

APPEAL OF THE CITY OF CAPE TOWN MUNICIPAL PLANNING TRIBUNAL (MPT) DECISION OF THE 7th JUNE 2016 TO APPROVE THE PROPOSED MIXED-USE BUILDING DEVELOPMENT ON ERVEN 8210 AND 144698, BOUNDED BY THE BUITENGRACHT, SHORTMARKET, LONGMARKET AND ROSE STREETS, CENTRAL CAPE TOWN.

CITY OF CAPE TOWN APPLICATION REF: 70268599
HERITAGE WESTERN CAPE CASE NUMBER: none



Figure 1: Bird's Eye View Photo-montage utilizing Google Earth and SketchUp, showing the proposed building (in white in the centre) in its setting, with Riebeeck Square and Heritage Square in the foreground (to the left and right, respectively) and the Bo-Kaap and Signal Hill in the background, courtesy Rick Brown Architects

PREPARED *Pro Deo* AT THE REQUEST OF THE BO-KAAP CIVIC AND RATEPAYERS ASSOCIATION, SOME LOCAL PROPERTY OWNERS AND OTHER INTERESTED AND AFFECTED PARTIES

14th August 2016

by

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1. INTRODUCTION

While the author of this report is as indicated and takes responsibility for it, it is recorded that some of the points of argument and text here presented are the product of joint deliberations that have emerged from exchanges with some other members of the Cape Institute for Architecture (CifA),¹ the Urban Design Institute of South Africa (UDISA),² the Association of Professional Heritage Practitioners and the South African Institute of Planners.³

On the 10th February 2016 I lodged comments and objections in the matter and followed this with verbal and written representations at the MPT hearing of the 7th June 2016.⁴ Recently I received an invitation to provide notice of, and grounds for, an appeal against the decision by the Tribunal, to be lodged with the City of Cape Town Appeals Authority, c/o Melanie Cloete, Statutory Compliance Unit, Legal Services Department, by the 15 August 2016.

Accordingly, this document constitutes both notice of, and grounds for, the appeal, lodged and addressed, as invited, to: planning.appeals@capetown.gov.za.

Kindly note that those I represent in this report have requested to be represented at any other decision making body's meeting, so as to have their opposition to the MPT decision confirmed and to present the material arguments here presented, with some not recorded in the MPT minutes. The facts and the reasoning are to be presented in order to place the CoCT Appeals Authority in a position to make an informed decision based on all the facts and representations.

The general grounds for the appeal are as follows:

- The decision is irrational and is obviously not in the longer-term public interest in terms of best practice and of sound city planning, urban design or heritage resources management, as may be understood by a reasonable person, even not a city planner or other built-environment professional;
- The decision is flawed procedurally;
- The decision did not take into account and respond to the substance of over 1,000 written reasonable objections lodged by the then due date of February 2016 by citizens of Cape Town, the majority being residents of the Bo-Kaap.

Specific grounds for the appeal are as follows:

- The decision flouts provisions of: the declared CoCT SDF of 2012; the declared Densification policy of 2012; and of the adopted Tall Buildings policy;
- The decision flouts provisions of the adopted District SDF of 2012;
- The decision flouts provisions of the HPOZ and the reasonable representations and objections made in regard to how the proposed development would be seriously damaging to significant heritage resources in the context of the site. The decision is challenged as a consequence;
- The decision flouts declared CoCT Urban Design policy;
- The development proposals were framed by a professional team no member of whom has professional qualifications and accreditation in either of the

¹ Besides the author of this appeal, CifA members involved have been: Dr./Prof. Stephen Townsend and Mr. John Stewart-Harris. The author hereby acknowledges their significant input.

² Besides the author of this appeal report, UDISA members involved have been: the Chairman, Mr. Khalied Jacobs and Mr. Matthew Gray. A UDISA letter of support for this appeal appears at Appendix 2.

³ The Town Planner Mr. Willem Bührmann, in particular.

⁴ I sent written representations via e-mail to the MPT administration a day or so before the MPT hearing.

disciplinary fields of urban design or of heritage resources management.⁵ Additionally, the CoCT official and case officer who prepared the internal planning report, Mr. Paul Heydenrych, has no professional qualifications or accreditation in either of the disciplines of urban design or of heritage resources management. And, moreover, the MTP decision was taken by a panel that comprised only one individual who has an urban design qualification (Mr. Simon Nicks) and none of whom have any heritage resources management qualifications or accreditation whatsoever. By implication, the vast majority of the professionals involved in the framing and the consideration of the proposals—including the MTP itself—have virtually no professional standing with respect to the very significant urban design and the related heritage resources management issues in the matter. This is by no means reasonable and the decision is, therefore, challenged.

The rest of this document is structured as follows: Section 2 provides representations and discussion relating to the grounds for the appeal of the MPT decision under the main sub-headings of general and then specific; Section 3 constitutes a conclusion to the arguments delineated; Section 4 provides the references cited; Appendix 1 is my report of June 2016, from which I made verbal representations at the MPT hearing of June 2016; Appendix 2 is a letter of support of this appeal from the Chairman of the Urban Design Institute of South Africa; and Appendix 3 is an extract from the Tall Building Guidelines of the City of Toronto.

2. REPRESENTATIONS AND DISCUSSION ITEMISED IN TERMS OF THE GROUNDS FOR THE APPEAL

2.1 GENERAL GROUNDS FOR THE APPEAL

2.1.1 *The decision is irrational and obviously not in the longer-term public interest in terms of best practice and sound city planning, urban design or heritage resources management*

As set out in the February 2016 objections, I again submit that even a cursory look at figures 1-5 occasions a shock to any reasonable reader. The development proposed is disproportionate and huge, and would occasion unacceptable intrusions in the context. It should not be approved in the public interest.

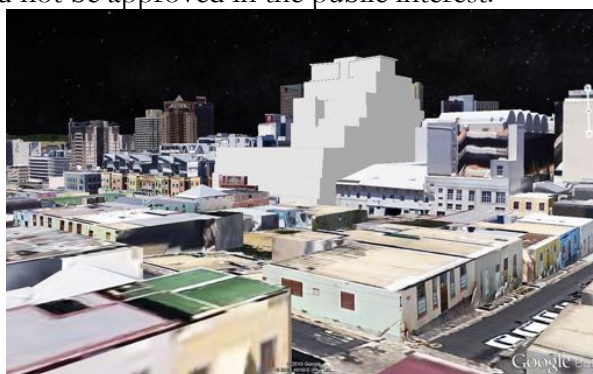


Figure 2: Bird's Eye View Photo-montage utilizing Google Earth and SketchUp, showing the proposed building (in white in the centre) in its setting when looking towards the east from above Chiappini and Church Streets, courtesy Rick Brown Architects

⁵ Henry Aikman, who prepared a Heritage Impact Assessment (HIA) after the deadline for objections of the proposed development, is an accredited heritage practitioner, but as I argued at the MPT hearing, his HIA falls considerably short of what would be professionally required.



Figure 3: Bird's Eye View Photo-montage utilizing Google Earth and SketchUp, showing the proposed building (in white towards the right) in its setting, with the Buitengracht, Heritage Square and Riebeeck Square in the centre. Note the 60m height of the monstrous City Park building—the same height as the proposed building under review! courtesy Rick Brown Architects



Figure 4: Bird's Eye View Photo-montage utilizing Google Earth and SketchUp, showing the proposed building (in white in the centre) in its setting, with Riebeeck Square and Heritage Square in the foreground (to the left and right, respectively), courtesy Rick Brown Architects

The street-level view (figure 5) demonstrates beyond a shadow of a doubt to any reasonable person that what is proposed is a huge building, entirely out of context and certainly not appropriate or in the public interest.



Figure 5: November 2015 Street-level view from the eastern corner of Riebeeck Square (101 Bree Street) looking westwards towards the site of the proposed ± 20 storey building development (the approximate outline-massing of the elevation of the building is shown in white outline, without the small proposed set-backs from about 38m up) with the ± 10 storey Studios Building appearing to the left and the 2-3 storey Heritage Square to the right: courtesy GoogleEarth Streetview.

Moreover, figure 6, presented by the Chairman of the Bo-Kaap Civic and Ratepayers Association at the MTP hearing of June, illustrates the likely consequence if this proposed development were approved, since it would set a precedent for similar 60m high redevelopments on adjacent city blocks situated between the Buitengracht and Rose Street. The result would be a veritable and massive wall that would have the effect of completely blocking-off the Bo-Kaap from the city centre, from many views its residents enjoy and the morning sun! It would also severely denigrate and hamper tourism.



Figure 6: Bird's Eye View showing the proposed building in red and other potentially redeveloped adjacent sites, in terms of the precedent approval of the proposals would set, courtesy Rick Brown Architects

2.1.2 The decision is deeply flawed procedurally

One blatant procedural flaw is that, as part of the proceedings of the MPT hearing, a legal opinion obtained by the applicant was referred to by the applicant's town planner, who claimed (as minuted) that the "HPOZ cannot take away rights in Zoning". This claim appears to have been relied on by officials and by the MPT in reaching its decision.

However, no legal opinion was presented at the tribunal hearing, nor has such opinion been made public. In the circumstances, all reference to such opinion is irrelevant, should not have informed the decision of the MPT and is, therefore, challenged.

Also, the MPT did not consider or discuss other procedural matters that were put to it in my objections of February 2016, as the MPT should have done.

2.1.3 The decision did not take into account and respond to the substance of over 1,000 written reasonable objections lodged by the then due date in February 2016

Despite the pleas of the MPT Chairman that citizens should participate in the processes attendant to development applications (Daniels 2016), at the MTP hearing and to the best of my recollection, none of the MTP panel referred to any of the over one thousand written objections lodged. This was, and is, not acceptable and should be reviewed as part of this appeal.

2.2 SPECIFIC GROUNDS FOR THE APPEAL

2.2.1 The decision flouts provisions of the declared CoCT SDF, of the declared Densification policy (both of 2012) and of the Tall Buildings policy

The overwhelming evidence shows that densification, as a very 'requirement' of current town planning-speak in Cape Town, is seized upon by all and sundry, above all by property developers and their professional teams of consultants on any project (especially sizeable ones), and is so argued as to seem to lead to the specific development proposal that is placed on the table being characterised as the absolutely necessary and appropriate intervention that is 'good for Cape Town'! Frankly, on many occasions such arguments and proposals are self-interested nonsense, which do not stand up to serious scrutiny from the perspective of sound city planning and the public good! This is one such case.

The truth of the matter is that there can not, and should not, be concerted urban intensification (densification) without pre-requisite and parallel structural change to the current urban form of Cape Town, such that real transformation is brought about in reality for the benefit of Cape Town's inhabitants.

The City of Cape Town 'Metropolitan Spatial Development Framework',⁶ that took very many years to develop, is an over-arching spatial policy framework which, inter alia, is aimed at generating a poly-centred urban form rather than the one we continue to have, which has an increasingly dominant Central Cape Town (unfortunately otherwise also known as the Central Business District (CBD), although there are very many non-business roles it plays, such as governance, judicial, cultural and so on) that is entirely spatially eccentric and is difficult and expensive to reach. Central Cape Town poorly

⁶ City of Cape Town, 2012.

serves the vast majority of the population of the metropolitan area who are remote therefrom and live in the ‘poverty traps’ of the south-east, for example!⁷

Why continue to intensify and densify central Cape Town, when this clearly flies in the face of a sensible and strategic metropolitan spatial framework that is adopted policy and requires quite different city management?

The CoCT *Densification Policy* contains the following statements:

*“Cape Town as a city is not defined by its urban or built skyline, and it is not intended for this to be the case in future. The mountain skylines and views of the sea are the defining elements that make Cape Town unique, and views of them must continue to be protected from inappropriate built form through, for instance, the application of the Tall Buildings Policy, when approved.”*⁸ (This author’s emphasis added).

“The determination of the appropriate location, height, scale, form and orientation of a higher-density development in a particular location should be guided by the density decision-making framework. The following factors must be considered:

...

- *Contextual informants related to the development application and its immediate surroundings, such as the natural environment, land use, **built and heritage character**, infrastructure availability and capacity, and socio-economic considerations, should determine the densities appropriate in a specific location.”*⁹ (This author’s emphasis added).

*“Higher-density forms of development need to be carefully evaluated in order to ensure that proposals fit in with the surrounding environment. The form and design of the development must be compatible with the area’s built/natural character. If it is not possible to accommodate a compatible built form without negatively altering the existing built context, or compromising the surrounding built environment, the development should not be supported.”*¹⁰ (This author’s emphasis added).

A comparison of the foregoing and the documentation made available by the development proponents shows that they have neither taken significant features of the CoCT *Densification Policy* into account, nor accurately reflected the said policy.

The MTP should have so noted, recorded and taken that into account in its finding and decision, but it did not, despite the fact that such representations were in the papers before it.¹¹

2.2.2 The decision flouts provisions of the adopted District SDF of 2012 and the Tall Buildings policy

What is clearly noticeable from close scrutiny of the extract of the relevant District Plan appearing as figure 7, below, is that the policy about some intensification of

⁷ The entirely eccentric location of Central Cape Town (the CBD), relative to the rest of the metropolitan area, has the further consequence of strangling commuter traffic to and from the CBD on a daily basis, with extremely negative impacts on city performance, inclusive of environmental and economic sustainability.

⁸ *Ibid*, p. 12.

⁹ *Passim*.

¹⁰ *Ibid*, p. 18.

¹¹ See my report of February 2016.

development on the Buitengracht axis (page 24 of the District Plan) is not spatially defined anywhere near the site in question! Rather, desirable densification is shown as located quite a number of blocks well to the south-west of Wale Street. This is contrary to what is stated on page 14 of the Bluegreen Planning and Design *Urban Design Report*. I have to record that this is tantamount to serious mis-representation of CoCT Policy.

The MTP should have so noted, recorded and taken this into account in its decision, but it did not, despite the fact that such representation was in its papers.¹²



Figure 7: CoCT District Plan, Sub-District 2: Central City, courtesy CoCT.

I now turn to the CoCT Tall Buildings Policy. However, this is generally a red-herring, since the proponents themselves have indicated that that policy is not really material to their proposals.¹³ Yet, the following statements that are part of the said policy are indeed relevant:¹⁴

*“Excessively tall buildings – either in clusters or alone – can destroy the essence of modern city life as it should be and, in the process, **undermine the character that the City wishes to project.** In Cape Town, a special concern is the protection of views to and from Table Mountain, a World Heritage Site and an international icon. **If not properly regulated, tall buildings can also destroy other elements that give Cape Town its special and unique identity.** An example is the visual corridor linking a person to the ocean. Also at risk are the areas around heritage buildings, the character of historically important urban precincts, and the general atmosphere in the public realm. Overshadowing, or the creation of dark spaces, and wind funnelling, can dramatically change the attractiveness of streets and areas for pedestrians who need to feel comfortable in their environment. It is these issues that require the protection of the City in the form of a firm policy, clear guidelines and good management.”*

...

¹² See my report of February 2016.

¹³ See page 16 of the previously mentioned Bluegreen (2015) *Urban Design Report*.

¹⁴ CoCT, 2011, *Tall Buildings Policy*, p. 5 and p. 11.

“All new tall buildings must be located in suitable locations, which are identified in the City’s hierarchy of plans/guidelines indicated below. Favourable consideration will be given to applications that align with these guidelines. If there are no local spatial plans, reference should be made to district or metropolitan-wide guidelines for the preferred location of tall buildings.” (This author’s emphasis added).

So, from the perspective of town planning, **it has to be stated as a fact that the development proposals under review do not conform with a strict reading of City of Cape Town’s declared policies as to: the CoCT SDF; Densification; the District SDF or the Tall Buildings Policy.**

Densification should not be promoted everywhere indiscriminately, it should be promoted only where it is contextually suitable.

The MTP should have so noted, recorded and taken these findings into account in its decision. However, it did not do so, despite the fact that this evidence and argument was in the papers before it.¹⁵

2.2.3 The decision flouts provisions of the Heritage Protection Overlay Zone and related matters

A high order CoCT policy (not referred to by either the development proponents or the MPT) states:¹⁶

“Cape Town is a unique historic city. It derives its character from evidence of a layered and multi-faceted history, its dramatic scenic setting, its historical townscapes and cultural landscapes, its cultural and heritage diversity and the traditions and memories that arise from its past. The role of the City is to coordinate the protection and enhancement of this unique character. The protection of heritage sites and the traditions and memories associated with them, are an important part of City management.” (This author’s emphasis added).



Figure 8: The view looking south down Rose Street from Strand Street: a view that underscores the ham-fisted, insensitive, engineering-dominated insertion of the ‘thorn-like’ multi-storey wall of development between Rose Street and the Buitengracht, in contrast to the single and two-storey type of development that characterises the Bo-Kaap. For many residents of the Bo-Kaap this has meant that they have lost the views of Table Mountain and Devil’s Peak (Van Graan, 2013: 52-53).

¹⁵ See my report of February 2016.

¹⁶ CoCT, *The Integrated Metropolitan Environmental Policy (IMEP): Cultural Heritage Strategy*, 2005.



Figure 9: The view looking north up the Buitengracht: a further view that underscores the ham-fisted, insensitive, engineering-dominated insertion of the ‘thorn-like’ multi-storey wall of development between Rose Street and the Buitengracht, in contrast to the single and two-storey type of development that characterises the Bo-Kaap. For many residents of the Bo-Kaap this has meant that they have lost the views of Table Mountain and Devil’s Peak (author’s photo, January 2016).

The zoning put in place over the said ‘thorn-like’ number of city blocks has promoted the redevelopment of fine-grained, single to double storey urban fabric to commercial and mixed-use multi-storey structures in a wall-like configuration between the Bo-Kaap and the central city.



Figure 10: The ‘Thorn’ that was put in place by the then City Engineer as a transformation of an integral part of the Bo-Kaap (outlined in yellow from Wale to Strand Streets and between Rose Street and the Buitengracht) with the site in question in context (outlined in red). A portion of the remaining part of the Bo-Kaap lies above and to the left of the ‘Thorn’ in the image. Base image courtesy of GoogleEarth

Fortunately, after such zoning was put in place the city government itself did not fully pursue the prior heavily engineered city policies for the area under discussion. In fact the City of Cape Town gave a more sensitive direction to developments in the area.

Part of the proposed development site is included in a long-declared Heritage Protection Overlay Zone (HPOZ) and the site as a whole also lies between long-declared Provincial Heritage Sites (Riebeeck Square and the Bokaap) and is diagonally opposite Heritage Square, which itself includes many buildings of considerable heritage significance conserved at substantial public expense.

As I set out in my statement at the MPF hearing, significant facts relating to the application in terms of S 42 (i) of the By-Law for Council approval in terms of Item 162 of the DMS to develop a new building within the Heritage Protection Overlay Zone HPO/2/3 are that:

- Heritage Western Cape does not support the application and “... the substantial impacts of an over-scaled building [proposal].” (p. 1767 of the papers for the tribunal meeting, in the context of the HWC letter of objection, pp. 1765-1767);
- In the course of two internal city reports on the development proposals (pp. 1666-1675), Mark Bell, the Principal Heritage Professional at the City of Cape Town, notes that “all the heritage resources [Riebeeck Square, Erven 1299 and 1300, the Bo-Kaap precinct, the Cape Town Centre HPOZ, and Heritage Square] ... will be impacted on in a negative manner ... because of the [proposed building] design’s sheer size and magnitude” (p. 1673 and repeated at p.1675). Moreover, he stated “The overall height [of the proposed development] is seen as problematic ...” (p. 1673 and repeated at p.1675);
- **The Cape Institute of Architects objected to the proposals**, as did over 1,000 other individuals or groups of individuals, many being residents of the Bo-Kaap;
- The purpose of the Heritage Protection Overlay Zone that was put in place by the City of Cape Town is precisely that: to protect heritage and to only approve new building proposals situated within the designated area if they would not do damage to the character of the area. This is in compliance with international best practice (see for example: ICOMOS (2005) *XI’AN Declaration on the Conservation of the Setting of Heritage Structures, Sites and Areas*; the UNESCO (2015) *Operational Guidelines for the Implementation of the World Heritage Convention*), and the City of Toronto (2013) *Tall Buildings Design Guidelines*,¹⁷ as well as local legal provisions embodied in the HPOZ;
- With respect, the Heritage Statement prepared by Aikman Associates (pp. 1732-1764) fails to define the character of the area and, as a consequence (as also specifically noted by Heritage Western Cape (pp. 1766-1767)), the design indicators/principles it defines are entirely inappropriate and inadequate;
- The development proponents are silent on the damage to the local tourism economy that would result if the development proposal was approved.

As identified in my report of the 10th February 2016, the character of the area, inclusive of Heritage Square and the two Provincial Heritage Sites proximate to the site under review, rests on the relatively fine-grain and limited heights and plan-frontage rhythms of most buildings, somewhat damaged by some more recent intrusive taller developments, such as the Hilton Hotel.

City of Cape Town management has been alive to this issue of out-of-place, intrusive, tall buildings in this area for very many decades, hence: the Title Conditions in

¹⁷ The relevant extracts may be viewed at Appendix 3.

force relating to development along Rose Street dating from the 1950's; much work undertaken by the city in the West City Action Area during the 1980's on the abandonment of the prior, heavily engineered, Solly Morris scheme for the Buitengracht and Heritage Square; the retention of the entire Heritage Square city block proximate to the site in question and to Van Riebeeck Square; and the Heritage Protection Overlay Zone HPO/2/3 put in place subsequently.

Indeed, it is relevant in this regard that I repeat what I said at the MPT hearing (which was not minuted): that a city report of the late 1980's recommended a maximum building height of 14 meters (four storeys) in this context, because of the heritage significance of the area: the report "was prepared by Derek Chittenden ... with the assistance of ... Henry Aikman" (City of Cape Town (1987) *West City Action Area Report Three (Draft)*, p. 51).¹⁸

In the circumstances of the foregoing, it was a surprise at the MPT hearing that certain of the City's officials, including officials who were members of the tribunal, and the chairman of the tribunal, Mr. David Daniels, commented on the applicability/non-applicability of the HPOZ restrictions saying that:

- there are no "specific provisions" applicable to the Central City HPOZ as required by Item 163 of the DMS;
- the restrictions articulated elsewhere in the DMS (either in the generally applicable restrictions or in the restrictions of the Central City Local Overlay Zone) were "rights" and could not be affected or "reduced" by restrictions imposed through the HPOZ as that would constitute an "expropriation"; and, therefore,
- the HPOZ could have no effect.¹⁹

Of considerable import in this matter are the powers derived from Items 18 and 158 to 164 (which are the provisions in respect of HPOZs) of the Municipal Planning By-Law of 2015 and its Development Management System (DMS).

The MPT appears to have conflated several issues (all, in our view, wrongly understood by the tribunal). These are as follows:²⁰

- the question revolving around the absence of "localised development management rules" pertaining to the HPOZ in question. In this regard we note that the introductory paragraph to the part of the DMS containing the Overlay Zone restrictions (Chapter 20: Overlay Zonings for Specific Management Mechanisms) includes the phrase, "localised development management rules"; but this paragraph can only be described as a 'preamble' at the beginning of the chapter dealing with all overlay zones.²¹ This is an explanation of the intention of the chapter and it is irrelevant in the decision-making here. Furthermore, the

¹⁸ It is inescapable that when employed by the CoCT, Messrs. Chittenden and Aikman recommended a maximum height of ± 4 storeys, but now that they are in the service of a developer, they argue that 18 storeys is desirable and acceptable. See: *CoCT West City Action Area Report Three* (1987), pages 46 and 51. I also have to place on record that I have been threatened, repeatedly, by Mr. Chittenden and his attorney of defamation and unprofessional conduct because of my publicly stated views on this matter. Naturally, I continue to provide my professional arguments and opinions on this development proposal, as I believe it to be extremely poorly conceived, entirely inappropriate and not in the public interest.

¹⁹ This is recorded in the minutes of the MPT meeting and appears in the summing up of the argument.

²⁰ I am indebted to Prof. Stephen Townsend for much of the argument presented in this section below, some of which constitute direct quotations, or adapted quotations, of text he prepared for an appeal of the MPT decision on the part of the Cape Institute for Architecture.

²¹ In fact, this brief statement is an abbreviation of a longer Preamble that appeared expressly as an explanation at the beginning of the appendix containing the overlay zones in the previous short-lived scheme (1 March 2013-30 June 2015).

Items comprising the HPOZ restrictions, Items 159-164, are precisely that, they are “localised development management rules” pertaining in the listed areas designated as HPOZs.

- as already noted, the minutes and decision of the MPT refer to Item 163 and to “specific provisions” which may be applied to a “heritage area” and it is iteratively stated that no such provisions have been devised for the Central City HPOZ as if this were significant. It is, however, clear that Item 163 enables the CoCT to “apply specific provisions to a ... heritage area protected as a Heritage Protection Overlay zone, which **may be in addition or alternative** to the general provisions in Item 162” (emphasis supplied). It is self-evident that it is not necessary for any “specific provisions” to have been established for the provisions of Item 162 to be in force. In other words, it is clear that the reference by the MPT to Item 163 is irrelevant in the matter at hand or in any wider argument about the powers derived from Item 162.
- there was considerable conflict and confusion in the utterances of the officials and of the MPT members (several of whom are City Council officials) during the course of the MPT hearing: on the one hand, the land-use officials and tribunal members iteratively repeated or implied that restrictions of the DMS are “rights”, that any additional restriction or limitation imposed via the HPOZ amounts to an “expropriation”, and that, in this case, there are no such restrictions; and, on the other hand, the heritage officials have argued that the proposed development is inappropriate as it will damage the heritage significance of the heritage area concerned. Indeed, the contradiction in the views of the two sets of officials is striking; and it is troubling that:
 - the MPT seems not to have recognised this in its decision-making;
 - nor did the MPT come to a clear view of this contradiction.

There has, however, since the first formal approval of the City Council in 1982 of a provision giving the City discretionary powers in what were then called “areas of architectural, aesthetic and historical significance”, been a tension between what the quantifying maxima/restrictions of the zoning scheme imply can be achieved and how the discretionary powers protecting significance may further limit a proposed building form/envelope. But it has been recognized from the outset that the conservation limitations are just like all of the limitations in the zoning scheme, they are all limiting restrictions which must all be respected/obeyed: a permitted floor area, for example, is not a right and it may not be achievable if the height or setback restrictions prevent that or if the permitted envelope is filled with parking (which is ‘bulk-free’); or if the visual impact of a proposed building would damage the significance of an architecturally or historically significant heritage building or townscape or place or space.

All in all, the contradictions in the views of the officials, and the reliance on “evidence” not presented (the claimed legal opinion), the ignoring of requirements referring to the architectural character of the Bokaap (the title restriction), the apparent view of the officials and tribunal that HPOZ designation does not empower the City Council to limit development in designated HPOZs, clearly, in our view, individually and jointly, flaw the tribunal’s decision fatally.

The Central City HPOZ was designated and gazetted as such in 1997 (although the Bokaap had been declared a then “national monument” in 1974, Riebeeck Square had been declared a then “national monument” in 1964 and its surrounds a then “area of special architectural, aesthetic and historical significance” in 1982). This is a very large area comprising numerous sub-areas of individually relatively homogenous history, ‘grain and texture’, and character; but, as a single townscape, it varies widely in ‘grain and texture’ and in character. This concluded a nearly twenty-year process of identifying

buildings, places, neighbourhoods, streetscapes, individually and then, ultimately, as a single townscape that should be managed as a single “urban conservation area”.²² Indeed, it was recognized and argued then that this provision was not devised to restrict architectural character or to determine style, but was to enable a negotiation process for the replacement of, and design of, every new building, ensuring that nearby conservation-worthy and culturally significant buildings and spaces were not damaged and that the ‘grain and texture’ of each part of the city centre was assessed before potentially intrusive new buildings were inserted. Indeed, there were only two reasons for the creation of these provisions (now for HPOZs): the first was to be able to prevent the demolition of the most important buildings; and the second was to prevent the construction of over-scaled and over-bearing buildings that were damaging to the townscape as an entity.²³

This particular part of the HPOZ, the West City area, has a number of buildings, places and streetscapes which are significant and sensitive: and it is self-evident that the development site, surrounded as it is by PHSs and within an HPOZ and diagonally abutting Heritage Square (established at considerable cost to the public coffers), is in a particularly sensitive location and it is self-evident (to us at least) that any proposal should fit very carefully into the existing townscape responding with care to the significances of each of the surrounding/abutting heritage resources.

I strongly submit that the proponents’ application in terms of S 42 (i) of the By-Law for Council approval in terms of Item 162 of the DMS to develop a new building within the Heritage Protection Overlay Zone HPO/2/3, which application was approved by the MPT decision, should not have been so approved on the grounds that the building height and massing is far too high and massive, respectively, and would do irreparable harm to the character of the area, as well as on other grounds previously advanced in my February report (pp. 229-281).

In the disciplines of urban design and of urban heritage resources management there is much consideration of urban grain and patterns and these are related to the significance and importance of the public realm and to street typologies which are spatially defined by the flanking development, its grain, the vertical and horizontal rhythms of abutting buildings of relatively narrow widths, and the resulting overall massing and patterns of development and of enclosure. It is not an exaggeration to say that in many parts of Cape Town during the period spanning 1940 to 1980 there was a war going on between the old and the new patterns of urban development, with the new tending to eviscerate and overcome the old. The predominantly fine-grained urban building texture, obviously derived from a fine-grained cadastral ownership pattern of many, relatively small properties constituting urban blocks, began to be replaced by consolidated, coarse-grained, larger properties (sometimes one property encompassing most or all of a city block—as was the case with the City Park building).

In fact, if anyone seriously reflects and thinks about this from a city management point of view, ‘Tall Buildings’ on the one hand and the surviving character of the Bo-Kaap, Riebeeck Square and of Heritage Square, (as the physical remnants of what much of Cape Town was like up till about the 1920s), on the other hand, are completely contradictory. If the Bo-Kaap, Heritage Square and Van Riebeeck Square are worth retaining as significant heritage resources and as signal indicators of Cape Town’s history, then Heritage Square, the Bo-

²² The most complete account of this process is to be found on pp146-158 of Townsend, Stephen, 2003, *Development Rights and Conservation Constraints*, unpublished PhD, University of Cape Town. Although unpublished, this is available on open-access at www.lib.uct.ac.za: click on the ‘Search and Find’ label at the extreme left of the top bar; and click on ‘Theses and Dissertations’ at the bottom of the window appearing; and then follow the prompts.

²³ Ibid. See pp124-133 for a discussion of the reasons for the designation of the earlier smaller central city UCAs and, ultimately, the single consolidated Central City UCA.

Kaap and Van Riebeeck Square must be protected from unacceptable buildings which have far too large a mass and height and are logically out-of-place.

2.2.5 The decision flouts declared CoCT Urban Design Policy and related matters

Since the 1950's Urban Design comprises an acknowledged arena of expertise within the built and natural environment internationally. As a discipline, Urban Design arose precisely because of the then perceived considerable gap that was seen to be developing in the practice of modernist urbanism between the disciplines of architecture, on the one hand, and town- and transportation-planning in many countries, on the other. The scope of urban design spans many scales and generally requires an academic and professional foundation in architecture, further developed at Masters level academically and professionally, often spanning core material and considerations inherent in architecture, landscape architecture, city planning and transportation planning.

Increasingly and internationally, urban design is seen as providing a critical view on matters of urban development both in formal and process terms. With the founding of the Urban Design Institute of South Africa (UDISA) more than a decade ago here in Cape Town,²⁴ this international professional trend was given some force in South African urban developments as well, many municipalities in recent years having developed the practice of requiring the services of duly accredited urban design practitioners in many projects. Unfortunately, we have to note that no accredited urban designers are on the professional team for this proposed project.

With the adoption of an *Urban Design Policy* in 2013, the CoCT specifically stated:²⁵

“It has also been observed that in many instances applicants invest large amounts of time and money into developing proposals which are not informed by basic urban design considerations and as a result respond inadequately to the site and its context. In instances where the impact of these proposals on the public realm is regarded as negative, applicants are required to amend their proposals before approval is granted. This can have severe time and cost implications for applicants, as typically the proposals which have been submitted for approval have progressed so far along the design process and are resolved to such a high level of detail that they cannot be easily amended without a radical revisiting of the concept. This results in frustrations for all parties, which is undesirable and unproductive.” (This author's emphasis added).

On the basis of the evidence of the surviving heritage resources within the context of the site, we addressed the question: what is the character of the townscape and streetscape insofar as it is derived from heritage resources?²⁶ The inevitable and logical answer was that, despite some severe damage occasioned by the insensitive zoning of the 1940's-50's and some buildings since erected in the 'Thorn' of some of the city blocks between Rose Street and the Buitengracht (stretching from Wale to Strand Streets) and, given the presence of Heritage Square just across the Buitengracht from the site in question, the dominant heritage-derived townscape and streetscape character has been compromised to some degree by some multi-storey developments but tends to be

²⁴ The author of this report was a founding member of UDISA and is Honorary Patron thereof.

²⁵ City of Cape Town (2013) *Urban Design Policy*, p. 5.

<https://www.capetown.gov.za/en/Planningportal/Documents/Urban%20Design%20Policy.pdf>, accessed 27th December 2015.

²⁶ See my report of February 2016.

defined to the north of ‘The Studios’ building by development that is predominantly low-rise, varying from 2 to 4 storeys, with a few exceptions.

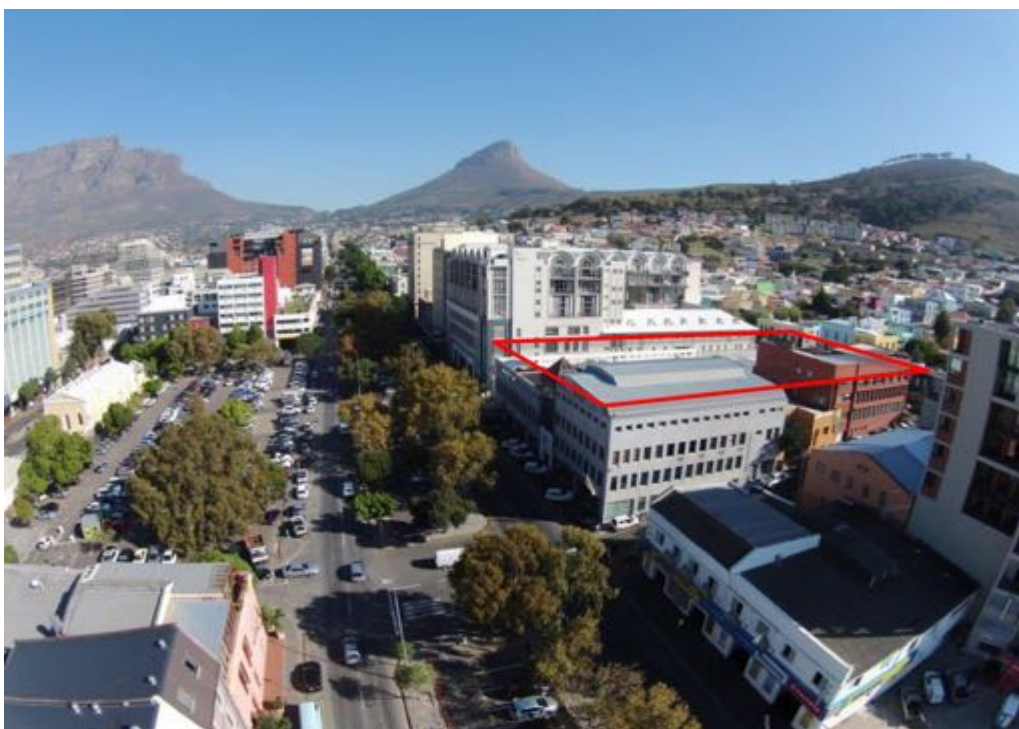


Figure 11: Bird’s Eye View of the Property (reproduction of figure appearing on page 7 of the Bluegreen Planning and Design *Urban Design Report*). What is shown on the figure is that the current height of development on the site is question is about right: that is because it is at an intermediate height between that of development on Heritage Square (seen to the left foreground in the figure) and ‘The Studios’ building (shown in the centre of the figure) with the site in question shown with the rectangular red ‘halo’.

From both the heritage and urban design perspectives, there are umpteen other more specific grounds as to why the development proposals are not in the public interest. These include that the design indicators relating to the height ‘datums’ are most illogically and incorrectly derived and argued for in the mentioned *Urban Design Report* and in the subsequent (and subservient) Aikman HIA. As an example, in regard to ‘The Studios’, as any architect would know, the height datum of an Art Deco building is never taken at its highest points but at the baseline from which the ‘flowering’ upper iconic forms spring.

In any event, as clearly seen from Riebeeck Square, ‘The Studios’ are 9-10 storeys in height at most and Heritage Square ranges generally from 2 to 4 storeys. In consequence, from heritage and urban design perspectives, so as to cohere with what is inherited, height design indicators could well range from 2 to 9 storeys at most, with a maximum height of 4-6 storeys for the site in question being the datum that would be logically derived. Figure 11 (prepared by the development proponents themselves) clearly shows that the current height of development on the site is question is about right: that is so because it is at an intermediate height between that of development on Heritage Square (seen to the left foreground in the figure) and ‘The Studios’ building (shown in the centre of the figure) with the site in question shown with the rectangular red ‘halo’.

It is incontrovertible that, because of its sheer massing, scale and height, the proposed development would severely impede and obstruct many views that are currently characteristic of the context and enjoyed by many. As shown in my February report, the shadows that would be cast would affect very many properties.

Moreover, having carefully looked at and analysed the following illustration prepared by the development pronent professional team, in my February 2016 report we

indicated that there was/is very good reason to believe that it is a distortion of what the development would actually look like.



Figure 12: View of Proposed Building from Riebeeck Square (reproduction of figure appearing on page 33 of the Bluegreen Planning and Design *Urban Design Report*)—repeat of figure 23.

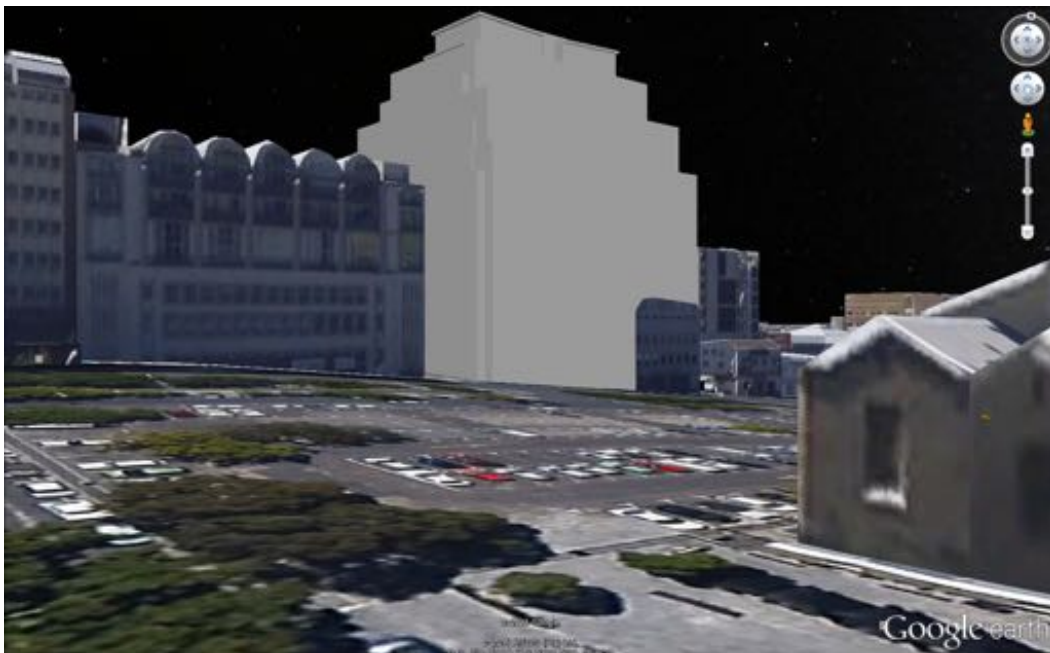


Figure 13: Our Construction of the View of the Proposed Building from Riebeeck Square, courtesy Rick Brown Architects.

Having generated our own view (figure 13) from a slightly higher viewpoint and having examined the above illustrations in great detail, as seasoned architects and built-environment professionals, we had no alternative but to make the serious suggestion to the effect that the illustration prepared by the development proponents seemed to falsify how the proposed building would appear.²⁷ A comparison of the two figures by any

²⁷ The 'we' referred to comprises the architects: Rick Brown, Neil Franks, Anna Cowen and Fabio Todeschini.

reasonable reader should make it obvious that there is a high probability that there is a serious problem here. What the proponents appear to have done is twofold:

- the image of the proposed building has been shrunk somewhat; and
- it has been set back from the perspective plane where it should have been.

The net visual effect of these contrivances has been that the image of the proposed building *vis a vis* its setting (in particular its relationship and relative scale, massing and height relative to ‘The Studios’ building) would seem to us to have been falsified. Certainly, the viewpoint appears to have been selected so as to avoid any reference to Heritage Square in the view frame.

The MPT chose not to make reference to the above statements and representations made in our February 2016 objections, nor to the specific request that it determine if falsification did or did not occur. In our view this is a further failing of the MPT that must be challenged.

3. CONCLUSION

Based on the foregoing, I and the signatories to the accompanying documents reiterate and state that:

- The site in question is flanked to the north-west by the historic Bo-Kaap and to the south-east by Van Riebeeck Square—both previously proclaimed National Monuments and now Provincial Heritage Sites (PHSs).²⁸ To the immediate east of the site is ‘Heritage Square’. It is a matter of record that ‘Heritage Square’, comprising the entire city block bounded by Riebeeck Square, the Buitengracht, Hout and Bree Streets, was retained by city policy and practice many years ago, the city foregoing considerable redevelopment rights because the block was held to comprise significant heritage resources of limited scale and building massing, having a distinctive urban character, which needed to be retained.
- The site is within the Heritage Protection Overlay Zone HPO/2/3 (previously the Central City Conservation Area) where the aims of heritage resources management, via such overlay zoning and related instruments, are the retention of the character occasioned by the heritage, only permissive of new development to the extent and to the degree that such new development would not intrude on, or do damage to, the very significant surviving heritage and the resulting existing townscapes and streetscapes.
- Nowhere in any of the papers made available about the proposed development is a detailed assessment of the existing character of the areas around the site in question undertaken, with a view to establishing clear design indicators from the heritage resources perspective. Moreover, what design indicators appear in the papers are part of the so-called ‘*Urban Design Report*’ prepared by professionals accredited in city planning but in neither urban design nor heritage resources management, or in Aikman’s HIA, which, with respect, we have discredited. Not surprisingly, as outlined in the appropriate sections of this report and that of February 2016, both the urban design and heritage resources management considerations underpinning the content of the proposals are deeply flawed, including many of the so-called design indicators, inclusive of those to do with building heights in the site context appearing in the said *Urban Design Report* and in the subsequently prepared HIA.

²⁸ In terms of the National Heritage Resources Act (Act 25 of 1999).

- Because of the HPO/2/3, the 38m and 60m proposed heights of the development are not 'as of right'. Yet the development proposals not only assume that they so are 'as of right', they require further set-back, building-line and other Departures that would have the effect of enlarging the overall, bloated proposed building envelope even further.
- The development proposals are truly massive and out of place and would obviously do very severe damage to the character of the broader context, including the mentioned Provincial Heritage Sites.
- The proposals do not conform to various CoCT policies and to many policy statements.
- The development proposals do not abide by what would normally be considered the heritage and development controls in place.
- Contrary to what is stated in the "Motivation Summary" prepared by the proponents of the development, the proposal has been shown: not to be compliant with Council Policy; the proposed building design is supported by a deeply flawed urban design study, not prepared by an accredited urban designer; and entirely inadequate consideration has been given to the heritage context of the site.
- For these and other heritage, urban design, city planning and architectural reasons, (such as: overshadowing; wind funnelling; blocking of many views; inadequate parking provision; extremely poor provision for services, etc.) we reject the MPT decision and appeal it as being grossly incorrect.
- As currently framed, the proposals and development applications are not in the public interest and must be denied.
- Redevelopment of the site is entirely possible and desirable. However, it would have to be of appropriate scale and massing and be the result of properly framed professional products, including those of appropriately accredited heritage practitioners and urban designers.
- As set out by our Town Planning colleague, Mr. Willem Bührmann in his letter of appeal of the MPT decision in this matter, "The MPT spectacularly failed to consider the provisions in the By-Law / DMS that were introduced in order to protect heritage resources in the oldest city in South Africa ... heritage resources that in this instance are not only of architectural merit but of significant historical merit, not to underestimate the[ir] cultural and social significance. ... one must not neglect to mention the economic importance of tourism that will shortly be the main economic support of this country, Cape Town and The Bo-Kaap."

We also wish to record our strong objection to a process that has been arguably unfair and undemocratic. According to evidence we have gathered (not all of which has been presented here), the development proponents have had numerous meetings with CoCT officials. In contrast, the author of this report, a professional representative of a large local civic group and of others with concerns about the development proposals, has been denied access to the same officials, despite repeated requests therefore.

The Bo-Kaap Civic and Ratepayers Association, others who have commissioned this report and I reserve our rights to make further comment and representations in these matters, including providing comment to SAHRA, HWC and to the CoCT and, if this appeal is unsuccessful, taking the matter to court.

We also record and require that we be notified as to when/where these matters are to be considered, so that at least some of us may be present to make appropriate representations at such meetings / hearings.



Prof. Fabio Todeschini

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6. **APPENDIX 1, APPENDIX 2 and APPENDIX 3**
See overleaf (attachments).