



REFERENCE NO: 14/3/1/D2/54/0512/21

Mr G.P. Coetzee
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Dear Mr Coetzee

APPEAL LODGED IN TERMS OF SECTION 35(3) OF THE ENVIRONMENTAL CONSERVATION ACT, 1989 (ACT NO. 73 OF 1989) AGAINST THE PERMIT GRANTED IN TERMS OF THE OUTENIQUA SENSITIVE COASTAL AREA REGULATIONS FOR THE PROPOSED EARTHWORKS AND VEGETATION CLEARING ON ERF NO. 2107, CONSTANTIA KLOOF, WILDERNESS

1. The Appeal lodged against the Outeniqua Sensitive Coastal Area ("OSCA") Regulations Permit granted on 9 December 2020, refers.
2. After careful consideration of the Appeal, as well as supporting documentation received, in terms of section 35(3) of the *Environment Conservation Act, 1989 (Act No. 73 of 1989)* ("ECA") and regulation 8 of the 1998 OSCA Regulations, I have decided to dismiss the Appeal and vary the abovementioned decision of the George Municipality granted on 9 December 2020 by including the following additional conditions that must be implemented and complied with:

Condition 33:

"The holder of this Appeal Permit must in writing, within 14 (fourteen) calendar days of the date of this Appeal decision notify all registered Interested and Affected Parties ("Interested and Affected Parties") of –

- 33.1 *The outcome of the Appeal;*
- 33.2 *The reasons for the decision;*
- 33.3 *The date of the decision."*

Condition 34:

"The holder of the OSCA Permit must compile an Implementation Programme (Environmental Management Programme) and submit it to the George Municipality for approval, before the commencement of the development, in order to mitigate the environmental impacts of the activities."

3. The abovementioned OSCA Permit and the conditions under which the authorisation was granted must be complied with.

4. **AMENDMENTS/EXCLUSIONS TO THE PERMIT OR ADDITIONAL CONDITION(S):**

4.1. Section K is excluded from the Permit.

4.2. Section J is substituted as follows and must be complied with:

"DURATION AND DATE OF EXPIRY

This Appeal Permit is valid for two years and shall lapse if the activity does not commence within two years from the date of issue of this Appeal Permit."

5. **REASONS FOR THIS APPEAL DECISION:**

The reasons for dismissing the Appeal and varying the Permit are detailed below:

Appeal ground 1: Background to the appeal

5.1. The then Minister of Environmental Affairs and Tourism has published "Regulations under section 26 of the Environment Conservation Act, 1989 (Act No. 73 of 1989) regarding identified activities concerning the Outeniqua Sensitive Coastal Area Extension" in the Schedule hereto with regard to the area described in Government Notice No. R. 1526 dated 27 November 1998.

5.2. Regulation 3 of the OSCA Regulations, 1998 states the following:

"Permit application

(1) Any application, other than an application referred to in subregulation (2) or (3), for authorization to undertake an activity, shall be submitted to the local authority concerned.

(2) Any application made by a local authority or a department of the Provincial Administration for authorization to undertake any activity, shall be submitted to the competent authority.

(3) Any application made by a department of the National Government for authorization to undertake any activity, shall be submitted to the Minister.

(4) Any application in terms of this regulation shall be accompanied by an environmental impact report."

5.3. The competent authorities therefore for the implementation of the OSCA Regulations, 1998 include local authorities, the Provincial Department of Environmental Affairs and Development Planning and the National Department of Environment, Forestry and Fisheries depending on which authority issued the OSCA Permit.

5.4. When the Interested and Affected Parties are afforded an opportunity to make written representations on the environmental impact report, the public must ensure that their detailed comments are submitted to the Applicant or Environmental Consultant for consideration. These comments must be responded to or addressed in the comments and responses report which must be submitted with the environmental impact report to the competent authority in order to inform the decision-making process or granting or refusing to issue an OSCA Permit.

5.5. It is acknowledged that the competent authorities do not have sufficient staff capacity to monitor compliance not only with the OSCA Permits, but with other authorisations or licences or permits issued in terms of other environmental legislation as well. However, any person or the public may complain (and provide specific details of the case) with the relevant competent authority if an interested and affected party identifies that there is non-compliance with the OSCA Permit or any other environmental approval or provisions of the environmental legislation.

5.6. Considering the above, this ground of appeal has been addressed.

Appeal ground 2: Applicability of environmental tools/regulations

5.7. The OSCA Application states the following:

Background

- 5.7.1. At 1 589.8m², Erf No. 2107 is the second largest erf along Fynbos Close where the average erf size is 1 115m². According to the George Zoning Scheme Regulations the maximum coverage for properties exceeding 1 000m² in size in Constantia Kloof is either 500m or 40% of the total erf size, whichever is the greatest.
- 5.7.2. This spatial limitation on coverage, reflects the fact that Wilderness, or parts thereof i.e. Constantia Kloof, fall within the Outeniqua Sensitive Coastal Area (came into operation on 27 November 1998). By limiting the maximum footprint per erf from a planning perspective, it helps ensure that owners/potential buyers do not plan/develop in such a manner as to have a detrimental negative impact on the receiving environment. The intention of these spatial limitations is to ensure that the greater part of an erf is left untransformed / remains natural/ is subjected to rehabilitation.
- 5.7.3. The Applicant intends to construct a single residential dwelling, with a total building area of 696m². This footprint exceeds the permissible maximum coverage by nearly 4%, excluding covered patios of 69m², external staircases, driveways (of which there are two), as well as and services and patio extensions (within the building lines). The George Planning Department must advise on the extent to which deviations/relaxations will be considered.
- 5.7.4. The site sensitivity however necessitates a conservative approach to prevent unnecessary transformation with an OSCA area. The current proposal will result in the area of total disturbance during construction to be considerable. Even if the footprint is reduced, the topography of the site requires excavations that will result in notable vegetation removal.
- 5.7.5. It is furthermore noted on the site development plan that various areas are indicated for 'landscaping'. Considering the site sensitivity, no formal landscaping (unless contained within the footprint area, should be allowed. Instead natural vegetation must be left intact outside of the 'working area' and constructed affected areas must be rehabilitated.

Site Sensitivity Analysis

- 5.7.6. The vegetation present on the property is mapped to fall within the Garden Route Granite Fynbos vegetation type, which has an Ecological Status on Critically Endangered. It was determined however that the site falls within an ecotone and is not covered with Garden Route Granite Fynbos as a whole.
- 5.7.7. It was noted during the site inspection that portions of vegetation had been disturbed / removed during the lockdown period. As far as could be determined Outeniqua Lab dug two (2) test pits within the general location of the proposed driveways to determine site stability. Also, the Municipality excavated a trench in the southern corner in search of a cable.

- 5.7.8. The Department of Forestry, Fisheries and the Environment ("DFFE") has taken notice of these actions and have alerted the owner to the fact that the removal of vegetation, albeit limited, may have been in contravention of the *National Forestry Act, 1998 (Act No. 84 of 1998)*. The DFFE is in the process of investigating the matter and that further investigations/actions may influence the outcome of the Forestry Permit application.
- 5.7.9. Garden Route Granite Fynbos is listed as a Threatened Ecosystem in terms of the National List of Threatened Ecosystems (Notice 1477 of 2009, Government Gazette No. 32689, 6 November 2009), as Gazetted in 2014 & 2016 and Section 52 of the National Environmental Management: Biodiversity Act, 2004.
- 5.7.10. It is noted that Garden Route Shale Fynbos (endangered status) is depicted to the north and confirms the concept that the site falls within an ecotone transition area.
- 5.7.11. During the site inspection conducted on 2 March 2020 it was noted that the vegetation on the property is also representative of the vegetation mapping undertaken by Vlok (undated) which constitutes Wolwe River Fynbos Forest, to a degree. Fynbos remnants are however present on the site and it is deemed to be an 'ecotone' where forest/fynbos integrates.
- 5.8. In terms of the impact assessment, the OSCA Application Report predicted that the following impacts would take place:
- Removal of indigenous vegetation to develop a dwelling**
- 5.8.1. The property is approximately 1 589.8m² in size and the total building is 696m². The whole site is covered in indigenous vegetation consisting of a mixture of fynbos and forest species, which include some protected tree species which will require a Forestry license for their removal.
- 5.8.2. According to the information received from the Architect, the proposed development falls within the permissible coverage of the area, however calculations indicates otherwise (43.7%). Taking into account of the site slope, external staircases, services and driveways, in addition to the footprint, it is anticipated that less than 30% of intact indigenous vegetation will remain post-construction.
- 5.8.3. To mitigate the impact, it is recommended that the maximum construction disturbance footprint around the house footprint be limited to 2m width and only in areas where it is absolutely necessary. The working area, inclusive of the 2m working area, must be hoarded (construction fencing) to prevent unnecessary damage to the remaining natural vegetation. At least 1m of the 2m construction area around the house, must be rehabilitated post-construction with suitable indigenous vegetation. No protected tree species or remaining natural forest may be removed outside of the working area unless authorized by the DFFE and where possible protected trees within the 2m construction area must be avoided. The George Municipality's Planning Department must advise on compliance with the George Zoning Scheme Regulations prior to the issuing of the OSCA permit. In the event that the proposal does not conform, the Municipality must

advise if the OSCA application must be resubmitted with an alternative (with or without stakeholder engagement).

Disturbance/fragmentation of habitat

- 5.8.4. Approximately 70% of vegetation on the property will be cleared to accommodate the proposed residential dwelling, driveways, stairs, services, retaining wall etc. Remaining vegetation will link to untransformed northern agricultural areas, however most surrounding land use resembles transformed, fragmented vegetation and habitat already.
- 5.8.5. To mitigate the impact, other than the house footprint and maximum 2m construction working area, the remaining natural vegetation must be fenced out prior to the construction to prevent access into the remaining natural areas and to avoid unnecessary damage/ fragmentation of the remaining habitat. The house footprint and 2m working area must be demarcated separately and inspected by the ECO prior to clearing.
- 5.8.6. Within the 2m working area, where necessary, the ECO must identify areas where vegetation may not be cleared i.e. protected tree species to limit the removal of indigenous vegetation and disturbance of habitat.
- 5.8.7. The areas outside of the working area are deemed no-go areas and may not be transformed/ disturbed unless permitted for services/ driveways/ areas that will be rehabilitated.

Loss of protected species

- 5.8.8. The site contains a number of protected tree species and some of these trees fall within the development footprint. The removal or trimming of protected tree species within the development footprint may be considered by the DFFE as the location of the dwelling will be within the original parameters for residential development for which Erf No. 2107 was set aside for, however care must be taken to avoid the removal of any protected tree species outside of the construction area and/or beyond the primary rights portion i.e. within the building lines.
- 5.8.9. The housing footprint and construction area must be demarcated separately prior to the construction activities and all protected trees within both areas must be marked. These areas must be inspected by the ECO prior to clearing to identify protected tree species. In the event that a protected tree species stands within the 2m working area, it is recommended that it not be removed unless it will prevent efficient/ safe working conditions. No protected tree species may be removed outside of the demarcated working area.
- 5.8.10. The ECO must be appointed by the Applicant prior to any site preparation. The working area and housing footprint must be demarcated separately prior to any vegetation clearing and inspected by the ECO to identify protected trees and limit the working area around the house footprint to avoid protected trees/ indigenous vegetation that will not unnecessarily complicate working conditions.
- 5.8.11. The ECO must induct the Contractor and his/ her team as well as any sub-contractors in terms of environmental requirements prior to any site clearing

and if necessary, must have regular 'toolbox talks' with the contractor/ team should there be any slip-ups in environmental measures.

- 5.8.12. To achieve the conservation management outcomes, only the permissible footprint and working area should be cleared for the purpose of constructing the proposed development and the rest of the vegetation should remain intact. The Zoning Scheme Regulations must be complied with unless otherwise permitted by the George Municipality in which case the Municipality must still abide by the *National Environmental Management Act, 1998 (Act No. 107 of 1998)* ("NEMA") Duty of Care Principles that dictate that environmental damages must be kept to a minimum. Indigenous vegetation should be used for rehabilitation and landscaping and ornamental landscaping must be minimised. The ECO must ensure that the housing footprint and working area do not exceed the allowable space and where possible the removal of natural vegetation within the working space must be limited and only indigenous, endemic interface landscaping is allowed and rehabilitation measures must be implemented to restore areas affected by construction.
- 5.9. In the Responding Statement, the Applicant addressed this issue as follows:
- 5.9.1. For the purposes of the OSCA Application as well as this Appeal, it must be noted that CBA is not yet adopted for the Western Cape albeit a valid guideline exists when considering transformation and loss of natural vegetation and habitat. Furthermore, it must be noted that the Constantia Kloof township development was approved and established prior to the CBA provisions. These cannot be applied retrospectively without due consideration of the primary rights awarded to a single residential property.
- 5.9.2. The ecosystem threat status for vegetation types was Gazetted in 2011. Constantia Kloof township development was approved and established prior these coming into effect. These cannot be applied retrospectively without due consideration of the primary rights awarded to a single residential property, without acknowledging the greater spatial planning context awarded by the established township development. Constantia Kloof township falls within the demarcated urban area/ edge of Wilderness, which is acknowledged in terms of the 2014 EIA Regulations (as amended) as having established primary rights which commenced prior to the EIA Regulations coming into effect, as well as being in-furtherance of (listed) activities i.e. township establishment.
- 5.9.3. Constantia Kloof is an established township consisting of developed and vacant erven with primary rights for single residential dwellings. Cognisance must be taken of (equal) rights associated with the already developed Constantia Kloof erven vs vacant Constantia Kloof erven (to be developed still). As is evident from aerial imagery Constantia Kloof is partially developed with provision for 'green belt' separating the properties along Whites Road and Constantia Kloof Road. Once fully developed, as per the Zoning Scheme Regulations, the only remaining natural area of functional value will be the said 'green belt' whereas remaining, undeveloped portions of individual erven will have diminished ecological functioning. In

the site plan, the approved erven within Constantia Kloof are indicated in light grey and the designated open space/ green belt in green.

- 5.9.4. Constantia Kloof is spread across mostly steep slopes with the majority of erven situated on slopes exceeding 30% indicated in red (Erf No. 2107 is situated on slopes between 10-30% indicated in orange).
- 5.9.5. As a result of the topography, most erven within Constantia Kloof require substantial cut (excavation) and fill (levelling) in order to achieve a reasonable development footprint. Most properties have split levels to accommodate entrance/ driveways, services and structures.
- 5.9.6. As new legislation is developed (from when a development is historically approved), which aims to improve regulating developments (most notably in sensitive areas i.e. intact natural vegetation, steep slopes etc.), it is the responsibility of the independent environmental assessment practitioner and decision-making authority, to acknowledge both environmental, as well as economic factors.
- 5.9.7. The Constantia Kloof conditional guidelines makes specific mention of height restrictions and (building) plans that must be considered by Council prior to the approval of any development on an erf. In these guidelines, mention is made of slopes, cut & fill, stabilization and rehabilitation, acknowledging site conditions and constraints.
- 5.9.8. The George Zoning Scheme Regulations improves on these guidelines by, amongst others, specifying maximum coverage for Single Residential properties (also applicable to Constantia Kloof).
- 5.9.9. The maximum 'coverage' (buildings) for erven within Constantia Kloof is prescribed as 500m² or 40% of property size (for erven greater than 1000m²), whichever is the greatest, with exclusions. Erf No. 2107 is 1 589.8m² which allows consideration of a maximum coverage of 635.92m². Non-building components such as driveways and service areas are excluded from the 40% coverage calculations implying a greater level of disturbance to be indicated.
- 5.9.10. In the Appeal, they acknowledge that they are aware of the exclusions from the 'coverage' area and they object to the +/-60% disturbance with a condition (of their appeal) that less indigenous vegetation should be removed from the site.
- 5.9.11. Following the OSCA process, the Planning Department of the Municipality, having considered all the comments/ submissions/ recommendations, requested a reduced footprint and ultimately approved a coverage area of 611m² (38.41%) down from 696m² / 43.7%. They furthermore applied conditions to the permit that (A) reduces the 1-2m walking area around the building to 1m only and (B) that all areas previously indicated for landscaping, be rehabilitated post-construction which reduces the overall disturbance area. It must be stated that although initial construction disturbance is allowed beyond the approved coverage, the condition to rehabilitate all such areas must be acknowledged as the long-term (postconstruction) footprint will be limited to that which has been authorised in terms of the OSCA permit.

- 5.9.12. The George Zoning Scheme Regulations have thus been complied with by the George Municipality in the consideration of the OSCA application.
- 5.9.13. After a lengthy investigation the Applicant decided to resettle in the George area. One of the reasons for this choice was their love for nature and its conservation. They have been, and still are active within the nature conservation business, with Mr. Stephan Coetzee, employed by the South African National Parks ("SANParks") for more than 30 years and contributing to the establishment of the Greater Garden Route National Park.
- 5.9.14. The following steps were undertaken to ensure that they adhere to the OSCA Regulations:
 - 5.9.14.1. They appointed a well-known EAP in the area, recommended by the George Municipality and SANParks, namely Cape EAprac on 25 February 2020.
 - 5.9.14.2. They obtained the OSCA Regulations from the EAP and provided the architect and structural engineer with these regulations.
 - 5.9.14.3. They instructed the architect and engineer from the onset to ensure that the minimum impact of the natural habitat be a priority when designing the dwelling.
 - 5.9.14.4. Therefore, the final design strictly follows the contours of the natural incline of the stand.
 - 5.9.14.5. After several consultations with both the George Municipality and the Environmental Practitioner, the plans evolved and were adapted to ensure 100% compliance with all the rules and regulations, at the same time considering the limited impact on the environment and also taking their needs into consideration.
 - 5.9.14.6. Changes were even effected after the OSCA Permit was issued to ensure a proper alignment required in the OSCA Permit.
- 5.10. The Applicant also provided a report from the Architect which confirmed the following:
 - 5.10.1. The client's brief to them as architects was to ensure that they design a house that would be of excellent quality, have spectacular views and be respected towards and grounded in nature. The stand has a fall of approximately 12m which necessitated that the design was done on multiple levels. They had to ensure that at least 4 of the 5 levels had direct access to nature and the natural forest on each level. The interaction between the ground and the house was done in an optimal way. This also ensured that cut and fill, disruption of natural ground levels and an unnecessary high structure were kept to a minimum.
 - 5.10.2. In conclusion they confirmed that they are committed to this investment and would find it difficult to understand the reasons for non-approval.
- 5.11. The George Municipality confirmed in the Responding Statement that:
 - 5.11.1. In terms of Erf No. 2107, Wilderness, the municipality ensured, when assessing the OSCA application that the owner only exercised his existing primary land use rights in accordance within the development parameters assigned to it by the George Integrated Zoning Scheme Bylaw, the

- conditions of approval imposed on the Constantia Kloof the development and the restrictions imposed by the property's title deed.
- 5.11.2. The George Municipality considered the comments received from the Appellant, DFFE and other Interested and Affected Parties and agreed that the area of disturbance was too large. Condition 1 of the OSCA Permit was therefore imposed whereby the development footprint was reduced to the area outlined in red colour on the revised site development plan. The disturbance area approved by the George Municipality is less than what was applied for.
 - 5.11.3. Conditions 11, 12 and 13 of the OSCA Permit also limits the owner to a 1m clear space around the footprint of the house with the remainder of the area needing to be rehabilitated to its natural state. No lawns, paving and patios', etc. are allowed outside of the area outlined in red colour. No landscaped gardens are permitted.
 - 5.11.4. A total of thirty-two (32) conditions of approval were included to cover the concerns raised and recommendations made by the Interested and Affected Parties.
- 5.12. Considering the above, the extent of the vegetation that will be cleared on the site due to the proposed dwelling has been adequately indicated and assessed in the OSCA Application Report.

Appeal ground 3: Site Inspection

- 5.13. In terms of the applicable OSCA Regulations, the *Environment Conservation Act, 1989 (Act No. 73 of 1989)* or the NEMA, the Applicant is not required to afford the Interested and Affected Parties an opportunity to do a site visit. However, it would be best practice for the Interested and Affected Parties to conduct a site visit in order to inform their comments submitted in the OSCA Application.
- 5.14. During this Appeal process, the Applicant submitted a Responding Statement which states the following:
- 5.14.1. At no point during the OSCA Application process or thereafter was any stakeholder prevented from visiting the site for the purposes of informing their comment or otherwise. Other stakeholders, most notably the Constantia Kloof Conservancy, visited the site on their own accord to inform their comment for this application. As such, there was no prohibition on any party, at any time during the process, to take measures they deemed fit to inform their input, including conducting a site inspection.
- 5.15. Therefore, any person should have arranged for access to the site with the EAP. Alternatively, the Interested and Affected Parties could have visited the site on their own initiative or made observations of the site from the road. Based on the Environmental Impact Report the site is easily accessible to the public.
- 5.16. During this Appeal process, the Department of Environmental Affairs and Development Planning's Sub-directorate: Environmental Appeals Management, which considered and made a recommendation to the Appeal authority in terms of this OSCA Appeal, easily conducted a site visit without the presence of the Applicant or the consultants.

- 5.17. Considering the above, this Appeal should not be upheld or the Appeal decision should not be delayed because a site visit was not afforded to the Interested and Affected Parties.

Appeal ground 4: Forestry application

- 5.18. The *National Forestry Act, 1998 (Act No. 84 of 1998)* specifically section 23 and (other relevant sections) states that:

"The Minister may in a State forest, license—

- (a) the establishment and management of a plantation;
- (b) the felling of trees and removal of timber;
- (c) the cutting, disturbance, damage or destruction of any other forest produce;
- (d) the removal or receipt of any other forest produce;
- (e) the use of land, structures or buildings for agricultural, commercial, communications, domestic, industrial, residential or transportation purposes;
- (f) the use of roads;
- (g) the moving of water, electricity, gas, fuel and any other thing across a State forest;
- (h) the construction of any road, building or structure;..."

- 5.19. The OSCA Application states the following:

5.19.1. The lack of ecological fires in the established (residential) area is likely the cause of the transition where the presence of fynbos, over time gets replaced with forest. The vegetation is likely to favor forest habitat in future.

5.19.2. The Forest / Fynbos vegetation on the site is dominated by tree species Cape Saffron (*Cassine peragua*), Candlewood (*Pterocelastrus tricuspidata*), Cape Beach (*Rapanea melanophloeos*), Wild Pomegranate (*Burchellia bubalina*) and Camphor Tree (*Tharconanthus camphoratus*), interspersed with Fynbos species Gonnabos (*Passerina corymbosa*), Blombos (*Metasia muricata*), False Boegoe (*Agathosma sp.*) etc.

5.19.3. The EAP during his site inspection noted that the lack of controlled fires, have resulted in the fynbos vegetation having become overgrown and a lot of dead biomass is part of the undergrowth.

5.19.4. One type of protected indigenous tree species, Cheesewood (*Pittosporum viridiflorum*), was noted to occur on the property.

5.19.5. A Forestry License will need to be obtained from the DFFE to authorise the removal, trimming and transplant of protected trees, as well as the clearance of any natural forest vegetation before the construction of the house may commence.

5.19.6. The Department of Fisheries & Forestry (DFFE), in their comment on the OSCA Application, pointed out that although they will consider applications for the removal of protected trees within the development area, they are unlikely to consider the removal of protected trees outside of the development area i.e. within building lines.

5.19.7. The site development plan has been updated to reflect the position of the 15 milkwood trees that were recorded on the property. Note that this is not a true tree survey although it was informed by spatial coordinates on photographs. Given the site's sensitivity, protected trees that fall within the

building area, where possible, must be retained and not removed unless necessary. Areas within the development footprint, where protected trees can be retained, should be protected where possible.

- 5.19.8. According to the Garden Route Biodiversity Spatial Plan (2017), the northern and northeastern portion of the property falls within a Critical Biodiversity Area (CBA). The majority of the site however is not indicated as CBA. CBA has not yet been adopted for the Western Cape but it is used as an indicator of ecological sensitivity.
- 5.19.9. Given the ecological status of the property, the 'disturbance envelope' required for the construction of the house and installation of the service infrastructure should be kept to a minimum i.e. as 'tight' around the development footprint, as possible.
- 5.19.10. The construction activity must also be conducted in terms of 'the Duty of Care principles' in terms of Section 28 of the NEMA, which "*...obliges every person who causes, has caused or may cause significant environmental degradation, to take reasonable measures to prevent such degradation from occurring, continuing or recurring*".
- 5.19.11. Given the slope of the property and findings from the Geotechnical Assessment, it is evident that excavations will be considerable. The appointed contractor will have to work extremely careful and precise to reduce the impact of excavated material on remaining natural vegetation.
Survey of protected trees to be undertaken to inform the Forestry Permit application
- 5.19.12. Once the municipal building plans are approved the holder of the OSCA permit must demarcate the housing footprint and working area to assist with orientation on-site. All protected trees within the demarcated area will be identified and clearly marked to inform the DFFE permit application.
- 5.19.13. To mitigate:
 - 5.19.13.1. The working area and house footprint must be clearly demarcated prior to any vegetation clearing. The ECO must inspect the demarcated area and identify all the protected tree species within it.
 - 5.19.13.2. Special attention must be given to protected trees within the 2m working area to identify where the working area must be less or intermitted to avoid the removal of protected trees in the 2m working area.
 - 5.19.13.3. A DFFE permit must be applied for and approved, prior to the removal/trimming of any protected trees within the development footprint. No protected tree species may be removed/ trimmed in the no-go areas.
Clearing of vegetation without prior approval
- 5.19.14. Vegetation was cleared in proximity to where the two (2) driveways are proposed by Outeniqua Lab (during lockdown period). The area cleared is roughly 6m x 1.5m each resulting in a removal of vegetation of approximately 18m². The vegetation was replaced along with the topsoil and the impact of this activity is not deemed to be significant considering that the site is demarcated for residential development and a house is proposed for construction within the near future.

- 5.19.15. To mitigate, the DFFE is conducting their own investigation and consulting directly with the owner.
- 5.20. The Environmental Principles set out in section 2 of the NEMA must be considered by the competent authority (George Municipality) to inform their decision-making. The development must be socially, environmentally and economically sustainable. Erf No. 2107 is zoned single residential and by default there are restrictions that may be placed on the owner without compromising his/ her primary (social/economic) rights. The (environmental) rights are acknowledged through means of the OSCA and DFFE permit application processes that enforce strict conditions (for construction and operation) that would otherwise not be applicable to development of single residential properties elsewhere.
- 5.21. In the Applicant's Responding Statement, it is confirmed that the application for a Forestry Permit is submitted to the Department once building plans have been approved. At the time of the OSCA process building plans had not yet been approved and the Forestry Application has not yet been submitted. The DFFE, in their comment on the OSCA application, requested that should any land use planning application be required, such application should be (re-)submitted to stakeholders for comment prior to finalisation of the OSCA permitting process. No land use planning application was needed in the case of Erf No. 2107, thus the OSCA permitting process could be concluded without additional stakeholder review and comment.
- 5.22. The OSCA Application Report concluded that:
- 5.22.1. The site on which the dwelling development will take place contains a mixture of the forest / **Fynbos** vegetation. The overarching mapped ~~vegetation type (Garden Route Granite Fynbos)~~ is indicated as Critically Endangered. The majority of the site however is excluded from the designated **Critical Biodiversity Area (CBA)**.
- 5.22.2. One type of **protected tree species** (Cheesewood) is noted to occur on the site and a number of these trees will be affected by the proposed development of a single residential dwelling as proposal. A Forestry Permit will be required prior to the clearing of any vegetation and the DFFE is currently looking into the clearing of vegetation (for test pits and the Municipality was looking for a cable during lockdown) which may impact on the outcome of the application.
- 5.22.3. During the public participation process, a concern was raised by key stakeholders namely the Constantia Kloof Conservancy and the Appellant regarding conformance with the George Zoning Scheme Regulations. The appointed architect confirmed in writing that the proposal complies, however it was deemed important that the application be referred to the Planning Department for internal comment prior to the OSCA permit being issued. Given the above, the property is considered to be sensitive from an environmental perspective, and thus adherence to the 'Principles of the General Duty of Care for the Environment' is important.
- 5.23. In the Responding Statement, the Applicant submitted a report from the Architect which detailed the following regarding changes to the building plan:

Process of Design and Measures taken to ensure that all statutory requirements were followed:

- 5.23.1. The client approached the Architects in November 2019 to become involved in the design of the new proposed house.
- 5.23.2. The client sent a copy of the Title Deed to the Architects in December 2019.
- 5.23.3. The following item in the title deed had relevance to the proposed house: All dwelling houses shall be constructed of brick, stone, or concrete.
- 5.23.4. The client contacted the Building Department of the George Municipality on 12 February 2020 to obtain information about any Statutory regulations pertaining to the proposed house.
- 5.23.5. The Building Control Department advised the client that an Environmental Consultant must be appointed for the OSCA application.
- 5.23.6. The client and Architect contacted the Environmental Consultant and received a fee proposal from them towards the end of February 2020.
- 5.23.7. The client appointed the Environmental Consultant on 25 February 2020.
- 5.23.8. To aid in the design process and to avoid the building of high retaining walls the client appointed a surveyor to do a contour survey in December 2019.
- 5.23.9. The first set of sketch plans was sent to the Environmental Consultant in the middle of March 2020.
- 5.23.10. Soon after that the Environmental Consultant requested information pertaining to the volume of excavated soil that was going to be removed.
- 5.23.11. The civil engineer sent information to the Environmental Consultant. Unfortunately, during the determination of the volume of excavation to be done, a geotechnical investigation was done without following the correct procedure.
- 5.23.12. The hard lockdown delayed the face-to-face meetings between the client and Architect but as far as possible the design process for the proposed house proceeded.
- 5.23.13. The design layout changed slightly during May 2020 with specific regard to correct height restrictions and to ensure unobstructed views as far as possible. The footprint was very similar than the earlier designs, but the entrance of the house moved closer to the street allowing more "garden" space on the western side.
- 5.23.14. This design ensured that all rooms have a view, and most rooms also have northern sun. The northern orientation ensured that they adhere to the South African National Standards ("SANS") 10400XA to ensure minimum of extra heating in winter.
- 5.23.15. At this time, the building line at the cul de sac turning circle was incorrectly indicated at 3m. All street building lines are 5m.
- 5.23.16. Because the stand is bigger than 1000 square metres all the side and back building lines must be 3m.
- 5.23.17. Information pertaining to the sewer system and connection point was obtained from the George Municipality in May 2020.
- 5.23.18. This information had to be shown on the drawings for the OSCA Application.

- 5.23.19. The Environmental Consultant requested more detailed information pertaining to heights, sewer system and areas in the beginning of June 2020.
- 5.23.20. Information was sent to them on 2 June 2020.
- 5.23.21. At this point the footprint of the house was 598 square metres.
- 5.23.22. More detailed drawing indicating the sewer system and connection point was sent to the Environmental Consultant on 3 June 2020.
- 5.23.23. The Environmental Consultant requested more information about the access road to the garages, electricity cables and telephone cables. The engineer sent information to them on 8 June 2020.
- 5.23.24. All information that the Environmental Consultant needed for the OSCA Application was sent to them by the 25 June 2020. The OSCA Application was sent to them on 2 July 2020.
- 5.23.25. The Environmental Consultant mentioned at this time that there are protected trees on the property and that a Forestry Permit would be necessary to remove or transplant the Cheese wood trees.
- 5.23.26. During the month of July 2020 all other Statutory regulations specifically adherence to SANS 10400 XA were checked by the Architects and where necessary windows were adjusted and shading elements were introduced over windows.
- 5.23.27. The shading elements made a small difference to the overall coverage (not to the footprint of the house).
- 5.23.28. In the period that the OSCA Application was under review the Environmental Consultant requested that elevations of the proposed house be sent to them. This was sent on 23 July 2020.
- 5.23.29. The Environmental Consultant sent a confirmation report indicating the position and type of protected trees that would have to be relocated. Only 2 trees were inside the footprint of the building and two other trees were quite close to the footprint of the building.
- 5.23.30. On 1 September 2020 comments regarding the OSCA Application were received.

The comments necessitated the following adjustments to the plans of the house:

- 5.23.31. Building line – as previously mentioned the Architects erroneously indicated the building line at the top portion of the cul de sac as 3m. This in fact had to be 5m as it was still regarded as a street building line. The top portion of the house had to move so that the 5m building line could be in line with the George Town Planning Scheme.
- 5.23.32. The yard wall was moved to not fall on the street building line.
- 5.23.33. Height restriction – the roof over one small portion had to be adjusted to fall within the 8,5m restriction.
- 5.23.34. Driveway – it was mentioned that only one driveway would be allowed and that the width of the driveway onto the street should not be more than 4m. Because of the steep slope of the stand it was not possible to position the four garages next to each other and the decision was taken to split the garages.

- 5.23.35. The George Town Planning scheme makes provision that on a site boundary that is longer than 30m two vehicle entrances are allowed provided that they are not less than 12m apart.
- 5.23.36. The distance between the two vehicle access points is more than 12m and the width of the access was reduced to 4m each.
- 5.23.37. Number of units - During the OSCA evaluation, a concern was raised that the house might in fact be 2 separate houses. This was not allowable in terms of the Town Planning regulations of the area. The design of the house on the very steep slope and taking into consideration the height restriction resulted in an articulated design that follows the natural contours of the site. It is a house that is big enough to accommodate the Clients somewhat large family and friends especially during holiday times when the whole family spends time together. The house has only one single entrance in the center of the house.
- 5.23.38. Coverage – the stand is bigger than 1000 square metres which allows a coverage of 40%. The coverage of the proposed house is less than 40 %.
- 5.23.39. Fencing – the Client confirmed that no fencing higher than 1,2m will be done on the street boundaries and it was indicated as such on the plans.
- 5.23.40. The drawings with the above changes were resubmitted to the George Municipality in the beginning of October 2020.
- 5.23.41. The OSCA Permit was issued with the following items to be changed on the plans:
 - 5.23.41.1. The fountain in the center of the garden and the paving around it to be omitted.
 - 5.23.41.2. No other hard landscaping and only a 1m paving area around the house will be permitted.
 - 5.23.41.3. No landscaping will be allowed, and the natural forest will have to be rehabilitated after construction.
 - 5.23.41.4. All other items as per the permit will be followed in strict accordance with the comments in the permit.
- 5.24. In terms of the applicable OSCA Regulations, the George Municipality is not prohibited from issuing an OSCA Permit just because the DFFE objects to the proposed activity.
- 5.25. The George Municipality confirmed in the Responding Statement that:
 - 5.25.1. One of the listed activities under OSCA is the clearing of vegetation. However, the clearing of protected trees and protected natural forest requires the issuing of a separate licence by the national DFFE in terms of the *National Forestry Act, 1998 (Act No. 84 of 1998)*. Thus, in terms of OSCA, the municipality may not authorise the clearing of such vegetation.
 - 5.25.2. The OSCA permit issued for Erf No. 2107, Wilderness, was only for the clearing of vegetation other than protected trees and protected forest or coastal thicket, as well as for the earthworks required to prepare the site for construction.
 - 5.25.3. The OSCA Permit letter states that a separate DFFE Permit must be obtained for the clearing of protected forest and trees. As per the Constitutional

- Court judgement in the Maccsand / City of Cape Town case, considering the same facts in terms of their mandates.
- 5.25.4. In terms of the provisions of the National Building Regulations and Buildings Standards Act, 1977, a municipality must ensure that all applicable laws are complied with before it may approve a building plan. Thus, the building plan submitted to the municipality for Erf No. 2107, Wilderness will need to comply with the building standards, South African National Standards codes, town planning requirements, the conditions of the OSCA Permit and the conditions of the DFFE licence before it may be approved.
- 5.25.5. The NEMA does not solely require the avoidance of environmental impacts. It provides options for minimising the impacts of the development on the environment and allows decision-making authorities to impose measures to remedy or mitigate against such impacts.
- 5.26. Considering the above, this ground of appeal is dismissed as the Applicant is committed to obtaining a Permit in terms of the *National Forestry Act, 1998 (Act No. 84 of 1998)* when the building plans have been approved by the George Municipality.

Appeal ground 5: Constantia Kloof Conservancy

- 5.27. The proposed roughly triangular Erf is situated north of Fynbos Close / Slot road, adjacent to the cul de- sac (on north-eastern corner), within the existing residential township of Wilderness.
- 5.28. The large neighboring properties to the north (Erf 1029 & Erf 1049) are vacant and according to the George Municipal GIZ zoning tool these properties are zoned Agriculture 1. Three properties are located to the south of the Fynbos Close road boundary: Erf 2108 (Plumes Guesthouse), Erf 2109 (vacant) and Erf 2110 (currently under construction). The neighboring property to the west, Erf 2106, is developed, with a small portion of garden extending onto Erf No. 2107.
- 5.29. In the Responding Statement, the Applicant responded as follows:
- 5.29.1. Constantia Kloof Conservancy is recognised, as a direct result of the establishment of the Constantia Kloof township.
- 5.29.2. Erven within Constantia Kloof have been awarded primary development rights (for a township within the urban edge) and conservation goals would be to primarily focus on open space management and to minimise potential negative environmental impacts associated with the approved development.
- 5.29.3. Established erven, unless expropriated, cannot be weighed and assessed in the same manner as open space / green belt areas within the conservancy area.
- 5.29.4. The so-called 'destruction of the forest' was initiated (and approved by the then decision-making authorities) when Constantia Kloof was authorised for township development.
- 5.29.5. Guidelines such as those applied by the Conservancy and prescribed by the Zoning Scheme and OSCA Regulations are additional tools to manage environmental impacts as these cannot be avoided within the established Constantia Kloof township post-facto.

- 5.30. Considering the above, the proposed site must be developed as it is situated within the existing residential township of Wilderness.

Conclusions

- 5.31. The NEMA principles that apply to the actions of all organs of state that may significantly affect the environment specifically require *inter alia* that:
- 5.31.1. Environmental management must place people and their needs at the forefront of its concern and serve their physical, psychological, developmental, cultural and social interests equitably.
 - 5.31.2. Development must be socially, environmentally and economically sustainable.
 - 5.31.3. That the disturbance of ecosystems and loss of biological diversity are avoided, or where they cannot be altogether avoided, are minimised and remedied.
 - 5.31.4. That a risk-averse and cautious approach is applied, which considers the limits of current knowledge about the consequences of decisions and actions.
 - 5.31.5. The social, economic and environmental impacts of activities, including disadvantages and benefits, must be considered, assessed and evaluated, and decisions must be appropriate in the light of such consideration and assessment.
- 5.32. The OSCA Application Report stated that the Environmental Principles set out in section 2 of the NEMA must be considered by the competent authority (George Municipality) to inform their decision-making. It acknowledged that the development must be socially, environmentally and economically sustainable. Erf No. 2107 is zoned single residential and by default there are restrictions that may be placed on the owner without compromising his/ her primary (social/economic) rights. The (environmental) rights are acknowledged through means of the OSCA and DFFE permit application processes that enforce strict conditions (for construction and operation) that would otherwise not be applicable to development of single residential properties elsewhere.
- 5.33. In terms of the criteria to be considered by the Competent Authority when considering Applications, section 24O(1)(b)(iv) of the NEMA (the principal act) states that if the Competent Authority considers an Application for an EA, it must consider "*where appropriate, any feasible and reasonable alternatives to the activity which is the subject of the application and any feasible and reasonable modifications or changes to the activity that may minimise harm to the environment.*" Therefore, the alternatives must be considered as reasonable and feasible for inclusion in the EIA process.
- 5.34. The definition and assessment requirements relating to "alternatives" makes it clear that the obligation to consider alternatives may be achieved in a variety of different ways including site locations, types of activities, design or layout; and technological or operational aspects of undertaking the activity (either in combination or in isolation of each other).
- 5.35. The site is easily accessible as it can be viewed from Fynbos Close. If the Applicant allows, the Interested and Affected Parties may also as it a small site.

- 5.36. The OSCA Application Report concluded as follows:
- 5.36.1. The site on which the dwelling development will take place contains a mixture of the forest / **Fynbos** vegetation. The overarching mapped **vegetation type (Garden Route Granite Fynbos)** is indicated as Critically Endangered. The majority of the site however is excluded from the designated **Critical Biodiversity Area (CBA)**.
 - 5.36.2. One type of **protected tree species** (Cheesewood) is noted to occur on the site and a number of these trees will be affected by the proposed development of a single residential dwelling as proposal. A Forestry Permit will be required prior to the clearing of any vegetation and the DFFE is currently looking into the clearing of vegetation (for test pits and the Municipality was looking for a cable during lockdown) which may impact on the outcome of the application.
 - 5.36.3. Concern was raised by key stakeholders namely the Constantia Kloof Conservancy and the Appellant regarding conformance with the George Zoning Scheme Regulations.
 - 5.36.4. Given the above, the property is considered to be sensitive from an environmental perspective, and thus adherence to the 'Principles of the General Duty of Care for the Environment' is important.
- 5.37. In the Responding Statement, the Applicant responded as follows:
- 5.37.1. No single stakeholder was ever 'denied' a site inspection. As a result, other stakeholders inspected the site out of their own initiative.
 - 5.37.2. Cape EAPrac cannot speak on behalf of other EAPs or other processes which the Appellant appears to be referring to in their experience. At no point in time did Cape EAPrac prevent any I&AP from sharing information or communicating with each other.
 - 5.37.3. The Issues & Response report was shared with all participating stakeholders and they could see and review comments from all stakeholders (the Appellant's excerpts from the comment of DFFE is proof that correspondence was shared amongst (Interested and Affected Parties) as part of the OSCA process.
 - 5.37.4. Once the OSCA permitting process (with its stakeholder engagement) is complete and a permit issued, unless a new or modified OSCA permit application is required, there is no obligation on the Applicant or EAP to keep circulating future/ other documentation to Interested and Affected Parties for comment.
 - 5.37.5. The Municipality applied its mind when it considered the OSCA permit application and was fully informed of the objections/concerns raised by participating stakeholders.
 - 5.37.6. Preserving more vegetation on the site must be reasonable and justifiable in terms of environmental and spatial planning provisions and additional measures have been put in place by the Municipality as part of the OSCA permit i.e. further restrictions on footprint/ rehabilitation.
- 5.38. Considering the above, the Appeal is dismissed and the OSCA decision is varied in terms of section 35(4) of the ECA.

6. **CONCLUSION:**

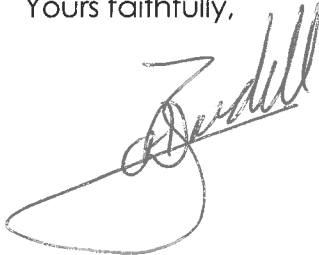
In view of the above, the NEMA principles, compliance with the conditions stipulated in the Appeal Permit and compliance with the implementation programme, the proposed activities will not conflict with the general objectives of integrated environmental management stipulated in Chapter 5 of the NEMA and any potentially detrimental environmental impacts resulting from the activity can be mitigated to acceptable levels.

7. **DISCLAIMER:**

The Western Cape Government, the Local Authority, committees or any other public authority or organisation appointed in terms of the conditions of this Permit shall not be responsible for any damages or losses suffered by the holder, developer or his/ her successor in any instance where construction or operation subsequent to the construction is temporarily or permanently stopped for reasons of non-compliance with the conditions as set out herein or any other subsequent document or legal action emanating from this decision.

Since I have discharged my decision-making powers when making the decision, I am *functus officio* in this regard. My decision is final and your only recourse, should a person still be aggrieved by my decision, is to apply to the Western Cape High Court to review my decision.

Yours faithfully,



**ANTON BREDELL
PROVINCIAL MINISTER OF LOCAL GOVERNMENT,
ENVIRONMENTAL AFFAIRS AND DEVELOPMENT PLANNING**

DATE: 25/6/2021

Copied to:
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