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OVERSTRAND



**REPORT ON:
THE FEASIBILITY OF THE LEASING AND DEVELOPMENT OF
DE MOND CARAVAN PARK AND ADJACENT LAND**

**Submitted:
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Revised to include Comments:

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Final Draft

EXECUTIVE SUMMARY

The Overstrand Municipal Council (the “Council”) is enjoined to secure ecologically sustainable development and to promote justifiable economic and social development of its community.¹ The Council is also charged with the duty to use municipal resources in the best interests of the local community² and to optimise the use thereof.³ With this in mind the municipal administration on an on-going basis reviews the uses to which municipal properties are put.

In the course of such a review it was established that the Hermanus Municipality during 1942 obtained the lion’s share of the land on which De Mond Caravan Park is situated (also known as “The Fishery”), by way of a Crown Grant. The Crown Grant stipulated that the land must be used for purposes of a “public resort”. Initially the property was used for that purpose, but over the years various lease agreements were concluded that eventually culminated in the members of the De Mond Caravan Park Association (the “DCPA”) securing for them certain use rights to the exclusion of members of the broader public.

Towards the end of 1999 the Greater Hermanus Municipality commissioned Advocate Werner Zybrands to investigate and assess the possibility of developing three municipal caravan parks (including De Mond) by way of public-private partnerships (also referred to as a “PPP”).⁴ Based on recommendations which he made at the time the Overstrand Municipality (the “Municipality”) subsequently advertised a Request for Proposal (“RFP”), evaluated proposals received in response to the RFP and concluded an agreement with a developer for the development of the De Mond land. A number of factors impacted negatively on the ability of the developer to perform in terms of the development agreement, with the result that the relevant development agreement was terminated during April 2010.

Situated next to De Mond Caravan Park is municipal land on which Klein River Lagoon Park (“KRLP”) was established and, next to that, the so-called “Prawn Flats”. Municipal land that was made available to Walker Bay Adventures (“WBA”) and to the National Sea-and-Sand Institute (the “Institute”) on a lease basis is situated in close proximity.

The Council is not satisfied that the municipal land described above is used in the best interests of the local community or that the use thereof has sufficiently been optimised. It has therefore resolved in principle to make that land available to a developer on a long term PPP lease basis to develop same primarily as a public resort. The Council appointed a transaction advisor to undertake the required feasibility study⁵ and, if the Council should decide to implement the proposal, to act in an advisory capacity and to assist the Municipality with the preparation and procurement of a PPP agreement.

The transaction advisors undertook the required feasibility study inter alia to establish all the legal requirements with which the Council would have to comply, should it decide to go ahead with the proposal; whether the proposal is consistent with applicable plans, policies and strategies; to identify potential risks to the Municipality associated with the proposed project; to establish whether there are any impediments or constraints (legal, financial or otherwise) that may stand in the way of or would make the implementation of the proposal an

¹ See section 152(1)(c) and 24(b)(iii) of the National Constitution (the “Constitution”) and section 73(1)(b) of the Local Government: Municipal Systems Act, 32 of 2000 (the “MSA”).

² See section 4(2)(a) of the MSA.

³ See section 3(1)(c)(iv) of the Development Facilitation Act, 67 of 1995 (the “DFA”). Section 195(1)(b) of the Constitution requires the public administration to promote the efficient, effective and economic use of resources.

⁴ A public-private partnership is a vehicle used to *inter alia* unlock the potential of municipal property and must comply with the provisions of section 120 of the Local Government: Municipal Finance Management Act, 56 of 2003 (the “MFMA”) and the Municipal Public-Private Partnership Regulations, 2005 (“the PPP Regulations”).

⁵ As contemplated in section 120(4) of the MFMA.

unattractive option; to record and assess all the relevant information; to convey to the Council the findings and recommendations of the project advisors; and to lay a solid foundation for the Request for Interest/ Proposal process described under "Procurement" below.

This report provides a brief overview of some of the most important laws, plans, policies and strategies that were considered in the investigation and assessment of the feasibility of implementing the proposal. The findings and recommendations of the feasibility study are set out below.

FINDINGS

The main findings of this feasibility study report are the following:

- 1. As the law currently reads it is legally permissible to make the municipal land concerned available on a long term PPP lease basis for development primarily as a public resort.*
 - 2. As the dense legislative environment within which planning and development must take place is in flux, it is advisable to monitor amendments made to legislation throughout the procurement and construction phases of the proposed project, to ensure lawful conduct.*
 - 3. There is no legal basis for claims by the De Mond Caravan Park Association or any of its members resulting from the lapsing of the current lease agreement or improvements that they may have made to the De Mond land during the currency of lease agreements with the Municipality.*
 - 4. In terms of the current lease agreements held by the Klein River Lagoon Park, the National Sea-and-Sand Institute and Walker Bay Adventures, these entities and their members do not have contractual rights to remain on the properties once these lease agreements lapse but a fair and equitable process going beyond the lease stipulations is called for. Premature cancellation of these lease agreements will necessitate compliance with the obligations stipulated.*
 - 5. The Integrated Zoning Scheme (the "IZS") of Overstrand expected to be finalised before commencement of the development will allow scope for a diversified resort albeit subject to the Council granting a number of consent land uses, e.g. hotel and conference facilities. Any delays or other complications with the approval of the IZS by the province and uncertainty if consent land use applications will be approved by the Council hold definite risks for procurement of suitable developers and the successful development of a public resort.*
 - 6. The duration of the planning and construction phase will be approximately four years given the time needed to complete an Environmental Impact Assessment ("EIA") and other prescribed studies, finalisation of consent use applications, the provision of required bulk infrastructure and installation of reticulation infrastructure. It should be expected that the development will take place in phases.*
 - 7. The proposed resort requires no capital input and minimal operational expenditure from the Municipality while presenting a highly affordable growth and development opportunity that will result in a significant economic and financial benefit to the Municipality.*
 - 8. The value of the land and the municipal revenue earned will increase considerably once new infrastructure has been installed, permanent improvements (such as buildings) have been constructed on the property and a public resort is operational.*
 - 9. A flexible income-based approach to rental determination will be more aligned with fair and sustainable business principles and enhance the financial viability of the development than a land value-based approach.*
 - 10. Market appetite will be good provided the composition of the development can bridge tourism seasonality by accommodating large groups for conferences and its usability as a venue for a wider range of events and occasions.*
-

RECOMMENDATIONS

It is recommended that:

- 1. That the findings of this study be noted and accepted.*
 - 2. The current lease agreements in respect of the municipal properties concerned not be renewed when they lapse (alternatively that they be terminated) in order that those properties will be available for redevelopment.*
 - 3. The municipal properties concerned be made available on a long term lease basis for development of primarily a public resort in a manner that will secure ecologically sustainable development, promote more equitable access for members of the broader public to municipal resources, socio economic development and optimum use of municipal land in the best interest of the local community.*
 - 4. That this Feasibility Study Report be made available to the public for comments and representations and the views and recommendations of National Treasury and the Western Cape Provincial Treasury thereon be solicited before the Council takes a final decision to grant the use, control and management of the land to a private developer for the establishment of a public resort.*
 - 5. That the procurement of a developer be done through a combined Request for Qualifications (“RFQ”) and Request for Proposals (“RFP”) process with the aim to appoint a preferred bidder and a reserve bidder with whom the Municipality may in its sole discretion negotiate should negotiations with the preferred bidder fail.*
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LIST OF ACRONYMS

BBBEE	-	BROAD-BASED BLACK ECONOMIC EMPOWERMENT
COA	-	CAPE OUTSPANS ACT
COGTA	-	DEPARTMENT OF COOPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS
DCPA	-	DE MOND CARAVAN PARK ASSOCIATION
DEA & DP	-	DEPARTMENT OF ENVIRONMENTAL AFFAIRS AND DEVELOPMENT PLANNING
DIP	-	DEPARTMENT OF INFRASTRUCTURE AND PLANNING
DFA	-	DEVELOPMENT FACILITATION ACT
DSL	-	DEVELOPMENT SETBACK LINE
DU/H	-	DWELLING UNITS PER HECTARE
EIA	-	ENVIRONMENTAL IMPACT ASSESSMENT
ESTA	-	EXTENSION OF SECURITY OF TENURE ACT
HIA	-	HERITAGE IMPACT ASSESSMENT
ICMA	-	NATIONAL ENVIRONMENTAL MANAGEMENT: INTEGRATED COASTAL MANAGEMENT ACT
IDP	-	INTEGRATED DEVELOPMENT PLAN
IZS	-	INTEGRATED ZONING SCHEME
KREMP	-	KLEIN RIVER ESTUARINE MANAGEMENT PLAN
KRLP	-	KLEIN RIVER LAGOON PARK
LRA	-	LABOUR RELATIONS ACT
LUMS	-	LAND USE MANAGEMENT SYSTEM
LUPO	-	LAND USE PLANNING ORDINANCE
MAT	-	MUNICIPAL ASSET TRANSFER
MFMA	-	MUNICIPAL FINANCE MANAGEMENT ACT
MIG	-	MUNICIPAL INFRASTRUCTURE GRANT
MSA	-	MUNICIPAL SYSTEMS ACT
MSL	-	MEAN SEA LEVEL
NEMA	-	NATIONAL ENVIRONMENTAL MANAGEMENT ACT
NEMBA	-	NATIONAL ENVIRONMENTAL MANAGEMENT: BIODIVERSITY ACT
NEMPAA	-	NATIONAL ENVIRONMENTAL MANAGEMENT: PROTECTED AREAS ACT
NEMWA	-	NATIONAL ENVIRONMENTAL MANAGEMENT: WASTE ACT
NHRA	-	NATIONAL HERITAGE RESOURCES ACT
NT	-	NATIONAL TREASURY
NWA	-	NATIONAL WATER ACT
ODS	-	OVERSTRAND DENSIFICATION STRATEGY
OGMS	-	OVERSTRAND GROWTH MANAGEMENT STRATEGY
OHSA	-	OCCUPATIONAL HEALTH AND SAFETY ACT
OHSR	-	OVERSTRAND HERITAGE SURVEY REPORT
PAIA	-	PROMOTION OF ACCESS TO INFORMATION ACT
PAJA	-	PROMOTION OF ADMINISTRATIVE JUSTICE ACT
PPP	-	PUBLIC-PUBLIC / PUBLIC-PRIVATE PARTNERSHIP
PPPFA	-	PREFERENTIAL PROCUREMENT POLICY FRAMEWORK ACT
PSDF	-	PROVINCIAL SPATIAL DEVELOPMENT FRAMEWORK
RFP	-	REQUEST FOR PROPOSALS
RFQ	-	REQUEST FOR QUALIFICATIONS
RLRA	-	RESTITUTION OF LAND RIGHTS ACT
SANS	-	SOUTH AFRICAN NATIONAL STANDARDS
SCM	-	SUPPLY CHAIN MANAGEMENT
SDA	-	SERVICE DELIVERY AGREEMENT
SDF	-	SPATIAL DEVELOPMENT FRAMEWORK
WBA	-	WALKER BAY ADVENTURES

INTRODUCTION

1. PURPOSE OF THE STUDY

The town of Hermanus situated within the Overstrand Municipality is a very popular tourist destination due to the scenic beauty of the area and the facilities and opportunities that the town offers to all walks of life. The Council is, however, faced with the complex problems of providing for an expanding population and meeting demands for social justice. It is charged with the responsibility of advancing social and economic well-being for both present and future generations by utilising municipal resources in ways that are efficient, equitable and sustainable, whilst protecting the environment for the benefit of present and future generations.

The Council is required to use the De Mond land for purposes of a public resort. Public resorts such as camping and caravan parks are usually utilised on a seasonal basis for a relatively short period each year. As a result they are often not financially viable and do not represent optimal utilisation of scarce resources. It would appear, however, that if facilities were to be provided to accommodate for example large tourist groups or conferences, occupancy rates may be increased by a considerable margin throughout the year, holding many positive advantages for the broader local community. Combined, the land under discussion presents an excellent opportunity for the type of development needed to attract large tour and conference groups throughout the year.

The purpose of this study is to investigate the feasibility of establishing as a PPP exercise primarily a public resort on the land under discussion, as part of the Council's endeavour to secure ecologically sustainable development and to promote justifiable economic and social development of its community. If the project is found to be feasible, the Council will require the transaction advisors to assist it with the implementation of the project in supporting, advisory and managerial capacities.

2. PROCESS

The Council in compliance with the requirements of the MFMA commissioned a study to establish the feasibility of the proposal.⁶ During the period November 2010 to January 2011 the project was formalised and a pre-feasibility analysis was undertaken. The project was subsequently registered with National Treasury.

In terms of the Municipality's commitment to foster transparency, to encourage public participation and to be accountable, consultations were held with representatives of interest groups and the authorities. It included formal discussions during December 2010 between the two most prominent land lease stakeholders, municipal representatives and the transaction advisors, the purpose of which *inter alia* was to inform the stakeholders of the initiation of the feasibility study and the process to be followed.

During the period January to June 2011 information was collated, further technical legal and institutional analyses as well as financial modelling were undertaken.

This draft feasibility study report is now submitted to the Council for consideration and will be followed by a compulsory 60 day consultation period before the final feasibility study report is submitted to Council, the views and recommendations of National and Provincial Treasuries are sought and the general public is afforded the opportunity to comment⁷. Once those comments, views and recommendations have been received and

⁶ See Appendix A.

⁷ See sections 21 and 21A of the MSA.

evaluated, appropriate amendments will be made to the report before it is submitted to Council for an in principle decision to proceed with a PPP.

If the Council resolves to proceed with a PPP, a process to procure a lease arrangement for the proposed development will be followed. Sensitive to the principles of legality and cost-effectiveness, National Treasury was requested to indicate the procurement process to be followed if the proposal was found to be feasible. It suggested that the process as set out in the Municipal Asset Transfer Regulations⁸ should be followed.

3. FORMAT AND CONTENT OF THE REPORT

Since the process prescribed in terms of the MAT Regulations is relatively vague in respect of the content of a feasibility study, the Municipality, on advice of its transaction advisors, agreed to incorporate components of the feasibility study report that are prescribed in the MFMA.⁹ The primary goal of a more comprehensive feasibility study is to provide the Council with adequate information to take an informed decision and to lay a solid foundation for the RFQ/RFP process, which is further expanded under "Section 6: Procurement Plan".

4. TRANSACTION ADVISORS

During 2010 the Municipality appointed Mr Johan du Plessis¹⁰ as the principal transaction advisor to undertake the required feasibility study¹¹ and, should Council decide to implement the proposal, to act in an advisory capacity and to assist the Municipality with the preparation and procurement of a PPP agreement. He is doing it in co-operation with Ms Anita Botha¹² and by Mr Riaan Kuchar,¹³ the latter who was appointed as the Project Officer.

⁸ See Chapter 4 of the Municipal Asset Transfer Regulations, 2008 (the "MAT Regulations").

⁹ See section 120(4) of the MFMA, as further expanded upon in the MFMA Municipal Public-Private Partnership Regulations, 2005.

¹⁰ An experienced practicing attorney with a local government and property development background, who specializes in environmental and land use matters and undertakes project management and facilitation.

¹¹ See section 120(4) of the MFMA.

¹² An experienced local government consultant who has been involved in the successful procurement of a number of PPP's in the local government sphere and in the subsequent contract management and monitoring of such PPP's. She trades under the style "Pro-Active Management Services: Local Government Consultancy", also known as "PAMS".

¹³ The Head of Town Planning and Property Administration of the Municipality.

SECTION 1: NEEDS ANALYSIS

1. ORIENTATION: LOCATION OF LAND

De Mond Caravan Park is situated on a portion of erf 4831 and a portion of erf 5327 in Hermanus and the KRLP, Prawn Flats and Sea and Sand are all situated on portions of erf 4831. The site is bounded on the north by the R43 where it enters Hermanus from the Stanford side and on the south by the Klein River Lagoon. There is a gravel access road to Prawn Flats, KRLP and Sea and Sand from the R43 and a tarred access road to De Mond off 17th Avenue. The De Mond site slopes in a southerly direction and has a cross-fall of approximately 20m. There are a few rocky outcrops on the site.

Figure 1.1: Contextual Overview of the Hermanus East Area including De Mond (Source: OGMS)

Figure 1.2: Aerial View of the De Mond and Adjacent Sites Earmarked for Development (Source: GIS, Overstrand)

2. RATIONALE

It is not in the best interests of the local community that the land concerned is not used in ways that are efficient, equitable and sustainable. It is also necessary to bring the use of the De Mond land in line with the conditions of the Crown Grant in terms of which it was made available to the Municipality.

There appears to be a real need for better integration and co-ordination of the usage of the said land, *inter alia* to control pollution, to order the activities along the shores of the lagoon, to enforce law and order and to undertake holistic planning and development that fully explores the potential of the land. This should be done in accordance with the objectives of environmental and other legislation, as well as the applicable plans, policies and strategies (e.g. the management plan of the Klein River Estuary).

The Council's financial resources are scarce relative to its obligations and must be managed. Management implies choice. The Council is charged with the notoriously difficult, albeit vital and necessary task to weigh economic, social and other factors, and to balance them against one another, when allocating funds. Given the extent of the Municipality's capital commitments in respect of basic service delivery and ensuring the adequate operation and maintenance of its water, sanitation, electricity and waste infrastructure, it cannot favourably consider developing a public resort itself. In addition the management of such a resort does not fall within the ambit of the available municipal expertise. It is therefore necessary that the proposed development should be undertaken by an external party, but in synergy with the Municipality's strategic and developmental planning.

SECTION 2: SITUATIONAL ANALYSIS

1. PROJECT OUTPUT SPECIFICATIONS

Government policy promotes the concept of a developmental state as part of the strategy to address the serious poverty problem and to promote socio and economic development. It goes beyond the scope of this report to provide even a brief overview of the emergence of developmental local government and the multi-dimensional policy architecture that underpins it. Suffice it to say that the uneven distribution of wealth and the reality of a steadily increasing poor population in need of economic opportunities, basic infrastructure and social support make economic growth and development the biggest government priority in the long run. The proposed development has a major role to play in respect of improved access to economic and social opportunities and municipal resources.

As part of its commitment to promote social and economic development the Municipality wishes to enter into a long term land lease agreement with a financially sound and environmentally responsible developer that has proven expertise to establish, manage and maintain a public resort that caters for the needs of the broader public (including specialist and large tourist groups and commercial interest) through the availability of hotel and conference facilities. The primary goals of the development will be to provide public resort facilities that will increase visitors numbers to Hermanus, especially during the traditional low and mid seasons and create much needed job opportunities (primarily for members of the local community) during the construction and operational phases of the public resort.

It is of paramount importance to the Council that the successful bidder shall act in a manner that respects, upholds and fulfill the fundamental environmental right contained in section 24 of the Constitution. It is recorded that the promotion of conservation of the Klein River Estuarine and preservation of the heritage character of De Mond and its surroundings will rank prominently in the evaluation of development proposals.

2. CURRENT LEASE AGREEMENTS

2.1 INTRODUCTION

The Municipality has over the years entered into a number of lease agreements in respect of the properties concerned. The transaction advisors therefore considered it necessary to investigate and assess to what extent (if any) the current lease agreements may hamper or impact negatively on the proposed future utilisation of those properties. The current lease agreements are discussed in the following sub-paragraphs.

2.2 DE MOND

A small portion of the present caravan park is located on a portion of erf 5327. The largest portion of the caravan park is located on a portion of erf 4831 Hermanus. The national government conditionally granted what is now known as erf 4831 (also referred to as "The Fishery") to Hermanus Municipality in terms of section 10 of the Crown Lands Disposal Act, No. 15 of 1887 (Cape) by the way of Crown Grant No. 110/42 during November 1942.

One of the conditions of grant imposed at the time relates to minerals and precious stones. The other two conditions stipulate that:

- 1) *the land must in accordance with a resolution of Parliament dated 16th and 23rd March 1934 only be used as*
-

a place of public resort; and

- 2) *the Government shall at all times have the free right to use any portion of the land for the purpose of obtaining access to the Klein River Lake.*

The Municipality acquired Erf 5327 in a land exchange transaction when the road now known as the R43 was constructed. The Deed of Sale of this portion of land (also known as “**The Fishery B**”) provides that:

“the State shall have the right at all times, of resuming for public purposes, such portion or portions of the land hereby granted, as may not have been alienated by the Municipality. In the event of resumption as aforesaid, no compensation shall be payable by the State, except in respect of substantial improvements of a permanent nature, erected or made on the land resumed, whether by the Municipality or by any person or body acting under the express authority of the said Municipality.”

In terms of the relevant title deed the Municipality may not alienate erf 5327 without the consent of the Minister of Agriculture.

The Council may contractually stipulate that a developer may only use the municipal land concerned for purposes of a public resort. If any approvals under the Land Use Planning Ordinance, 15 of 1985 (“**LUPO**”) (Western Cape) will be required for the proposed development, the Council will also be empowered to impose appropriate conditions of approval (discussed below),¹⁴ which may include a requirement that the land only be used for purposes of a public resort.

Past Use

Erf 4831 was initially used for purposes of a public resort, but over the years various lease agreements were concluded that eventually culminated in the members of the DCPA securing for them certain use rights to the exclusion of members of the broader public.

The first lease agreement for the caravan park was entered into in 1994 with a certain Mr Groenewald. It contained terms and conditions in terms of which:

- it was valid for a seven year period;
- the lessee had to pay the municipality an agreed monthly rental and all rates, taxes and levies;
- the park was to be used for a caravan/camping park and should remain open for such business;
- by referring to patrons, customers and visitors, it clearly envisaged a place open to the public;
- entitled the lessee to allow 31 mobile home sites;
- all or any of the caravan sites could be set aside for the use of permanent residents (the reason presumably being that managing it as a visitor based caravan park was not sustainable);
- the lessor (the Municipality) could, in its absolute discretion, withdraw the right to set caravan sites aside for permanent use at any time;
- improvements could be made to the land, stipulating that structural alterations and additions required the Council’s prior written approval;
- *“any such alterations or additions which the Lessee may make having obtained the Lessor’s consent thereto in writing shall become the property of the Lessor without any liability on the Lessor to compensate the Lessee in any way in respect thereof; or (at the Lessor’s option) shall be removed upon termination of the Lease and the premises restored to their previous condition.”*
- the lessee was required, at its own expense and to the satisfaction of the Municipality, to keep and maintain the park and all buildings in a good order inclusive of fencing, roads, and so forth.

¹⁴

See “Land Use Planning Ordinance” in Section 3.2.3.1

During August 1994 the Council resolved that additions to caravans be permitted; provided that each application should include a locality plan and that deviations from such a plan will not be allowed. Towards the end of 1999 the Municipality appointed Advocate Werner Zybrands¹⁵ to investigate the possibility of PPPs for the three caravan parks belonging to the Greater Hermanus Municipality, including De Mond. During March 2000 he submitted a report (the “**Zybrands Report**”) to Council, in which he recorded that many additions were made to caravans, but that no formal applications (including locality plans) were ever made or at least none could be found in the Municipality’s records by 1999. The Zybrands Report made several recommendations concerning De Mond Caravan Park, *inter alia* that:

- a legal definition of what constitutes a ‘public resort’ be obtained;
- the ‘perceived rights’ of the De Mond Caravan Park tenants be clarified;
- the Council favourably considers a long term PPP arrangement with a developer; and
- a RFP document be prepared to solicit proposals from prospective developers to set the process in motion.

The tenants of the De Mond Caravan Park established an association during 2000 and the Municipality authorised with effect from August 2000 the assignment of the lease agreement with Mr Groenewald to the DCPA. The DCPA subsequently applied to Council for an extension of the lease period to 30 years. The Council refused the application and asked for a legal opinion as previously recommended in the Zybrands Report.

Currently the area north of the access road into De Mond is occupied by a residence, administration office and a hall (including a shop and ablution facilities). The remainder of the De Mond site comprises of 212 stands currently occupied by an array of caravans, A-frame wooden houses, permanent wooden houses and tents. All these sites are sub-let on an annual basis to the members of the DCPA, thereby effectively excluding any other tourists or caravaners and preventing its use as a public resort.

Legal opinion

The question of what constitutes a ‘public resort’ was the subject of a request for a legal opinion put to Advocate Mario Wilker. His legal opinion served before the Council during May 2001. The learned advocate scrutinized the procedure followed in the House of Assembly which culminated in the Crown Grant, but could not find any definition of the words ‘public resort’ in the House of Assembly minutes or reports or in any applicable legislation. He then concluded that:

- 1) the effect of the reservation contained in the Crown Grant is that ‘The Fishery’ can be used only as a public resort and that this reservation (which was registered in favour of the State) created a public servitude over the land in favour of the general public, which servitude probably cannot be terminated due to non-use or by prescription; and
- 2) as there is no definition of ‘public resort’ contained in the statutes, the normal principles applicable to the interpretation of contracts should be applied to determine the meaning of those words (the general rule being that the intention of the parties must be gathered from the language used and that such language must be given their ordinary grammatical meaning).

The following is an extract from the legal opinion obtained from Adv. Wilker, quoted *verbatim* to convey clearly some of his findings and submissions:

1. *The Fishery must be used as a public resort, i.e. must be open to the general public at large to be used for recreational purposes. Consultant (the Municipality) has wide powers to give effect to this purpose.*

¹⁵

At that time a local government consultant and currently the Municipal Manager of Overstrand Municipality.

- The general public should be given as much access as possible to the premises. If the current use is maintained, the occupation of the various units should be made available for rental by the general public for short term visits or, if not viable, should be made available for rental on a yearly basis on tender. Granting certain individuals the right to occupy the units on a semi-permanent basis of up to 30 years would, to a large extent, exclude the use of the premises for recreational purposes by the general public.*
2. *The proposal by the De Mond Caravan Park Association makes no mention of what improvements of the premises are contemplated or what amount will be spent on improving the property.*
 3. *It is submitted that it will be in the interest of Consultant to invite tenders to develop and/or manage the property, whether in terms of a[n] annual lease or a long term lease, in order to ensure that the property is used to the benefit of the general public and to maximise possible income of Consultant and the community.*
 4. *The rights of the individual tenants/sub-tenants should be separately considered in relation to the specific lease agreement which prevails in respect of the portion of the property which they occupy.*

Based on the legal opinion received, the Collins English Dictionary and the Concise Oxford Dictionary were consulted to establish the ordinary grammatical meaning of the words “public resort”. In terms thereof it means a ‘*place set aside for frequent use by the general public*’.

The definitions contained in one piece of the legislation may not be used to interpret the words “public resort” as used in other legislation or, for that matter, in the Crown Grant. The transaction advisors, however, believe that the provisions of the now repealed Public Resort Ordinance, 20 of 1971, serves as a clear indication of what the authorities would normally regard as permissible within a public resort. In terms of that Ordinance, a resort is defined as “*a public resort, seaside resort, holiday centre, holiday camp, caravan park, tent camp and picnic place*”. In terms of that Ordinance the permissible activities within a resort *inter alia* include providing and maintaining-

- works, undertakings and facilities for the recreation, benefit and convenience of the public;
- roads, bridges, aerodromes, ferries, fences, structures, buildings and other works;
- camping, holiday and picnicking facilities, entertainments, transport services and other undertakings and facilities;
- and
- furnishing accommodation, sale of articles and goods to visitors and supply of services;
- the letting of any building, structure or land by public tender or public auction;
- determining fees or charges to be levied for entry into and remaining in such resort and for use and enjoyment of works, undertakings and other services or facilities.

Development and Current Circumstances

Between 2001 and 2007 the Municipality from time to time renewed the lease agreement with the DCPA for short periods, but took no further action in respect of a PPP as proposed in the Zybrands Report. However, during February 2007 the Municipality advertised a RFP. The DCPA submitted a Proposal, but in May 2008, after following the prescribed tender adjudication process, the Municipality appointed someone else that submitted a tender to develop a public resort on the land on which De Mond Caravan Park is situated. The Municipality at that stage also suspended its lease agreement with the DCPA.

The cumulative impact of a number of factors eventually led to the termination during April 2010 of the development agreement with the appointed developer.¹⁶ As this implied that the Municipality would have to

¹⁶ Invaluable lessons may be learned from that experience.

again make a fresh attempt to enter into a PPP, potentially involving lengthy delays, the Municipality concluded a new lease agreement with the DCPA expiring on 29 February 2012. This may leave sufficient time to complete this feasibility study and to procure a willing and able developer.

Perceived Rights

The Zybrands Report confirmed that some members of the DCPA were of the opinion that they were accorded certain “rights”, based on the facts that the lease agreement:

- permitted 31 mobile home sites;
- made provision that the lessee could permit caravan sites to be set aside for the use of permanent residents;
- provided for the levying and payment of property tax by the lessee.

It is noteworthy that the Municipality withdrew the right of allowing permanent residents with effect from 1 July 2007. The DCPA subsequently suspended the membership of four of the tenants who continued to reside permanently in the caravan park.¹⁷ Therefore, permanent residency in De Mond is not permitted and, should anyone be in “permanent” occupation, it will be in breach of the relevant municipal lease agreement. Furthermore the lease agreement specifically stated that the lessee “*shall pay by due date all charges and deposits in respect of rates, electric light, power, gas, water, telephone, sewerage, refuse removal and other service charges levied by the Lessor ...*”. Compliance with the contractual provisions did not give rise to any rights beyond the validity date of the lease agreement.

The legal opinion obtained from Advocate Wilker dealt with the ‘perceived rights’ of the De Mond tenants. The learned advocate noted the various clauses mentioned above and invited attention to the imminent lapsing of the “permanent residence” concession when the lease agreement expired. He submitted that “mobile” implies “movable” and that the cost of constructions, additions or alterations erected without the consent of the Municipality would not be recoverable by the tenants. In his opinion the tenants would, however, have the right to remove the mobile homes, plastic constructions and any non-essential additions or alterations prior to the termination of the lease period, the essence of the matter being that the property be returned to the Municipality in good order and condition as required in terms of the lease agreement.

As official records show, the Municipality terminated its lease agreement with the DCPA and did not get involved in negotiations with tenants. Instead it required the appointed developer to negotiate and conclude a settlement with the tenants to the Council’s satisfaction, before the latter was prepared to enter into a lease agreement with the developer. Unfortunately some of the terms of the agreement which the developer subsequently concluded with the tenants were unrealistic and may have created unrealistic expectations on the part of the lessees, something which may complicate the current process somewhat.

At this stage the settlement agreement are of no further force or effect. The terms and conditions of the municipal lease agreement remain in place and are still fully enforceable.

It would appear that the same measure of goodwill that prevailed in the past between the Municipality and the DCPA, still persists. The transaction advisors strongly recommend that in any new tender process and subsequent agreement negotiated with a potential developer:

- the Municipality should retain the responsibility to deal with claims (if any) from erstwhile lessees; and

¹⁷

See the minutes of the Annual General Meeting of the DCPA held on 27 December 2007.

- the successful proponent should be required to enter into discussions with the DCPA representatives to see whether a special arrangement could be made in terms of which members of the DCPA could be accommodated on a short-term preferential basis in the proposed new development, against payment of reasonable fees and charges and without endangering the financial viability of the project.

In terms of the current lease agreement the DCPA remains fully responsible for the maintenance of the caravan park, including all municipal infrastructure and improvements. It is clear from a recent *in loco* inspection that the caravan park is poorly maintained, with most structures showing varying degrees of neglect. It would appear that between the award of the first development tender in mid-2007 and the re-assignment of the lease to the DCPA during July 2010, the DCPA and its members did not make a *bona fide* attempt to meet their maintenance obligations in terms of the lease agreement.

In an act of goodwill and also to enable the DCPA to do the necessary maintenance, the Municipality stipulated in the new lease agreement entered into during July 2010 (renewed with effect from 1 March 2011 until 29 February 2012) that no rental is payable by the DCPA. Calculated at R43 412-45 per month this concession amounts to R520 949-40. As a further concession, the Municipality also waived the requirement in terms of which the DCPA had to make an investment of R120 000 and cede same to the Municipality as security for the due payment of all monies owed to the Municipality in terms of the lease agreement.

It is common cause that the current lease agreement expires on 29 February 2012. It therefore follows that in principle the contractual rights (if any) of the DCPA members to remain in occupation, will also expire on that date. Moreover, the maxim *nemo plus iuris ad alium transferre potest quam ipse habet* applies. Simply stated it means that a person cannot grant more rights than he himself has. In view of the fact that the only lawful use of the bulk of the De Mond land in terms of the relevant Crown Grant was for purposes of a public resort, the transaction advisors are of the opinion that the Municipality was unable to grant exclusive use rights to anyone in respect thereof.

In dealing with the DCPA and its members' the Municipality is legally bound to take its guidance primarily from the current lease agreement. In terms thereof two situations may potentially arise concerning improvements made to the property by the lessee during the currency of the lease agreement. Firstly the lessee may remove such improvements at the termination of the agreement (provided the lessee restores the premises to their previous conditions). Secondly, failing such removal, the Municipality will retain ownership of the improvements, in which event the developer will have to bear the costs of demolishing existing structures not required for purposes of the proposed development.

Attention is invited to the provisions of the Extension of Security of Tenure Act, 62 of 1997 ("**ESTA**"). It *inter alia* provides for measures to regulate the conditions on and circumstances under which the right of persons to reside on land may be terminated. The purpose of that Act is to extend the rights of tenure of occupiers, whilst giving due recognition to the rights, duties and legitimate interests of owners.

In terms of the Act and its Regulations, an "occupier" means (with certain exclusions¹⁸) a person residing on land which belongs to another person and who has or on 4 February 1997 or thereafter had consent or another right in law to do so. Section 8(1) of ESTA deals with the termination of right of residence and states that an occupier's right of residence may be terminated on any lawful ground; provided that such termination is just and equitable, having regard to all relevant factors and in particular to the following factors:

¹⁸ I.e. excluding a labour tenant, a person using the land for industrial, mining, commercial or commercial farming purposes except a subsistence farmer (own interpretation) and a person who has an income in excess of R5000 per month whether it is a cash wage or salary or other earning.

- the fairness of any agreement, provision in an agreement, or provision of law on which the owner or person in charge relies;
- the conduct of the parties giving rise to the termination;
- the interests of the parties, including the comparative hardship to the owner or person in charge, the occupier concerned, and any other occupier if the right of residence is or is not terminated;
- the existence of a reasonable expectation of the renewal of the agreement from which the right of residence arises, after the effluxion of its time; and
- the fairness of the procedure followed by the owner or person in charge, including whether or not the occupier had or should have been granted an effective opportunity to make representations before the decision was made to terminate the right of residence.

Although the transaction advisors are of the opinion that there is no legal basis for a claim by the DCPA or its members to remain on the De Mond land after 29 February 2012, they believe that such members have over the years developed a strong sense of “belonging there”, strengthened by the expenses incurred by members in improving and maintaining the property. The transaction advisors therefore believe that principles of fairness and equitability dictate that a special effort should be made to see whether current DCPA members could not be accommodated in one way or another in the proposed new development. Hence their strong recommendation above that in any new tender process, the successful proponent should be required to enter into discussions with the DCPA representatives to see whether a special arrangement could be made in terms of which members of the DCPA could be accommodated on a short-term basis on mutually acceptable terms.

2.3 KLEIN RIVER LAGOON PARK

The KRLP is situated on a portion of erf 4831 measuring 6279m² adjacent to De Mond caravan park. During May 1994 the Greater Hermanus Municipality entered into a lease agreement with the Klein River Lagoon Park Body Corporate for 15 years, with the option of renewal for a further 5 years. During 2009 the KRLP made use of the extension clause, with the result that the lease will expire on 30 April 2014. A monthly rental is payable to the Municipality, escalating at 10% annually. According to the lease agreement, the site may only be used for mobile park homes.

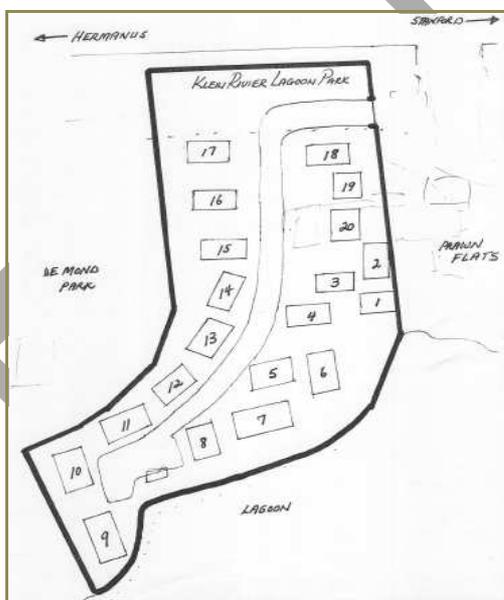


Figure 2.1: Sketch showing position of 20 mobile houses in KRLP.

The KRLP is very well maintained with 20 houses of varying sizes. The owners, the majority of whom are Cape Town based, stay at the park during holidays and long weekends and fund the total maintenance and rates and taxes from the monthly levy payable to the body corporate.

The KRLP lease agreement contains provisions similar to the De Mond lease regarding payment of rates and taxes and the erection of buildings or other improvements on the land with the Municipality’s prior written consent. In terms of their lease agreement KRLP had to link up to the municipal water and electricity services, provide its own sewage system and ensure waste removal. It placed the responsibility for the maintenance of the land (including the fence, buildings and structures) on the KRLP and provides that, failing such maintenance, the Municipality may cancel the lease agreement and resume possession of the property without any

compensation being payable to the KRLP or its members. In such an event the Municipality may contractually claim expenses due to losses and damages suffered by it from the KRLP.

With regards to the situation applicable at the expiration of the lease, the agreement only states that the KRLP will be expected to “*restore and deliver up to the Lessor the said Land in a condition satisfactory to the Lessor*”.

The portion of erf 4831 on which the KRLP is situated, was not included in the previous RFP. It would appear from a discussion held at the outset of the feasibility study with a representative of the KRLP, that the KRLP understands the limitations of its own lease agreement. It has voiced a strong commitment to form part of the proposed project, including potentially making a financial investment therein.

If the proposed development is taken in hand before the KRLP lease agreement lapses on 30 April 2014, several scenarios should be considered. One would be that the development be undertaken in phases, with the phase involving the KRLP land only commencing after 30 April 2014. Another would be, based on the exterior appearance of the houses that those houses may, as an interim arrangement, be retained to form part of the development. It would be reasonable to expect that further negotiations will have to be entered into between the parties concerned and that the Municipality may have a prominent facilitation role to play in the process.

2.4 PRAWN FLATS

Prawn Flats is directly adjacent to the KRLP. It is also situated on a portion of erf 4831 which was not included in the previous RFP. The area is leased to WBA for the purpose of operating a small boat hiring, lagoon cruises and a canoeing facility. The initial three year lease was entered into on 1 November 2004 for a nominal monthly rental escalating at 10% annually.

Similar to the De Mond and KRLP lease agreements, WBA needs the prior written consent of the Municipality *inter alia* to erect buildings or structures or affect improvements or additions to the property. It is also responsible for the maintenance of the land, fence, buildings and structures. As with the KRLP lease, the land must be restored to a condition satisfactory to the Municipality at expiry of the lease. The lease gives WBA three months from date of termination to remove buildings and/or structures, failing which these become the property of the Municipality without compensation. The same condition will apply if the lease is cancelled due to defaulting on rental or any other condition. Removal of structures may only take place if all outstanding monies have first been paid to the Municipality.

The lease agreement has since 2007 been extended on a month-to-month basis on the same terms and conditions. Although legally the lease agreement may be cancelled on with one month's notice, the transaction advisors believe that a three month notice period would be more reasonable, especially as the longer notice period would not be detrimental to the proposed project.

2.5 SEA AND SAND

Sea and Sand is situated on the Prawn Flats land, but the Municipality and the Institute entered into a separate lease agreement in respect of the portion that the Institute is using. That portion of land was not included in the previous RFP.

The lease agreement is for a 25 year period. It commenced on 24 August 1989 and will expire on 23 August 2014, unless terminated earlier. A nominal rental is payable and the property may only be used as a training camp where the focus is on teaching sea rescue and other life skills.

The lease agreement includes the same requirements regarding buildings, structures and fences and maintenance provisions as found in the lease agreements discussed above. It provides that the Municipality may use the land if required at any time for any particular purpose and that the land, buildings and structures thereon will revert to the Municipality in a condition satisfactory to it, without payment of any compensation whatsoever when the lease expires. Contractually the Institute may, however, with prior municipal approval, remove its own funded structures/buildings when the agreement expires.

It is noteworthy that in terms of the lease agreement the Municipality may cancel or amend the lease to enable it to resume possession of the whole or any portion of the land at any time on giving three months' written notice, if the land is required for any municipal or government purpose. In such an event, the Municipality is contractually required to pay the Institute compensation for improvements which it has made on the land. In turn the Institute may cancel the agreement and claim compensation for own funded improvements made on the remaining land, if an amended lease leaves it with a portion of land insufficient for its operations. However, it remains the Municipality's prerogative to decide for which improvements it will pay compensation based on a certified statement of actual capital cost to be submitted by the Institute. It is not foreseen that a development would reach the area used by the Institute before expiry of the lease agreement.

3. LAWS, POLICIES AND PLANS

The Municipality is exclusively a creature of statute and possesses no rights and powers except such as are either expressly or by necessary implication conferred upon it by a competent legislative authority.

As everyone has the fundamental right to administrative action that is lawful, reasonable and procedurally fair and as the Municipality is required to respect, protect, promote and fulfill that right,¹⁹ the transaction advisors made all reasonable efforts to ascertain whether the proposed action on the part of the Municipality is legally permissible and, if statutory empowerment exists for the proposed action, what statutory requirements will have to be complied with for such action to be "lawful".

In South Africa planning and development has to take place in a very dense legislative environment. It goes beyond the scope of this report to deal in detail with all the statutory provisions with which the Municipality and "would-be developers" will have to comply in relation to the proposed development. Suffice it to say that the transaction advisors considered it prudent to only briefly refer to a select few statutory provisions below. The legislation which they considered included national, provincial and municipal laws.

Policy considerations will feature in the evaluation of development proposals. Our courts regard the adoption of policy guidelines by state organs to assist decision-makers in the exercise of their discretionary powers as both legally permissible and eminently sensible. However, policy guidelines may not be applied inflexibly or in a

¹⁹ See sections 33(1) and 7(2) of the Constitution. Also see section 1(a) of the Constitution that highlights the supremacy of the Constitution and the rule of law (which underpins the principle of legality).

manner which excludes decision-making involving the conscientious exercise of the relevant discretion. This means that policy can at most be a guiding principle, but in no way decisive.

3.1 CONSTITUTIONAL MANDATE

The Constitution as the supreme law of the Republic is the logical point of departure for any exploration of the maze of statutory provisions that apply within this field. In terms of the Constitution the objects of local government include-

- *To ensure the provision of services to communities in a sustainable manner;*
- *To promote social and economic development;*
- *To encourage the involvement of communities and community organisations in the matters of local government.*

The Constitution requires each municipality to strive, within its financial and administrative capacity, to achieve those objects.²⁰ It also requires each municipality, to structure and manage its administration and budgeting and planning processes to give priority to the basic needs of the community, and to promote the social and economic development of the community.²¹ The public administration (which includes the municipal administration) is governed by democratic values and principles enshrined in the Constitution.²² Included amongst those values and principles are that the public administration must-

- *promote the efficient, effective and economic use of resources;*
- *respond to people's needs;*
- *be development-orientated; and*
- *provide services impartially, fairly, equitably and without bias.*

The municipal mandate derived from these sections is supported through the development of tourism potential and the creation of jobs. The transaction advisors are confident that the proposed development and the downstream economic impact thereof will make a significant contribution in this regard. It should promote more effective use of the municipal land and enable more equitable access to the proposed public resort for members of the broader community.

3.2 NATIONAL AND PROVINCIAL LAWS, POLICIES AND PLANS

The Municipality must act within the statutory framework provided by national, provincial and municipal laws. The legislation that will or may have to be complied with in respect of the proposed development *inter alia* includes the following:

- The Constitution, DFA, MSA, MFMA, ESTA (previously referred to);
- The National Environmental Management Act, 8 of 2004 (the "**NEMA**"), Cape Outspans Act, 17 of 1937 (the "**COA**"); the Restitution of Land Rights Act, 22 of 1994 (the "**RLRA**"); the Removal of Restrictions Act, 84 of 1967; the Marine Living Resources Act, 18 of 1998; the National Environmental Management: Biodiversity Act, 10 of 2004 ("**NEMBA**") the National Environmental Management: Protected Areas Act, 57 of 2003 ("**NEMPAA**"); the National Environmental Management: Integrated Coastal Management Act, 24 of 2008 (the "**ICMA**"); the National Heritage Resources Act, 25 of 1999 (the "**NHRA**"); the Occupational Health and Safety Act, 85 of 1993 ("**OHSA**"); the National Water Act, 36 of 1998; the

²⁰ See section 152 of the Constitution.

²¹ See section 153 of the Constitution.

²² See section 195 of the Constitution.

National Building Regulations and Buildings Standards Act, 103 of 1977; the Promotion of Administrative Justice Act, 2 of 2000 (“PAJA”) and the Advertising on Roads and Ribbon Development Act, 21 of 1940;

- National and provincial regulations promulgated in terms of the empowering legislation, such as the PPP Regulations and the MAT Regulations.
- The Municipal Ordinance, 20 of 1974 and LUPO; and
- The applicable municipal Zoning Scheme.

Relevant sections of some of these acts and regulations are discussed below.

3.2.1 MUNICIPAL SYSTEMS ACT

Chapter 4 (specifically sections 21 and 21A) prescribes the community consultation processes to be followed by the Municipality when procuring a private party developer. Chapter 5 deals with the Integrated Development Plan (the “IDP”), Chapter 8 with the provision of services²³ and the Municipality’s performance management and monitoring mandate is set out in Chapter 6. Section 41 requires the Municipality to extend its own performance monitoring to all its external service providers.

A private developer leasing municipal land for an extensive period and operating a public resort on such land, will promote local tourism, but will not directly provide any municipal services and for that matter will not be an external service provider in terms of the MSA. However, the lease contract will have to be monitored in terms of Section 116 of the MFMA which obliges a municipality to do such management and monitoring and provides guidance on how this is to be done. Briefly, it requires that a contract be properly enforced and performance be monitored with regular reporting to the Council.

Section 98 of the MSA requires the Municipality to adopt bylaws to give effect to its credit control and debt collection policy including its enforcement. Section 75 of the MSA refers to the adoption of by-laws to give effect to the municipality’s tariff policy, which in terms of section 74 must determine the fees levied for services rendered by the municipality itself or by way of service delivery agreements. These policies and by-laws are in place and should thus be applied to the proposed development.

3.2.2 MUNICIPAL FINANCE MANAGEMENT ACT

As a whole the MFMA is important in that it regulates municipal fiscal and financial management and sets requirements for the efficient and effective management of the revenue, expenditure, assets and liabilities of municipalities. The land in question is a municipal capital asset. The transaction advisors believe that the provisions of section 14 of the MFMA (which deals with the *alienation* of municipal capital assets) will not directly apply to the proposed transaction. They would nevertheless strongly recommend that the Council decide whether the land in question is required for the provision of essential municipal services before making a RFP and, if it is not so required, that the Council in open Council *inter alia* consider the benefit that the broader community will derive from the proposal, if implemented, once proposals have been received from the private sector.

²³

In terms of section 73 of the MSA the general duties of a municipality include to promote social and economic development.

Chapter 4 of the MAT Regulations regulates the granting by municipalities of rights to use, control and manage capital assets in circumstances where Section 14 of the MFMA do not apply. Needless to say, it will have to be complied with.

Section 120 of the MFMA and the PPP Regulations deals with PPP's as contemplated in the Council's land development proposal. The PPP Regulations define a PPP and put forward three criteria for measuring when a contract between a municipality and a private party could be regarded as a PPP:

“public-private partnership” means a commercial transaction between a municipality and a private party in terms of which the private party—

- (a) performs a municipal function for or on behalf of a municipality, or acquires the management or use of municipal property for its own commercial purposes, or both performs a municipal function for or on behalf of a municipality and acquires the management or use of municipal property for its own commercial purposes; and
- (b) **assumes** substantial financial, technical and operational risks in connection with-
 - (i) the performance of a municipal function;
 - (ii) the management or use of municipal property; or
 - (iii) both; and
- (c) receives a benefit from performing the municipal function or from utilizing the municipal property or both by way of-
 - (i) consideration to be paid or given to the municipality or a municipal entity under the sole or shared ownership of the municipality;
 - (ii) charges or fees to be collected by the private party from users or customers of a service provided to them; or
 - (iii) a combination of the benefits referred to in subparagraphs (i) and (ii);

The definition is drafted in such a way that there must be compliance with all three subsections for it to be a PPP. In terms of the proposal the developer will acquire the use of municipal property for its own commercial purposes (i.e. developing a public resort and operate it at a profit), assume substantial financial and operational risks in connection with such use (e.g. that sufficient accommodation figures will not be achieved, resulting in a lower income than expected, whilst remaining responsible to service development loan repayments to the financial institutions involved and maintaining rental payments to the Municipality).

The Municipality is of the opinion that since none of these substantial risks currently exist, it will not transfer any risk to the developer. National Treasury accepted this interpretation of the Municipality and advised compliance with the MAT Regulations.

As stated in the Introduction, the approach set out in the MAT Regulations has been adopted. However, given the inadequacy of guidance provided in those regulations regarding the content of a feasibility study, the transaction advisors also took guidance from Section 120 of the MFMA and the PPP Regulations and incorporated Section 120 feasibility study components herein.

A substantial difference between the PPP Regulations and the MAT Regulations is that the latter do not prescribe a public participation process for assets valued at less than R10m and, according to the current value of the land concerned (as indicated in the municipal valuation roll) it is worth less than R10m. However, since the current valuation roll may not reflect the real value of the land and a long term right is to be granted to the selected developer, the Municipality has agreed with the transaction advisors to do public consultation and soliciting of the views and recommendations of the National and Provincial Treasuries in respect of this study.²⁴

In doing so, the process followed by the Municipality does not differ substantially from a PPP process, given that it includes the required public consultation, Council approvals and a competitive bidding process.

The main difference lies therein that in terms of the MAT Regulations a municipality only needs to consult National Treasury once, whilst the Section 120/PPP Regulations process dictates three such consultations, resulting in a considerably longer project procurement process.

Adherence to its interpretation that no risks are to be transferred to the developer obliges the Municipality to deal with the current lease agreements in respect of the municipal properties concerned and any associated risks. If the Municipality does not follow this route but require the successful proponent to indemnify the Municipality against and take over the risk of all claims that current tenants may institute against the Municipality resulting from termination of lease agreements or in respect of improvements made to the municipal land concerned, there would be a risk transfer from the Municipality to the developer and it would constitute a PPP within the context of the interpretation assigned to it by the Municipality.

Section 33 of the MFMA has a wide range of provisions regarding contracts that have a future budgetary implication and how such contracts should be adjudicated and awarded. It stipulates that, if a contract will impose **financial obligations** on the municipality beyond the 3 years covered in the annual budget for that financial year, the contract may in terms of section 33(1)(a) only be entered into if the municipal manager has, at least 60 days prior to the Council meeting at which the contract is to be approved:

- *made public the draft contract in accordance with section 21A of the MSA including an information statement summarising the municipality's obligations in terms of the proposed contract and invited comments;*
- *solicited the views and recommendations of National Treasury, the Provincial Treasury, the Department of Co-operative Governance and Traditional Affairs and any other national department with an interest;* and

Taken the following into account – Section 33(1)(b):

- *Its projected financial obligations in terms of the contract for each year of its duration*
- *The impact of these financial obligations on future municipal tariffs and revenue*
- *Comments and representations from the community and IAPs*
- *Views and recommendations from Treasury et al.*

Adopted a resolution – Section 33(1)(c) - in which:

- *It determines that the municipality will secure a significant capital investment or will derive a significant financial economic or financial benefit from the contract*
- *It approves the entire contract exactly as it is to be executed*
- *It authorises the municipal manager (accounting officer) to sign the contract on behalf of the municipality.*

Section 33(2) deals with circumstances when Section 33(1) will not apply and *inter alia* states that if the financial obligation on the Municipality is below a prescribed value or a prescribed percentage of the municipality's approved budget for the year in which the contract is concluded, the process set out above will not apply.

The transaction advisors are of the opinion that there will be no or very limited financial obligations on the Municipality in respect of the proposed land lease for development of a public resort. In the absence of National Treasury circulars and guidelines on the subject, it would appear that no value or percentage as contemplated in

section 33(2) of the MFMA has as yet been prescribed. In response to enquiries made by the transaction advisors National Treasury confirmed that, in the absence of municipal financial obligations in respect of the proposed development, Section 33 will not apply.

Chapter 11 of the MFMA deals with the procurement of goods and services by the municipality, and the disposal of assets. Section 112 obliges municipalities to develop and implement a Supply Chain Management (“SCM”) policy and the matters to be addressed therein. The Overstrand Municipality has a compliant SCM policy in which the competitive bidding processes to be followed is adequately addressed. Section 6 of the MFMA Municipal Supply Chain Management Regulations, 2005 (the “SCM Regulations”) requires that the Council performs an oversight role in respect of the implementation of the SCM policy. All risks related to an external service delivery contract must be identified and communicated to a municipality’s internal audit unit established in compliance with section 165 of the MFMA. The internal audit unit should then include the contract risk profile in its risk-based audit plan.

3.2.3 LAND USE PLANNING AND ZONING

The proposed development will have to be in visual harmony with the surrounding built and natural environment. To ensure this, it will *inter alia* have to comply with the legislation applicable to land use and zoning.

3.2.3.1 LAND USE PLANNING ORDINANCE

The Municipality’s powers and duties in respect of municipal planning and land use management are *inter alia* derived from LUPO. The Ordinance empowers the Municipality to impose appropriate conditions when approving a development application. The Council therefore is able to influence the form and character of the proposed development, so as to ensure that it is, for example, aligned to the municipal strategic planning objectives (e.g. low or high density, preservation of natural character or specific building forms) as set in the Overstrand Growth Management Strategy (“OGMS”).

The Municipality has to balance the type of, density and character of development that will be permitted (on the one side) with economic feasibility and as required as per the zoning scheme conditions. Whilst the Municipality is compelled to enforce the provisions of the applicable Zoning Scheme and conditions of land use approvals, it is also empowered to approve departures from land use restrictions after following due process.²⁵

During May 2011 the Department of Land Affairs and Rural Development released a Draft Spatial Planning and Land Use Management Bill, 2011 for comments. The intention is that the Bill will replace the DFA and some other laws.²⁶ At this stage it is not possible to indicate with any degree of certainty whether the Bill will become law in the course of project evaluation or implementation.

3.2.3.2 ZONING SCHEME

²⁵ See sections 39(1) and 15 of LUPO.

²⁶ The objects of the Bill are *inter alia* to provide a uniform, effective, efficient and integrated regulatory framework for spatial planning, land use and land use management in the manner that promotes the principles of co-operative government and public interest. The Bill will *inter alia* prescribe the preparation and content of municipal spatial development frameworks, municipal land use planning including the obligation that a municipality must adopt and approve a single land use scheme for its entire area of jurisdiction within five years from the commencement of the Act. It also deals with the establishment and composition of Municipal Planning Tribunals and sets out matters to be dealt with by such tribunals.

The Hermanus Municipality's zoning scheme²⁷ (the "**Zoning Scheme**") currently applies to the land proposed for development. It sets out the land use restrictions that apply to those properties.

In terms of the Zoning Scheme the De Mond site is zoned Resort Zone 1. Holiday accommodation is permitted on land zoned for that purpose as a primary right. The Zoning Scheme defines "holiday accommodation" as "*a harmoniously designed and built holiday development in a unique natural environment with an informal clustered layout which may include the provision of a camping site, mobile homes or dwelling units, whether in private or public ownership, which comprises a single enterprise and which may only be marketed by means of short-term renting or time sharing, but does not include a hotel or motel.*"

As a hotel is specifically excluded and as definitions contained in zoning schemes are not land use restrictions as contemplated in LUPO, a developer who intends erecting a hotel on the land will have to obtain appropriate approval for the rezoning thereof.

The remainder of the area under discussion is zoned Open Space Zone II. In terms of the Zoning Scheme, 'open space' means "*any land used or reserved in terms of the scheme for use by the public as open ground, park, garden, playground, recreational ground or square.*" The Municipality confirmed that it is acceptable for public resort facilities to be developed on such land.

The preparation of the IZS that will replace all existing zoning schemes and zoning regulations within the Overstrand municipal area has been taken in hand a number of years ago and the work has reached an advanced stage of completion. The IZS will clarify the grey areas that exist in the Hermanus Zoning Scheme and provide for more consent uses²⁸. Consent uses provide more scope for a diversified public resort development which can holistically address the various lifestyle elements that would determine the financial viability of such a development within a seasonal economy.

The IZS has been submitted to province and the Municipality is expecting approval thereof prior to commencement of the proposed development. The project advisors believe that it would therefore be prudent to take cognisance of the provisions contained in the IZS which, if finally promulgated, will contain land use restrictions that will impact on development proposals.

If the IZS is approved and promulgated, Erf 5327 and Erf 4831 (which includes part of De Mond, KRLP, Prawn Flats and Sea & Sand) will be zoned as "Holiday Resort".

In terms of the IZS the primary uses permissible in **Resort Zone 1** will be "*conservation use, holiday accommodation, private open space, private road and tourist accommodation*", whilst consent uses will include "*additional dwelling units, conference facilities, holiday housing, hotel, place of assembly, place of entertainment, recreational facilities, restaurant, rooftop base station, transmission tower, tourist facilities, any other related use determined by Council*".

According to the development rules, the Council must stipulate development parameters with regard to density, height, coverage, layout, building design, landscaping, parking, access, signage and the use of the property. These matters will probably also be addressed in the environmental authorisation under NEMA. Usually conditions of approval or authorisation include requirements relating to the submission of plans to the competent authorities for approval and those plans (e.g. a site development plan, a landscape plan or

²⁷ Promulgated as a provincial regulation as P.N. 330/1992 of 10 July 1992.

²⁸ A "consent use" is a use that requires the prior written consent of the Council and is to be distinguished from a primary use right. The Council has discretion whether to grant or refuse an application for consent use.

an environmental management plan) may not be deviated from without the approval of the competent authority.

The primary uses of Erven 5327 and 4831 will therefore include holiday accommodation and tourist accommodation. In terms of the IZS “holiday accommodation” means *a harmoniously designed and built development, used for holiday and recreational purposes, whether in private or public ownership, which:*

- *consists of a single enterprise in which accommodation is supplied by means of short term renting and time sharing only;*
- *may include the provision of a camping site, mobile home park and dwelling units;*
- *may also accommodate a restaurant and indoor and outdoor recreation facilities; but*
- *does not include a hotel or conference centre.*

A number of definitions are relevant to highlight some of the consent uses in Resort Zone 1:

“dwelling units” *meaning a unit containing one or more rooms, with adequate sanitary facilities and a kitchen, which may be used for long or short term accommodation purposes, and may be included in or separate from the main building on the property;*

“conference facilities” *means a place of commercial nature where information is presented and ideas exchanged among groups of people or delegates whose normal place of work is elsewhere, and may include overnight accommodation and the supply of meals and beverages to delegates;*

“holiday housing” *means dwelling units, mobile homes or camping sites that are harmoniously designed and built, for holiday or recreational purposes, and which may be separately alienated by means of sectional title division, fractional title, the selling of share blocks or the subdivision of property;*

“hotel” *means a property used as temporary residence for transient guests, where lodging and meals are provided, and may include: a restaurant or restaurants, associated conference and entertainment facilities that are subservient and ancillary to the dominant use of the property as a hotel; and premises which are licensed to sell alcoholic beverages for consumption on the property but does not include an off-sales facility;*

“place of assembly” *means a public hall, a hall for social functions, a music hall, an exhibition hall, a club house, a town hall, civic centre, which is not directly related to a commercial undertaking and excludes a place of entertainment;*

“place of entertainment” *means a place used for commercial entertainment which may attract large numbers of people, operate outside normal business hours or generate noise from music or revelry on a regular basis, including a cinema, theatre, amusement park, dance hall, night club, gambling and live music;*

“recreational facilities” *means the use of land, including stretches of coastline, for large uncovered or open areas developed or undeveloped to practice a particular sport or combination of sports and general recreation, and includes a clubhouse, associated infrastructure and buildings, indoor and outdoor swimming pools and associated infrastructure and includes a firing range and driving range, but does not include any building or structure that is used for business or any other use not aligned to or dependent on the sport concerned;*

“transmission tower” *means any support structure and associated infrastructure more than 3m in height, that is used for the transmission and/or reception of electromagnetic waves; and includes telecommunication, cellular communication, radio, television and satellite transmission;*

“tourist facilities” mean amenities for tourists or visitors such as lecture rooms, restaurants, picnic areas, gift shops, cafés, restrooms, recreational facilities, animal parks (domestic or otherwise), but does not include a hotel or overnight facilities;

The possibility to provide holiday accommodation on Erven 5327 and 4831 and facilities such as a restaurant and recreational facilities will form the backbone of a public resort. If the Council grants special consent, dwelling units (including time sharing and short term rental) and hotel and conference facilities will be permitted, which will be ideal, given the location of Erf 5327 in respect of the R43. Also included as consent uses are holiday housing under section title, fractional title or share blocks. Fractional title will, due to the exclusivity limitations in respect of the Crown land portion of erf 4831, only be allowable on the portions of erf 4831 currently occupied by the KRLP and Prawn Flats.

It is not contemplated at this stage that the land will be subdivided (*inter alia* as no portion of Erf 5327 may be alienated without the consent of the State, something which will involve a time-consuming process with an uncertain outcome).

Other attractive consent uses include a place of assembly and a place of entertainment, which when granted will probably be made subject to stringent conditions to ensure that undue interference with rights to peace and quiet are respected.

The likelihood of consent use applications being granted should be strongly influenced by the Klein River Estuarine Management Plan (the “**KREMP**”), other similar Council policies and the related legislation. It can be accepted that the Council will probably attach strict conditions to consent uses to ensure the protection of the environment.

As it is, the De Mond site currently includes two sewage pump stations. A consent use will probably be required for ‘utility services’, depending on the development proposal.

The uncertainty surrounding the granting or refusal of applications for consent uses should pose a risk to potentially interested developers. It can safely be accepted that those developers will require a due diligence period and will require that any development agreement that may be concluded, contains a suspensive condition in terms of which the agreement will become unenforceable if the required consent uses are not granted.

3.2.3.3 RESTITUTION AND LAND RIGHTS

The RLRA regulates the restitution of rights in land in respect of which persons or communities, who regard themselves as having been dispossessed of land under discriminatory laws, could have lodged claims for restitution or restoration. According to the findings of the historical research done as part of the Overstrand Heritage Survey Report (the “**OHSR**”), a land claim was lodged in terms of the RLRA by persons, claiming to have been forcibly removed from Mount Pleasant during 1998. This land claim was apparently combined with an earlier land claim for the areas of Stanford & De Mond, in an attempt to avoid that it be rejected on the ground of being lodged after the stipulated closing date for claims. It is further stated in the OHSR that an answer is “still awaited” and that the process has apparently been highly contested, with accusations of new-comers trying to stake false claims and corruption on the part of the committees handling the matter. It is important to note that the fact that a land claim has been submitted, does not translate into a prohibition of any further development on the land concerned. Section 11(7) of the RLRA regulates the situation. If the regional land claims commissioner concerned is satisfied that a claim received complies with the requirements of that Act, the commissioner must publish the prescribed notice in the Government

Gazette. Section 11(7) of the RLRA *inter alia* provides that, once that has been done, *no person may in an improper manner obstruct the passage of the claim* and that *no person may sell, exchange, donate, lease, subdivide or rezone the land in question without having given the regional land claims commissioner one month's written notice of his or her intention to do so.*

The transaction advisors have attempted to establish from the responsible regional land claims commissioner whether the claim referred to above, has been accepted and, if so, whether a notice as contemplated in section 11(7) was published in the Government Gazette. Unfortunately they have as yet not managed to solicit a reply from the commissioner's office or otherwise obtain more information of the claim. As a safety precaution a developer would be well-advised to serve notice that complies with the requirements of section 11(7) on the regional land claims, of the developer's intention to lease, subdivide or rezone the municipal land concerned.

3.2.4 PROVINCIAL POLICIES AND PLANS

The transaction advisors investigated and assessed the consistency of the proposed utilisation of the land concerned with applicable provincial policies and plans. The Provincial Spatial Development Framework (the "PSDF") deserves special mention. It was adopted by the Western Cape Government as a policy plan towards the end of 2005 and has subsequently been approved in terms of LUPO as a so-called "section 4(6) structure plan". It calls amongst other things for a tight urban edge and *inter alia* aims to discourage the phenomenon of urban sprawl.

3.2.5 ENVIRONMENTAL LEGISLATION

South African legislation governing environmental management and related matters is extensive, fragmented and sometimes overlaps. The Municipality is keenly aware of the statutory obligations that it has in terms of that legislation.²⁹ It has therefore incorporated specific provisions into strategic municipal documents to promote environmental management objectives as found in the legislation and to ensure lawful administrative action.

Examples of such strategic documents are the OGMS, OHSR, KREMP, the municipal Spatial Development Framework (the "SDF") and the Overstrand Density Survey (the "ODS").³⁰

3.2.5.1 ENVIRONMENTAL AUTHORISATION

NEMA provides that no one may commence with any listed activities before obtaining environmental authorization from the competent authority. Anyone wishing to obtain such authorization must follow a *basic* or a *full* environmental impact assessment process, depending on the type of activity envisaged.³¹ The onus will be on the appointed developer to ascertain which listed activities will be triggered by the proposed development and what the applicable statutory requirements are that will have to be complied with to obtain the required environmental authorization.

A detailed discussion of the provisions of the EIA Regulations falls beyond the scope of this report. Suffice it to say that in terms of Listing Notice No. 3³² the construction of resorts, lodges or other tourism

²⁹ E.g. in terms of section 54 of the NEMBA, a municipal IDP must take into account the need for the protection of ecosystems either nationally or provincially listed as critically endangered, endangered, vulnerable or protected ecosystems. The conservation of estuaries is *inter alia* covered in the Marine Living Resources Act, No. 18 of 1998.

³⁰ Also see "Estuary Study and Management Plan" under Strategic and Institutional Plans.

³¹ Environmental Impact Assessment Regulations, 2010 (the "EIA Regulations") published in Government Gazette 33411 (Notice No 664) of 30 July 2010.

³² Item 6(d) in Notice 546 in Government Gazette 33306 of 18 June 2010.

accommodation facilities that sleeps 15 people or more in an estuary, in urban areas within 1km from the high-water mark of the sea and/or in areas within 100m from the edge of a watercourse, is a listed activity requiring environmental authorization.³³ It is noteworthy that both “estuary” and “watercourse” as used in the EIA Regulations, carry wide meanings.

The establishment of setback lines for estuaries requires an assessment of a specific set of processes and local conditions, determined with the inputs from ecologists and engineers.³⁴ If a setback line has been determined in terms of the applicable legislation, environmental authorization will be required before commencement of such activities within the setback line. The Municipality is in the process of determining a Development Setback Line (“DSL”) for the area of development as informed by the various studies mentioned in this report. It appears that the DSL will be a strict measure thus placing the major part of the proposed development area on the watercourse side of the development setback line.

In terms of the EIA Regulations the competent authority would ideally take a decision within 30 days, but built into the regulations are extension periods which effectively allow for 120 days if the application complies with all requirements. Taken into account the required content of a basic assessment and its public consultative process, it could realistically be assumed that it would take between 9 and 12 months to obtain environmental authorization for the proposed development.

Since the proposed development will fall within 1 kilometre of the high water mark it will also be within the Coastal Protection Zone as defined in ICMA, the goal of which is to enable the use of land that is adjacent to coastal public property or that plays a significant role in a coastal ecosystem to be managed, regulated or restricted.

3.2.5.2 ASSESSMENTS, SURVEYS & INVESTIGATIONS

Further conditions of the EIA would probably be a Geophysical Survey and a Geotechnical Investigation and it is possible that the Municipality may also require a traffic survey depending on the development proposal. Preferably prior to a geotechnical investigation, the selected developer will have to conduct a geophysical survey using a reliable method to assess the likely variations in the bedrock topography along selected traverse lines; to determine the location of geological structures for the positioning of drill-sites for the abstraction of groundwater and to assess the soils’ aggressiveness in order to establish a benchmark for the soil samples to be taken during the geotechnical investigation.

The Geotechnical Investigation would have to be done through the excavation of a sufficient number of pits to cover the land to be developed in order to record the water rest levels; recording of surface features; recording the results of field penetration and laboratory tests as well as a chemical analysis of soil-water extracts - the objective being to determine all possible geotechnical constraints to be taken into account in the planning and design of the various components of the development.

3.2.6 HERITAGE LEGISLATION

³³ As per a DSL analysis done in 2008 by a local consultant for the previous developer, a “**development setback line**” is defined as meaning “*an area between the location where a development is contemplated and the high water mark of the sea, the edge of an estuary or river system, or the edge of a cliff. It provides a safe landward limit which will ensure that developments will not be damaged by storm events, flood erosion, sand movement, or slumping of cliffs or steep slopes.*”

³⁴ Usually the setback line is measured from the high water mark which, in SA, is approximately 2m above Mean Sea Level (“MSL”). The earlier DSL analysis that was undertaken determined that the three low lying areas of the De Mond site with dwelling structures, measured between the 2m and 3m above MSL contours and that the major part of the property lies above 12m MSL. According to the analysis, it is well known that the low-lying areas were flooded during high water levels in the Vlei.

Section 38 of the NHRA has specific relevance. It states that if a development which will change the character of a site exceeding 5000m² in extent is contemplated, the responsible heritage authority must be notified thereof at the time of its initiation and should be furnished with details regarding the location, nature and extent of the proposed development. The responsible authority will then decide if a HIA is necessary and besides the standard information required other conditions to be met.³⁵

3.2.7 HEALTH AND SAFETY LEGISLATION

Given that the municipality will remain the owner of the land concerned, it would be essential to include in a contract with a developer a Health and Safety Indemnity Agreement in accordance with the stipulations of OHSA.

3.2.8 CAPE OUTSPANS ACT

It could make a substantial contribution to the sustained financial viability of the project if portion of the land that the Municipality acquired under the relevant Crown Grant, could be sold and the proceeds of the sale could be put towards the costs of the proposed public resort. For this reason the transaction advisors considered it necessary to consider the current constraints on the sale of portion of that property.

It would appear that a number of laws would potentially feature prominently, should it be decided to pursue the avenue of selling portion of the land concerned. It would *inter alia* include:

- the COA;
- the MFMA (more particularly section 14 of the MFMA);³⁶
- LUPO (to achieve subdivision and rezoning) and potentially the NHRA, NEMA and so forth; and
- the MSA.³⁷

The following provisions of the COA may find application in the scenario sketched above:

1. ***Issue of deeds of grant of outspans to divisional or municipal councils.*** – Upon application by any divisional council or municipal council, the Minister of Public Works may, in his discretion, and without payment of any consideration, cause a deed of grant, containing such conditions as he may think fit, to be issued to that council in respect of the whole or any portion of the land of which any outspan consists, being Crown land, situated within the area of jurisdiction of that council, and in the case of a divisional council, not situated within the area of jurisdiction of any other local authority.
2. ***Exemption from transfer duty.*** –
3. ***Resumption for public purposes.*** –
 - (1) *While any land which has been granted to any council under section one remains the property of that council, the Minister of Public Works may resume for public purposes the whole or any portion thereof, subject to the payment to the council of compensation.*
 - (2) *If the amount of compensation to be paid under sub-section (1) is not settled by agreement between the Minister of Lands and the council concerned, the amount shall be fixed by arbitration*

³⁵ See further discussion in “Due Diligence” under regulatory issues.

³⁶ At this stage section 14 of the MFMA is dealing with the alienation of a municipality’s capital assets (which include land).

³⁷ See the provisions of sections 21 and 21A of the MSA requiring that contract documents be made known for public comment and be approved by the Council.

under the provisions of the Arbitrations Act, 1898 (Act No. 29 of 1898) of the Cape of Good Hope, and for that purpose it shall be presumed that the said Minister and the council concerned, agreed to refer the fixing of the amount to a single arbitrator.

4. **Council to whom land granted not to alienate or burden it without Administrator's consent.**—*The council to which any land has been granted under section one shall not sell, exchange or donate or otherwise alienate, or let or mortgage or otherwise burden, the land or any portion thereof, without the consent of the Administrator of the Province of the Cape of Good Hope, and except upon conditions approved by him.*

It is noteworthy that even the letting of land obtained by way of a Crown Grant under the COA, is subject to the "Administrator's consent"³⁸. If the purpose of the sale would be to achieve the purposes of the original grant (namely to develop in a meaningful way a public resort on the remainder of the land), the required consent would probably be obtained. It is to be expected that obtaining the necessary approval will probably be a time-consuming process³⁹ and, when granted, that the approval will probably be subject to appropriate conditions.⁴⁰

Obtaining the Premier's approval will only be a first step in a lengthy process. In order to achieve the sale and transfer of the portion of land, it will *inter alia* be necessary to obtain the approvals of all the competent authorities charged with the responsibility of applying the environmental heritage, land use and other applicable legislation (e.g. to create a new land unit for purposes of separate registration in the Deeds Registry). The transaction advisors believe that it would be premature at this stage to discuss in detail the steps that will have to be followed in order to satisfy "due process" requirements, should it be decided to pursue the "sale option". Suffice it to say that the steps to be taken, should the Premier's approval under the COA be obtained, will probably take at least two years to complete.

3.2.9 SUMMARY

The Municipality is duty-bound to focus on the delivery of basic services, but also to promote social and economic development. The proposed development of a public resort will promote social and economic development, as will more fully appear from this report.

The Municipality is obliged to ensure that the land on which the De Mond Caravan Park is located is used as a public resort. In doing so, the land will be utilised in a fair and equitable non-exclusive manner. The Municipality must also ensure that the current lessees of the De Mond land as well as the lessees of other portions of the municipal property concerned be treated fairly and equitably, each according to the conditions of the lease, consideration of the financial investments that were made and goodwill.

The transaction advisors are satisfied that the Municipality is following the correct processes to procure a private developer and that the municipal administration is keenly aware of the environmental, heritage and other legislation that the development will have to comply with. In the opinion of the transaction advisors the municipal administration should be able to monitor the implementation of the proposed development.

In terms of the Zoning Scheme the land in question is correctly zoned for the proposed development provided the latter does not include a hotel. The IZS may be finalised before the development commences. The IZS will be more suited to handle the consent applications which will be required for purposes of the proposed development.

³⁸ The word "Administrator" should now be read as "Premier".

³⁹ The application for consent would have to be fully motivated and substantiated with adequate financial facts and reasoning for the Premier to grant the Municipality a right in principle to proceed with the sale.

⁴⁰ E.g. relating to ring-fencing the revenue acquired through the sale of a portion of the land, to ensure that it is only used for the development of a public resort.

3.3 MUNICIPAL LAWS, POLICIES AND PLANS

3.3.1 BY-LAWS AND POLICIES

The applicable municipal by-laws must be complied with and the relevant municipal policies (e.g. the local labour promotion programme and the plot clearing policy) will have to be taken into consideration as guidelines when planning the proposed development and evaluating the development proposals. Those by-laws include by-laws relating to fire safety, electricity, water and sanitation, storm water management, swimming pools, solid waste management, streets and public places, property rates, outdoor advertising and signage. The Fire Protection requirements set out in SANS 0400 will have to be complied with.⁴¹

3.3.2 STRATEGIC & INSTITUTIONAL PLANS

The Municipal Council governs Overstrand in accordance with a number of key strategic planning and management instruments. Those instruments are used to achieve integrated development and planning within financial constraints, principles of economic, social and environmental sustainability, engineering excellence and are focused on meeting community needs.

This section investigates the alignment of the proposed development of a public resort on municipal land with the vision, mission and key objectives of the Municipality as reflected in its principal strategic planning document, namely the IDP. The Municipality has aligned its IDP with the National Spatial Development Perspective, including the national key performance areas, the Provincial Growth and Development Strategy; and the District Growth and Development Strategy (“DGDS”).

Other relevant documents consulted included the ODS, the OGMS, the SDF and the OHSR. Documents not specifically consulted for the purpose of feasibility, but which a developer should consult, are sectoral plans such as the Integrated Transport Plan, the Water Services Development Plan and the Integrated Waste Management Plan. This will be necessary to ensure that the bulk services of the proposed development will be aligned with the municipal standards, systems and practices.

3.3.2.1 INTEGRATED DEVELOPMENT PLAN

The Municipality’s vision is expressed as follows in the 2011-12 IDP: *to be a centre of excellence for the community*. Its mission is to deliver optimal services in support of economic, social and environmental goals. Key to the provision of a better quality of life for all its communities is local economic development. It is therefore the main function of the Directorate of Economic Development to promote economic development initiatives, tourism, sustainable job creation, poverty reduction and shared growth that integrates and, on the other hand, to connect the Municipality, its citizens and its natural resources.

The Overstrand economy comprises 40% of the Overberg district economy with Hermanus being the economic hub of the municipality contributing almost two-thirds of the economic output. This has led to the migration of low skilled job seekers to the area, putting pressure on the Municipality to create more sustainable jobs and there is a growing realisation that unless Overstrand stimulates shared growth it will not be able to meet its development mandate.

⁴¹ Requirements *inter alia* include that a fire hydrant be provided not more than 90m away from every dwelling unit, that professional design standards must include determining the fire risk category of the development to give access to the appropriate fire fighting vehicle in terms of road width and turning circle, and so forth.

Through its economic development strategy, Overstrand has *inter alia* set itself the goal to increase economic growth to 6% per annum by 2014, sustain its natural resource base, halve official unemployment and poverty figures by 2014 and broaden participation in the economy. Each of these goals could be directly addressed by the proposed development project as well as indirectly since growth of the tourism industry will have a knock-on effect on all other industries and has real potential to leverage job creation. Recognising this, Overstrand has identified tourism as a priority sector and facilitation of its growth as a strategic intervention. Strategic interventions include ensuring an enabling spatial framework by utilising *inter alia* municipal assets; managing natural resources in a manner that ensures the long-term transformation and sustainability of the economy; and promotion of job creation. However, since the Municipality realises these interventions cannot be implemented simultaneously, its IDP specifically identifies the private sector as contributing to *inter alia* tourism development and job creation.

Apart from the Municipality's role in specific PPP's that could for example be part of tourism development (such as the proposed project), the Municipality has a broader yet vital role to fulfil in attracting investors to Overstrand and cultivating the secondary industries and businesses that follow.

In order to fulfil its constitutional objectives⁴² the Municipality depends largely on financial support from the national and provincial governments. The Municipality will receive a provincial transfer of R103,998m over the next three years of which 98,3% must be used for housing. It does not include an allocation for economic development and tourism. National transfers focus mainly on institutional strengthening, infrastructure investment and the equitable share. It is expected that a Municipal Infrastructure Grant ("MIG") of R42,553m will be received over the next three financial years and beyond. In terms of its master planning the Municipality will, however, require approximately R100m per annum (2011 prices) for the next 25 years to invest in new and maintenance of existing infrastructure.⁴³

It was previously estimated that the cost of developing a public resort on the De Mond land would amount to approximately R198m.⁴⁴ Given the infrastructure investment costs set out above, this is not a financial commitment that the Municipality can afford to make towards local economic development and tourism. The proposed development may, however, be an attractive business proposition to a private developer if undertaken "in partnership" with the Council.

It is noteworthy that, in terms of the Constitution, the Municipality is required to be development-orientated.⁴⁵ The Municipality in its IDP confirmed its commitment to create an enabling environment for the success of projects, such as the proposed development. Although the seasonal nature of public resorts generally impacts negatively on the financial viability of such undertakings, the Council is confident that it can make a positive contribution to promote tourism in the traditional mid and low seasons (e.g. by initiating or facilitating activities such as conferences that will attract more visitors to the public resort). It has already embarked on a benchmarking project including the development of a Tourism Business Barometer to determine the extent of tourism on the economy and enable forecasting of tourism growth figures through reliable data collection and analysis on an annual basis.

An important area of socio-economic alignment between the proposed project and the Municipality's strategic efforts concerns the Municipality's goal to implement more focused Broad Based Black Economic Empowerment ("BBBEE") and the development of emerging entrepreneurs and contractors. This is to be achieved *inter alia* through a skills development and mentoring programme and developing a database of

⁴² See section 152(1) of the Constitution.

⁴³ I.e. water R822m, sanitation R668m, electricity R595m and roads R408m.

⁴⁴ Estimate of the developer whose development agreement was terminated during April 2010.

⁴⁵ See sections 152(1)(c) and 195(1)(c).

such skills. Although some of the job opportunities created during the construction phase of the project would be temporary in nature, it would assist to alleviate poverty. During the operational phase of the project a significant number of permanent jobs would be created. Procurement stipulations will include appropriate BBBEE requirements⁴⁶ and that preference will be given to employment of local skills and labour. In terms of the IDP requirements PPP proposals will be assessed through the lens of BBBEE and in consideration of the stated principles.

The transaction advisors found that the proposed development project will be directly aligned to the Municipality's economic development drive, its key priorities and interventions focused on unlocking the full potential of tourism and the creation of sustainable employment.

3.3.2.2 SPATIAL DEVELOPMENT FRAMEWORK

Sustainable development relates to balancing human well-being, economic efficiency and environmental integrity. The SDF is a sectoral plan that forms part of the comprehensive IDP and is one of the municipal tools used to promote sustainable development. The SDF contains the municipal spatial policy, guiding the creation of integrated and sustainable use of land. This has to be achieved within the broader context of protecting the value of the Overstrand Municipal area as a natural resource and enhancing the sub-region as a popular eco-tourist destination.

Overstrand has recently completed a review of its SDF in which it consolidated existing spatial policy and plans. As planning is a continual and incremental process linked to various dynamics, it constitutes a cyclical process which demands continued updating and annual reviews of the SDF. The environmental and social responsibility with which planning is approached is clearly articulated in the SDF and several of the objectives could be directly or indirectly achieved or contributed to by the proposed development.

The bioregional planning model adopted by Overstrand provides a significant departure from previous planning models of a Land Use Management System ("LUMS") aimed at protecting ecosystems. Several other sectoral plans which are part of the SDF have been or are in process of being finalised. The KREMP and the OGMS, serve as examples.

KREMP was prepared in conjunction with Cape Nature, is in its final stages of refinement and is considered to be of particular importance for this study. The Council approved the OGMS during January 2011.

According to the Development Pattern Policy for Urban Nodes and Settlements as contained in the SDF, De Mond falls within the Greater Hermanus Regional Node. Applicable guidelines indicate that as a general principle, public investment initiatives should focus on strategically located (public) properties that are linked to the town's comparative advantage (tourism). The focus should then be to upgrade and develop these properties to improve quality of life and to establish an enabling environment for job creation in partnership with the private sector. The SDF includes as a specific strategy that the Municipality must identify and actively facilitate key catalyst projects in conjunction with strategic partnerships with business/investors. The proposed development fits perfectly into this scenario.

The Tourism Related Land Uses Policy as contained in the SDF differentiates between agri-tourism and eco-tourism which includes the proposed public resort. From a land use management perspective the majority of the policy and guidelines in Table 2.1 below, as extracted from the SDF, will be applicable to the proposed development.

⁴⁶ See the Preferential Procurement Policy Framework Act, No. 5 of 2000 (the "PPFPA"), the Preferential Procurement Regulations (2001) and the new set of Regulations gazetted on 8 June 2011 that will commence on 7 December 2011.

Table 2.1 – Tourism Related Land Uses

No.	Policy statement
P12.1	Eco-tourism accommodation should only be permitted as a single enterprise. Separate alienation (Resort Zone II purposes) should as a general principle only be permitted within existing urban nodes, rural settlements, the urban fringe and designated rural development areas (RDA – refer Section 5.4.4).
P12.2	Council should only in exceptional circumstances allow separate alienation (Resort Zone II purposes) within conservation and environmentally sensitive areas, where adequate proof is provided to its satisfaction of the implementation of an approved environmental management plan and in exchange for designating / rezoning land for conservation purposes.
P12.3	A primary requirement of an eco-tourism development should be that the development should be natural resource based focused on a specific natural attraction.

Issue	Guidelines
Definition / description	<ul style="list-style-type: none"> • Eco-tourism development means a business enterprise providing overnight accommodation to transient guests and related holiday activities often located within a unique setting. The types of facilities include a range of building sizes, building types and building arrangements such as: <ul style="list-style-type: none"> - resorts (holiday accommodation) - guest house - camping - hotels
Land use parameters	<ul style="list-style-type: none"> • Ancillary activities / uses to be shown on a SDP and Council to approve the use; i.e. lecture rooms, restaurants, tourist facilities, conference facilities, spa/hydro wellness centre and any other use which is in its opinion reasonably and ordinarily related to the resort. • Where more than 5 additional units are permitted on an agricultural unit, application will be required for resort purposes. Only the "footprints" of the buildings could be rezoned to resort purposes, depending on the objective of the development.
Development parameters	<ul style="list-style-type: none"> • The size of the development / number of units / density shall be determined: <ul style="list-style-type: none"> - by contextual informants such as environmental sensitivity, views, carrying capacity for the environment, services provision - on its own merits according to desirability criteria - with reference to place-making elements (refer to Section 5.3.10) - maximum density of 1 unit/2,5 ha • A site development plan (SDP) should be submitted simultaneously for all development applications. Council to determine conditions of approval attached to the SDP. • The cumulative effect of the existing buildings and the proposed development should not impact on the rural character of the surrounding area. • Proof must be provided that sufficient housing exists for farm workers before additional dwelling units for tourism purposes will be permitted. • The resort development should not be subdivided from the agricultural unit. • The size of additional dwellings should be restricted to 120m². • Dwellings should be grouped and where applicable, incorporated into the farm buildings. • Visual impacts should be restricted and the aesthetic qualities of buildings should complement the existing architecture and heritage character of the area.

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Issue	Guidelines
Development form	<ul style="list-style-type: none"> • Prevent linear development (e.g. along rivers or along the shores of dams) by strictly limiting development within designated nodes/clusters.
Services	<ul style="list-style-type: none"> • Water provision for domestic and drinking purposes should comply with the SABS's standards for domestic water (SABS 241). • Any solid waste that may arise from the proposed development should be moved to an approved dumping site. The storage/ transportation of any solid waste should be done in a manner that will prevent any form of pollution of the environment, including pollution of water resources. • All domestic sewerage should be disposed of in such a manner as to prevent any pollution of water resources (underground or surface). If septic tanks are to be used, an impact study should be undertaken in order to determine the soil characteristics as well as the possible impact of such disposal on ground water resources. • All services should be provided by the developer subject to requirements of Water Services Act for water and sewage.

Whilst the intention with the various plans, policies and strategies *inter alia* is to stimulate eco-tourism, this must take place within the framework of the applicable municipal parameters.

3.3.2.3 OVERSTRAND GROWTH MANAGEMENT STRATEGY

The Municipality adopted a holistic approach in the development of the OGMS. It *inter alia* considered engineering inputs concerning water, sewerage, electricity, solid waste and roads and placed a specific focus on the protection of sensitive natural and heritage environments and resources.

The OGMS forms part of the SDF and serve as a guiding principle in municipal decision-making. In essence it addresses the critical spatial issues relating to future municipal growth and development, e.g. the containment of urban sprawl, the need for increased residential densities and the improvement of social and economic integration of existing urban areas.

Hermanus East is a high property value area with a low vacancy factor of less than 8%. Several natural features (e.g. the heritage areas along the coast) mark it as a sensitive area to development and place restrictions on the extent to which development may take place. However, development opportunities do exist. The area under discussion serves as an example. It falls within the south eastern edge of the Hermanus East Planning Area. The OGMS identifies the promotion of a medium density housing node adjacent to the caravan park and specifically emphasizes the De Mond Caravan Park area as offering an opportunity for redevelopment. In fact, the De Mond Caravan Park in its current state is almost paradoxical to the aesthetic residential area adjacent to it.

Eight Planning Units have been identified for the Hermanus East Planning Area, which on average would increase the current gross density for the area from 6.3 to 9.1 dwelling units per hectare. The De Mond area is not included in any of the planning units but are flanked on two sides by planning units 4 and 5 for which a variety of densification interventions, some incrementally, are proposed.

The ownership of the De Mond area is indicated as municipal owned and it falls partly within the current urban edge as defined in the SDF. The Klein River Lagoon, Prawn Flats and Sea and Sand areas seem to fall outside the urban edge. The Municipality has, however, confirmed that from a municipal perspective, public resort facilities may fall outside of the urban edge. It should be noted that the Municipality must ensure its viewpoint is in alignment with the Provincial Spatial Development Framework.

The land use of the De Mond area is indicated as structured open space Resort Zone 1 with the lagoon front as Open Space Zone II. De Mond is characterised in the OGMS as a special area within the green belt. Any development would be seen as a Green Corridor Development with the opportunity being to improve equitable public access to this municipal resource. The inclusion of the other areas (i.e. Klein River Lagoon area, Prawn Flats and Sea and Sand) in the proposed development could enable orderly development. This

may be achieved while retaining the current low density character and ensuring environmentally integrated activities with minimised and controlled disturbance of the natural environment within the applicable sensitive areas parameters.

3.3.2.4 OVERSTRAND DENSIFICATION STRATEGY

Growth management is essentially the result of key spatial concerns which are *inter alia* addressed through densification strategies. The Overstrand Densification Strategy therefore feeds into the OGMS. The Densification Grading of the De Mond area is 10 – 20 DU/H and the De Mond Caravan Park is 9,3 hectares in size. This is substantially lower than the current usage which relates to 212 individual caravan stands in close proximity to each other. As far as the proposed development is concerned, the impact of the suggested densification should be limited given that the expected style of development would allow substantially more open space resulting in a lower density development.

3.3.2.5 OVERSTRAND HERITAGE SURVEY REPORT

Heritage issues are addressed within the legal context of primarily the provisions of the NHRA.⁴⁷ The SDF contains a Heritage / Landscape Conservation Policy in compliance with the NHRA. The overarching heritage policy requires the Municipality to coordinate and manage the protection and enhancement of the unique character of the region and to ensure that appropriate heritage management practices become an integral component of overall municipal management. The Heritage Survey Report points out that property development that took place without a Heritage Impact Assessment (“HIA”), have had a major impact in the cultural landscape along the south coast.

There are no specific historical buildings or archaeological sites in the immediate area of the development. The landscape study done by the Heritage Survey identified the mountain ranges and the coastline as providing the natural landscape frame. The proposed development would be located on the growth management zone identified as the coastal interface zone which has high social and aesthetic significance and relate to heritage overlay zones, i.e. areas where the existing nature and development together contribute to the local character. Preferably development in these areas must be limited and rather be directed to other areas with greater capacity for growth.

The heritage survey makes provision for proposed heritage conservation areas and special areas. As stated De Mond is regarded as a special area. The survey specifically states the following:

“That an area including the coastal zone from the new harbour to the old harbour, and from the Marine Tidal pool to De Mond, and including the cliff paths and the interface between the built edge and the natural coastal environment, be proposed as a special area. This would apply to areas not already covered by existing environmental legislation, such as tidal pools and beaches. Attention should be given to the protection of the elevated sea views and scenic links between the natural and built environments along this edge. Special policies and guidelines should be prepared to safeguard these landscape qualities, and may include the following:

- *Subdivision and density controls along the sea /suburban edge;*
- *Height and roofscape controls;*
- *Protection of private garden landscapes along cliff paths*

⁴⁷ Act 25 of 1999. See for example the requirements made in section 38 relating to notification to be given to the competent heritage authority of proposed developments.

- *Retention of Single Residential zoning status in sensitive areas;*
- *Controls to avoid the interruption of sea views; and*
- *Garden boundary wall controls adjacent to cliff paths and other sensitive areas.”*

The proposed development will have to comply with these criteria and aim to contribute to the heritage character of the area. As indicated in this report a landscape master plan will be required for the development. Base information is already available as a landscape architect prepared a landscape concept for the earlier development proposals that did not materialise. The landscape concept took the heritage characteristics of the site into account.

3.3.2.6 KLEIN RIVER ESTUARY STUDY AND MANAGEMENT PLAN

A host of legislation prescribe conservation in respect of estuaries but it is the ICMA⁴⁸ that provides various levels of protection and governs the management thereof.

ICMA was not yet applicable when the KREMP was prepared. To give effect to the provisions of ICMA and to include municipal planning for 2013-2018, KREMP is now under review. The Municipality is committed to the clear vision and strategic objectives of KREMP and the proposed development, given its location in terms of the estuary as indicated in Figure 2.2, will have to adhere to that vision and objectives and, where applicable, assist with the implementation thereof.

Figure 2.2: Aerial View of the Proposed Development Area (Source: OGMS)

KREMP identified four key strategic areas that are already in various stages of implementation.⁴⁹ In respect of each of these key strategies, the Municipality is an important role-player both as implementer and enforcer of implementation.

In respect of water quality the Municipality will through its water quality practices as *inter alia* also outlined in its Water Safety Plan, pursue a multi-faceted campaign to ‘clean up’ polluting activities and installations which may include holding national and provincial departments responsible for their obligations in terms of water legislation.

KREMP puts forward three important strategies to integrate KREMP in land use management. Firstly to integrate the spatial implications of the KREMP into the Municipality’s SDF (refer to Figure 2.3). Secondly the adoption of a Coastal Zoning Scheme as contemplated by the ICMA and integration thereof in the Municipality’s LUMS (refer to Figure 2.4) and, lastly, the adoption and implementation of the guidelines supported by its Biodiversity Assessment (refer to Figure 2.5).

Figure 2.3: 1st Draft Spatial Conservation and Development Framework for the KREMP (Source: KREMP)

Figure 2.4: 1st Draft of the Coastal Zoning Scheme for the KREMP (Source: KREMP)

⁴⁸ The National Environmental Management: Integrated Coastal Management Act, No. 24 of 2008.

⁴⁹ That is the establishment of the institutional arrangements which include the KREMP Forum and a Technical Working Group; improving the quality and flow of water to the extent that it is safe for swimming all year round; getting users to attach greater social and economic value to the estuary and the municipality and land owners to introduce land use management measures and practices that safeguard the health of the estuarine ecosystem.

Figure 2.5: 1st Draft Biodiversity Assessment of the Klein River EM Area (Source KREMP)

The proposed development sites are at the centre of the KREMP's coastal zone⁵⁰ focus. As the proposed development will fall within 1 kilometre of the high water mark it will be within the Coastal Protection Zone. The goal of the Coastal Protection Zone is to enable the use of land that is adjacent to coastal public property or that plays a significant role in a coastal ecosystem, to be managed, regulated or restricted. Coastal public property in turn is made up primarily of the seashore (i.e. the area between the low and high water marks) and coastal waters are essentially all waters influenced by tides – whether an estuary, harbour or river – and the sea, out to the limit of the territorial sea.

Also indicated as falling under the Coastal Protection Zone is the 100m High Water Mark Offset. Environmental authorisation is required before certain listed activities⁵¹ may commence within that zone. The proposed development will involve activities for which environmental authorisation will be required under NEMA.

Special land use restrictions that will apply within the coastal zone will be incorporated into the Municipality's IZS which is currently being compiled.

As is indicated on the map above, De Mond is on the northern bank of a defined restricted zone. KREMP proposes that the area must be subject to stringent measures to protect the estuary and provide access thereto, as more fully explained in its operational objectives and management guidelines. The specific supported and non-supported uses and activities which the KREMP would like to see becoming Council policy and part of the Overstrand Zoning Scheme are as listed below.

Supported uses and activities:

- *Line fishing from the shore or from a boat or craft in compliance with MLRA permitting system and bag limits.*
- *Bait collecting, subject to periodic review, in compliance with MLRA permitting system and bag limits.*
- *Collection of mud prawn, sand prawn, bloodworm, pencil bait and tapeworm restricted to daylight hours, using legal implements.*
- *Canoes, kayaks, paddle skis, rowing boats and other low impact non-motorised craft.*
- *Motorised boats < 7Hp in transit only.*
- *Sailing and para-sailing – only registered participants during authorised regattas.*
- *Bird watching, hiking, swimming, non-destructive scientific research.*
- *Aquaculture enterprises, subject to EIA, licensing and concessions awarded through open and transparent procurement processes.*
- *Sustainable levels of harvesting of plant material from estuarine habitats to support job creating enterprises and livelihood strategies.*
- *Rehabilitation of the riparian reserve.*

⁵⁰ A coastal zone is defined in the ICMA as the "area comprising coastal public property, the coastal protection zone, coastal access land and coastal protected areas, the seashore, coastal waters and the exclusive economic zone and includes any aspect of the environment on, in under and above such area."

⁵¹ See section 24 of NEMA, the EIA Regulations and Listing Notice 1 published in Government Gazette 33306 (Notice No 544) of 18 June 2010.

Non-supported uses and activities:

- *No capturing or removal of fish during mouth breaching events.*
- *No capturing of line fish species with cast nets, seine nets, gill nets or traps.*
- *No removal of indigenous vegetation, no planting of any material (except where rehabilitation is underway),*
- *No fertilisers or pesticides in the riparian reserve.*
- *No jet skis. No motorised boats > 7HP. No skiing.*
- *No sail craft except as supported.*
- *No sand mining.*
- *Infrastructure and municipal services:*
- *No bridges or causeways.*
- *Limit of one only licensed launch site and jetty. No other wharfs or edge hardening.*
- *Management interventions*

It would appear from the findings of the 1st Draft Biodiversity Assessment of the KREMP Areas (See Figure 2.5) that the proposed development will require a hydrological sensitivity analysis and geotechnical study.

3.3.3 ALIGNMENT OF PROJECT

The transaction advisors conclude that the proposed development project is directly and soundly aligned to the Municipality's economic development drive and its key priorities and interventions, focused on unlocking the full potential of tourism and the creation of sustainable employment.

Furthermore, that it is aligned to the SDF, the OGMS and municipal densification objectives. The proposed development will have to comply with heritage and environment protection requirements. In addition to the applicable statutory requirements, the relevant competent authorities may impose further requirements to be complied with as conditions of approval.

4. MUNICIPAL CAPACITY AND MANAGEMENT CONSIDERATIONS**4.1 MUNICIPAL STAFF**

Except for the oversight of the Municipal Manager and the inputs to be provided by the Chief Financial Officer from time to time, the functions related to the procurement, management and monitoring of this project to develop a public resort are all located in the Directorate of Infrastructure and Planning ("DIP") with qualified staff heading the various divisions. Included herein are the divisions of Water and Transport, Electricity, Solid Waste Planning, Town Planning and Property Administration, Project Management and Development Control, Building Control, Environmental Management Services, Geographical Information System and Planning and Provision of Bulk Infrastructure.

To complement the expertise and capacity located in the Town Planning and Property Administration Division as the division mainly responsible for the project procurement, administration and management of the project's implementation, the Municipality has appointed the transaction advisors.

The DIP has undertaken master planning of the engineering infrastructure requirements (i.e. water, sanitation, roads, storm water and electricity) linked to expected short, medium and long term development projections which inter alia include the proposed development. It also has the expertise to approve engineering services designs and standards for new developments to ensure water and sewer distribution systems planning. The DIP

staff members have adequate skills to liaise with consultants, developers and contractors and will conclude a service agreement for the new development inclusive of regulating the bulk service contributions.

The DIP has in the past, through its divisions working together in an integrated manner, managed other large projects. The transaction advisors are confident that it will again be able put a project team together that will be able to manage, monitor and control the various aspects of the project development cycle.

Irrespective of the liaison that a developer may have with the KREMP Forum, the Heritage Committee and other environmental groups, it can be expected that the Municipality (as an important participant in these forums and committees), will ensure the views of environmental stakeholders are solicited and their interests served as best possible through the development. For instance, to meet the stringent water and wastewater quality standards of the Department of Water Affairs, it can be expected that the Municipality will expand its quality sampling regime to include the development. Logically these management and monitoring operations will have operational budget implications but none is expected to fall outside the budget or having an over-expenditure impact thereon.

Although contract management, monitoring and performance reporting in compliance with Section 46 of the MSA and Section 116 of the MFMA will primarily be a function of the Town Planning and Property Administration Division, the nature of the development will require the Municipality to establish adhocracies of expertise dealing with specific matters as these arise. The latter division will also have to deal speedily and effectively with the number of consent uses expected due to the primary zoning uses of the land in question not making provision for all the components (e.g. conference facilities that will make the development sustainable notwithstanding the seasonal nature of tourism).

An essential stipulation in the development agreement should be a three-year review of the contract, not with the purpose of changing the goal posts, but to iron out and refine problematic issues which will in their original form not be sustainable over a thirty year or more period.

Given that any bulk infrastructure systems will form part of the council's assets, these will have to be recorded by the Financial Directorate in the asset register with depreciated values based on an annual condition survey.

It is the objective of the Municipality's Directorate Economic Development to build and maintain cordial relationship with its provincial and district tourism partners. It may therefore be able to assist to speed up the processing of the EIA application.

4.2 FINANCIAL OBLIGATIONS

The transaction advisors believe that potential municipal financial obligations flowing from or connected with the proposed project will be limited to the following:

- Demolition costs;
 - Costs to maintain insurance cover in respect of municipal assets such as bulk infrastructure;
 - Costs of municipal staff (e.g. that of the Project Manager and staff associated with the administration of the long term lease agreement);
 - Costs to comply with health and safety legislation;
 - Compensation payable in the event of premature cancellation of lease agreements;
 - Legal costs to resist claims from current lessees or to obtain ejection orders against occupiers;
-

- The provision or upgrading of external bulk or link municipal services;
- Costs of the transaction advisors and advertisement costs.

The developer should contractually be made responsible for the *costs of demolishing* buildings and other structures on the project site, such as the ablution blocks and clubhouse.

The costs of maintaining *insurance cover* in respect of municipal assets such as infrastructure and buildings on the property is normal expenditure that would have been incurred if the project would not have been undertaken. It should be made a term of contract that, from date that the developer takes possession of the municipal property concerned, the developer shall be responsible to arrange and maintain insurance cover in respect of the municipal assets on or under the property, until same is demolished or removed with Council's consent. This approach will result in a saving on current municipal expenditure.

The Council will not be required to appoint additional *municipal staff* to assist with the proposed project. Staff currently in the employ of Council (e.g. the Project Manager and staff associated with the administration of the municipal lease agreements) may be required to assist with project planning, implementation and operational matters (e.g. receipt of rentals). The municipal expenses relating to existing staff members would have been incurred even if the project would not have been undertaken and therefore do not represent additional municipal expenditure. The operational costs associated with the administration of the leased property should (excluding the added contract management responsibilities), be less than current expenditure as only one tenant will remain. The operational budget of certain divisions (e.g. project management and environmental management) will have to include responsibilities linked to the development for the planning and implementation phases of the proposed development.

The health and safety legislation squarely places certain obligations on the Municipality as landowner. The Council may (and should) protect itself against claims made under the health and safety legislation in respect of incidents occurring on the property to be leased on a long term basis to a developer. This can be achieved by inserting appropriate conditions of lease which will place the onus on the developer to arrange and maintain adequate insurance cover to the Municipality's satisfaction; and to indemnify the Municipality against all claims that may be made or brought against it under or arising from the provisions of health and safety legislation.

If dealt with as per the different lease stipulations and, as suggested, in a fair and equitable manner, the Municipality should not have to spend any compensation or other legal monies on dealing with its current land lease stakeholders except for the fees of the transaction advisors facilitating the necessary contractual wrap-up arrangements. If the Council should take a decision to prematurely cancel any of the current lease agreements, it probably will attract financial obligations arising from such cancellation. The Council itself is in control of its decisions and can avoid attracting liability by not cancelling any lease agreement prematurely. However, the Municipality may have to incur legal costs to resist claims from current lessees or to obtain ejection orders against occupiers. It may have been necessary to incur such expenditure even if the development project would not be proceeded with. In order to comply with the conditions of the relevant Crown Grant, the Council must take effective steps to ensure that those conditions are complied with. Such steps may include legal action against occupiers who are not prepared to vacate the premises after the current lease agreements have lapsed.

In terms of standard municipal practice conditions of approval imposed under LUPO makes the developer responsible to provide at own cost all the required internal municipal services as well as for the cost of link services.

Section 42 of LUPO also empowers the Council to require from a developer as condition of approval that a financial contribution be made to the Municipality for municipal expenses incurred in the past that facilitates the

proposed development and/ or to fund or provide engineering services that are directly related to the needs arising from the development. Basically the thinking behind the relevant provision is that any formula for contributions in respect of the cost of providing services should ensure equal treatment; more particularly that the residents of the “old town” should not subsidise the new development and that neither should the “old town” derive any benefit from the new development, unless a deliberate decision to the contrary is taken.

The Municipality has a Development Contribution Policy which forms part of its Tariff Schedule. The DIP has master plans in place for all municipal bulk services and continuously updates same to reflect supply and demand projections, the proposed density proposals and maintenance costs. DIP is therefore able to do accurate bulk service contribution calculations, ensuring the Municipality (and therefore land owners in the “old town”) does not have to fund augmentation of these services using own capital. In appropriate circumstances the Municipality may require a developer to install or upgrade municipal services in lieu of payment of development contributions.

The OGMS identified a new water reservoir to cater for increased demand as a medium term requirement, mainly due to the impact of increased densification in Hermanus East. A short term requirement is the upgrading of the Scout and De Mond pump stations for which the Municipality has voted some funds, but may prefer to spend it on other pump stations. It is accepted that the Municipality will determine the bulk service contributions to be paid by the appointed developer, based on the developer’s SDP and will require the developer to upgrade the De Mond pump station as part of its reticulation network.

The costs of the transaction advisors are directly related to their time required to perform the necessary work relating to the project. In addition to undertaking this feasibility study, they will be required to assist the Municipality with the procurement of a new developer for the proposed public resort, should the Municipality decide to go ahead with the proposal. The quality and innovativeness of the developmental proposals and the complexity and extent of contract negotiations will have a direct impact on the time required by the transaction advisors to perform their work.

The Municipality should place the onus on the new developer to apply at own cost for all necessary approvals and authorisations in terms of the applicable legislation. If this is done, the Municipality will not incur any expenditure in respect thereof and further inputs from the transaction advisors in respect of land use and environmental matters will not be required, which will translate in a saving of municipal expenditure. Further municipal costs relating to the project should, in those circumstances, be restricted to the costs of statutory advertisements which the Municipality will have to place relating to the invitation of proposals, the letting of land and so forth. The Municipality may, however, be required to incur costs to obtain realistic market valuations of the properties concerned.

The Municipality will terminate the current short term lease agreement of the historical Selkirk Cottage when required. This will pose no problem or financial implications.

Based on the above it is not foreseen that the project will require capital costs or place any significant operational financial burden on the Municipality.

4.3 AVAILABILITY OF SERVICES

The Municipality has the support of grants for the upgrading of infrastructure but these grants are applicable to previously disadvantaged areas and not to the area where the development will take place.

4.3.1 ROADS

The R43 provincial road runs alongside the eastern border of the area. According to the OGMS, the existing and well maintained collector and local road systems of the Hermanus East Planning area are currently operating within acceptable levels of service. It is possible as indicated by the OGMS, that the road systems would be able to accommodate the increased densities proposed by the OGMS but it cannot be assumed that the number of users added to the immediate road infrastructure would not in itself justify an upgrading of any of the feeder roads. The extent, size and character of the proposed development will determine if the developer must include a Traffic Impact Assessment with the EIA. Should it be determined that the development necessitates an upgrading of the road system, it will be for the cost of the developer. Similarly, the traffic impact assessment will be used to determine if the developer might be partly responsible for an increase in the maintenance responsibilities and costs of the Municipality. Of certainty the access road/s to the development will need to be upgraded and an internal network of roads will be part of the development.

4.3.2 WATER AND SANITATIONS

There is a local water supply line to the De Mond property which has sufficiently capacity for current use. According to the OGMS, although the bulk water supply to Hermanus East area is regarded as sufficient, the potable water treatment works are now operating at capacity and will require a costly upgrade to provide for development in the existing as well as the future areas. In addition the water network is old and requires replacement. An additional water storage reservoir will soon be required to service Hermanus East as and when further development takes place.

The main sewage collector line runs along the northern border of the park to the De Mond pump station with the Scout Camp pump station further east. The capacities of these pump stations would need to form part of project planning and further development would in the medium to long term require an upgrade of and a connection to the bulk wastewater treatment works.

Once the extent and nature of the development is known as indicated on the Site Development Plan of the developer, the Municipality will be able to determine the 'cradle to grave' impact of the development on the bulk water and sanitation services and the corresponding costs to be provided for in the bulk services contributions of the developer. The internal water and sewage reticulation network would be the responsibility of the developer as approved by the Municipality in terms of its Site Development Plan.

The Municipality will be able to indicate all buried reticulation services installed by the Municipality and it will be necessary for the selected developer to verify with the current occupants of the De Mond Caravan Park the location of additional water lines and power supply connections which may have been installed but not recorded on a layout plan of the park.

4.3.3 ELECTRICITY

According to the OGMS, sufficient capacity is currently available to serve the needs of Hermanus East but the demand trend is increasing and will have to be carefully monitored. Apart from that it would be feasible to do an audit of the bulk Eskom electricity supply and distribution network to see if it would be able to accommodate the proposed increased densities in Hermanus East.

Power is provided to De Mond, KRLP, the De Mond sewage pump station and Lakeview Chalets on the other side of the R43 (also municipal owned) from a 500kVa mini-substation on the border of the De Mond camp. The Institute gets its power from a 50kVa pole transformer. An analysis of the cumulative demand of these consumers, especially in peak times, clearly indicates that there is hardly any spare capacity available.

It is not possible to determine the power demand of a new resort development unless the nature and extent of the development is known. The Site Development Plan of a selected developer will be used to determine the power supply needs of the development, the short, medium and long term impact thereof on the bulk supply and distribution network of the Municipality and the costs to be apportioned to the bulk services contribution of the developer. The internal electricity network would be the developer's responsibility as approved by the Municipality.

4.3.4 WASTE

According to the OGMS, sufficient solid waste capacity exists to service the town. The Voëlklip drop-off site is not far from the area on the R43 towards Stanford.

4.4 ASSET MANAGEMENT

Section 63 of the MFMA requires a municipality to manage its assets and liabilities. Erven 5327 and 4831 will remain municipal property and must, as is currently the case, be reflected on the Municipality's Asset Register, be dealt with in terms of its Asset Management Policy and the Generally Recognised Accounting Practice ("GRAP") as applicable to municipalities. The land lease will classify as a finance lease earning rental revenues and subject to capital appreciation to be accounted for in terms of GRAP 16, the accounting practice applicable to investment properties.

Any bulk infrastructure paid for in full or in part by the developer in compliance with the Municipality's Development Contribution Policy will become part of the Municipality's infrastructural assets and thus will need to be reflected in the Municipality's asset register, annually verified and aligned with the requirements of GRAP 17 (the accounting practice in respect of property, plant and equipment) and be included in its maintenance plans. Internal reticulation infrastructure will not form part of the Municipality's assets.

In terms of its asset management policy and procedures, the Municipality will be responsible for insuring assets included in its asset register and the developer for its own internal infrastructure as would be stipulated in a lease contract.

5. BBEE AND SOCIAL DEVELOPMENT ANALYSIS

Job opportunities created during the construction phase of the project would be temporary in nature but will assist to alleviate poverty. During the operational phase of the project a significant number of permanent jobs will be created.

The Municipality is committed to the promotion of BBEE. It is therefore necessary to achieve socio-economic alignment between the proposed project and the Municipality's strategic efforts to implement more focused BBEE. Development proposals will be assessed through the lens of BBEE and the municipal principles to develop emerging entrepreneurs and contractors and give preference to employment of local skills and labour.

In terms of sections 21 and 28 of the SCM Regulations, all bids must be evaluated in accordance with the Municipality's SCM, the PPPFA and the applicable Preferential Procurement Regulations. In terms of the PPPFA and its Regulations, bidders will be able to earn preferences for elements such as the number of specific designate representatives in management, transfer of skills, equity employment, indirect empowerment by procuring goods and services from specific designated enterprises and socio-economic development initiatives in terms of the BBEE Scorecard to be included in the RFQ/RFP.

6. STAKEHOLDER ANALYSIS

As owner of the land earmarked for the proposed public resort and having to ensure a financially sound and sustainable development is procured to the social and economic benefit of its community, the Municipality (represented by both municipal officials and town councillors) is an important stakeholder. However, there are a number of other stakeholders who have rights or interests, the views of whom must be taken into account, acknowledged and/or protected in the process now in hand.

6.1 DE MOND CARAVAN PARK ASSOCIATION

The Municipality has over the years maintained an open and transparent relationship with the DCPA. On 20 December 2010, the transaction advisors met with the DCPA at which meeting the Municipality formally confirmed its intention to put the proposed development out on tender again after following due process commencing with this feasibility study. An outline of the content of the study and the estimated procurement timeframe were presented. The projected timeframe was estimated to be two years but possibly shorter depending on the legal process advised by National Treasury.

The DCPA voiced concerns regarding the sustainability of the proposed development given the current economic climate, repeated its 2009 AGM recommendation that the proposed development be put on ice for a period of five years and requested a fair process providing their members adequate time to manage their own interests. Subsequently National Treasury advised the Municipality to follow the shorter process as prescribed by the MAT Regulations and the Municipality, through its advisors, provided the DCPA with a process diagram indicating the estimated target date for finalisation of a new Lease Agreement with a developer as June 2012.

It was agreed that the Municipality and the DCPA including their external advisors, should have a shared information base, be transparent and meet as and when the process necessitates it but keeping communication channels open. The DCPA was requested to give feedback of their AGM and the Municipality's advisors undertook to meet with the DCPA's legal advisor.

The DCPA at its AGM decided to improve the condition of the ablution blocks and fences at an estimated cost of R100 000 with individual members committing to the upgrading of their stands – an envisaged spending of R1,5m. The DCPA requested the municipality to assist with the upgrading of the internal roads as apparently it was done by the Municipality in the past. The Municipality was not prepared to invest additional funds due to the current and envisaged set of circumstances and indicated that the total rental saving of R0.5m (if calculated until February 2012) could be used by the DCPA for this purpose, given that it is contractually their responsibility and for their own use.

The transaction advisors met with the DCPA's legal representative on 2 March 2011. They noted the expectations of the DCPA members and the reasons put forth to support their expectations. These matters will have to be dealt with as already outlined.

At the meeting held between the transaction advisors and the representative committee of the DCPA on 20 December 2011, the DCPA committee gave the Municipality the assurance that it has a mandate from their members and will ensure that any future discussions are entered into with a re-confirmed mandate.

6.2 KLEIN RIVER LAGOON PARK

The Municipality has a good relationship with the Body Corporate of the KRLP. As with the DCPA, the Municipality also had a meeting with the KRLP's representative on 20 December 2010, at which meeting the Municipality formally confirmed its intention to put the proposed development out on tender again after following due process as outlined at the meeting and that, different from the previous tender, the envisaged tender will include the land on which the KRLP is situated.

The KRLP's first choice as communicated would be to become part of a proposed public resort development, preferably still managing itself, but the members are open for different options and quite prepared to make a financial investment. The last recorded sale of a KRLP property was approximately two years ago and based thereon the smaller units are worth between R350 – 400 000 while the larger units trade at R0,5m. From the Municipality's perspective as communicated, its primary goal would be to see the KRLP accommodated within a sustainable development, but keeping in mind that it has to pursue a total solution for the land in question which would not be open to any disputes.

It was agreed that the Municipality and the KRLP keep channels of communication open, including feedback on this document and process. The representative of the KRLP gave the transaction advisors the assurance that he has been mandated to represent the KRLP in discussions with the Municipality.

6.3 WALKER BAY ADVENTURES

The communication between the Municipality and WBA, is mostly limited to regular extensions of the lease agreement. As a land lease stakeholder, it would be fair and reasonable that the WBA be included in any further meetings with the other lease stakeholders.

6.4 SEA & SAND

The communication between the Institute and the Municipality is limited and only initiated if a specific issue necessitates such. As a land lease stakeholder, it would be fair and reasonable that the Institute be included in any further meetings with the other lease stakeholders and it should be kept in mind that its lease agreement will only expire on 23 August 2014.

6.5 SELKIRK COTTAGE

Situated on the Prawn Flats is the fenced, standalone historical Selkirk Cottage approximately 150m² in size, owned by the Municipality and currently occupied on the basis of a short term lease. The cottage is listed on the Heritage Register and due to its historical value, the Municipality intends to keep it and terminate the lease agreement when required. The Municipality will restore the cottage as and when required. A developer will be expected to include the cottage in its terrain plan and ensure it is not damaged in any way.

6.6 ENVIRONMENTAL STAKEHOLDERS

Important stakeholders to be consulted by the Municipality (when having to decide on whether it would grant consent use applications) and by a procured developer in complying with the applicable legislation, would *inter alia* be the Heritage Committee, the KREMP Forum and environmental conservationists with an interest in the development. These parties will, through a public consultation process, also get an opportunity to comment on the feasibility of the development project.

6.7 COMMUNITY

The expectation is certainly that all jobs created would benefit the local community and that affordability and value-for-money principles are adhered to. The community who may share in the use of a public resort and who will benefit from the social and economic spin-offs in respect of tourism and job creation is an important stakeholder. The community will, through a public consultation process, get an opportunity to comment on the feasibility of the development project.

6.8 TRADE UNIONS

It is not envisaged that any of the Municipality's employees will be directly involved in the proposed development project. The Municipality is thus not legally obliged to consult the trade unions, but will nevertheless make the feasibility study and the proposed agreement available to the trade unions for comments, if required.

6.9 CONSULTATION PLAN

As indicated above, meetings have already been held with important land lease stakeholders to ensure transparency and fairness. The Municipality will make any studies and/or agreements available to identified stakeholders following processes as stipulated in either the MSA (refer to Sections 21 and 21A), the MFMA, the MAT Regulations and other applicable legislation, depending on the circumstances.

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SECTION 3: PROJECT ANALYSIS

1. STRATEGIC IMPORTANCE

The proposed development project is directly and soundly aligned to the Municipality's economic development drive and its key priorities and interventions, all of which are focused on unlocking the full potential of tourism and the creation of sustainable employment. It is also aligned to the SDF, the OGMS and municipal densification objectives.

The proposed development will have to comply with heritage protection and environmental requirements, some of which are to be found in statutory provisions and the other that may be imposed by the competent authorities when granting approvals or authorisations required by law.

2. PROJECT ABILITY

If a private developer funds the proposed public resort development, it will imply that the Municipality has complied with the relevant condition of the Crown Grant without using enormous amounts of public funds to perform this obligation. The transaction advisors are confident that such a development will provide Hermanus with improved means of accommodating day tourists, large tourist groups and the commercial market in need of conference facilities. It should be able to compete successfully with nearby facilities such as Arabella and improve visitor figures, especially in the traditional mid and low seasons. In addition the establishment of hotel and other public resort facilities could cater for various needs of the local community. All development (e.g. residential accommodation and recreational facilities) will be done within the boundaries imposed by an environment sensitive to exploitation of its unique character and heritage qualities.

The proposed project presents the Municipality with the opportunity to turn the current uncoordinated arrangement of the existing land usages into an orderly, coordinated, integrated and well-managed development and use of municipal property. The intention is that the proposed development will provide the broader public with more equitable access to municipal resources in an orderly manner and present the opportunity to better manage pollution prevention and conservation of the biodiversity of the Klein River Estuarine.

Ideally positioned at the entrance of Hermanus where the R43 enters it from Stanford, the development should contribute and enhance the pristine character of Hermanus East and Voëlklip and contribute to the image of a town taking pride in its appearance.

During construction of the facilities it will be possible to create a considerable number of jobs varying in skills requirements and duration, but contributing to the livelihood of the local community. Fully developed, the resort should offer valuable permanent job opportunities again with varying degrees of skills and expertise. The opportunities offered for the development and transfer of skills are significant and not limited to the resort given the potential impact of the resort on down-stream economic activities by capturing a larger segment of the economy either through the tourism, commercial, training or recreational facilities it will offer.

3. PROJECT ASSET PROVISION

The Municipality will be responsible to make the municipal land concerned available to the developer on a long term lease basis. It may well be that it would make business sense for a developer to retain some of the existing structures on the property, even if only during the construction phase of the project. This may require that the developer concludes an agreement with the rightful owners of such structures (e.g. the owners of mobile homes).⁵² The transaction advisors strongly recommend that the preferred bidder not be required to negotiate settlement with any of the parties that have made permanent improvements to the municipal land.

It will be primarily the Municipality's responsibility to ensure the entire portion of land is an asset to the developer and not in parts a liability. In this respect it will have to be able to give full assurance and record it as such that the developer will, within the conditions imposed by an EIA, be able to erect on the land all the facilities needed to establish a sustainable economic unit whether such facilities are allowed by the zoning classification as primary or consent uses. It is only the small portion of fenced-off land on which the historical Selkirk Cottage is located that will not be available to the developer.

Fixed assets such as fencing, internal roads and water and sewer reticulation systems will be regarded as part of the land leased without any regard to its condition at the time of handing it over to the developer. Although the existing sewer pump stations will serve the development and must as such be upgraded at the total or partial cost of the developer, these will due to its wider functionality within the municipality's system, remain municipal assets, recorded on the municipal asset register and part of the bulk system maintained by it unless otherwise negotiated.

Any bulk infrastructure will irrespective if it is funded in total or partially with the development contributions of the developer and irrespective of whether the Municipality elects to do the upgrading works itself or prefer these to be done by the developer, become and remain municipal assets. These assets will be recorded, insured, maintained and annually depreciated by the Municipality unless otherwise determined by the lease agreement.

The number, combination and character of fixed building and infrastructure assets provided by the developer as part of the development will depend on its development proposal but it could foreseeably include the following:

- hotel, conference, restaurant, a quick on-site shop and related tourist retail facilities
- dwelling units of the size, height, density and otherwise as allowed by municipal zoning and policy considerations
- recreational facilities as allowed by primary and consent uses
- security structures and equipment including fencing and gatehouse
- safety equipment including fire-fighting equipment
- internal road and paving network
- internal electricity reticulation network
- internal water and sewerage reticulation network
- storm water drainage
- waste handling area including containers for recyclable goods

The manner and extent to which a developer incorporate "green building" design principles such as energy efficiency measures, would be important.

⁵² In terms of the *superficies solo cedit maxim*, the ownership of improvements that have been affixed on a permanent basis to land, belongs to the owner of the land on which it has so been affixed. Mobile homes are not regarded as immovable property. It is for this reason that, should the new developer require the use of the mobile homes, it will have to conclude agreements with the rightful owners thereof.

4. PROPOSED PROJECT DURATION

It is necessary to distinguish between the planning and construction phase of the proposed development (on the one hand) and the operational phase of the proposed development (on the other hand).

The land lease agreement will need to be of sufficient duration to enable the developer:

- sufficient time for the work that will be required *before* the public resort will become operational (e.g. staff training, the acquisition of furniture and so forth);
- sufficient time, once the public resort becomes operational, to recover his capital investment, interest payments made to a financier and to make an acceptable return on the capital investment.

It is foreseen that the duration of the planning and construction phase will be approximately four years given the time needed to complete an EIA and other prescribed studies, finalisation of consent use applications, the provision of required bulk infrastructure and installation of reticulation infrastructure.

The MAT Regulations in terms of which this study and procurement of a developer for the public resort is done, does not prescribe the duration or other conditions of the project to the Municipality.⁵³ The transaction advisors are of the opinion that the duration of the land lease agreement should not be dictated in the procurement documents other than stipulating that the duration will need to comply with legislative prescriptions but would depend on the nature of the proposal and the benefit to be derived by the Municipality and the community from different contract periods as substantiated in a developer's proposal.

5. RISK CONSIDERATIONS

Risk is an important component to be considered in respect of the proposed long term land lease agreement with the aim to identify and manage these risks throughout the RFQ/RFP, contracting and contract management phases. The following discussion seeks to highlight the most prominent risk areas.

Legal risks:

A number of legal risks are inevitable in projects such as the proposed.

The legal land issues and the risks these present are adequately discussed in the preceding and next section of the study. Two other risk areas need to be pointed out:

- If the study proceeds to a bidding/tendering phase, the risk that the bidding process followed is not in accordance with the processes prescribed in relevant legislation, regulations and the Municipality's SCM policy. The transaction advisors will take care to ensure the RFQ/RFP process is done correctly and it will be mainly the Municipality's task to ensure the correct processes are followed in evaluating, adjudicating and awarding of the tender.
- That the land lease agreement concluded between the Municipality and a preferred bidder is not specific enough in respect of grey areas, all grey areas are not foreseen and addressed, inconsistencies are unintentionally written into the agreement, the agreement contains clauses which could be interpreted differently and the agreement does not make provision for all relevant clauses. The Municipality assisted by the transaction advisors have the expertise to ensure the drafting, negotiation and conclusion of a

⁵³ Section 40 of the MAT Regulations provides that the Municipality may grant the right to use, control and manage a municipal asset subject to any conditions including the period for which it is granted.

good and practically executable agreement and it is assumed that a selected developer will have an equally competent legal team to assist it.

Regulatory risks:

This relates to the necessary authorisations and consents required from other government authorities, e.g. an EIA, not been granted or overlooked or causing delays as well as the ease of control and enforcement of the contract by the Municipality. The need for an EIA has been identified and the risks related to the enforcement of the contract can be managed through proper contract management and monitoring as required in terms of municipal legislation.

Insolvency risk:

In respect of a private entity the possibility of insolvency can never be ruled out. The impact and consequences of a selected developer becoming bankrupt will need to be adequately addressed in the agreement. More important will be the inclusion of qualitative criteria in the RFP to ensure only proven financially viable bidders enter the process and strict adherence to financial criteria during the tender evaluation and adjudication processes.

Site and availability risks:

To avoid a reoccurrence of the financial and other risks which confronted the previous developer, the Municipality must ensure it finalises all aspects of the current land leases and present the developer with vacant land in respect of De Mond and the other portions of the land currently occupied or a definite date on which land with leases only expiring in 2014 will be available.

The establishment of infrastructure and facilities holds a number of risks, e.g. planning, design and construction risks linked to the supply of material, theft, availability of water, electricity, etc. From a municipal perspective it will require detailed site development plans and bulk services' contributions to enable availability of infrastructure and services, legally compliant designs, hands-on project management by the developer and strict quality control. The zoning of the land earmarked for the development is another risk area, in particular a municipal risk. Included thereunder is the Municipality being able to get the more enabling new IZS approved in time to form the baseline for the development and, assuming this is done, the zoning consent uses to be approved by the Municipality will be a definite risk for potential developers. Non-performance by the Municipality to address these risks could result in a non-viable project.

Operating (including technology) risks:

These risks concern any factors (other than force majeure), impacting on the operational requirements of the development. It includes operating expenditure exceeded, labour problems, e.g. availability and establishment of required skills, incompetence, fraud, corruption, mismanagement of equipment and financial obligations, incompleteness or faulty completion of jobs, technology failure, environmental incidents, crime such as theft of vehicles, equipment and stock. Except for the Municipality being the ultimately accountable party in respect of health and safety and environmental incidents, all the other risks mentioned will be carried by the developer/operating company. Mitigating measures for the Municipality will be to use the RFP and contracting processes to ensure the appointment of an experienced and competent developer/operating company.

Maintenance risks:

Managing and mitigating the maintenance risks inherent in the services' and build infrastructure will be the responsibility of the developer/operator. Through the agreement the Municipality will establish its requirements for the maintenance of the public resort and in particular the services' infrastructure and through its contract management practices it will exercise an oversight role that these requirements are met.

Environmental risks:

Parts of the development will be in environmentally high risk areas, e.g. the area adjacent to the Klein River Estuary. An EIA will lay down specific conditions and an environmental management plan will form part thereof to ensure the development exists in synergy with its environment. However, these measures will not completely rule out the risk of environmental damage arising from operational activities. An experienced public resort operator will be a mitigating factor. The Municipality can add thereto by making ISO 9001; ISO 14001 and OSHAS 18001 accreditation an advantage in its RFP and awarding marks for it.

Health and safety risks:

Health and safety risks will be most applicable to construction activities and continue to be important throughout the lifespan of the development in relation to staff and visitors. The signing of an Occupational Health and Safety Indemnity Agreement as part of the contractual arrangement between the Municipality and the developer/operator is essential.

Insurance risks:

Inadequate or no insurance of infrastructure which belongs to the Municipality will be the Municipality's risk. Construction liabilities and losses, the on-site assets of the development and the operation and maintenance related insurance risks will be the developer's responsibility. The agreement will need to address public liability insurance and stipulate the need for 'contractor all risk' insurance during the construction phases.

Financial risks:

It is not foreseen that the Municipality will carry any financial risk. It could however, by awarding the tender to a developer which is not financially sound assume the potential financial risk of having to go through another procurement process and losing rental, property rates' and services' revenue. The same situation will apply if a developer does not obtain the consent land uses needed to establish a viable public resort.

On the other hand, the developer/operator will assume substantial financial risk. To mitigate its capital investment risks it could be expected that the developer will require a land lease agreement of sufficient duration to get a return on investment, contractual terms and conditions that links the compensation payable to the Municipality to the financial viability of the public resort and a number of suspensive clauses to be added to the agreement, e.g. the approval of an EIA, approval of the IZS to ensure the most enabling zoning of the land, approval of consent land uses and finalisation of all matter incidental to the current land leases by the Municipality.

Depending on the financial arrangements of the developer other factors such as interest and inflation rates could have a considerable impact on its financial stability. Interest rates have been adjusted radically to mitigate the huge negative impact of the slump in the world economy on local businesses and individuals. Given that all predictions are that the world economy and SA's will take at least two years to become stable and only then enter a slow growing phase again, it can be assumed that the interest rate would rather be adjusted downward more in the following year and then to remain stable for at least some time before any further adjustments would be considered. Mainly due to the economic downswing the inflation rate has increased and it is not expected to become as stable as it has been for the few years preceding the current downswing. However, South Africa's monetary and fiscal policies are still strictly applied and it can be expected that it will, over the longer term, result in a stable inflationary environment.

Force majeure risks:

These are unforeseen risks which usually hold a surprise element. Droughts and floods are such risks. The contract will include a standard clause on these risks.

Residual value risk:

It concerns the risk that the fixed assets are not in a good condition when the public resort is either at the expiry date of the lease agreement or due to the bankruptcy of the developer/operator handed over to the Municipality. Mitigating measures could include the securing of a maintenance bond from the developer/operator but the transaction advisors do not advise this route and it does not fit in with the nature of the agreement. Adequate contract management including an oversight evaluation and random verification of the assets' condition will form part of the agreement and should be sufficient to identify and manage 'red flag' situations.

Crime risks:

A number of the risks referred to crime. In reality crime always plays a role in the execution of any project in SA. These risks will have to be managed by the developer/operator through 'hard' and 'soft' mitigating measures, e.g. fencing and security, referencing, training and adequate remuneration of staff.

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SECTION 4: DUE DILIGENCE

.1 LEGAL LAND ISSUES

Although the Municipality is by statute empowered to enter into a long term lease agreement in respect of Erf 5327 and the portions of Erf 4831 concerned, it will have to follow due process to ensure that it acts lawfully. The Municipality will *inter alia* have to obtain all necessary approvals required in terms of the applicable legislation and conditions under which the land was obtained.

The Council has preliminary resolved to make the land available for development of a public resort by way of a long term lease agreement to fulfil its legal mandate but will make a final decision once the public participation process with regards to this study has been concluded and an acceptable development proposal procured.

The Crown Grant in terms of which a portion of Erf 4831 was acquired clearly stipulates that it should be used for purposes of a public resort. The transaction advisors are satisfied, based on the legal opinion referred to above, that the proposed land use will satisfy the conditions of grant.

The current and proposed zonings of the properties concerned have been discussed in detail above. It is not necessary to repeat the discussion. Suffice it to say that the current and proposed zonings of the properties may present certain obstacles in the way of the proposed development, although those obstacles should not be insurmountable. The following comments serve to highlight some of the concerns which the transaction advisors have in this regard.

- Although holiday accommodation is a permissible land use on land zoned Resort Zone 1 (i.e. the current zoning of the De Mond site), the definition of “holiday accommodation” specifically excludes a hotel. As definitions contained in zoning schemes are not “land use restrictions” as contemplated in LUPO, a “departure” application is not an option and a developer who intends erecting a hotel on the land, will have to obtain appropriate approval for the rezoning of the property.
 - The lagoon front at De Mond and the remainder of the area under discussion are currently zoned Open Space Zone II. Although the Municipality confirmed that it is acceptable for public resort facilities to be developed on land zoned Open Space Zone II, the existing lawful development on the property constitutes the land use parameters that apply to the property. If anything more is contemplated (such as erecting a hotel), it will therefore require approval of a departure under section 15 of LUPO.
 - In terms of the IZS which the Municipality expects to be approved prior to the development, the proposed zoning of Erven 5327 and 4831 is Holiday Resort as confirmed by the Municipality. It would appear that in terms of the IZS the primary land uses will be less limiting and that, combined with the consent uses, it will allow more scope for a diversified resort development. However potential developers will probably regard the uncertainty surrounding the granting or refusal of applications for consent uses as risk factors. It can safely be accepted that those developers will require a due diligence period and will require that any development agreement that may be concluded, contains a suspensive condition in terms of which the agreement will become unenforceable if the required consent uses are not granted.
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.2 REGULATORY ISSUES

The most prominent regulatory measure may potentially prove to be the requirement that environmental authorisation be obtained in terms of section 24 of NEMA before commencement of any of the listed activities that will form part of the proposed development. It would appear that a full EIA may be required, which should include a heritage assessment. This would imply that the competent heritage authority will become a commenting authority (as opposed to a decision-making authority).⁵⁴

In terms of the applicable legislation the Municipality has a limited albeit important role to play in the environmental process. The transaction advisors expect that the Municipality will probably only be required to play a facilitating role in respect of liaison with the Overstrand Heritage Committee and the Klein River Estuarine Forum. Potential bidders would be well-advised to take note of the list of recreational activities published by the Forum, which the Forum will not support for inclusion in the coastal zone parameters of the IZS (refer to item 3.3.2.6).

.3 SITE ENABLEMENT

The current lease agreements of the DCPA, KRLP, WBA and the Institute required careful analysis to ascertain if there are risk areas and, if so, what these would be and how they should be dealt with. The transaction advisors endeavoured to determine those risks (if any) and came to the conclusion that the current lessees and their members do not have contractual rights to remain on the properties when the current lease agreements lapse. However, legal and goodwill considerations discussed earlier, support a fair and equitable process going beyond the lease stipulations.

Trading of stands/mobile homes by the members of the DCPA and the KRLP has been an on-going and sometimes lucrative practice but the Municipality has not had any involvement therein neither did it get any dividends from it. The respective lease agreements of these entities are silent on the matter of site-trading. Any consequences due to misrepresentation of the future of these stands/homes to new buyers by the members or body corporates of the DCPA or the KRLP will not be the Municipality's concern.

Should it become necessary for purposes of the proposed project to cancel a lease agreement prematurely (if permitted), the Municipality will have to comply with the relevant obligations that it has contractually accepted. However, premature cancelling of leases is not anticipated. With the De Mond lease agreement expiring on 29 February 2012 and the WBA agreement extended on a month-to-month basis, these agreements pose no problem. The other two leases expire respectively 30 April and 23 August 2014. Based on an expected project lead time of four years of which the first two years will be mostly dedicated to the EIA, planning, design and consent use applications before actual construction can take place, these leases might have expired or be on the verge of expiry by the time that actual construction begins. Irrespective, should these leases be allowed to run their full period, all matters related thereto must be contractually stipulated in the lease agreement between the Municipality and a selected developer.

The Municipality must deal with the occupants of Selkirk Cottage but need not do so before an agreement with a selected developer has been concluded and, even so, it could be possible to reach mutual agreement with the selected developer that the cottage be rented out until construction begins.

⁵⁴ See section 38(8) of the NHRA.

The land claim in terms of the RLRA referred to earlier, if published, should not present an obstacle in the way of the proposed development, provided the requirements of that Act relating to advance notice to the regional land claims commissioner are complied with.

From the available information it would appear that in principle adequate bulk services capacity will be available but some upgrading of bulk water, sanitation and electricity distribution networks and link services will be required *inter alia* to cater for the needs that will arise from the proposed development. The Municipality will only be in a position to determine the nature and extent of the infrastructure upgrades and link services necessitated by this project and the concomitant bulk service contribution required from the developer, once the Site Development Plan of the development is provided to it. It is quite likely that the Municipality will prefer not to use its own project procurement and management capacity but will instruct the developer to use his bulk contributions, procurement processes and contractors to do the upgrades, limiting the Municipality's role to approval of designs, oversight and final sign-off. The agreement with the selected developer will make provision for such an arrangement.

To the extent dictated by the Municipality's asset management policy, the selected developer will be required to draw up a detailed contour site plan indicating all underground reticulation services installed on the land concerned and its maintenance responsibilities in respect thereof will be spelled out in the land lease agreement.

.4 PROCUREMENT ISSUES

The report set out the legislation governing the feasibility and procurement processes. Since it is the Municipality's contention that there will not be any risk transfers and therefore that the project does not comply with all the criteria needed to qualify as a PPP, the alternative process of the MAT Regulations is implemented as advised by National Treasury albeit with strong elements of the PPP process embedded therein. However, the Municipality must keep an open mind to the effect that, if it appears that financial, technical or operational risk transfer becomes a real issue, the Municipality must incorporate into the procurement process the other legal prescriptions needed to comply with the PPP procurement process. With the possibility of the latter in mind, the transaction advisors have ensured that such adaptability will be possible.

The Municipality is obliged to follow a transparent process, allowing ample opportunity for public participation and, in certain instances, for a right to aggrieved parties to appeal to the competent authorities. It is not considered necessary to discuss in detail all the statutory requirements relating to advertisement of proposals and the public participation process that will have to be followed in respect of the proposed development. Suffice it to say that the final feasibility report will be an opportunity for the broader public to obtain information regarding the proposed project and to make their comments and concerns known to the Municipality.

Another main part of the procurement process concerns the stipulations of Section 33 of the MFMA concerning contracts imposing long term financial obligations on the Municipality. The municipality is convinced that there will not be such obligations and, if so, these would be minimal and probably below the threshold of financial impact still to be set by National Treasury. Again an open mind is necessary. Irrespective of whether a section 33 process is followed or not the land lease agreement as concluded will be available for the public to scrutinise.⁵⁵

⁵⁵ Section 46(b) of the MAT Regulations stipulates that an agreement granting a right to use, control or manage a capital asset to a private sector party or organ of state may not be withheld from public scrutiny subject to the stipulations of the Promotion of Access to Information Amendment Act, 54 of 2002 (the "PAIA").

.5 INSTITUTIONAL ISSUES

The Municipality will need to deal quickly and effectively with applications lodged with it under LUPO⁵⁶ and other legislation which the Municipality must apply.⁵⁷

If the transaction advisors must assist the Municipality with the various facilitation tasks indicated in this report, the communication channels between the transaction advisors and the various divisions within the Municipality must also be effective.

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⁵⁶ E.g. applications for rezoning, subdivision and departures.

⁵⁷ E.g. applications for consent used in terms of the Zoning Scheme or IZS and applications for building plan approval under the National Buildings Regulations and Buildings Standards Act, 103 of 1977.

SECTION 5: VALUE ASSESSMENT

1. CURRENT PROPERTY ASSESSMENT

The valuations for the properties under discussion as reflected in Table 5.1, were extracted from the current municipal valuation roll. The Municipality should verify/review these values at regular intervals and in accordance with Council policy for asset management and property rates' purposes.

Table 5.1: Valuation Roll extract reflecting the current land values of the proposed development sites

ERF NO	SUB CODE	TOWN	TOWN	INIT-IALS	NAME	EXTENT	STREET NO	STREET	LAND VAL	IMPR/MENTS	TOTAL	VALZONE	USAGE	LANG	PROP TAX CODE	
4831		HKR	KLEINRIVER		MUN OVERSTRAND	2346447	ZZZZ	UNKNOWN	0	0	0	MUNI	HOUSE	E	EXEMP	
4831	2	HKR	KLEINRIVER		WALKERBAY ADVENTURE	300	ZZZZ	KLEIN RIVER LAGOON	400000	HER	564000	BUS	SHOP/OFFICE		BUS	
4831	3	HKR	KLEINRIVER		MUN OVERSTRAND	0	ZZZZ	SELKIRK COTTAGE	RMO	0	0	MUNI	HOUSE	E	EXEMP	
4831	4	HKR	KLEINRIVER		MUN OVERSTRAND	9699	ZZZZ	FOURTH STREET	MO	0	0	MUNI	HOUSE	E	EXEMP	
4831	5	HKR	KLEINRIVER		PRAWN FLATS MARINA	300	ZZZZ	KLEIN RIVER LAGOON	500000	HER	300000	RES	HOUSE	E	RES	
4831	6	HKR	KLEINRIVER		MUN OVERSTRAND	500	ZZZZ	SEVENTH STREET	RMO	0	0	MUNI	HOUSE	E	EXEMP	
4831	45	HKR	KLEINRIVER		SEA AND SAND	5000		PRAWN FLATS	0	0	0	RES	HOUSE	E	RES	
4831	47	HKR	KLEINRIVER	FM	SWINGLER	495	ZZZZ	FOURTH STREET	MO	0	0	RES	HOUSE	E	RES	
4831	48	HKR	KLEINRIVER	SG	PAGE	500	ZZZZ	SELKIRK COTTAGE	RMO	0	0	RES	HOUSE	E	RES	
4831	50	HKR	KLEINRIVER		MUN OVERSTRAND	500	ZZZZ	SELKIRK COTTAGE	RMO	0	0	MUNI	HOUSE	E	EXEMP	
4831	51	HKR	KLEINRIVER		KLEIN RIVER LAGOON PAR	9988	ZZZZ	DEMOND CAMP	100000	HERM	120000	RES	HOUSE	E	RES	
4831	1	HKR	KLEINRIVER		ATTERBURY CONSORTIUM	MO	ZZZZ	UNKNOWN	3375000	HERM	3375000	BUS	HOU/ACCOM	E	BUS	
5327		HVK	VOELKLIP		MUN OVERSTRAND	2470	5327	SEVENTH STREET	500000	HERM	0	500000	MUNI	ROAD/POS	E	EXEMP

The monthly and annual revenue earned by the Municipality from the properties which form part of the proposed development is indicated in Table 5.2.

Table 5.2: Current municipal revenue from the properties

Property	Value of Property	Monthly rental	Rental as % of value	Monthly Property tax	2011/12 Tariff*	Monthly Rental & Prop Tax	Total Annual
De Mond**	R 3,375,000.00	R 43,412.45	15.4	R 1,338.75	0.00476	R 44,751.20	R 537,014.40
KRLP	R 2,120,000.00	R 5,318.87	3	R 667.24	0.00476	R 5,986.11	R 71,833.32
WBA	R 964,000.00	R 670.00	0.83	R 382.39	0.00476	R 1,052.39	R 12,628.68
S&S***	R -			R 0.04	-	R 0.04	R 0.50
Total	R 6,459,000.00	R 49,401.32		R 2,388.42		R 51,789.74	R 621,476.90
Total Revenue						R	673,266.64

* Property rates as applicable to commercial land and commercial improvements
** The Municipality has suspended the De Mond rental for the current lease period, i.e. March 2011 to February 2012
*** See and Sand pays only for services rendered

The Municipality has suspended the De Mond rental payable for the lease period March 2011 to February 2012 therefore the total current rental received by the Council for these properties amounts to R5 988.91 per month.

Other revenues include payment for electricity and water consumption which varies substantially between quiet and peak times.

Service charges excluded, the members of the DCPA pay on average R211.09 per month and the members of the KRLP on average R299.30 per month to the Municipality for their sites. However, the lease agreements of these properties make the tenants fully responsible for the maintenance of the land, internal infrastructure, fences, buildings and structures, therefore in principle, the DCPA and KRLP save municipal maintenance expenditure with regards to these properties.

From a municipal perspective, the financial management of these properties is relatively simple and, based on the small rate payable per site by the members of the DCPA and the KRLP, it is clear the Municipality's focus has been on sustainability rather than revenue enhancement.

2. BUSINESS MODEL

The transaction advisors are satisfied that the development project is legally permissible; will give effect to the clear terms of the Crown Grant in terms of which the bulk of the De Mond land was acquired; and that it is physically possible to implement.

The preliminary financial feasibility of the project is set out below. The Municipality has no benchmark for this type of development and it does not want to be prescriptive, therefore, due to the many uncertainties that will only be clarified once the development proposals are received and a preferred bidder selected, the figures discussed are mostly estimates or based on assumptions.

2.1 PROPERTY/ASSET COSTS AND VALUE

The value of the land concerned as "vacant land" will increase considerably once new infrastructure has been installed and permanent improvements (such as buildings) have been constructed on the property.

The Municipality will in terms of the *superficies solo cedit* maxim become the owner of permanent infrastructure on the land but in terms of the land lease agreement to be concluded the use, management and control of these assets will be granted to the developer for the period of the lease together with the risks and accountability for the initial asset (the land) and the added assets (services and build infrastructure) on the land. For the full period of the lease the risks and liabilities of the on-site assets (on and under the ground) will be the responsibility of the developer for which adequate insurance would have to be obtained at the developer's cost.

The maintenance and insurance of off-site upgraded/new bulk infrastructure and link services necessitated by the development and paid for by the developer through its bulk services' contribution, will be a municipal responsibility and so reflected in its asset management register and maintenance plans.

It is expected that the development will take place in phases. The total value of the build and services infrastructure to be added to the Municipality's assets in respect of the current De Mond site is expected to exceed R198m.⁵⁸ Further phases of development including the other sites currently occupied by KRLP, WBA and the Institute will possibly double the investment amount over an estimated span of 10 years. However, these figures and timeframe are rough estimates which can only be verified and substantiated once the development proposals based on the RFP are received and evaluated.

The demolition costs of current municipal owned infrastructure such as the ablution blocks and clubhouse on the Erf 5327 portion of the De Mond site will be incurred by the developer.

⁵⁸

This figure is based on the development proposal received in 2007.

2.2 LAND LEASE REVENUE

The rental amount which the appointed developer/resort operator will have to pay to the Municipality once the facilities are operational will be considerably higher than the current monthly rentals payable by existing lessees.

The determination of a fair lease amount will have to take into account the interests of the Municipality; the interests and financial viability of the developer and the sustainability of the public resort during its phases of development and once it is completed.

Initially the only baseline for determining the lease amount will be the value of the vacant land available for development to the developer. Realistically it will be the land currently occupied by the DCPA and possibly WBA with the other areas, i.e. the land leased to the KRLP and the Institute excluded until these leases expire in 2014. The lease amount could be an agreed fixed percentage of the value of the available land aimed at ensuring the Municipality's revenue equals current rental revenue or an acceptable amount based on financial viability considerations. Alternatively, it could be an agreed escalating percentage based on the value of the land to deter the developer from delaying construction without good reason.

As the other land becomes available for development, a revaluation of the land will have to be done and factored into the rental calculation but it is foreseen that, as a baseline, the current value of all portions of the land will have to sustain at least until the 1st phase of the public resort is operational or as negotiated with the developer. Thereafter determination of the lease amount could be based on a fixed or escalating percentage of the value of the land and/or a fixed or escalating percentage of the gross income of the public resort or a mix of these. The transaction advisors are of the opinion that an income-based rental is preferable to support the financial viability of the developer/operator. The structuring, phasing and escalation of a rental amount will also depend on the nature, extent, phasing and duration of the development and the risks and liabilities inherent to the development.

Notwithstanding the points made above, the Municipality will not dictate to potential developers how to approach this matter in their proposals. Adopting a flexible approach to the determination of the rental amount will necessitate an agreement with sufficient checks and balances to ensure the interests of one party do not outweigh the interests of the other party.

It is possible to construct various land lease rental scenarios but in the absence of a revaluation of the land and the market related proposals put forth by potential developers it will be a premature exercise. The current rental amount of the De Mond land is calculated at approximately 15,4% of its value of R3 375 000. Depending on the proposals received, the Municipality will ultimately have to decide if it wishes to maintain the current revenue base or off-set an initial lower rental against the prospects of an exceptional expansion of its asset base and a considerably higher rental over the medium to longer term.

2.3 PROPERTY RATES REVENUE

The property rates payable by the developer will initially be based on the current value of the land in question and will, as is the case with the other service charges, be billed separately by the Municipality. The 2011/12 property rate tariff applicable to commercial land and commercial improvements is R0.00476 (VAT included). Therefore the Municipality's property rate revenue from the De Mond property will be R1 338.75 per month at the commencement of the development agreement. Based on an escalation of 9%⁵⁹ the tariff will increase to R0.00672 by 2016/7, i.e. R1 890.00 per month when the 1st phase of the development is expected to be completed and

⁵⁹

This is on average the annual increase of the Municipality's rates and taxes.

operational. A conservative estimate of the land value upon completion of a 1st phase is R50m which would at the same tariff of R0.00672 translate in an increased property rate revenue of R28 000 per month or R336 000 per year. This revenue will increase with each completed phase of development in accordance with the value of the land with improvements and the accumulated annual increase in property rate tariffs.

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2.4 SERVICES' REVENUE

It is realistic to expect that the electricity and water consumption will in comparison with the current consumption figures of De Mond and KRLP increase significantly especially during peak times. A reliable benchmark was not available.

Refuse removal revenue will be subject to seasonal fluctuation but will on average increase considerably in comparison with current such revenue earned from these properties.

Additional services' related revenue could be, in accordance with Section 42 of LUPO, a financial contribution required by the Municipality from the developer for municipal expenses incurred in the past to install bulk infrastructure that now facilitates the proposed development and/or to fund or provide engineering services that are directly related to the needs arising from the development. These expenses could also be factored into the bulk services' contribution of the developer.

2.5 MUNICIPAL COST IMPLICATIONS

It is not foreseen that the project will require municipal capital input costs or place any significant operational financial burden on the Municipality.

The main components of municipal operational cost that will not be recuperated from the developer will be the following:

- staff and administrative costs for procurement, project and contract management and its related matters such as legal, asset quality and maintenance monitoring;
- valuation costs;
- infrastructure insurance; and
- legal costs, e.g. for negotiation and conclusion of the agreement.

2.6 MARKET APPETITE

Although the rate of development in SA has in general slowed down considerably, the transaction advisors believe that the project would be appropriately supportable from the market subject to the ironing out of the zoning consent use issues set out in this report. Hermanus is a very popular tourist destination but tourism trends are linked to seasonality. Market appetite will be good provided the composition of the development can bridge this seasonality by accommodating large groups for conferences and its usability as a venue for a wider range of events and occasions, thus subject to a number of consent uses being granted.

The development being a public resort in Hermanus will most likely attract investors who have the financial capacity and the operational competence to run such a resort or joint ventures of investors and operators who, collectively, have the funds and knowledge to establish a successful resort. Probably the most well-known developer/operator in SA is Forever Resorts South Africa which has 20 properties across SA combining hotel, self-catering and conferencing facilities and fits the profile of the type of developer/operator that is required. Another is Premier Hotels and Resorts which already has properties in Knysna and Cape Town.

The Municipality will ensure the RFP is widely advertised to attract suitable developers/operators.

3. AFFORDABILITY ASSESSMENT

An assessment of the affordability of the proposed development must analyse if it will be a viable project for the Municipality and the developer whilst benefitting the community.

The proposed resort presents a highly affordable growth and development opportunity to the Municipality. It will not be required to make any capital investment or commit operational expenditure specific to the development other than the transaction advisor fees, a very small percentage of staff and administrative capacity for project, asset and contract management, bulk infrastructure insurance costs and the maintenance costs of new/augmented bulk infrastructure and link services. The Municipality's operational expenditure will be minimal in comparison with the revenue that it could earn from the development.

For a developer, the viability of the proposed public resort will depend on a number of primary factors discussed in this report, i.e. enabling land use permissions, fair rental, an enabling agreement and successful mitigation of risks. Therefore, potential developers will regard the affordability and financial viability of the development as closely linked to the diligence and ability of the Municipality to successfully process its consent land use applications, the Municipality's baseline for calculating rental revenue and the duration of the agreement. A flexible income-based approach rather than a rigid asset value based approach to rental determination will be more aligned with fair and sustainable business principles and practices thus enhancing the viability of the development. A balanced approach composed of a fair basic rental and a percentage of gross income will provide the Municipality with a stable revenue source.

4. INITIAL VALUE FOR MONEY ASSESSMENT

The current use of the land provides the Municipality with a stable revenue source but the revenue earned is much lower than the revenue that could be earned if the land is optimally used. Apart from the activities of the WBA and the Institute, the land is not used to stimulate or accommodate local tourism and is of no socio-economic benefit to the wider community.

The development of the land will:

- enable the Municipality to fulfil its legal mandate of establishing a public resort;
- substantially increase the revenue (rental and property rates) earned by the Municipality's from leasing the land;
- significantly expand the Municipality's asset base;
- enable increased socio-economic activities in the community;
- give effect to the municipal strategic objectives of local economic development, job creation and sustainable tourism; and
- provide shareholding, management and contractual BBBEE opportunities.

There is no doubt about the potential socio-economic value of the development both in terms of the downstream impact of the tourism it will attract and the job opportunities to be created.

The transaction advisors found that the proposed development project will be directly aligned to the Municipality's economic development drive, its key priorities and interventions focused on unlocking the full potential of tourism and the creation of sustainable employment.

Irrespective of any initial leniency built into the rental determination based on the weak economic situation prevailing in SA and the world, the lease of the land under discussion to a private developer for the establishment of a public resort will result in a significant economic and financial benefit to the Municipality.

5. INFORMATION VERIFICATION

All the data used in the Feasibility Study Report has been obtained from municipal documents or directly from the Municipality or other stakeholders.

It is noted that:

- at the commencement of this study the zoning of Erf 4831 in terms of the IZS was indicated as Open Space Zone 1: Nature Reserve. The transaction advisors pointed out the complexity and risks involved in the zoning of Erf 4831 as a “nature reserve” to the Municipality and provided a few alternatives. Acting on their advice, the Municipality has affected an amendment of the IZS that it considered suitable and confirmed to the transaction advisors that in the IZS submitted to the province Erven 5327 and 4831 are now zoned as Holiday Resort. The transaction advisors accepted this as correct and have based the discussion and assumptions thereon.

The report has demonstrated the value-for-money to be derived from the development of a public resort on the land under discussion. The structure and detail of the business model will depend on the development proposals received in response to the RFP. Since these proposals may outline a number of business scenarios, it would have been a premature exercise to do detailed financial projections and analyses. However, a number of broad assumptions were made that clearly argued the strategic, financial and socio-economic advantages of the development for the Municipality.

It was explained that the Municipality will incur minimum operational and no capital cost with regards to the development. The risks have been identified and mitigation measures discussed. Except for a few risks relating to site enablement and regulatory matters, the risks will be owned by the private developer and costs have not been apportioned to these risks.

All documentation used for and produced in respect of this study is on record with the transaction advisors and notices, advertisement, etc. handled by the Municipality are also on record at its appropriate offices for the purposes of an audit by the Auditor-General or should it be sourced in terms of the PAIA.

The Feasibility Study and its related processes comply with all legislative requirements as pointed out herein. Briefly, it is in accordance with the provisions of the MAT Regulations and aligned to the requirements of section 120 of the MFMA and the PPP Regulations. It has studied the related national, provincial and municipal legislation and policy documents. The planned procurement and contract management processes will also comply with applicable legislation.

The transaction advisors confirm the accuracy and verifiability of the information contained in this report.⁶⁰

SECTION 6: PROCUREMENT PLAN

1. PROCUREMENT FRAMEWORK AND TIMETABLE

1.1 DEPARTURE POINT

The procurement must take place in accordance with the Overstrand SCM Policy and with the applicable legislation. It *inter alia* includes:

- the MSA, the MFMA and the PPPFA;
- the applicable National Treasury regulations.

The transaction advisors consider compliance with the provisions of the MAT Regulations, the Preferential Procurement Regulations (2011) and the National Treasury PPP Guidelines, including the Code of Good Practice for Black Economic Empowerment in PPPs, of particular importance within the context of the procurement process.⁶¹

1.2 RFQ AND RFP PROCESSES

The procurement will involve a combined RFQ and RFP evaluation process. The RFQ process will include evaluation criteria such as:

- project understanding;
- property development capabilities and experience;
- the strength of covenant between companies in a consortium or joint venture;
- financial and market standing;
- ability to raise funding;
- legal commitment and integrity;
- BBBEE credentials; and
- a proven record of the ability to manage, operate and maintain a public resort

on which the shortlisting of qualifying bidders will be done.

Depending on the quality and appetite of bidders, the result could be two to three qualifying bids whose proposals will be further evaluated. Thus a failure to pre-qualify at the RFQ stage will effectively disqualify a bid from being further evaluated.

The second evaluation will only include the shortlisted bidders and result in the selection of a preferred bidder with whom the municipality will enter into negotiations. The RFP evaluation criteria would be substantial and rigorously applied *inter alia* requiring:

- adequate proof of the sustainability of partnerships or joint ventures or contingency planning to ensure the continuance of the strengths, e.g. skills, capacities, project experience on which the bid is based;
- comprehensive financial modelling including cash flow projections demonstrating affordability;

⁶¹ This is so, even though the Municipality does not regard the proposed project as a PPP; a view confirmed by National Treasury.

- value for money and the optimum combination of whole life costs and benefits enabling the Municipality to thoroughly interrogate the proposal;
- a full risk assessment will be required taking all internal and external factors into account and indicating how key sensitivity variables will be managed;
- information related to corporate governance, quality management, environmental impact management inclusive of all legal processes and timeframes, health and safety management, operational management; and
- BBBEE factors such as bidder equity in respect of investment, management and operational aspects.

If, in the opinion of the municipality, the RFP evaluation renders a result calling for or making it possible to appoint a preferred bidder and a reserve bidder, this will be done. Therefore the success of negotiations with the preferred bidder will determine whether the Municipality will eventually enter into a lease agreement with the preferred bidder to achieve the proposed public resort development. If not, the Municipality may in its sole discretion decide to negotiate with the reserved bidder.

1.3 KEY PHASES AND TIMEFRAME

The key phases and timeframe as currently pursued are set in Table 6.1 below.

Table 6.1: Key Phases of the Project and Timeframe Pursued

KEY PHASES	PROJECTED TIME FRAME
PHASE 1: Submission and finalisation of the Feasibility Study followed by the obligatory consultation processes as per legally stipulated periods	October – December 2011
PHASE 2: Conclusion of the Feasibility Study process with Council approval of the recommendations and the RFQ/RFP process to proceed	January 2012
PHASE 3: Submission of RFQ and RFP combined document inclusive of the outline of a contract and contract management plan and municipal approval to proceed with procurement process – time allowed for exploratory talks with possible investors prior to finalisation of RFQ/RFP document and eight weeks allowed for submission of proposals (obligatory site meeting to be done).	February 2012 March – April 2012
PHASE 4: Procurement process – first the RFQ and thereafter the RFP evaluations and the adjudication process with a report submitted to the Municipality.	May 2012
PHASE 5: Based on municipal authorisation to proceed with negotiations with the preferred bidder, draft PPP contract concluded and submitted to municipality.	June – July 2012
PHASE 6: (only if section 33 of MFMA involved) Obligatory consultation processes as per legally stipulated periods if s33 of MFMA involved.	July - August 2012

PHASE 7: Final approval of PPP contract by the Council, contract signed and start of implementation phase	September 2012
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2. PROCUREMENT MANAGEMENT

The project team comprising of the transaction advisors and municipal personnel, will take this process through procurement to contracting and implementation of the contract.

The Municipality has prescribed processes which must be and will be followed. In terms of the MFMA the Municipality is duty-bound to comply with the provisions of its SCM policy, including the preferential procurement stipulations contained therein. The transaction advisors are satisfied that within the operational framework provided by the various statutory provisions and policies, no room has been left for manoeuvring or unacceptable methods to be implemented. In order to ensure a smooth transition from procurement to contract implementation and compliance with the relevant contractual terms and conditions of approval, a contract management plan will be put into place at the same time as concluding a lease agreement with the preferred bidder.

In accordance with the above the Municipality's bid evaluation and adjudication committees will see to it that the bids are fairly evaluated and the adjudication process implemented as prescribed. The transaction advisors will assist those committees in an advisory capacity. Should there be an appeal against the bid awarded, the Municipal Manager will handle the appeal process in terms of the prescribed procedure.

The transaction advisors will draft the RFQ and RFP document and it will be subjected to an adequate internal quality assessment process to ensure it complies with municipal requirements. Bids received that do not comply with the bid conditions and requirements, should be rejected outright.

3. STAKEHOLDERS

The Municipality regards on-going stakeholder engagement during all stages of the process as essential for the successful conclusion of the project. It has undertaken to maintain adequate and continuous communication with the executive committees of the DCPA and the KRLP representative. The owners of WBA and the Institute should also be kept informed regarding progress with the procurement process. The Municipality should take the position of the members of the DCPA and the KRLP into account when negotiating with the preferred bidder.

If any of the aforementioned stakeholders become a party to a bid consortium or put in a bid as a separate entity, it goes without saying that further communication with such a party would have to ensure that information, if made available, does not provide the party with an unfair advantage or prejudice any other bidder.

4. INFORMATION TO BIDDERS

The tender process should include an obligatory briefing session and site meeting. The RFQ/RFP document should be inclusive and contain all the necessary information. However, it is expected that some bidders will want to study the volume of documents in respect of town planning, environmental planning, services' master planning, etc. available before preparing and submitting proposals or bids. Therefore the Municipality will need to establish a data room at the offices of the DIP which will be open at specific hours to the bidders who attended the briefing session and site meeting.

It is to be expected that potential individual bidders may raise questions or require further clarification. The Municipality should stipulate a cut-off date for the submission of such questions and should reserve the right not to respond to any particular query or question. The reply to such questions received should be in writing and should be made available to all potential individual bidders on record.

5. OBLIGATIONS & CLARIFICATION

Bidders should be required to strictly and properly comply with all municipal RFQ/RFP and tender requirements (e.g. to give full information, to present same in the required format and to lodge the required warranties).

The RFQ/RFP document should provide that the Municipality may have informal clarification sessions with individual bidders to address unclear aspects of their bids; provided that bidders will not be permitted to amend, vary or add to their bids at such sessions.

6. SECURITY AND CONFIDENTIALITY

The public administration is enjoined to foster transparency by providing the public with timely, accessible and accurate information and to be accountable. In addition it is required to respect, protect, promote and fulfil everyone's fundamental right of access to information held by the Municipality. Whilst the Municipality is bound to comply with those requirements, it should implement and maintain the necessary security and confidentiality measures to likewise ensure that the privacy of communications is not infringed.⁶²

7. AUDIT TRAIL

Both the transaction advisors (on the one hand) and the Municipality's project officer (on the other hand) will keep an audit trail and regularly submit audit reports to the Municipal Manager.

⁶²

See section 195(1)(f) and (g), section 32(1)(a) and section 14(d) of the Constitution. Also see the PAIA.

APPENDIX A



Number: W. Zylbrandt
 Enquiries:

Lêerverwysing:
 File Reference:

Datum:
 Date: 3 December 2010

KANTOOR VAN DIE MUNISIPALE BESTUURDER
 OFFICE OF THE MUNICIPAL MANAGER

Head of PPP Unit
 National Treasury
 Private Bag X115
 Pretoria
 0001

Fax: 012 315 5132

Dear Sir,

NOTIFICATION OF A SECTION 120(4) FEASIBILITY STUDY

With reference to Regulation 2(1) of Regulation 309, the Municipal Public-Private Partnership Regulations ("the Regulations") to the Municipal Finance Management Act, No. 56 of 2003 ("MFMA"), you are hereby notified that:

1. Overstrand Local Municipality intends to conduct a Section 120(4) feasibility study for a public-private partnership with respect to the development and use of its De Mond Caravan Park by a private party for its own commercial purposes based on a long term PPP lease agreement.
2. Based on a Council Resolution in this regard (refer to **Annexure 1**) the Municipal Manager has been mandated to authorise the transaction advisor to proceed with the Feasibility Study and accordingly wishes to register the project with National Treasury.

It is hereby confirmed that:

1. The Municipality has the necessary internal expertise to oversee the Feasibility Study, which study is to be done in accordance with the requirements of Section 120(4) of the MFMA and Regulation 3 of the Regulations;
2. A transaction advisor/....

-2-

3. A transaction advisor with the relevant skills and expertise, namely Johan du Plessis, Project Management & Facilitation, has been appointed (refer to **Annexure 2**) to manage the completion of the Feasibility Study and, if so decided, the preparation and procurement of a PPP agreement on behalf of the Municipality; and
4. Mr Riaan Kuchar, has been appointed as the Project Officer. His contact details are: Tel: 028 313 8087 and e-mail: rkuchar@overstrand.gov.za

We trust you will find the above notification and information satisfactory in compliance with Regulation 2 but, should additional information be required, please do not hesitate to contact me.

It is confirmed that the Municipality is aware of its further consultative obligations in respect of National and Provincial Treasury as per Sections 120(6) and 33 of the MFMA and Regulation 4 of the Regulations and will adhere to these as the process unfolds.

Also be advised that the Municipality intend to submit a Pre-TVR: 1 Application for funding of the process by the Project Development Facility (PDF) of National Treasury once notification of registration of the project is received.

Yours sincerely



WERNER ZYBRANDS
MUNICIPAL MANAGER

APPENDIX B-1

Final Draft

PAMS

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083 458 6067 Cell
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Pro-Active Management Services

10 October 2011

The Municipal Manager
Overstrand Municipality

Dear Sir,

Feasibility Report on the Leasing and Development of De Mond Caravan Park and Adjacent Land

On behalf of PAMS, I hereby confirm the accuracy and verifiability of the abovementioned report.

Yours sincerely,



Anita Botha