the perimeter of the Estate, including trying to prevail upon others to do so on the basis of an admitted obligation.

84. In the premises it is submitted that the Respondent has both tacitly and expressly acknowledged that it has a contractual duty to perform the obligation which is the subject matter of the application.

85. In the premises the running of prescription has been interrupted and prescription commences to run afresh from September 2010, alternatively from 19th May 2009.³⁷

Conditions of authorization

86. The documents that are annexed to the Answering Affidavit in relation to the conditions of authorization pursuant wherefo the Estate was re-zoned and the development approved stipulate that there will be a surrounding fence around the whole of the "activity" being the entire Estate.³⁸

87. The entitlement to claim that the fence should be erected according also arises by virtue of these provisions and could for that reason also not have prescribed.

COSTS

88. As for costs it is submitted that the Respondent should pay all of the costs that have been incurred as a consequence of it opposing the relief sought by the Applicants as well as the wasted costs that have been incurred in dealing with its applications for striking out and dismissal of the Application.

AJ NELSON SC

5TH June 2012

³⁷ Replying affidavit paragraph 54

³⁸ Replying Affidavit paragraphs 16 to 22 and 56

BOX 135

ON THE ROLL: 7/6/12

IN THE HIGH COURT OF SOUTH AFRICA

WESTERN CAPE HIGH COURT, CAPE TOWN

CASE NUMBER : 12755/2011

In the application of :

- MARIUS KLEYNHANS** 1st APPLICANT
In his capacity as Trustee for the time being of
The Kleynhans Family Trust
- HEATHER KLEYNHANS** 2nd APPLICANT
In her capacity as Trustee for the time being of
The Kleynhans Family Trust
- CORNERCADE (PTY) LTD** 3rd APPLICANT
- SHIRLEY MILLICENT KOSTER** 4th APPLICANT
- TIELMAN NIEUWOUDT AGENBAG** 5th APPLICANT

and

OVERSTRAND MUNICIPALITY RESPONDENT

FILING NOTICE

DOCUMENTS FILED :

Respondent's Heads of Argument.

Dated at Cape Town this 6th day of JUNE 2012

CHIN INC
12 Hope Street
HERMANUS

VANDERSPUY
PC Noëthling
021 419 3622
paula@vdsilaw.co.za

c/o Van der Spuy Cape Town
Attorneys for Respondent

per:

(Ref. PC Neethling/MM/ar/CHI1/0028)
4th Floor
14 Long Street
Cape Town
P O Box 1701
Cape Town
DX : 53 Cape Town
(Tel. 419-3622)
(FX: 418-1329)

To: THE REGISTRAR
High Court
CAPE TOWN

and to: MICHAEL RANGE & ASS
Attorney for Applicants
Hermanus
c/o Strauss Daly Inc
15th Floor
The Terraces
34 Bree Street
CAPE TOWN
Ref: L Malherbe

14 H 55
RECEIVED
2012-06-21
Liz

RECEIVED
2012-06-21

**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)**

Case no: 12755/11

In the matter between:

MARIUS KLEYNHANS in his capacity as Trustee for the time being of The Kleynhans Family Trust	First Applicant
HEATHER KLEYNHANS in her capacity as Trustee for the time being of The Kleynhans Family Trust	Second Applicant
CORNERCADE (PTY) LTD	Third Applicant
SHIRLEY MILLICENT KOSTER	Fourth Applicant
TIELMAN NIEUWOUDT AGENBAG	Fifth Applicant
AND	
OVERSTRAND MUNICIPALITY	Respondent

RESPONDENT'S HEADS OF ARGUMENT
(APPLICATION IN TERMS OF RULE 8(5)(g))

(Postponed for hearing in the Fourth Division on Thursday 7 June 2012)

INTRODUCTION

1. Applicants have applied for an order directing the Respondent to ensure that the Fernkloof Estate in Hermanus ("the Estate") is fully protected by electrified fencing

designed to prevent unauthorised access to the Estate.¹ In effect this Court is being asked to order the Respondent to erect an electrified fence, of unspecified make-up and design, along certain portions of the northern and southern boundaries of the Hermanus Golf Course which have not hitherto been fenced.

2. Respondent has already filed heads of argument dealing with:

2.1. The application it proposes bringing, and of which it has already given notice, to have various passages in the main founding affidavit and in the various supporting affidavits struck out – based on (mainly) irrelevance and inadmissibility, as well as various other grounds;

2.2. The merits generally, including *in limine* points relating to non-joinder and prescription.

3. The present set of heads of argument is filed in addition to the above, in support of the application which Respondent will bring, on the basis set out below, to have First Applicant, Mr Marius Jakobus Kleynhans, subjected to cross-examination in order to test the correctness of various allegations made by him in the replying affidavit as well as the further affidavit (dated 28 May 2012) deposed to by him in this matter.

4. In the heads of argument previously filed in connection with Respondent's application to strike out, it was submitted that such application ought to be adjudicated – and irrelevant material therefore excised from Applicants' papers – before the preliminary question of non-joinder is argued (and *a fortiori* before the merits generally are argued).

5. The same applies to the present rule 6(5)(g) application, for two reasons.

5.1. Firstly, the offending passages in Applicants' papers, on the basis of which the application referred to will be brought (see below), ought for similar

¹ Answering affidavit para 4.

reasons likewise (via the procedure of cross-examination) to be nullified, that is, effectively removed from Applicants' papers, before the question of non-joinder is argued. Otherwise Respondent will be placed in the intolerable position of potentially (depending on the finding made by this Honourable Court in connection with the non-joinder issue) having passages which are both defamatory of Respondent and untrue broadcast among a multitude of co-respondents. (See generally paragraphs 13 and 88 of Respondent's further affidavit of 3 June 2012 filed in answer to the affidavit filed by Applicants on 28 May in respect of interlocutory matters and an application for postponement – hereafter "*Respondent's 3 June affidavit*".)

- 5.2. Secondly, and at any rate, it is trite that an application of the present kind ought ordinarily to be made at the outset of the proceedings, before argument on the merits. See *Kalil v Decotex (Pty) Ltd and Another* 1988 (1) SA 943 (A) 981; *Lombaard v Droprop CC and others* 2010 (5) SA 1 (SCA) 16B and *Pahad Shipping v CSARS* [2010] 2 All SA 246 (SCA) para 20.

THE APPLICATION TO HAVE FIRST APPLICANT SUBJECTED TO CROSS-EXAMINATION

6. Rule 6(5)(g) provides as follows (emphasis supplied):

"Where an application cannot properly be decided on affidavit the court may dismiss the application or make such order as to it seems meet with a view to ensuring a just and expeditious decision. In particular, but without affecting the generality of the foregoing, it may direct that oral evidence be heard on specified issues with a view to resolving any dispute of fact and to that end may order any deponent to appear personally or grant leave for him or any other person to be subpoenaed to appear and be examined and cross-examined as a witness or it may refer the matter to trial with appropriate directions as to pleadings or definition of issues, or otherwise."

7. In *Moosa Bros & Sons (Pty) Ltd v Rajah* 1975 (4) SA 87 (D) at 93E-H Kumleben J said the following:

"(a) As a matter of interpretation, there is nothing in the language of Rule 6(5)(g)

which restricts the discretionary power of the Court to order the cross-examination of a deponent to cases in which a dispute of fact is shown to exist.

(b) The illustrations of "genuine" disputes of fact given in the *Room Hire* case at 1163 do not - and did not purport to - set out the circumstances in which cross-examination under the relevant Transvaal Rule of Court could be authorised. They a fortiori do not determine the circumstances in which such relief should be granted in terms of the present Rule 6(5)(g).

(c) Without attempting to lay down any precise rule, which may have the effect of limiting the wide discretion implicit in this Rule, in my view oral evidence in one or other form envisaged by the Rule should be allowed if there are reasonable grounds for doubting the correctness of the allegations concerned.

(d) In reaching a decision in this regard, facts peculiarly within the knowledge of an applicant, which for that reason cannot be directly contradicted or refuted by the opposite party, are to be carefully scrutinised."

8. This passage has been approved and confirmed in subsequent cases such as *Khumalo v Director-General of Co-operation and Development and Others* 1991 (1) SA 158 (A) 167G-168A, *Minister of Environmental Affairs and Tourism v Scenematic Fourteen (Pty) Ltd* 2005 (6) SA 182 (SCA) 202 (para 29) and *Pahad Shipping v CSARS* [2010] 2 All SA 246 (SCA) para 19). See also Cilliers, Nel & Loots *Herbstein & Van Winson The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa* 5th ed Juta 2009 (vol I) 463, 465.
9. From these authorities it is clear that an order subjecting the relevant deponent to cross-examination is possible and appropriate where there are grounds for doubting the correctness of the averments in question (*Khumalo* at 168A-C), or, in effect, for disbelieving the deponent in question (*Scenematic* at 202-203, para 30).

THE ALLEGATIONS ON THE STRENGTH OF WHICH THE RULE 6(5)(g) APPLICATION IS BROUGHT

The replying affidavit

10. In the replying affidavit First Applicant makes various allegations that, in the circumstances, entitle Respondent to test their veracity by means of cross-

examination. (The paragraph references below are to the paragraph numbers of the replying affidavit.)

- 10.1. Firstly, he alleges (in paragraphs 92 and 117) that "ARK 7" (the Boundary Structures Key Plan) was never disclosed to him, either in his capacity as purchaser of an erf in the Estate, or in his capacity as selling agent.

That there are clear grounds to disbelieve his statements in this regard is apparent from the fact that the framed version of "ARK 7" was prominently on display, in First Applicant's presence, for an extended period of time. This is in turn apparent from what is said in paragraphs 19.1, 19.2.2 and 20 of Respondent's 3 June affidavit and the objective evidence (print-outs of still images from video material of the events) underlying Respondent's allegations in this connection. (See also paragraph 11 of Respondent's 3 June affidavit.)

- 10.2. Secondly, First Applicant alleges that purchasers of erven in the Estate generally were misled (see eg para 40, 75 to 77, 80) on the basis that "ARK 7" was allegedly deliberately withheld from and not disclosed to them (para 40, 118). (See also paragraph 11 of Respondent's 3 June affidavit.)

That there are likewise grounds for disbelieving First Applicant's statements in this regard is clear generally from what is said in paragraphs 19 to 21 of Respondent's 3 June affidavit and from the underlying objective evidence as mentioned above.

- 10.3. Thirdly, First Respondent has denied involvement with a website (paras 100 and 101) in circumstances where and in a manner from which it is clear that he has not been frank with the Court, that his denials are disingenuous, and that he has in a discreditable manner attempted to avoid having to answer the substance of Respondent's allegations (paragraphs 110 to 117 of Respondent's 3 June affidavit). It is submitted that it is apparent from this that First Applicant's denials on this score are not to be believed and deserve

to be tested by way of cross-examination.

The additional affidavit filed on 28 May 2012

11. In this additional affidavit First Applicant has:
- 11.1. Repeated the contention that Respondent has deliberately misled, or defrauded, potential purchasers (see paragraphs 13 and 34; answered in paragraphs 10-14 and 83, respectively, of Respondent's 3 June affidavit);
 - 11.2. Levelled generalised accusations of untruthfulness at Respondent (paragraph 19; answered in paragraphs 64 and 65 of Respondent's 3 June affidavit).
12. For the reasons given in Respondent's 3 June affidavit and traversed above, in connection with the statements made by First Applicant in his replying affidavit, there are likewise reasonable grounds for disbelieving the above-mentioned allegations in the additional affidavit filed by Applicants and therefore for testing them under cross-examination.

CONCLUSION

13. In the premises it is submitted that a case has been made out for subjecting First Applicant to cross-examination and this Honourable Court is requested to grant an order to that effect.

A DE V LA GRANGE SC

C R CILLIERS

Respondent's Counsel
Chambers
Cape Town
6 June 2012

RESPONDENT'S LIST OF AUTHORITIES

Decided cases

- Kalil v Decotex (Pty) Ltd and Another 1988 (1) SA 943 (A)
- Khumalo v Director-General of Co-operation and Development and Others 1991 (1) SA 158 (A)
- Lombaard v Droprop CC and others 2010 (5) SA 1 (SCA)
- Minister of Environmental Affairs and Tourism v Scenematic Fourteen (Pty) Ltd 2005 (6) SA 182 (SCA)
- Moosa Bros & Sons (Pty) Ltd v Rajah 1975 (4) SA 87 (D)
- Pahad Shipping v CSARS [2010] 2 All SA 246 (SCA)

Commentaries

- Cilliers, Nel & Loots Herbstein & Van Winsen The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa 5th ed Juta 2009

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case no: 12755/11

In the matter between:

MARIUS KLEYHANS

First Applicant

in his capacity as Trustee for the time
being of The Kleynhans Family Trust

HEATHER KLEYNHANS

Second Applicant

in her capacity as Trustee for the time
being of The Kleynhans Family Trust

CORNERCADE (PTY) LTD

Third Applicant

SHIRLEY MILLICENT KOSTER

Fourth Applicant

TIELMAN NIEUWOUDT AGENBAG

Fifth Applicant

AND

OVERSTRAND MUNICIPALITY

Respondent

NOTICE OF MOTION

TAKE NOTICE that Respondent intends at the outset of the hearing of this matter (postponed for hearing in the Fourth Division on Thursday 7 June 2012) to apply to this Honourable Court for orders that:

1. First Applicant (**MARIUS JAKOBUS KLEYHANS**), in his capacity as deponent to the replying affidavit filed in this matter and the further affidavit filed by Applicants on 28 May 2012, be ordered to appear and subject himself to cross-examination (as contemplated in Rule 6(5)(g)) at the instance of Respondent in connection with certain allegations made by him in the aforementioned affidavits, on the basis that

there are reasonable grounds for doubting the truth or correctness of the allegations in question.

- 2. Such of the Applicants as may decide to oppose this application be directed to pay the costs thereof.
- 3. Respondent be granted further and/or alternative relief.

Kindly place the matter on the roll accordingly.

DATED AT CAPE TOWN THIS 6th DAY OF JUNE 2012.

CHIN INC

Attorneys for Respondent

Per: _____

HERMANUS

c/o VAN DER SPUIJ CAPE TOWN

4th Floor

14 Long Street

CAPE TOWN

TO:
THE REGISTRAR
Western Cape High Court
CAPE TOWN

AND TO:
MICHAEL RANGE & ASSOC
Attorney for Applicants
HERMANUS
c/o **STRAUSS DALY INC**
15th Floor
The Terraces

14/55
 RECEIVED
 2012-06-06
 [Signature]

34 Bree Street
CAPE TOWN
Ref.: L. Malherbe

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NO: 12755/2011

In the matter between:

MARIUS JAKOBUS KLEYNHANS
in his capacity as Trustee for the
time being of The Kleynhans Family Trust

FIRST APPLICANT

and

HEATHER KLEYNHANS
in her capacity as Trustee for the
time being of the Kleynhans Family Trust

SECOND APPLICANT

CORNERCADE (PTY) LTD

THIRD APPLICANT

SHIRLEY MILLICENT KOSTER

FOURTH APPLICANT

TIELMAN NIEUWOUDT AGENBAG

FIFTH APPLICANT

AND

OVERSTRAND MUNICIPALITY

RESPONDENT

ORDER

Having heard the parties it is ordered that:



1. A copy of the Notice annexed hereto marked "A" is to be served upon the parties indicated in the Notice in the manner recorded therein and moreover to be made available for inspection by any interested person or body, in the manner recorded therein, and the possible joinder of additional parties is to be effected in terms of the procedure set out in the Notice generally.
2. The parties' legal representatives are hereby granted leave to approach the Judge in chambers for further directions as soon as possible after the period stipulated in paragraph 4 of the Notice.
3. The main and interlocutory applications are postponed to a date to be determined in consultation with this Honourable Court's Registrar.
4. The Applicants' Attorneys of record, at its clients' costs, shall provide the Respondent's Attorneys of record as soon as possible with a hard copy of the papers filed of record to date, for purposes of control.
5. Costs in this matter will stand over for later determination, save that all costs in respect of making the papers filed of record available as referred to in paragraph 2 of the Notice annexed hereto marked "A", shall be borne by the Applicants and shall be payable on demand.

BY ORDER



DATE:

Michael Range & Associates
Tel – 028 3130106
litigation@rangelaw.co.za



625
13/8/2011
ANNEXURE "A"

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NO: 12755/2011

In the matter between:

MARIUS JAKOBUS KLEYNHANS

FIRST APPLICANT

in his capacity as Trustee for the
time being of The Kleynhans Family Trust

and

HEATHER KLEYNHANS

in her capacity as Trustee for the
time being of the Kleynhans Family Trust

SECOND APPLICANT

CORNERCADE (PTY) LTD

THIRD APPLICANT

SHIRLEY MILLICENT KOSTER

FOURTH APPLICANT

TIELMAN NIEUWOUDT AGENBAG

FIFTH APPLICANT

AND



OVERSTRAND MUNICIPALITY

RESPONDENT

621
13/08/2012

NOTICE OF COURT ORDER

BE PLEASED TO TAKE NOTICE that in this matter the Applicants have applied for an order that the Respondent must ensure that the Fernkloof Estate is fully protected by electrified fencing that is designed to prevent unauthorised access to the estate, within a period to be determined by the Court.

BE PLEASED TO TAKE NOTICE that in terms of a Court Order dated 13 August 2012, notice is hereby given to the following persons and entities of this application in order to establish whether they or any of their members wish to join as parties in this application:

- A The Owners of properties in the development known as Fernkloof Estate, Hermanus,
- B The Fernkloof Estate Master Property Owners Association (FEMPOA) and the precinct property owners associations in Fernkloof Estate;
- C The Hermanus Heights and Main Road Property Owners (Northern and Southern boundary owners) as appear from "ARK5" attached hereto; and
- D The Hermanus Golf Club.

14
KAPSTADT
WESKAP HOE HOF

TAKE NOTICE FURTHER that service of this Notice is to take place as follows:

1. The Deputy Sheriff is directed to serve a copy of this Notice as well as the Court Order on the following persons and entities in accordance with Rule 4(1)(a)(i) of the Uniform Rules of Court such service to take place within ten (10) days of the date of the Court Order:

- 1.1 The Chairperson of the Hermanus Golf Club;
- 1.2 The Chairperson of FEMPOA;
- 1.3 The Chairperson of each of the individual precinct property owners associations in the Fernkloof Estate;
- 1.4 Each of the property owners referred to in "ARK 5".

2. A copy of this Notice as well as the Court Order and the papers filed of record to date, shall be available for inspection by any person(s) or body, in downloadable format, on the official website of the Respondent at www.overstrand.gov.za and, in hard copy, at the Hermanus Municipal Library during official library hours. This constitutes the sole responsibility the Respondent will have in respect of the availability or provision of this information.

3. Any hard or electronic copies of the above which any such person(s) or body may wish to acquire from a source other than the aforesaid website, shall be obtainable, at the expense of such person(s) or body, by arrangement with the Applicants' Attorneys of Record, Michael Range & Associates, whose contact details appear at the end of this Notice, where a hard copy for purposes of inspection will also be available.



4. Any person(s) or body that claims to have a right to be joined in these proceedings shall depose to an affidavit setting out the grounds upon which it claims to have such a right, and file such affidavit with the Applicants' Attorneys within one hundred (100) days from date of the Court Order ("the 100-day period").
5. In the absence of such an affidavit being filed it will be assumed that a person(s) or body who acquired notice of this application, has elected to abide the decision of the Court and to have waived the right to be joined as party to these proceedings.
6. After the lapse of the 100-day period the Applicants and Respondent may approach the Honourable presiding Judge in chambers to make a ruling on who should be joined as parties to these proceedings and to provide a directive as to the further conduct of this matter.

DATED AT CAPE TOWN ON THIS 13th DAY OF AUGUST 2012

Michael Range & Associates

Attorneys for Applicants

101 Warrington Arcade

Harbour Road, Hermanus

Tel – 028 3130106

litigation@rangelaw.co.za



AFFECTED GOLF COURSE BOUNDARY PROPERTY OWNERS

62

SOUTHERN BORDER

ERF NO	NAME
1153	J & L Makepeace
1255	DA DE La Harpe Charlton, C/O Poplar Grove
1257	ME Crews
1260	Coppersun Nineteen (Pty) Ltd
1263	HR Brocher
5332	BR & I Zeisner
1265	Jupiter Motor Cycles Properties (Pty) Ltd
1268	Velvet Moon Properties 69 (Pty) Ltd, C/O S Maintz
1267	Dr. BRD & G Easter
1286	Lariza Investments No 170 (Pty) Ltd
1285	AG Westbrook Family Trust

NORTHERN BORDER

ERF NO	NAME
5967	WD & MJ Salda
5968	AJ Tyley & 4 Others
5969	JL Wallace
5970	Eagle Valley Properties 256 CC
5971	ME & LG Hooper
5972	MR Furst
5973	W & IC McGeachy
5974	JS & SJ Atkinson
5975	Tswalu Trust, C/O DI Hyman
5976	CJ Mouton
7681	WA Lewis
5979	M & J & H Hattingh & 2 Others
5980	IM & CJ Bairle
5981	B & JD Evans
5982	HJ Linney
9921	Royalstraat 3 Elendomme CC, C/O Mr. IH Kinston
5986	PM Hulse
5987	C & HM Swart
5988	WJ & EO van Rensburg & Nykamp
5989	WJ & MR van der Hoeven
5990	TWJ Reid
5991	OP & ME Kopke
5992	Talana Trust
5993	JM & J Orr & Rhodes
5994	ELCO Trust
5995	HDV Elwas
5997	Tamjon Inv Trust
5842	DH Bryer
5841	R. Rosseau
5840	Saint Mala Securities Pty Ltd
5839	Prof. F. Coetzee
5838	R. Brynard

90
 R

5837	CAVN Conroy
5836	NV van der Riet
5835	CJ & MM van Dyk
5834	Mrs. Durr Storm Michael-Trustees
5833	JV Cloll
5832	JV Cloll
5831	KS Byisma
5830	S Klaucke
5828	Quantum Leap Inv 244 Pty Ltd, C/O JC Wright
5827	MR Furst
5826	Pybus Family Trust, C/O RN Pybus
5825	GAL Nel
5824	Bardix Discretionary Trust
5823	F & GJ Stroud
5822	VP de Villiers

WES-KAAP HOE HOEF

Handwritten signature