



EIA Reference: 16/3/3/1/A6/50/2046/19

13 August 2020

The Minister of Local Government Affairs & Development Planning
For Attention: Minister Anton Bredell (c/o Mr Marius Venter)
c/o Deputy Director
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RE: RESPONDING STATEMENT – HOUMOED EXTENSION PHASE 2

Introduction

1. This Responding Statement is submitted in response to the appeal from the Noordhoek Environmental Action Group (the Appellant) submitted on 14 July 2020 against the Environmental Authorisation for the Houmoed Avenue Extension: Phase 2 granted to the City of Cape Town (the City).
2. The City was granted an extension until 14 August 2020 to submit this Responding Statement and it is therefore submitted within this extended time-frame.
3. The Appellant has raised three (3) grounds of appeal which are all responded to below. Given the nature of the allegations made, the City has liaised with Ms Sadia Chand of Chand Environmental Consultants and Mr Fred de Villiers from HHO Consulting Engineers (HHO) to contribute to the compilation of this Responding Statement.

Response to Ground 1: Opposition to Linkage of Phase 2 to Phase 1

4. The Appellant states that it rejects any and all linkages of Phase 2 to Phase 1. It argues that the two applications are stand-alone applications and all and any linkages between the two cannot make the permission (Environmental Authorisation or rezoning) or completed construction dependent upon the completion of the other, as set out and implied in Point 3.1 on page 23 of the Environmental Authorisation and point 3.3 on page 28 of the Environmental Authorisation.

5. Whilst the Transport Impact Assessment Report by HHO dated June 2016 confirms that the completion of the whole of Houmoed Avenue will be required to accommodate future traffic flows, the two phases can be implemented separately (apart from the Houmoed Avenue / Lekkerwater Road intersection which is common to both phases). The Needs and Desirability documented in Section D of the Basic Assessment Report (BAR) clearly evidences this.

Response to Ground 2: Upgrading of Stormwater Outflows is Insufficient

6. The Appellant states that it is of the informed opinion that merely upgrading the stormwater outflows from Masiphumelele before they enter the wetland is insufficient as they carry unsustainably high levels of pollution, particularly during low flow periods. The Appellant supports the installation of low water flow diversion pumps in order that this water is redirected into the adjacent sewer main and then to the Wildevoelvlei Water Treatment works to be treated.
7. The Appellant further argues that attention must be paid to the accessibility of the proposed culverts as the drains in this region are regularly blocked and that access must be provided for routine clearance of these culverts.
8. This matter was comprehensively dealt with in Appendix-Gviii of the BAR which is the Stormwater Management Plan of April 2018. Annexure B: Stormwater Management Plan, shows a system of pipe culverts, litter traps and low flow diversion chambers within the new development area. Details of the proposed litter traps and low flow diversion chambers can be seen on page 17.
9. The large box culverts under the roadway will be accessed *via* manholes for both manual cleaning and jet machines as required during routine maintenance of the stormwater system. The stormwater that bypasses the low flow diversion chambers will flow through a "Wetland Outfalls or Primary Treatment Structure" described on page 18 and Figure 6.5 on page 19. These structures will be regularly maintained and cleaned by the City.

Response to Ground 3: The Existence of a Reasonable Apprehension of Bias on the Part of the Environmental Assessment Practitioner

10. This ground of appeal focuses around the Environmental Assessment Practitioner (EAP), Ms Sadia Chand, also being a director of the construction company, Martin & East which was previously awarded a tender by the City for the upgrading of Kommetjie Road and Ou Kaapse Weg to dual carriageway. While the Appellant's arguments in this regard are contained in Appendix 1 to its Appeal, its allegation, in essence, is that there is a reasonable apprehension of bias on the part of the EAP and a failure by the EAP to declare a potential conflict of interest to interested and affected parties or the authorities. The Appellant thus argues for the process to start again with the appointment of an independent EAP.
11. At the outset, it is important to understand that while the Environmental Authorisation for Houmoed Avenue Extension: Phase 2 has been granted, the City has not yet advertised Phase 2 of the extension for tender and accordingly no contractors, including Martin & East, have submitted tenders for this phase nor been awarded such tender.

12. Before responding to the arguments set out by the Appellant in Appendix 1, it is important to explain what the EAP's role in the process has been, what her position is on the Board of Martin & East and what the City's adjudication process will be in the event that tender for Phase 2 is advertised.

12.1 Role of the EAP in the Environmental Process

- 12.1.1 Chand Environmental Consultants (Chand), of which the EAP is the Director, was appointed by HHO, the City's engineering consultant, to undertake the environmental process on the Houmoed Avenue Extension (Phases 1 and 2) on behalf of the City. The Applicant in the environmental process is the City, to which the EAP is completely independent. Martin & East did not have any role to play in Chand being appointed to undertake the environmental process.
- 12.1.2 The scope of work required Chand to conduct the Environmental Authorisation application process in terms of the National Environmental Management Act, 107 of 1998 (NEMA) Environmental Impact Assessment (EIA) Regulations, in addition to the Water Use Licence application in terms of the National Water Act, 36 of 1998. Chand were therefore appointed during the Conceptual Design Stage of the project (Stage 2 in terms of the Engineering Council of South Africa (ECSA) Guidelines).
- 12.1.3 Specialists that are independent from Chand and the City provided specialist assessments on the application. Their input was incorporated in an accurate and comprehensive manner in the BAR, thereby demonstrating a non-bias approach. It needs to be specifically noted that the EAP's opinion did not deviate from the opinions and recommendations received from the specialists.
- 12.1.4 The Comments and Responses Report captured the essence of all issues raised by interested and affected parties, and the accuracy thereof was supported by the submission of original comments to the Competent Authority. The Competent Authority is tasked with verifying that there was no misleading information presented in the Comment and Response Table as well as the BAR. The EAP remained objective at all times and did not present any false information which could lead to a question of her independence.
- 12.1.5 In addition, it is important to note that the EAP was not the only specialist from Chand who was involved in the Environmental process. Ingrid Eggert, an experienced Environmental Consultant played an important role in this process, with her and Ms Chand both conducting the Basic Assessment. Ms Eggert at all times had access to the work being undertaken by Ms Chand, and in fact took the lead in compiling the BAR. Had there been any bias or a lack of objectivity on the part of Ms Chand, Ms Eggert would have been duty bound by the relevant professional and ethical codes to disclose this. This further supports our view that there can be no question as to objectivity.

12.2 EAP's Position on the Board of Martin & East

- 12.2.1 The EAP serves on the Board of Martin & East fulfilling a strategic role in matters relating to environmental/social responsibility and governance. The EAP was serving on the Board of Martin & East prior to being appointed as the EAP for the Houmoed Avenue project.
- 12.2.2 It is important to note that the EAP's role on the Board does not involve input into the operational aspects or day-to-day decision-making in the company. This means that she does not know whether or not Martin & East will tender for specific projects.
- 12.2.3 The EAP is not a shareholder at Martin & East, and as such her remuneration remains the same regardless of how many construction jobs the company is awarded or successfully completes. None of the actions undertaken by the EAP during the environmental process stood to benefit Martin & East or the EAP in her personal capacity. There is no evidence that the EAP has acted in an unobjective or biased manner.
- 12.2.4 The mere fact that the EAP serves on the Board of Martin & East does not mean that she has any personal interest in the project, nor does it create circumstances that may compromise the objectivity of her work.

12.3 City's Adjudication Process

- 12.3.1 Should the Environmental Authorisation be upheld by the Minister of Local Government Affairs & Development Planning, the City will likely advertise the tender for the construction of Phase 2 of the extension. This tender will be adjudicated in terms of the City's own competitive tender process in accordance with the City's Supply Chain Management Policy and in compliance with the Local Government: Municipal Finance Management Act, 56 of 2003 (MFMA). The EAP will have no influence over the compilation of the tender document and the adjudication process and thus in no way could she create an unfair advantage for Martin & East.
- 12.3.2 As mentioned above, Martin & East were previously awarded a tender by the City for the upgrading of Kommetjie Road and Ou Kaapse Weg to dual carriageway. That tender however has absolutely no bearing to the Environmental Authorisation which is currently the subject of this appeal. The City, in this section, makes reference to that tender merely to illustrate its rigorous adjudication process prior to the award of any tender.
- 12.3.3 The Bid Evaluation Committee (BEC), in assessing the tenders for the Kommetjie Road Upgrade Project, considered the fact that Ms Chand served on the Board of Martin & East. Given that Ms Chand was part of the professional team giving guidance on environmental matters it conducted a thorough investigation into whether or not she had had any input into or in any way influenced the compilation of the tender document, or was in a position that could cause or be interpreted as

a conflict of interest. The BEC's investigation concluded that no advantage was gained by Martin & East and that no conflict of interest existed.

12.3.4 It is therefore clear that the City's Supply Chain Management process (which is separate from the NEMA requirement for independence) is extremely strict and imposes the necessary checks and balances to ensure that no actual or potential conflict of interest exists in the awarding of City tenders.

12.3.5 Similarly, should Martin & East or any other company tender for the construction of Phase 2 of the extension, the tender will be thoroughly assessed by the City in terms of its Supply Chain Management process to ensure compliance with the MFMA and to satisfy the City that no conflict of interest exists.

13. We now respond to the content of Appendix 1. Some of the arguments raised in Appendix 1 have already been addressed above and accordingly to avoid repetition, we reference the first response provided above, where necessary.

13.1 Un-numbered Paragraph 1

13.1.1 The Appellant alleges that in the comments in regard to Phase 1 of the project, it stated repeatedly that it was of the view that the EAP was biased but that the EAP responded briefly and without justification that it is 'independent'.

13.1.2 The allegations regarding the independence of the EAP were thoroughly addressed in paragraph 32 of the City's Responding Statement to the Appeal submitted by AVDS Environmental Consultants against the Environmental Authorisation granted for Phase 1 of the Houmoed Avenue Extension. It is therefore not necessary to repeat those responses in respect of the current Appeal, which deals with the Environmental Authorisation granted for Phase 2, suffice to say that this was addressed in the previous Responding Statement.

13.2 Un-numbered Paragraphs 2 – 4

13.2.1 The Appellant makes reference to the EIA Regulations of 2014 and in particular states the following:

- That an EAP must be independent and objective;
- That there must be no circumstances that may compromise the objectivity of that EAP in performing such work;
- That the EAP must disclose to the Applicant and the Competent Authority all material information that reasonably has or may have the potential of influencing the objectivity of its report;
- The work of the EAP must be performed in an objective manner, even if this results in views and findings that are not favourable to the application.

13.2.2 The City submits that the EAP has complied with all the above requirements as evidenced in paragraph 12 above. In particular, the following are worth emphasising:

- The EAP'S role on the Martin & East Board does not involve input into the operational aspects or day-to-day decision-making in the company;
- The EAP's opinion did not deviate from the opinions and recommendations received from the specialists; and
- The EAP remained objective at all times and did not present any false information which could lead to a question of her independence.

13.2.3 Furthermore, the City was satisfied that the EAP's role on the Martin & East Board had no potential of influencing the objectivity of her report. For the sake of completeness, we point out that Regulation 13(f) of the EIA Regulations requires an EAP to:

(f) disclose to the proponent or applicant, registered interested and affected parties and the competent authority all material information in the possession of the EAP and, where applicable, the specialist, that reasonably has or may have the potential of influencing—

- i) any decision to be taken with respect to the application by the competent authority in terms of these Regulations;*
- ii) the objectivity of any report, plan or document to be prepared by the EAP or specialist, in terms of these Regulations for submission to the competent authority;*

unless access to that information is protected by law, in which case it must be indicated that such protected information exists and is only provided to the competent authority.

Given that the EAP's position on the Martin & East Board had no potential of influencing the decision of the Competent Authority or influencing the objectivity of the report prepared by the EAP, we submit that no declaration of her position on the Board of Martin & East was required in terms of Regulation 13(f). The Appellant fails to demonstrate how the EAP's report could have been influenced or given rise to a conflict of interest. Not even a case for potential conflict of interest has been made by the Appellant.

13.3 Un-numbered Paragraphs 5 – 6

13.3.1 The Appellant questions whether the requirement of independence in the EIA Regulations should be interpreted broadly to mean that an EAP should recuse itself or be disqualified from conducting an EIA when it has private interests in a firm which may benefit from the relevant activity.

13.3.2 It is submitted that even on a broad interpretation, there would be no grounds for the EAP to recuse herself or be disqualified. As discussed under paragraph 12, even if the City advertises Phase 2 of the Houmoed Avenue Extension for tender, the EAP will have no influence over whether Martin & East will tender for the project, she will have no input in the compilation of the tender document and she will have no influence over the adjudication process as this will be done in terms of the City's own competitive tender process as described above. It is therefore illogical to suggest that the EAP could create an unfair advantage for Martin & East.

13.3.3 In addition, should Martin & East tender for this project, and should they be awarded the tender, it will have no bearing on the EAP's remuneration further supporting the

view that she met all the requirements of independence in terms of the EIA Regulations.

13.4 Un-numbered Paragraphs 7 – 8

- 13.4.1 The Appellant makes reference to Article 8.5 of the United Nations Convention Against Corruption (UNCAC) which requires each State Party to establish measures and systems requiring public officials to make declarations to appropriate authorities regarding benefits from which a conflict of interest may result with respect to their functions as public officials.
- 13.4.2 For purposes of this response, we do not deem it necessary to enter into a debate as to whether the EAP should be regarded as a public official or not. The reasoning submitted by the Appellant simply has no merit. Suffice to say, for the reasons already explained in paragraph 12 above, the EAP will not derive any benefit from the future possibility of the tender for Phase 2 being awarded to Martin & East and thus no conflict of interest exists. While the Appellant goes to great lengths in its appeal to discuss the legal framework surrounding conflicts of interest, it fails to show how the EAP's position on the Martin & East Board created an actual or potential conflict of interest in the circumstances.

13.5 Un-numbered Paragraph 9

- 13.5.1 The Appellant refers to the Code of Ethics for members of the International Association for Impact Assessment which requires that members must at all times place the integrity of the natural environment and the health, safety and welfare of the human community above any commitment to sector or private interests.
- 13.5.2 It is submitted that for the reasons explained in paragraph 12 above, the EAP at no stage failed to comply with this Code of Ethics. Her opinion did not deviate from the opinions and recommendations received from the specialists, she did not misrepresent the environmental impacts and she did not present any false information. As such, the City is satisfied that she remained objective at all times.

13.6 Un-numbered Paragraphs 10 – 16

- 13.6.1 The Appellant in these paragraphs argues that the EAP by conducting a public participation process, is exercising a public power and therefore considered to be an organ of State in terms of the Constitution, that its conduct is likely to amount to administrative action, that it is to be considered to be a public official in terms of UNCAC and that its conduct should be assessed in terms of relevant provisions of UNCAC.
- 13.6.2 It concludes that any actual or potential conflict of interests on the part of an organ of State must be dealt with in a manner that prioritises the values of democracy, accountability, transparency, honesty and integrity in the public administration. It

further states that the scheme of UNCAC gives rise to the conclusion that the declaration and active, effective management of actual or potential conflicts of interest are essential bulwarks against influence peddling, favouritism and other forms of corruption.

- 13.6.3 Here as well, we are of the view that it is not necessary to enter into a debate as to whether the EAP should be regarded as a public official or not. Furthermore, regardless of whether or not the EAP is regarded as a public official, there was no actual or potential conflict of interest as has been explained in paragraph 12 above. The rest becomes a moot point.

13.7 Un-numbered Paragraphs 17 - 20

- 13.7.1 The Appellant in these paragraphs makes the points that the construction industry has a reputation internationally for collusion and corruption, that the construction industry in South Africa is riven with different forms of corruption and that utmost care should therefore be taken to ensure that all transactions between the public sector and the construction industry should conform to the highest legal and ethical standards. The Appellant alleges that neither the Applicant, nor the EAP, nor the Competent Authority exercised this level of care since the information regarding the EAP's position on the Board of Martin & East is readily available in the public domain as the result of the most cursory Google search.
- 13.7.2 As explained in paragraph 12 above, given that there was no real or potential unfair advantage to be gained by Martin & East by virtue of the EAP's involvement in this matter, we strongly disagree that the necessary level of care was not exercised by all parties concerned.
- 13.7.3 Furthermore, the fact that the information regarding the EAP's role on the Martin & East Board is so easily accessible to the general public, including by means of the cursory Google search the Appellant refers to, is one of the clearest indications of openness and transparency on the part of the EAP, rather than of any form of collusion or corruption.

13.8 Un-numbered Paragraph 21

- 13.8.1 The Appellant argues that no EAP should ever conduct public participation processes on behalf of the State and simultaneously sit on the Board of any construction company and that EAPs should guard against the potential conflicts of interest which automatically arise from these dual roles.
- 13.8.2 With respect, these statements are unfounded. There is no sound reason as to why an EAP cannot fulfil dual roles provided that there is no conflict of interest. In this case, there was no such conflict. As explained in paragraph 12, the EAP serves on the Board of Martin & East fulfilling a strategic role in matters relating to environmental/social responsibility and governance. Her role on the Board does not involve input into the operational aspects or day-to-day decision-making in the

company and as such there is no automatic conflict of interest as the Appellant would have us believe.

13.9 Un-numbered Paragraph 22

- 13.9.1 The Appellant questions whether the alleged conflict of interests (ie. the EAP's position at Martin & East) was declared in line with the appropriate legal framework, and if so, was it managed by the Applicant and the Competent Authority in accordance with this framework (by framework, we assume the Appellant is referring to the EIA Regulations).
- 13.9.2 We deny that there was a conflict of interest which needed to be declared for the reasons explained in paragraph 12 above. As such there was no need for the EAP to make such a declaration.
- 13.9.3 The City was aware of the EAP's role on the Board of Martin & East and was satisfied that no conflict of interest existed. The Competent Authority, prior to issuing the Environmental Authorisation for Houmoed Avenue Extension: Phase 2, contacted the EAP to investigate the allegation of bias as reported in a *Ground Up* article. The City was made aware of this query and provided with a copy of the EAP's response. A copy of this response is attached hereto as **Annexure A** for ease of reference.

13.10 Un-numbered Paragraph 23

- 13.10.1 The Appellant argues that in the initial planning application for the extension of Kommetjie Road, the construction of Houmoed Road was originally conceived as an auxiliary part. It is argued that the proximity of these two projects in time, geographically and in the consecutive planning applications, give rise to a reasonable apprehension in the mind of an ordinary person that the EAP conducting the EIA for Houmoed Road may not be independent and objective. The Appellant alleges that the role of the EAP on the Board of Martin & East demonstrates the existence of a potential conflict of interests which could be an indicator of actual or potential corruption.
- 13.10.2 The City disagrees that the role of the EAP on the Board of Martin & East would give rise to a reasonable apprehension in the mind of an ordinary person that that EAP may not be independent and objective. As explained in paragraph 12.3 above, the tender for Phase 2 of the extension has not been advertised and if advertised, it will be adjudicated in terms of the City's own competitive tender process in accordance with the City's Supply Chain Management Policy and in compliance with the MFMA. Furthermore, the EAP will have no role in the compilation of the tender. There can thus be no suggestion that the EAP will be able to influence these processes in any way, thereby creating an unfair advantage for Martin & East.
- 13.10.3 Furthermore, in our view, the existence of a reasonable apprehension of bias on the part of the EAP would not be sufficient to establish a ground for reviewing the

decision to grant the Environmental Authorisation. That test is applied to judges and members of administrative tribunals because it is important that the public have faith that whoever adjudicates a matter is unbiased. The EAP's role in this case is not as a decision-maker or adjudicator.

13.10.4 In terms of Section 6 of the Promotion of Administrative Justice Act, 3 of 2000 (PAJA), a court or tribunal has the power to judicially review an administrative action if the administrator who took it was biased or reasonably suspected of bias. In terms of PAJA, a decision is defined as:

“ means any decision of an administrative nature made, proposed to be made, or required to be made, as the case may be, under an empowering provision, including a decision relating to –

- (a) making, suspending, revoking or refusing to make an order, award or determination;*
- (b) giving, suspending, revoking or refusing to give a certificate, direction, approval, consent or permission;*
- (c) issuing, suspending, revoking or refusing to issue a licence, authority or other instrument;*
- (d) imposing a condition or restriction;*
- (e) making a declaration, demand or requirement;*
- (f) retaining, or refusing to deliver up, an article; or*
- (g) doing or refusing to do any other act or thing of an administrative nature,*

and a reference to a failure to take a decision must be construed accordingly;”

13.10.5 Given that no decision was or could be taken by the EAP, as contemplated in PAJA, it follows that there can be no request for the Environmental Authorisation issued by the Competent Authority to be set aside on the ground of a reasonable apprehension of bias on the part of the EAP.

13.10.6 With regards to bias as a ground of Appeal, the EIA Regulations do not refer to apprehension of bias. The EIA Regulations define “independent” as follows:

“in relation to an EAP, a specialist or the person responsible for the preparation of an environmental audit report, means—

- (a) that such EAP, specialist or person has no business, financial, personal or other interest in the activity or application in respect of which that EAP, specialist or person is appointed in terms of these Regulations; or*
- (b) that there are no circumstances that may compromise the objectivity of that EAP, specialist or person in performing such work;*
excluding -
 - (i) normal remuneration for a specialist permanently employed by the EAP; or*
 - (ii) fair remuneration for work performed in connection with that activity, application or environmental audit;*

As such, a reasonable apprehension of bias is not sufficient to set aside the decision to grant the Environmental Authorisation on appeal. Even if it was, the Appellant has failed to show any apprehension of bias. The substance of the work of the EAP has not been challenged in any way. There is no allegation by the Appellant that her report was biased or that she misrepresented the environmental impacts or the content of the expert reports in any way.

The Appellant has further failed to explain what personal interest the EAP had in this matter and why this allegedly created a conflict with her preparing an objective report.

13.11 Un-numbered Paragraph 24

13.11.1 The Appellant states that there is no declaration of any conflict of interests in the BAR. The Appellant further states that in her CV in the BAR, the EAP does not state her role at Martin & East and questions why this information was withheld. The Appellant is of the view that the EAP should have recused herself from conducting the process.

13.11.2 For the reasons set out in paragraph 12, we do not agree that there was a real or potential conflict of interest as a result of the EAP serving on the Martin & East Board which needed to be included in the BAR. Furthermore, the information regarding the EAP's role on the Martin & East Board is readily and easily accessible in the public domain.

13.11.3 The purpose of including the EAP's CV in the BAR is to provide proof that the EAP has the skills and expertise to conduct the EIA process. We submit that the EAP's role on the Martin & East Board had no bearing on her competence to undertake the EIA process on behalf of the City and hence there was no reason for this position to be included in her CV which was included in the BAR.

13.12 Un-numbered Paragraph 25 – 26

13.12.1 The Appellant is of the view that Chand should have recused itself from conducting the process, distancing itself from any apprehension which could arise in the mind of the reasonable person that the EAP may be biased in favour of Martin & East. The failure of the EAP to recuse herself or to relinquish her position on the Board of Martin & East is argued by the Appellant to be a lapse of judgment.

13.12.2 The issue of reasonable apprehension of bias has already been addressed under paragraph 13.10 and for those reasons, the City is of the view that there was no need for the EAP to recuse herself from conducting the process or to relinquish her position on the Board of Martin & East.

13.13 Un-numbered Paragraph 27

13.13.1 The Appellant questions how the Applicant and the Competent Authority managed the conflict of interests.

13.13.2 As stated previously, the City was aware of Ms Chand's position on the Board of Martin & East. The City reiterates that no conflict of interest existed which needed to be declared to the Competent Authority.

13.13.3 As discussed in paragraph 13.9, the Competent Authority contacted the EAP to investigate the allegation of bias prior to the issuing of the Environmental

Authorisation for Houmoed Avenue Extension: Phase 2. It appears that the Competent Authority was satisfied that no bias existed given that the Environmental Authorisation for Phase 2 was subsequently granted.

13.14 Un-numbered Paragraph 28

13.14.1 The Appellant questions whether the Competent Authority suspended the EAP at any stage of considering the application in terms of the EIA Regulations.

13.14.2 The EAP was not at any stage suspended by the Competent Authority nor was the application suspended at any stage.

13.15 Un-numbered Paragraph 29

13.15.1 The Appellant refers to the requirement for the Competent Authority to investigate a matter where it is notified by an interested and affected party of suspected non-compliance.

13.15.2 As discussed in paragraph 13.9, prior to issuing the Environmental Authorisation for Houmoed Avenue Extension: Phase 2, the Competent Authority contacted the EAP to investigate the allegation of bias. It appears that the Competent Authority was satisfied that no bias existed given that the Environmental Authorisation for Phase 2 was subsequently granted.

13.16 Un-numbered Paragraphs 30 - 33

13.16.1 The Appellant refers to the International Code of Conduct for Public Officials contained in the Annex to the United Nations General Assembly Resolution 51/59 which provides that public officials shall not undertake activities outside the scope of their office which will impair public confidence in the impartial performance of their functions and duties.

13.16.2 The Appellant further makes reference to the Organisation for Economic Co-operation and Development (OECD) Guidelines for Managing Conflict of Interest in the Public Service which requires conflict of interest to be managed by measures including recusal of the public official from involvement in affected decision-making processes, restriction of access by the public official to particular information and resignation of the public official from their public office.

13.16.3 Regardless of whether or not the EAP is regarded as a public official, there was no actual or potential conflict of interest as has been explained in paragraph 12 nor is it reasonable for the Appellant to suggest that the EAP's role on the Martin & East Board would impair public confidence in the impartial performance of her functions and duties. The Appellant fails to justify how it arrives at this conclusion.

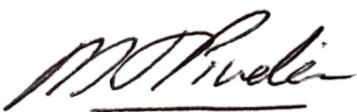
13.17 Un-numbered Paragraphs 34 – 35

- 13.17.1 The Appellant states that the test for bias is not the existence of bias but the reasonable apprehension in the mind of an ordinary person that bias might be present.
- 13.17.2 The Appellant states that if the declaration was made by the EAP and the City and the Competent Authority decided that the EAP was still competent to conduct the EIA, that these decisions undermine public confidence in the process in that they result in the existence of a reasonable apprehension of bias. The Appellant further argues that this constitutes strong grounds for judicial review of the entire process and that the EIA does not meet the requirements for a lawful and procedurally fair process.
- 13.17.3 The issue of reasonable apprehension of bias has already been addressed under paragraph 13.10.
- 13.17.4 The City strongly disagrees that the role of the EAP on the Martin & East Board gives rise to a reasonable apprehension of bias that results in the EIA process being flawed. While the Appellant has gone to great extent in its appeal to argue how conflict of interest and apprehension of bias should be dealt with, it fails at a fundamental level to show how the EAP's position on the Martin & East Board created an actual or potential conflict or how it reasonably gave rise to an apprehension of bias.
- 13.17.5 The City's view remains that the EAP has met the requirements of independence in the EIA Regulations for conducting the Basic Assessment process and that her conduct in no way created a conflict of interest or gave rise to a reasonable apprehension of bias. The allegations in this regard are without foundation. The EAP had no financial or other interest in whether the Environmental Authorisation was granted or not.
- 13.17.6 There can in any event be no judicial review of the process on the ground of a reasonable apprehension of bias as the EAP was not fulfilling a role of decision-maker or adjudicator in the current circumstances.

14 Conclusion

The City does not believe that any of the grounds raised in the NEAG Appeal have any validity for the reasons provided in this Responding Statement. As such, the City believes that the Environmental Authorisation, as granted by the Competent Authority, should be upheld.

Yours Faithfully

**Mark Pinder (Pr Eng)**

Head: Conceptual Design and Project Planning
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