

**BEFORE THE INDEPENDENT TRIBUNAL CONSTITUTED BY
THE MEC OF CULTURAL AFFAIRS AND SPORT, WESTERN CAPE,
IN TERMS OF SECTION 49(2)
OF THE NATIONAL HERITAGE RESOURCES ACT 25 OF 1999**

In the appeal of:

DESIREE MCCALL AND OTHERS

APPELLANTS

and

HERITAGE WESTERN CAPE

FIRST RESPONDENT

CITY OF CAPE TOWN

SECOND RESPONDENT

CRISPIAN

I&AP

RULING: 6 MAY 2024

HERITAGE APPEAL TRIBUNAL:

Adv. GH Philander (Chairperson)

Mr J Retief (expert)

Ms L Robinson (expert)

Adv. M Petersen (secretariat)

INTRODUCTION

- [1] This is an appeal in terms of section 49(2) of the National Heritage Resources Act, Act 25 of 1999 (the NHRA), read with Provincial Notice 336 of 2002 (PG5937 of 25 October 2002) against the decision of the First Respondent's Appeals Committee to permit the development of CCT Social Housing on the abovementioned even situated on Victoria Walk, Melbourne Road and Earl Street in Woodstock. Part of erf 13136 Woodstock is also known as the "Castle Bowling Green, more recently known as the Golders Green Bowling Club".
- [2] The properties in question are Melbourne Street and Earl Street, Woodstock in the Western Cape Province. This Appeal Tribunal is ceased with considering the matter of the matter *de novo*.
- [3] The Appellants' appeal was lodged with the office of the Provincial Minister responsible for the Western Cape Department of Cultural Affairs and Sport in and during November 2023.
- [4] On 18 January 2024, the Heritage Appeal Tribunal conducted a site inspection of the properties. The hearing was conducted in person on 19 January 2024 and finalized on 13 February 2024.
- [5] The majority of the Appellants were legally represented by Mr. Henk Smith and Ms. Cathleen Powell. Mr. Henk Smith represented the Appellants on 19 January 2024. Due to other commitments Mr. Henk Smith was unavailability to appear on 13 February 2024. At the hearing on 13 February 2024, the Appellants were represented by Ms. Cathleen Powell in Mr. Henk Smith's absence.

- [6] The First Respondent was represented by Ms. Penelope Meyer and Ms. Naushina Rahim, who work in the legal unit. Ms. Meyer has extensive knowledge of the legal prescripts and policies of the First Respondent.
- [7] The Second Respondent is the City of Cape Town (CoCT) was duly represented by Mr. Karol Michalowski of the law firm Fairbridges Wertheim Becker. Counsel for the CoCT is Adv. Coriaan de Villiers.

DISPUTE

- [8] The issue the tribunal is seized with is whether the decision of the Appeals Committee is correct in approving the proposed social housing development situated at Melbourne Street and Earl Street (Park Site), Woodstock, having due to the heritage principles set out in the National Heritage Resources Act, 25 of 1999.

FACTUAL BACKGROUND

- [9] The application for the development, which if approved will require a rezoning process, was tabled at a meeting of the Impact Assessment Committee (IAC) of Heritage Western Cape on 17 May 2023. At the meeting, the IAC resolved to support the recommendations of the Heritage Impact Assessment (authored by Bridget O’ Donoghue dated March 2023 and submitted to HWC), not to allow the City of Cape Town to proceed with a housing project on the site, instead deciding that:

“CCT develop and implement a plan to improve the Earl Street site (erven 13126,13127, RE/13019 and part erf 13136, Golders Green Park and the field (Erf 13137 and portion 13136) as an urban park for public

recreational use to benefit the existing residents of Woodstock and the future residents of the Woodstock Hospital site.”

[10] It should be noted that the CoCT intends that the Woodstock Hospital site and the existing buildings thereon be redeveloped to incorporate social housing. No objection to this proposal was received and the redevelopment of the Hospital site is not part of this Appeal Process.

[11] The CoCT subsequently decided the IAC on appeal to the Appeals Committee of Heritage Western Cape. At a meeting of the Appeals Committee held on 13 September 2023 the Committee resolved to overturn the decision of the IAC to permit the construction of social housing on the site.

[12] There appeared to be little if any rationale for the decision made by the Appeals Committee in terms of heritage with the decision as follows:

“The development to be generally in accordance with the drawings on pages 95 – 100 of the HIA and those included on the six pages of the Proposed Design by Urban Concepts dated 17 May 2022 and attached to the HIA as Annexure 3 is approved and may proceed. This, however, is subject to the building plans being endorsed as generally in accordance with the 18 Proposed Design by HWC before submission to the City for building plan approval. Particular emphasis to be paid to the interface with the Melbourne Terrace in the design development process.”

[13] Further to a request from the Woodstock Residents Association, the reasons for the decision made by the Appeals Committee were provided. These may be summarised as follows:

- 13.1 “4. *The Earl Street edge of the site borders on a row of semi-detached single-story Victorian cottages and a two-storey Art Deco block of flats on the intersection with Victoria Road. No heritage impact is anticipated on these heritage resources.*
- 13.2 5. *The west side of the site borders onto a servitude that provides access to the Melbourne Terrace garage facilities. (The garages themselves are new but the terraced houses are a declared Provincial Heritage Site) No direct impact is anticipated or expected on the Melbourne Terrace houses.*
- 13.3 6. *The northern part of Golders Green Park borders on Golders Green Road which consists of free-standing residential houses that have no outstanding heritage value that may inhibit the proposals for development.”*
- 13.4 The site has been Graded IIIC by the City of Cape Town in 2023.

Point in limine

[14] The submissions by the CoCT can be summarised as follows:

The CoCT contended that the appeals submitted by the various appellants are invalid and do not have proper standing before this tribunal. The three preliminary points raised can be summarised as follows:

1. Lack of standing,
2. Lateness, and
3. Failure to set out grounds of appeal.

[15] This tribunal will first and foremost deal with the *point in limine* raised by the CoCT as follows:

Lack of Standing

- 15.1 The CoCT contended that the various appellants did not have *locus standi* as the various Appellants were not a party before the Appeals Committee of the First Respondent. The COCT submits further that should the appellants be permitted to appeal to the Provincial Minister, it will undermine the tiered system of appeals, as contemplated in regulation 12(2) read with regulation 12(1) issued in terms of section 49(1) of the National Heritage Resources Act, 25 of 1999.
- 15.2 The CoCT, however accept that the WRA filed an appeal with the Second Respondent's Appeals Committee. Even if the tribunal accepts that the rest of the appellants do not have standing before the tribunal, by the COCT's own submissions the WRA filed an appeal to the First Respondent's Appeals Committee. This brings the tribunal to the second question regarding lateness.
- 15.3 Notwithstanding the above, the tribunal is of the view that the processes and proceeding before this tribunal is not as rigid as in court. One needs to bear in mind that the matter is heard by the tribunal of the Provincial Minister *de novo*. As the matter is heard afresh, the tribunal is of the view that access to justice must be applied in the broader sense. The tribunal therefore apply the principles set out in section 34 and section 38 of the SA Constitution and noted the various categories of *locus standi*.

Lateness

15.4 It is clear from the record that the appeals of the various Appellants were filed with the office of the Provincial Minister from 29 September 2023. The date is confirmed in the submissions submitted by the CoCT dated 11 December 2023. It is further common cause the Appeals Committee decision was handed down on 19 September 2023. The ROD about the Appeals Committee Decision was subsequently elaborated upon on 10 October 2023.

15.5 Appeals are filed with the Provincial Minister of Cultural Affairs and Sport in the Western Cape, in terms of section 49(2) of the National Heritage Resources Act, Act 25 of 1999 (the NHRA), read with Provincial Notice 336 of 2002 (PG5937 of 25 October 2002)

Section 49(2) provides the following:

“Anybody wishing to appeal against a decision of the SAHRA Council or the council of a provincial heritage resources authority must notify the Minister or MEC in writing within 30 days. The Minister or MEC shall then appoint an independent tribunal, consisting of three experts, having expertise regarding the matter.”

15.6 In terms of regulation, 12(6) of the Provincial Heritage Regulations appeals must be submitted to the Provincial Minister in writing within 21 days of the date on which the decision is communicated to the parties in

writing. The tribunal is aware that regulation 12(6) is inconsistent with section 49(2) of the NHRA.

15.7 Should the tribunal accept the submissions of the CoCT that the *dies* to file an appeal to the Provincial Minister starts to run from 19 September 2023, it would be accepted that the Appellants' appeal was submitted to the Provincial Minister is out of time. What is important is the fact that the ROD which contains the decision of the First Respondent was amended and expanded upon on 10 October 2023. Having regard to the amendment of the ROD by the First Respondent, the tribunal concludes that the appeals of the Appellants were submitted and filed in time.

15.8 To simply dismiss the Appellants Appeal will therefore not be in the interest of justice, having due regard to the constitutional principle of access to justice.

Failure to set out grounds of appeal.

15.9 On the question of whether the Appellants contain written grounds of appeal, the tribunal is directed to the Appellants' appeal. Having perused the Appellants' appeals, the tribunal concluded that there exist sufficient grounds to warrant the Appellants' appeals as valid appeals.

[16] The tribunal therefore made its ruling in respect of the Second Respondent's *point in limine* as follows:

The Second Respondent's *point in limine* is therefore dismissed.

[17] On the merits, the Second Respondent pointed out the various procedural issues raised by the Appellants. Without going into details, the tribunal found no irregularities with the process before the First Respondent. The arguments put up by the Appellants therefore are without merit.

[18] The tribunal considered the various oral and written submissions before it by the parties and which was considered carefully by this tribunal before making its final ruling. The tribunal is mindful that it needs to strike a balance between the need for social housing and heritage.

The Heritage Impact Assessment

[19] Authors: Bridget O'Donoghue Heritage Specialist, Tony Barbour Environmental Consulting (Social impact assessment), Asha Consulting (Pty) Ltd Archaeological consultant.

March 2023

It is important to interrogate the Heritage Impact Assessment developed for the site as both the Appellants and the I&APs have made several references to its findings and recommendations and there appear to be differing views on the relevance and quality of the report.

Recommendations of the HIA

[20] Bridget O' Donoghue made the following recommendations:

- 20.1 *The HIA was accepted by HWC as it meets the requirements of NHRA Section 38(3).*
- 20.2 *That the CoCT investigate the accommodation of additional units on the former Woodstock Hospital Site (Erven 13130-RE, 13131, 13132,13133, 13134, 13135, 13138, 13139, 13140-RE, 13143, 13144, 13146-RE Woodstock, Cape Town.*
- 20.3 *CoCT develop and implement a plan to improve the Earl Street site (Erven 13126, 13127, RE/13019 and part of 13136), Golders Green Park, and the field (Erf 13137 and portion of 13136) as an urban park for public recreational use to benefit both the existing residents of Woodstock and the future residents of the Woodstock Hospital site. This plan is to be approved by the CCT Environment and Heritage Management Branch (EHMB) with comments from the local civics.*
- 20.4 *CoCT investigate the development of civic use accommodation on the CoCT-owned property located on 59-67 Mountain Road (Erven 14011, 14013, 14014, and 14014 Woodstock). Usage of future buildings could include an Early Childhood Development Centre.*
- 20.5 *If any archaeological material or human burials are uncovered during the course of development, then work in the immediate area should be halted. The find would need to be reported to the heritage authorities and may require inspection by an archaeologist. Such heritage is the property of the state and may require excavation and curation in an approved institution.*
- 20.6 *Although the assessment of the proposed residential development is positive, the HIA's conclusion is that the **site should be a publicly***

accessible site that is used primarily for recreational purposes.
Civic uses in a retained or new building can be considered.

- [21] The HIA then proceeds to make several recommendations to HWC that will not be repeated verbatim here but relate to the development of the Golders Green Park and the field as an urban park for recreational use, the quote below is relevant:

“That the CoCT investigates the accommodation of additional residential units on the Woodstock Hospital site and that the Earl Street site be used for public-recreational use and not for social housing”.

- [22] The Social Impact Assessment is important as the author analyses the social and community significance of the site. This aspect of is noticeably lacking in any of the findings or rationales for decision-making in the process to date but is one of the major informants in assessment of the cultural significance of the property.
- [23] Dr Townsend, in his response to the HIA and the SIA, states that the claim made that the *“Earl Street site also has important social and historical value and memories for residents. During the Apartheid period, the Bowls Club was one of the few venues in the area that no whites could rent and use for important social events, such as weddings, etc. The clubhouse was also used as a voting station in the first democratic elections in 1994.* is a claim that is so weak in the circumstances, to be risible”. This comment is not only offensive to all South Africans who have made the transition to democracy and an integrated society, but also illustrates a narrow view of the concept of inclusive heritage that relates not to the built environment but to the (intangible significances), the memories, experiences, and practices of communities that add such a rich and diverse layer to our culture.
- [24] Dr. Townsend further submitted that *“it is clear that this site and its encompassing townscape is not of the highest architectural, urban-design or townscape significance; its scale, grain, and texture are varied and its elements, both as individual buildings and as collectives, have low significance and therefore, ...”*
- [25] This clearly displays a lack of understanding of the deep social and cultural significance that has been demonstrated by the Appellants in their arguments and is also touched upon in the HIA.

[26] The Contextual Analysis by Urban Concepts is interesting as it explores the opportunities and constraints offered by the site, it analyses the existing built fabric in terms of height, massing, architectural language, and precedent, landscape elements as well as history and grading, and landscape elements. It does not, however, make clear recommendations that would have been informed by the analysis. This, in the mind of this reviewer, is its major failing if the work was to have been used as a motivation for the development.

Recommendations of the SIA

[27] A Social Impact Assessment was prepared by Tony Barbour in February 2023.

27.1 *The establishment of Social Housing creates an opportunity for low- and moderate-income households to live in areas that they would not be able to afford. This gives them the opportunity for easier and cheaper access to the socio-economic resources of the city and enables them to take greater control of their livelihoods. The Woodstock-Salt River area is well located in terms of access to public transport and proximity to potential employment opportunities. Social Housing also provides an opportunity to contribute towards restructuring South African cities and address the spatial and socio-economic challenges associated with Apartheid Planning. The establishment of Social Housing in the area will therefore represent a significant social benefit for the beneficiaries of the project.*

27.2 *The suitability of the Woodstock-Salt River area for the development of Social Housing and the benefits thereof are supported by the findings of the SIA. The local civic organizations also recognise the importance of social housing and the suitability of the Woodstock-Salt River area for the development of Social Housing.*

- 27.3 *The findings of the SIA indicate that the development of Social Housing in the Woodstock-Salt River area must also be considered within the context of where and how much is appropriate for the area. The development of Social Housing on the Earl Street site cannot therefore be looked at in isolation and needs to be considered within the context of the development of other Social Housing projects in the Woodstock area, specifically the Woodstock Hospital site.*
- 27.4 *The sites identified for Social Housing, including the Earl Street and Woodstock Hospital sites, were identified in the **Woodstock, Salt River, and Inner-City Precinct: Affordable Housing Prospectus** prepared by the CCT in 2017. The Prospectus notes that the Woodstock-Salt-River area and surrounds were identified as ideal locations for the development of affordable housing, as these suburbs are well-located, being close to public transport and employment opportunities. However, despite the suitability of the area, the local civic organisations and the public were not involved in and or consulted during the site selection process.*
- 27.5 *The Earl Street site (Erven 13126, 13127, RE/13019, and part of 13136) is located on land designated Community Facility 1. The development would therefore result in the loss of potential open space. The social and health benefits associated with open spaces are significant and well-documented. The findings of the report by the World Health Organization (WHO) Office for Europe, Urban Green Spaces, and Health (2016) also indicate that “there is accumulating evidence showing that urban green space may be “equigenic”, i.e., that the health benefits linked with access to green space may be strongest among the lowest socio-economic groups, including minority ethnic groups. The provision and maintenance of appropriate green space in urban areas may therefore make an important contribution to reducing health inequalities. The WHO report also notes that the provision of urban*

green space has been shown to benefit economically deprived urban communities more than others, creating more equal socio-economic conditions. The majority of the new residents that will benefit from Social Housing in the Woodstock-Salt-River area will fall within the lower socio-economic category.

- 27.6 *The importance of green spaces for health is also recognized in the Parma Declaration (WHO 2010) with a commitment "...to provide each child by 2020 with access to healthy and safe environments and settings of daily life in which they can walk and cycle to kindergartens and schools, and to green spaces in which to play and undertake physical activity". The Table Bay District Plan also highlights the need to provide residents of high-density developments with access to open spaces.*
- 27.7 *The total number of social housing units proposed in the Woodstock area is ~990-1000, of which ~750(76%) are associated with the Earl Street and Woodstock Hospital sites. Based on the average household size of 3.7, the development of the Earl Street and Woodstock Hospital sites would equate to ~2775 new residents. There are approximately 800 existing households in upper Woodstock area, which equates to ~3000 residents. The development of social housing on the Woodstock Hospital and Earl Street sites would therefore almost double the current population of the area. As indicated above, the majority of the new residents will fall within the lower socio-economic category.*
- 27.9 *The development of Social Housing on the Earl Street site (Erven 13126, 13127, RE/13019, and part of 13136) is therefore not supported by the findings of the SIA. This is due to the loss of open space in one of the more densely populated suburbs in the City of Cape Town where there is already a shortage of open space. Once open space is lost it can seldom be reclaimed. Open space in densely populated areas, such as the Woodstock-Salt River area, is therefore a scarce irreplaceable resource whose value will increase with time as the population grows*

and the demand and need for open spaces grow. The development of Social Housing on the Earl Street site will therefore result in a lost opportunity for the CCT to provide more open space in an area where the need for safe, well-managed, and maintained open space will increase. Every effort should therefore be made by the CCT to retain and enhance existing open spaces for the benefit of current and future generations.

27.10 *The development of Social Housing on the Earl Street site is not supported by the Woodstock Residents Association (WRA) and Woodstock Aesthetics Advisory Body (WAAB). In this regard, the HIA and SIA process has provided local civics and members of the community with an opportunity to comment on the suitability of the sites identified for Social Housing by the CCT, an opportunity that was not afforded to them when the sites were initially selected.*

27.11 *Based on the findings of the SIA it is recommended that the Earl Street site (Erven 13126, 13127, RE/13019, and part of 13136), including the adjacent Golders Green Park and open field, should be developed by the CCT as a public urban park to benefit both the existing residents of Woodstock and the future residents of the Woodstock Hospital site.*

27.12 *The findings of the HIA and SIA regarding the Earl Street site (Erven 13126, 13127, RE/13019, and part of 13136) should also inform the Local Spatial Development Framework (LSDF) for the Woodstock-Salt River area that is currently being prepared.*

[28] The matter was discussed at the IACOM meeting on 17th May 2023. The IACOM decision regarding the Woodstock Hospital site can be summarised as follows:

- 28.1 *The Committee resolved to support the HIA as meeting the requirements of S.38(3) of the NHRA and further supports the recommendations of the HIA prepared by Bridget O'Donoghue and dated March 2023 as follows:*
- 28.2 *The application to redevelop the site for social housing is approved.*
- 28.3 *The concept design by Urban Concepts (Pty Ltd of November 2021 is approved as a concept plan for further design development.*
- 28.4 *A detailed set of architectural plans is to be resubmitted and approved by HWC. These plans to address the design elements highlighted in the assessment.*

The IACOM decision re the Earl Street site.

- [29] *As stated above, the matter was discussed at the Impact Assessment Committee (IACOM) meeting held on 17th May 2023. The Committee resolved to support the HIA as meeting the requirements of S.38(8) of the NHRA and further supports the recommendations of the HIA prepared by Jason Orton, Bridget O'Donoghue, and Tony Barbour and dated March 2023 as follows:*

CoCT investigate the accommodation of additional units on the former Woodstock Hospital Site.

- [30] *CoCT develop and implement a plan to improve the Earl Street site, Golders Green Park, and the field as an urban park for public recreational use to benefit both the existing residents of Woodstock and the future residents of the Woodstock Hospital site. This plan to be approved by the CCT Environment and Heritage Management Branch with the comments from the local civics.*

[31] CoCT investigate the development of civic use accommodation on the CoCT-owned property located on 59-67 Mountain Road. Usage of future building could include an Early Childhood Development Centre.

The Victoria Walk Appeal (former Woodstock Hospital site)

[32] The Appeals Committee heard the matter on the 13th of September 2023. The Committee's decision was as follows: "*The Victoria Walk (former hospital site) appeal, against the recommendation by IACOM to support the establishment of social housing on the Woodstock Hospital Site, brought by The Woodstock Residents Association (WRA), was dismissed and the IACOM decision was upheld.*"

[33] The reasons provided by the Appeals Committee for its decision can be summarised as follows:

33.1 *The site, although rich in social history, is not included into the HPOZ that covers Woodstock and the surrounding area. The City's grading of the site varies from IIIC to IV in parts. This has had the effect of reducing the gravitas of the site as a heritage resource.*

33.2 *The surrounding context is predominantly characterized by housing from the Victorian era. Most of these will not be directly impacted by the intervention.*

33.3 *There is a sensitive social and political layering to the site which should be taken cognition of which, when considering the current development proposal for the hospital site, is constrained enough to not raise concern.*

33.5 *The site and its proposed redevelopment could play a significant role in the integration and densification of the inner city with the bonus of accessibility to transport and economic nodes.*

33.6 *The hospital buildings are structurally sound which may potentially curb costs. In addition, the development of the site may increase permeability by allowing pedestrian thoroughfare through the built structures /footprints.*

33.7 *The existing building layout also creates opportunities for the development of internal green and paved courtyards.*

The Earl Street (Park Site) Appeal

[34] As stated above, the matter was heard by the HWC Appeals Committee on the 13th of September 2023.

[35] An appeal was brought by the City of Cape Town, against the recommendations of IACOM which was essentially for the Park in its entirety to be developed and maintained as a public open space. The City is in favour of developing social housing along the Earl Street boundary of the park. At the same time, the existing open area and Golders Green Park are to be retained as open spaces. See plans of Proposed Design by Urban Concepts dated 17th May 2022.

[36] The City's appeal was upheld. The development to be generally in accordance with the drawings on pages 95-100 of the HIA and those included on the six pages of the Proposed Design by Urban Concepts dated 17 May 2022 and attached to the HIA as Annexure 3 is approved and may proceed. This is subject to the building plans being endorsed as generally in accordance with the 18 Proposed Design by HWC prior to submission to the City for building plan

approval. Particular attention to be paid to the interface with the Melbourne Terrace in the design development process.

[37] The appeal brought by the City of Cape Town, for maintaining and developing the park as a communal amenity, was upheld. The reasons for the Appeals Committee's decision can be summarised as follows:

[38] *The site previously housed the Woodstock Bowls Club. The existing open area and Golders Green Park will be retained as open space. This places the content of the appeal outside of the notion of the reduction in open space(s).*

[39] *The Earl Street site is located on land zoned Community Facility 1. The need and provision of social housing within the inner city, within reach of public transport and employment opportunities, post the subdivision and consolidation, is supported in line with the SDF for the Woodstock-Salt River area.*

[40] *There is no notable impact on any heritage resources. The retaining wall has not been identified as having any heritage value.*

[41] *The Earl Street edge, to the Northern side of the site, borders on a row of semi-detached single-story Victorian cottages and a two-storey Art Deco block of flats on the intersection with Victoria Road. No heritage impact is anticipated on these heritage resources.*

[42] *The west side of the site borders on a servitude that provides access to the Melbourne Terrace garage facilities. No heritage impact is anticipated or expected on the Melbourne Terrace houses.*

[43] *The Southern part of Golders Green Park borders on Golders Green Road which consists of free-standing residential houses that have no outstanding heritage value that may inhibit the proposals for development.*

[44] *The proposed design for the Earl Street Social Housing project meets the requirements of a quality and liveable inner-city context. The above statement, derived from the SIA is supported.*

Site inspection and observations

[45] The tribunal members Adv Graig Philander, Mr. Jacques Retief, and Ms Laura Robinson, accompanied by the secretariat, Adv Michael Petersen of the PGWC, undertook a site inspection on 18 January 2024, the site inspection was attended by representatives of the Appellants, Heritage Western Cape, the City of Cape Town, and their legal representatives.

[46] During the site meeting, it was emphasized that the site is within the Woodstock restructuring zone, which permits and prioritizes the development of social housing.

APPLICABLE LAWS

[47] Section 49(2) of the NHRA and Regulation 12(6) of the regulations (Provincial Notice 336 of 2002 (PG5937 of 25 October 2002), provides for an appeal against a decision of Heritage Western Cape.

[48] Section 49(2) provides:

“Anybody wishing to appeal against a decision of the SAHRA Council or the council of a provincial heritage resources authority must notify the Minister or MEC in writing within 30 days. The Minister or MEC shall then appoint an independent tribunal, consisting of three experts, having expertise regarding the matter.”

[49] Section 49(3) provides:

“The tribunal contemplated in subsection (2), in considering the appeal referred to it by the Minister or the MEC, must have due regard to –

- (a) the cultural significance of the heritage resources in question.*
- (b) heritage conservation principles; and*
- (c) any other relevant factor which is brought to its attention by the appellant or the heritage resources authority.”*

[50] Regulation 12(6) provides:

“When persons or bodies referred to in sub-regulation (1) wish to appeal against a decision of the Council of Heritage Western Cape or its appeal committee to grant or refuse a permit, consent or authority, an appeal, stating the grounds of appeal, must be lodged with the Provincial Minister in writing within 21 working days of the date on which the decision of the Council of Heritage Western Cape or its appeal committee was made known in writing to the appellant”.

[51] The law regarding heritage is governed by the Constitution of the Republic of South Africa, 1996, and the National Heritage Resources Act (Act 25 of 1999)

has been applied as the primary statutory instrument for determining heritage issues in South Africa.

- [52] The tribunal notes that the NHRA provides for conserving and managing heritage resources at the National, Provincial and Local levels. At the provincial level, the First Respondent manages and conserves heritage resources in the Western Cape.
- [53] The *Constitution of the Republic of South Africa* (SA Constitution) protects cultural heritage. Protecting cultural heritage is located in section 31(1) of the SA Constitution.

'Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community, - (a) to enjoy their culture, practice their religion and use their language; and (b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.'

- [54] The NHRA defined a "heritage resource" as *"any place or object of cultural significance. Section 3 of the NHRA places heritage resources within the context of the national estate, listing a wide variety of places, buildings, structures, equipment, and other resources that can have heritage or cultural significance"*.

- [55] Section 3 of the NHRA provides the following:

"3(1) For the purposes of this Act, those heritage resources of South Africa which are of cultural significance or other special value for the present community and for future generations must be considered part of the national estate and fall within the sphere of operations of heritage resources authorities."

- “(2) Without limiting the generality of subsection (1), the national estate may include—*
- (a) places, buildings, structures, and equipment of cultural significance.*
 - (b) places to which oral traditions are attached or which are associated with living heritage.*
 - (c) historical settlements and townscapes.*
 - (d) landscapes and natural features of cultural significance.*
 - (e) geological sites of scientific or cultural importance.*
 - (f) archaeological and palaeontological sites.*
 - (g) graves and burial grounds, including—*
 - (i) ancestral graves.*
 - (ii) royal graves and graves of traditional leaders.*
 - (iii) graves of victims of conflict.*
 - (iv) graves of individuals designated by the Minister by notice in the Gazette.*
 - (v) historical graves and cemeteries; and*
 - (vi) another human remains which are not covered in terms of the Human Tissue Act, 1983 (Act No. 65 of 1983).*
 - (h) sites of significance relating to the history of slavery in South Africa.*
 - (l) movable objects, including—*
 - (i) objects recovered from the soil or waters of South Africa, including archaeological and paleontological objects and material, meteorites, and rare geological specimens.*
 - (ii) objects to which oral traditions are attached or which are associated with living heritage.*
 - (iii) ethnographic art and objects.*
 - (iv) military objects.*
 - (v) objects of decorative or fine art.*
 - (vi) objects of scientific or technological interest; and*

(vii) *books, records, documents, photographic positives, and negatives, graphic, film, or video material or sound recordings, excluding those that are public records as defined in section 1(xiv) of the National Archives of South Africa, Act, 1996 (Act No. 43 of 1996).*

(3) *Without limiting the generality of subsections (1) and (2), a place or object is to be considered part of the national estate if it has cultural significance or other special value because of—*

- (a) *its importance in the community or pattern of South Africa's history.*
- (b) *its possession of uncommon, rare, or endangered aspects of South Africa's natural or cultural heritage.*
- (c) *its potential to yield information that will contribute to an understanding of South Africa's natural or cultural heritage.*
- (d) *its importance in demonstrating the principal characteristics of a particular class of South Africa's natural or cultural places or objects.*
- (e) *its importance in exhibiting aesthetic characteristics valued by a community or cultural group.*
- (f) *its importance in demonstrating a high degree of creative or technical achievement at a particular period.*
- (g) *its strong or special association with a particular community or cultural group for social, cultural, or spiritual reasons.*
- (h) *its strong or special association with the life or work of a person, group, or organization of importance in the history of South Africa; and*
- (i) *sites of significance relating to the history of slavery in South Africa.'*

[56] Section 5 of the *NHRA* deals with the general principles for heritage resource management and reads:

The identification, assessment, and management of the heritage resources of South Africa must —

- (a) take account of all relevant cultural values and indigenous knowledge systems.*
- (b) take account of material or cultural heritage value and involve the least possible alteration or loss of it.*
- (c) promote the use and enjoyment of and access to heritage resources, in a way consistent with their cultural significance and conservation needs.*
- (d) contribute to social and economic development.*
- (e) safeguard the options of present and future generations; and*
- (f) be fully researched, documented, and recorded.'*

[57] The National Heritage Resources Act, Act 25 of 1999 (NHRA), has been applied as the primary statutory instrument for determining heritage issues in South Africa. The law regarding heritage is also governed by the Constitution of the Republic of South Africa, 1996.

The property itself – status quo

[58] The property is currently occupied illegally by a few families who, it is understood, used to be in the employment of the previous leaseholder of the building – a childcare facility. There are also a couple of container structures that date from the time of the childcare facility. The open space is neglected, overgrown, and has not been maintained by the owner, the CoCT.

[58] The group did not enter the building that was previously used as the Golders Green Bowling Club, but it appeared to be in poor repair from a cursory look at the exterior. The significance of the building does not lie in its architectural form but in its social history and the value that it holds for the community of Woodstock, both as a place where people of all races could gather freely under the Apartheid regime, as well as serving as a polling station in the first democratic elections in 1994.

[59] While walking around the site members took note of several muddy areas and water seepages occurring throughout the open land, particularly where there are ground-level changes and retaining walls. One of the residents informed us that there is constant subterranean running water, (from the mountain slopes above Woodstock) and that he has had to install a pumping system in the basement to address the challenge of water ingress throughout the year. Whilst this is not strictly a heritage issue it is an environmental challenge as the water will need to be addressed in engineering terms should any new development take place on the site. This may well prove to be expensive which may in turn affect the cost modelling and subsequent viability of social housing.

The neighbouring urban environment

[60] The principal features of the properties are the following:

The area enclosed by Earl Street, Melbourne Road, Victoria Walk and Golders Green Road, and Golders Green Park, is a public open space. An area along the northern side used to house the Woodstock Bowling Club but this is no longer active.

[61] The area enclosed by Victoria Walk, Nerina Street, Mountain Road, and Earl Street is occupied by the former Woodstock Hospital and presently houses several homeless people. The building has become quite dilapidated and needs refurbishment if it is to serve as viable social housing.

- [62] The residential houses on three sides of Golders Green are mostly single-storey Victorian homes. The Woodstock Hospital occupies all the frontage on Victoria Walk, extending between Earl Street and Nerina Street.
- [63] The site has a degree of contextual and historical value with the result that it was given a CoCT Grade IIIC significance.
- [64] There are cottages at the corner of Melbourne Road and Earl Street which have provincial heritage status.
- [65] The site is immediately adjacent to a Heritage Protection Overlay Zone (previously known as an urban conservation area), and the site is located within a proposed HPOZ. The terrace of Victorian cottages known as Melbourne Terrace, the Provincial Heritage Site – previously a national monument, is a well-preserved example of single-story workers' cottages, now restored and gentrified, but a fine example of housing typical to the suburb of Woodstock and neighbouring areas such as Salt River and Observatory. The detached houses situated on Earl Street are also good intact examples of housing typical of the period and, the Art Deco Block of apartments is similarly stylistically a good example of the genre and sits comfortably within the residential environment.
- [66] All in all, the environment reads coherently as a medium to high-density residential area consistent in terms of height, scale, massing, response to the streetscape, etc. There are views down to what would have been the original Woodstock Beach, across Table Bay to Robben Island, as well as significant views up to Devils Peak and Table Mountain.

Significance of the Site

- [67] The point was made during the tribunal hearing that significance, by its very nature is fluid as more histories, both oral/anecdotal and written are uncovered.

Statements of significance cannot be fixed in time but require updating regularly as new information comes to hand.

[68] One of the major challenges facing the tribunal is that of defining the significance of the site and the building(s) situated on it. There was, to date, no evidence that either the CoCT or Heritage Western Cape had attempted to research any possible aspects or history of the site that might uncover credible and meaningful significance. The HIA itself did not clearly articulate the significance sufficiently. It was in essence, the presentation of the Appellants, that provided much-needed guidance in terms of possible credible significance. From the presentation made by the Appellants, it became clear that there is indeed significance that warrants further identification, acknowledgment, and interpretation. This relates particularly to the social and cultural significance of the property over the past 50 years or so, and it is embedded in the memories of long-term residents of the area.

[69] The significance does not only reside in the built and physical forms present on a site. It is therefore important that this significance is further researched, and it should not be the responsibility of the Appellants, but the owner and the Provincial authority tasked with decision-making on the future of the site.

Conclusion

[70] There is contextual value to the built environment in Earl Street. The houses, opposite the site of the former Woodstock Bowls Club, a row of semi-detached single-story Victorian cottages, and a two-story Art Deco block of flats on the intersection with Victoria Road, are all of a similar scale. On the corner of Melbourne and Earl Streets, there are the Melbourne Terrace Cottages which are heritage assets and are of a similar scale to the other Earl Street buildings. In contrast to this, the proposal of the CoCT for (mainly) three-story apartments to be built as socio-economic housing introduces a different scale and grain to

the locality where these are to be built. See drawings and models of the proposed development in Bundle F.

[71] In terms of the Act, Act 25 of 1999, *Place* includes a site, area, or region of open space, including a public square, street, or park (may contain components, contents, spaces, and views). A *related space* is defined as a place that contributes to the cultural significance of another space. *Setting* means the area around a place, which may include visual catchment. *Alter* means any action affecting the structure, appearance, or physical properties of a place or object, whether by way of structural or other works, by painting, plastering, or other decoration, or any other means. The proposed development for socio-economic housing will have an impact on the existing spaces and views contributing towards the experience of Earl Street and more.

[72] Perusing the development plans it is quite clear that scale will be a problem with negative effects for both the current residents of the Victorian cottages in Earl Street as well as for the residents of the Melbourne Terrace cottages (a three-story as well as a double storey building as proposed will overlook their back yards).

[73] The impression gleaned from perusing the documents and the discussion during the hearing leaves the impression that insensitive densification of the built environment, albeit for a commendable goal, such as socio-economic upliftment, will come at the cost of heritage resources. This does not necessarily lead to the best outcome – for existing and new residents alike. The proposal by IACom to increase the number of accommodation units on the Woodstock Hospital site and to develop the entire open space, including the Earl Street site, for the benefit of both the current residents as well as the new residents appears to be a better option.

- [74] It must be said upfront that no member of the Tribunal denies the very real and urgent need for social housing and that this housing should be well integrated into the existing urban fabric of the city, close to places of employment, schools, healthcare, and recreational opportunities.
- [75] That said, it is understood that several sites in the suburb of Woodstock have been identified for the development of social housing and there has been no opposition to the use of such open spaces to provide social housing units. In the case of this site, the situation is somewhat more complex. It is clear that there is considerable heritage significance associated with the open land, it is immediately adjacent to a Provincial Heritage Site, Melbourne Terrace, which will undoubtedly be negatively impacted by fairly densely packed social housing units, some of which may be up to four stories in height, and situated almost directly on the common boundary of the properties in question, and which is not the established pattern for the immediately surrounding residential area.
- [76] It is also noted that there is no objection to the provision of a large number – 600 - of social housing units across Victoria Road on the old Woodstock Hospital site.
- [77] Although it is not the duty or purview of this tribunal to make a judgment on the provision of Public Open Spaces in a densely packed residential area, the owner CoCT has left the park in a poor state with no maintenance: this cannot be used as an argument for suggesting that a different use be proposed for the park. During the hearing, the Appellants mentioned that they had approached the CoCT with a request that consideration be given to making Earl Street Park into a community park, like successful models elsewhere (De Waal Park being a notable example). The residents' group would assume the maintenance and management of the park in conjunction with the city, thereby ensuring that the responsibility for the daily maintenance and care is removed as a burden from an overstretched City Parks Department, it is understood that no response to this request has been received.

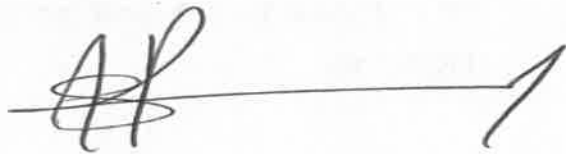
[78] Having due regard to the heritage significance of the site the tribunal is of the view that the property in its totality should not be developed for social housing.

DECISION

[79] Having heard all the parties and after having read the documents filed, the tribunal unanimously arrived at the following decision:

79.1 The appeal is accordingly upheld.

DONE AND SIGNED AT BELLVILLE DATED 6 MAY 2024.

A handwritten signature in black ink, consisting of a stylized 'G' and 'H' followed by a long horizontal line ending in a small flourish.

ADV. G H PHILANDER (Chairperson)

Concurred by:

Mr Jacques Retief & Ms Laura Robinson