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**IN THE MATTER OF AN APPEAL AGAINST THE REFUSAL OF THE PART 2 AMENDMENT
APPLICATION FOR THE ENVIRONMENTAL AUTHORISATION GRANTED FOR THE PROPOSED
MIXED USE TOWNSHIP ESTABLISHMENT TO BE KNOWN AS PROTEADAL EXTENSION 1 ON
PORTION 216 (A PORTION OF PORTION 214) OF THE FARM PAARDEPLAATS 177 IQ,
MOGALE CITY LOCAL MUNICIPALITY**

REFERENCE NUMBER Gaut 006/17-18/E0157

**STATEMENT IN SUPPORT OF THE APPEAL IN TERMS OF SECTION 43 OF THE NEMA AS
READ WITH THE NATIONAL APPEAL REGULATIONS PUBLISHED UNDER GNR 993 OF
8 DECEMBER 2014**

APPELLANT'S SUMMARY OF GROUNDS FOR APPEAL

1. *The Head of the Gauteng Department of Agriculture and Rural Development ("HOD") infringed the Appellant's right to just administrative action as referred to in the Constitution of the Republic of South Africa 108 of 1996 and in related national statutory law, namely the Promotion of Administrative Justice Act 3 of 2001 ("PAJA"). The administrative action to refuse the Part 2 Amendment Application for the environmental authorisation granted for the proposed mixed use township establishment to be known as Proteadal Extension 1 on portion 216 (a portion of portion 214) of the farm Paardeplaats 177 IQ, Mogale City Local Municipality was done in an unlawful and/or unreasonable manner on one or more or alternatively all of the following grounds –*
 - 1.1 *The HOD was biased or reasonably suspected of bias¹;*
 - 1.2 *The action was materially influenced by an error of law²;*
 - 1.3 *The action was taken because relevant considerations were not considered³;*
 - 1.4 *Taken arbitrarily or capriciously⁴;*
 - 1.5 *Not rationally connected to the purpose for which it was taken⁵;*
 - 1.6 *Not rationally connected to the purpose of the empowering provision⁶;*
 - 1.7 *Not rationally connected to the information before the administrator⁷;*
 - 1.8 *Not rationally connected to the reasons given for it by the administrator⁸; and/or*
 - 1.9 *The action is otherwise unconstitutional or unlawful⁹.*

¹ Section 6(2)(a)(iii) of the PAJA.

² Section 6(2)(d) of the PAJA.

³ Section 6(2)(e)(iii) of the PAJA.

⁴ Section 6(2)(e)(vi) of the PAJA.

⁵ Section 6(2)(f)(ii)(aa) of the PAJA.

⁶ Section 6(2)(f)(ii)(bb) of the PAJA.

⁷ Section 6(2)(f)(ii)(cc) of the PAJA.

⁸ Section 6(2)(f)(ii)(dd) of the PAJA.

⁹ Section 6(2)(i) of the PAJA.

1. INTRODUCTION

- 1.1. The Head of Department ("**HOD**") of the Gauteng Department of Agriculture and Rural Development ("**Department**") refused the amendment application ("**Amendment Application**") submitted by Eco Assessments Close Corporation ("**Eco Assessments**") on behalf of Suikerbos Valley Investments (Proprietary) Limited ("**Appellant**") pertaining to the amendment of the environmental authorisation in terms of the National Environmental Management Act 107 of 1998 ("**NEMA**") in respect of the proposed mixed use township development ("**Proposed Development**") on portion 216 (a portion of portion 214) of the farm Paardeplaats 177 IQ, Mogale City Local Municipality ("**Property**") dated 11 March 2011 ("**EA**"). We have attached, marked "**Annexure A**", a copy of the letter from the HOD addressed to the Appellant dated 26 June 2018, which letter details the aforesaid refusal ("**Refusal**").
- 1.2. In terms of section 43(2) of the NEMA "*any person may appeal to an MEC against a decision taken by any person acting under a power delegated by that MEC under this Act or a specific environmental management Act*".
- 1.3. It appears from the information available to us that the powers to issue the Refusal have been duly delegated by the MEC of the Department ("**MEC**") to the HOD. Therefore, the Appellant is entitled to submit an appeal to the MEC in terms of section 43(2) of the NEMA against the HOD's decision to refuse the Application as set out in the Refusal.
- 1.4. We have been requested to assist the Appellant in lodging an appeal in terms of section 43(2) of the NEMA against the Refusal as set out hereunder.

2. RIGHT OF APPEAL IN TERMS OF SECTION 43 OF THE NEMA

- 2.1. An appeal in terms of section 43(2) of the NEMA is regulated by the National Appeal Regulations published under GNR 993 on 8 December 2014 ("**Appeal Regulations**").
- 2.2. In terms regulation 4(1) of the Appeal Regulations -

"An appellant must submit the appeal to the appeal administrator, and a copy of the appeal to the applicant, any registered interested and affected party and any organ of state with interest in the matter within 20 days from:

- (a) *the date that the notification of the decision for an application for an environmental authorisation or a waste management licence was sent to the registered interested and affected parties by the applicant; or*

(b) *the date that the notification of the decision was sent to the applicant by the competent authority, issuing authority or licensing authority, in the case of decisions other than those referred to in paragraph (a)".*

2.3. Therefore, in terms of regulation 4(1)(b) of the Appeal Regulations, the Appellant must lodge the appeal against the Refusal within 20 days of the date upon which the Appellant was notified of the Refusal. In this regard, the Appellant received notification of the Refusal via email on 27 June 2018, a copy of which email is attached marked "**Annexure B**".

2.4. Accordingly, in terms of regulation 4(1)(b) of the Appeal Regulations, the Appellant is to submit the appeal against the Refusal on or before 17 July 2018, which we hereby do.

2.5. In terms of regulation 4(2) of the Appeal Regulations –

"An appeal submission must be-

(a) submitted in writing in the form obtainable from the appeal administrator; and

(b) accompanied by-

(i) a statement setting out the grounds of appeal;

(ii) supporting documentation which is referred to in the appeal submission; and

(iii) a statement, including supporting documentation, by the appellant to confirm compliance with regulation 4(1) of these Regulations.

2.6. In respect of the requirement as set out in regulation 4(2)(a) of the NEMA, we refer you to the form to which this submission is attached.

2.7. In respect of regulation 4(2)(b)(iii) of the Appeal Regulations, as set out in paragraph 2.3 above, we confirm that the Appellant received notification of the Refusal via email on 27 June 2018, a copy of which email is attached marked "**Annexure B**". We furthermore confirm that in accordance with the regulation 4(1) of the Appeal Regulations, this appeal will be sent to all registered interested and affected parties.

2.8. In respect of the requirements as set out in regulations 4(2)(b)(i) and 4(2)(b)(ii) of the Appeal Regulations, we have set out our grounds of appeal and supporting documentation further below.

2.9. Therefore, the Appellant submits that it meets the requirements as prescribed in terms of regulation 4 of the Appeal Regulations.

3. INTRODUCTORY RECORDALS

- 3.1. Before setting out the grounds of appeal, we have set out below a summary of the pertinent factors as elaborated on in the Amendment Application as well as a brief description of the purpose of open spaces in relation to the Property and how this purpose is incorporated by the proposed amendment as requested in the Amendment Application ("**Proposed Amendment**"). Furthermore, we have set out in paragraph 4 below the Appellant's responses to various recordals in the Refusal. The grounds of appeal are detailed in paragraph 5 below.

Pertinent factors associated with Proposed Amendment

- 3.2. As is set out throughout the Amendment Application and in this writing, the Proposed Amendment is not in respect of all the buffer zones as prescribed in condition 1.25 of the EA and for your ease of reference, we have attached as "**Annexure C**" a schematic diagram describing the areas which form the subject matter of the Proposed Amendment ("**Annexure C Diagram**"). The Amendment Application seeks to request the relaxation of the buffer zone as stipulated in condition 1.25 of the EA from 50m to 0m around the *Protea caffra* grassland areas on the southern open space area at the entrance of the Property (Area 1 of the Annexure C Diagram) and the small *Protea caffra* area west (Area 2 of the Annexure C Diagram) and immediately north of the existing house (Area 3 of the Annexure C Diagram), only. For clarity, it is confirmed that the Appellant will maintain the prescribed 50m buffer around the drainage line on the northern boundary of the site (Area 4 of the Annexure C Diagram) as well as around the *Protea caffra* tree and grassland areas to the east of the existing house (Area 5 of the Annexure C Diagram) and that the Proposed Amendment does not apply to such areas. In this regard, reference is furthermore made to Figure 6B of the Amendment Application ("**Figure 6B**") which depicts the various "buffer areas" as are applicable in terms of condition 1.25 of the EA. For your ease of reference, a copy of Figure 6B is attached as "**Annexure D**".
- 3.3. Although extensively detailed in the Amendment Application, for ease of reference, the Appellant would like to highlight the following pertinent factors applicable to the Proposed Amendment –
- 3.3.1. Specialist investigation of the isolated *Protea caffra* patches initially identified on the Property in 2009 (i.e. the patches which form the subject matter of the Proposed Amendment) concluded that these areas were only moderately sensitive owing to the impacts of historical agricultural activities. On this basis it is submitted that a 50m buffer around these isolated *Protea caffra* patches would be unwarranted. Nevertheless, the inclusion of such *Protea caffra* patches into the layout as open space, as provided for in

the Proposed Amendment, would add value to the overall development. This view is supported by Professor Leslie Brown as recorded in the report prepared by Enviroguard Ecological Services Close Corporation, dated 7 September 2016, which is attached to the Amendment Application as Appendix D ("**Enviroguard Report**"), who re-affirms the view that the envisaged 50m buffer around these moderately sensitive areas would be counterproductive to a sustainable development as these areas include mono-specific stands of *Hyparrhenia hirta*, an anthropogenic grass that indicates the degraded condition of sections of this grassland;

- 3.3.2. The critically endangered Albertina Sisulu orchid species does not occur on or in close proximity of the Property, however a buffer of 600 m has been kept free around the nearest population, which is located 475 m south east of the Property;
- 3.3.3. The relaxation of the 50 m buffer as requested in the Amendment Application was done on land that has historically been disturbed by agriculture (i.e. Areas A and B on Figure 6B and Areas 1, 2 and 3 of the Annexure C Diagram)... The Proposed Amendment ensures that the open space area is now consolidated into an effective and functional ecological corridor that offers linkages between "core open spaces";
- 3.3.4. Area A of Figure 6B will be compromised by the development of a Public Road from the R28 which intersection has partly been constructed and is currently used to provide access to the Property;
- 3.3.5. The open space provided in the north & east of the Property (Areas C, D & E on Figure 6B), is a very good example of a consolidated open space, where fragmentation is limited and where the most important ecological features are included into one larger area;
- 3.3.6. An external ecologist, Professor Leslie Brown, has deliberated the application of buffer areas in respect of the Property supported by literature studies and his findings are recorded in the Enviroguard Report. The conclusions on page 7 of the Enviroguard Report indicate that the relaxation of the buffer areas as requested in the Amendment Application will not negatively affect the biodiversity nor ecological functioning of the Property.

- 3.4. In light of the above, it is submitted that the open space system as set out in the Proposed Amendment provides adequate corridors and linkages between the ridge habitats located off the Property, thereby ensuring the continued ecological functionality around and through the

Property.

Purpose of open space areas

- 3.5. The purpose of open spaces in an urban area, amongst others, is to prevent unrestricted sprawl of built up areas and to create some green areas within the urban fabric. The value of green open spaces may vary from a landscaped park to natural areas where nature can be protected. Open spaces may further provide services such as assisting with storm water control.
- 3.6. From several perspectives, the proposed open space plan for the Proposed Development in terms of the Proposed Amendment is a very good example of an urban open space. Firstly, it is located directly adjacent to a larger natural area which will allow for the natural movement of seeds, insects and smaller mammal species in and out of the development site. Secondly it has connected its most important ecological features (the *Protea caffra* areas and drainage line) into one area where seed dispersal and species movement will be possible. Thirdly, the development infrastructure of the Proposed Development, can largely be kept out of these open areas, being located in south western parts of the Property. Thus, the Proposed Amendment incorporates essential urban conservation strategies in that Core Areas (that include natural habitat that can fulfil the ecosystem needs and functions) are preserved and protected. These areas are also connected with relevant corridors & buffers within and across the landscape that will offer linkage to marginal areas, that include less suitable natural habitat such as the isolated *Protea caffra* pockets. The Proposed Amendment is unlikely to negate the value that the connected open space provides to ecological processes within a development framework.
- 3.7. The proposed open space system as proposed by the Proposed Amendment will mitigate the impact on north-south connectivity in the landscape. East-west connectivity is also accommodated through the conservation of the drainage line.
- 3.8. It is important to note that the Proposed Development has already been approved by virtue of the EA, which approval duly took into account the perceived sensitivity of the Property. The focus of the Amendment Application should therefore be on the Proposed Amendments to assess if the Proposed Development will still be sustainable. This seems not to have been done based on the reasons provided in the Refusal, as is further elaborated on below.

4. THE APPELLANT'S RESPONSES TO RECORDALS IN THE REFUSAL

4.1. Ad paragraph 3(d) of the Refusal

- 4.1.1. Paragraph 3(d) of the Refusal records that the HOD relied on the precautionary principle in making his decision to refuse the Amendment Application.
- 4.1.2. The precautionary principle is set out in section 2(4)(a)(vii) of the NEMA, which provides that *"a risk-averse and cautious approach is applied, which takes into account the limits of current knowledge about the consequences of decisions and actions"* (own emphasis).
- 4.1.3. The precautionary principle is therefore of relevance when there is a limit *"of current knowledge about the consequences of decisions and actions"*. The Appellant denies that there are any *"limits of current knowledge"* in respect of the Proposed Amendment, especially in light of the Enviroguard Report, which sets out detailed findings and conclusions in respect of the Proposed Amendment and its impacts on the environment.
- 4.1.4. The Appellant therefore submits that there are no *"limits of current knowledge about the consequences"* of the Proposed Amendment and therefore the precautionary principle cannot be applied in respect of the Amendment Application.
- 4.1.5. It is important to note that nowhere in the Refusal has the findings or the conclusions in the Enviroguard been challenged by the HOD. Furthermore, as is detailed in paragraph 5.2 below, it appears from the findings of the HOD as set out in paragraph 4 of the Refusal that the HOD has failed to take into account the contents of the Enviroguard Report.

4.2. Ad paragraphs 3(a) and 4(a) of the Refusal

- 4.2.1. In terms of paragraph 3(a) read with paragraph 4(a) of the Refusal, one of the issues deemed as significant in respect of deciding whether or not to grant the Amendment Application is condition 1.22 of the EA which provides that *"this authorisation is granted on condition that development with a footprint not exceeding 60% of the entire site is implemented"*. Furthermore, paragraph 4(a) of the Refusal records that the purpose of condition 1.22 of the EA is *"because the other part is highly sensitive"*.
- 4.2.2. In respect of the sensitivity of the Property, the Appellant submits that, as further detailed

in the Amendment Application, read together with the Enviroguard Report, it has been established by ecologists that the buffers which form the subject matter of the Proposed Amendment are not “*highly sensitive*” and that most of the grassland buffer areas around these *Protea caffra* patches are dominated by *Hyparrhenia hirta*, an anthropogenic grass that indicates the degraded condition of sections of this grassland, which degradation is due to previous agricultural activities. Most of the *Protea caffra* patches have further been isolated by the former farming activities which has resulted in the herbaceous layer being moderately altered. The initial ecological assessment¹⁰ as well as the follow up investigation as reflected in the Enviroguard Report, confirms that the isolated *Protea caffra* patches, which form the subject matter of the Proposed Amendment, had a moderate sensitivity. For this reason, the Proposed Amendment places greater emphasis on protecting and buffering the Core Areas in the far north and east of the Property (as reflected as Areas C, D and E on Figure 6B), which areas are relatively untransformed.

- 4.2.3. As is set out in the Amendment Application, as the EA currently stands, the Appellant would only be able to development 3.8164 hectares of land which equates to only 30% of the entire site¹¹. Therefore, although condition 1.22 of the EA stipulates that 60% of the Property can be developed, in reality, as a result of the buffers as set out in condition 1.25 of the EA, the Appellant would only be able to develop 30% of the Property which is only half of the allowed 60% as per condition 1.22 of the EA.
- 4.2.4. The Appellant confirms that the amendment as requested in the Amendment Application would result in the development of approximately 6.36 hectares of the Property which equates to a footprint of approximately 50%, which therefore still falls within the 60% development allowed for in terms of condition 1.22 of the Authorisation¹².
- 4.2.5. The Appellant therefore submits that the Proposed Amendment will still result in the footprint of the Proposed Development to fall within the ambit of the 60% footprint in compliance with condition 1.22 of the EA. It is once again confirmed that the area which forms the subject matter of the Proposed Amendment is not “*highly sensitive*” and is in fact moderately sensitive as a result of being degraded by past agricultural activities.

¹⁰ Conducted by Eco Assessment as part of the application for the EA in 2009.

¹¹ See section 4.1 of the Amendment Application.

¹² *Ibid.*

4.3. Ad paragraph 4(b) read with paragraphs 3(b) and 3(c) of the Refusal

4.3.1. The HOD makes the following allegations in paragraph 4(b) of the Refusal, each of which are addressed by the Appellant further below –

4.3.1.1. That the Amendment Application seeks to *completely remove* the buffer as provided for in condition 1.25 of the EA;

4.3.1.2. "*the ecological link which is used and offered as an off-set in return for the Department approving the proposed site*" is worthy of conservation and significantly contributes to biodiversity conservation, which allegation is also reflected in paragraphs 3(b) and 3 (c) of the Refusal;

4.3.1.3. Condition 1.25 of the EA states that the sensitive areas must be incorporated into conservation areas and "*hence no development may take place on the open space areas*".

Complete removal of the 50 m buffer and the Proposed Amendment is not ecologically sustainable

4.3.2. In terms of paragraph 4(b) of the Refusal, the HOD is of the view that the Proposed Amendment will result in "*a complete removal of the buffer*" as provided for in condition 1.25 of the EA. This is emphatically denied by the Appellant.

4.3.3. As is set out throughout the Amendment Application, the Appellant seeks to relax the buffer as set out in condition 1.25 of the EA only in respect of the *Protea caffra* grassland areas on the southern open space area at the entrance of the site and the small *Protea caffra* area west and north of the existing house (Areas A and B on Figure 6B and Areas 1, 2 and 3 of the Annexure C Diagram). As confirmed in the Amendment Application, the Appellant will maintain the prescribed 50m buffer around the drainage line on the northern boundary of the site as well as around the *Protea caffra* woodland north of the existing house (that includes the drainage line at Area 4 of the Annexure C Diagram) and the *Protea caffra* tree and grassland areas to the east of the existing house (Area 5 of Annexure C Diagram) and the Proposed Amendment does not apply to such areas.

4.3.4. As is clear from the Amendment Application, the Appellant submits that the buffers for which the Appellant has applied for a relaxation will offer little to no ecological value. In

this regard, we refer you to paragraph 1.26 of the Amendment Application read together with Figure 6B and the Annexure C Diagram, which sets out the summary of the conservation value of the various buffers as provided for in terms of the Proposed Amendment -

4.3.4.1. *“Buffer Area A (located in the south west of the site) comprises historically farmed areas that offers little to no value as a buffer.*

4.3.4.2. *Buffer Area B (located immediately south of the north Protea caffra patch and on the west of the site), similarly comprised historically farmed areas that would serve little function as a buffer.*

4.3.4.3. *Buffer Area C (located immediately south of the drainage line) has been retained. The Protea caffra area located immediately north of the existing house is included in the 50m buffer of the drainage line. Areas immediately south of this area has historically been farmed and therefore are excluded as buffer area.*

4.3.4.4. *Buffer Area D (located south west of the Protea caffra grassland) has been retained.*

4.3.4.5. *Buffer Area E (located in the most north eastern parts of the site) comprises largely historically farmed areas in the south west and more natural areas in the north east. The north eastern parts of this area fall within the 50m buffer areas of the drainage line and the Protea caffra grassland and will thus be retained’.*

4.3.5. As is clear from the above, out of the 5 buffer areas as provided for in condition 1.25 of the EA, as depicted above, 3 of the areas will retain the buffer of 50 m, while only 2 areas will have no buffer, namely Areas A and B as reflected in Figure 6B. In other words, 3 of the 5 buffer areas will retain a buffer and the Amendment Application only request the relaxation of the buffer of 50 m to 0 m in respect of 2 buffer areas, namely Areas A and B of Figure 6B and Areas 1, 2 and 3 of the Annexure C Diagram.

4.3.6. Therefore, the Appellant denies that the Proposed Amendment amounts to a “*complete removal of the buffer*” area as alleged by the HOD in paragraph 4(b) of the Refusal.

4.3.7. Furthermore, the Appellant denies that the relaxation of the buffer in respect of Areas A

and B as reflected in Figure 6B and Areas 1, 2 and 3 of the Annexure C Diagram will not be ecologically unsustainable as is alleged by the HOD in paragraph 4(b) of the Refusal.

4.3.8. The Amendment Application read with the Enviroguard Report provides that, the south west portion of the Property consists of degraded land and it is for this reason that the the largest parts of the development footprint as proposed in the Amendment Application is located toward the south western corner of the Property¹³. The Appellant confirms that the north, north eastern corner as well as eastern parts of the Property are left as ecological areas and buffers to allow for ecosystem functionality (potential habitat areas, corridors and linkages with the surrounding landscapes and ecological areas)¹⁴. The Enviroguard Report confirms that the northern section (Area 4 of the Annexure C Diagram) of the Property, for which prescribed buffers are retained, contains most of the natural and ecological sensitive areas¹⁵.

4.3.9. The above is confirmed in paragraph 4 on page 6 of the Enviroguard Report¹⁶, which provides that *“the imposition of a 50 meter buffer zone along the edge of the ridge on the south would, from an ecosystem point of view, not achieve a “buffering” effect since the land is already degraded and the spread of weeds and secondary successional species into the pristine natural areas might be further enhanced. A buffer zone would serve no purpose other than conserving degraded land which will in all likelihood degrade even further once the area is developed. It would then negate the anticipated effect of the buffer zone. Unless these areas are actively rehabilitated (which still would not bring back all the original species - Van Oudtshoorn et al. 2011) it would serve no purpose to conserve an area comprising pioneer and secondary successional species”*.

4.3.10. The Enviroguard Report concludes¹⁷ that -

4.3.10.1. *“from a plant ecological and ecosystem point of view the area as demarcated in the amended layout could be supported since the plan makes adequate provision for all natural areas to be conserved appropriately (i.e. that a 50m buffer around the fragmented natural patches and southern ridge is not prescribed)”*; and

¹³ See figure 6 of the Amendment Application.

¹⁴ *Ibid.*

¹⁵ Conclusion of the Enviroguard Report on page 7.

¹⁶ Also recorded in the bullets under paragraph 3 of the Amendment Application.

¹⁷ Page 7 of the Enviroguard Report.

4.3.10.2. *“it is not foreseen that the proposed development would have a negative effect on the ridge area in the south and should not affect the microclimate, water runoff, temperature or light of this ecosystem negatively”.*

4.3.11. As is set out in the Amendment Application, the Appellant submits that *“the open space as reflected in the amended layout plan (Figure 6) has been optimized and consolidated to include and connect all the Protea woodland and stream areas to ensure ecological viability as well as provide for a consolidated open space area where no development will be permitted”*¹⁸.

4.3.12. In light of the above, the Appellant emphatically denies the allegation made by the HOD in paragraph 4(b) of the Refusal that the Proposed Amendment would not be ecologically sustainable. The Appellant confirms that the areas where the relaxation of buffers has been applied for (Areas A and B as reflected in Figure 6B and Areas 1, 2 and 3 of the Annexure C Diagram), are areas where historical agricultural activities had transformed the land and the Proposed Amendment represents a more consolidated development area to the south and central parts of the Property. The Proposed Amendment further includes adequate corridors and the protection of core areas. Area B of Figure 6B (Areas 2 and 3 of the Annexure C Diagram) still allows for space of approximately 15 m around the *Protea caffra* patch, even though this has been indicated to be reduced to a 0 m buffer. Even in respect of the *Protea caffra* patch on the northern Area B (Area 3 of the Annexure C Diagram), there is space allowed around the *Protea caffra* patch except in the south eastern corner where development is located close to the open space.

“The ecological link which is used and offered as an off-set in return for the Department approving the proposed site”

4.3.13. Paragraph 4(b) of the Refusal refers to an ecological link that was used as an offset. The Appellant submits that this allegation is misplaced and fails to take into account what is meant by an “offset”. The Draft Biodiversity Offset Policy published under GNR 276 on 31 March 2017 (**“Biodiversity Offset Policy”**) defines “Biodiversity offsets” so as to mean *“conservation measures designed to remedy the residual negative impacts of development on biodiversity and ecological infrastructure, once the first three groups of measures in the mitigation sequence have been adequately and explicitly considered (i.e. to avoid, minimize and rehabilitate/ restore impacts). Offsets*

¹⁸ Last paragraph of paragraph 4.1 of the Amendment Application.

are the 'last resort' form of mitigation, only to be implemented if nothing else can mitigate the impact'.

4.3.14. It is therefore clear from the above that an "offset" is the last resort in instances where there are no mitigation measures to "*avoid, minimize and rehabilitate/ restore impacts*". It is confirmed that any impacts on biodiversity as a result of the Proposed Development incorporating the Proposed Amendment are appropriately and adequately mitigated against. In support hereof, we refer to the following records in the Enviroguard Report –

4.3.14.1. "*the 50 m buffer zone along the seasonal drainage channel incorporates all of the pristine vegetation and some degraded areas while the exclusion of the Protea veld areas ensures connectivity between existing natural areas outside the property towards the north, east and south. There is no connectivity towards the west with all the land already developed or used as old fallow fields with little climax vegetation present*"¹⁹;

4.3.14.2. "*it is not foreseen that the proposed development would have a negative effect on the ridge to the south*"²⁰;

4.3.14.3. "*it is concluded that from a plant ecological and ecosystem point of view the area as demarcated in the amended layout could be supported since the plan makes adequate provision for all natural areas to be conserved appropriately*"²¹.

4.3.15. In light of the above, it is submitted that the HOD incorrectly refers to "*an off-set*" in paragraph 4(b) of the Refusal and there are no off-sets applicable to the Proposed Development or the Proposed Amendment. It is once again confirmed that none of the sensitive areas will be removed and/or disturbed by the Proposed Amendment and all sensitive areas will remain, including, *inter alia*, the drainage line and the *Protea Caffra* situated on the Property. In other words, the sensitive areas will be retained even with the Proposed Amendment and there is no need for an offset.

4.3.16. Notwithstanding the above, as set out in paragraphs 4.4.11 to 4.4.15 below, the Appellant submits that the Proposed Amendment ensures that the most sensitive areas

¹⁹ Paragraph 4 on page 6 of the Enviroguard Report

²⁰ Conclusion on page 7 of the Enviroguard Report

²¹ Conclusion on page 7 of the Enviroguard Report.

are still adequately linked into the proposed consolidated open space system.

Inclusion of sensitive areas into conservation areas

4.3.17. Paragraph 4(b) of the Refusal records that “*hence no development may take place on the open space areas*”. This statement is in reference to condition 1.25 of the EA which provides that “*these sensitive areas must be incorporated into conservation areas*”. The sensitive areas as referred to in condition 1.25 of the EA refers to the following areas (as further depicted in Figure 6B and the Annexure C Diagram) –

4.3.17.1. The *Protea caffra* grassland areas on the southern open space area at the entrance of the site (Area A on Figure 6B and Area 1 on the Annexure C Diagram);

4.3.17.2. The small *Protea caffra* area west of the existing house (Area B on Figure 6B and Area 2 on the Annexure C Diagram);

4.3.17.3. The drainage line on the northern boundary of the site (Area C on Figure 6B and Area 4 on the Annexure C Diagram);

4.3.17.4. The *Protea caffra* woodland north of the existing house (Area B on Figure 6B and Area 3 of the Annexure C Diagram);

4.3.17.5. The *Protea caffra* tree and grassland areas to the east of the existing house (Areas D and E on Figure and Area 5 of the Annexure C Diagram).

4.3.18. As is detailed throughout the Amendment Application, the Appellant seeks to request the relaxation of the buffer zone as stipulated in condition 1.25 of the Authorisation from 50m to 0m around the *Protea caffra* grassland areas on the southern open space area at the entrance of the site (Area A on Figure 6B and Area 1 of the Annexure C Diagram) and a section of the small *Protea caffra* area west (Area B on Figure 6B and Area 2 of the Annexure C Diagram) and north (Area B on Figure 6B and Area 3 of the Annexure C Diagram) of the existing house, only. The prescribed 50m buffer around the drainage line on the northern boundary of the site (Area C on Figure 6B and Area 4 on the Annexure C Diagram) as well as around most of the *Protea caffra* woodland north of the existing house and all of the *Protea caffra* tree and grassland areas to the east of the existing house will be maintained (Areas D and E of Figure 6B and Area 5 on the Annexure C Diagram).

4.3.19. Furthermore, as is clear from the Amendment Application, the amendment is merely to relax the buffer area around the *Protea caffra* grassland areas on the southern open space area at the entrance of the site and the small *Protea caffra* area west and north of the existing house and does not seek to remove such areas from the conservation area.

4.3.20. In light of the above, it is confirmed that the “sensitive areas” as envisaged in condition 1.25 of the EA will still be incorporated into conservation areas and no development will take place within such areas as is reference in paragraph 4(b) of the Refusal. As is confirmed under paragraph 3.1.1 of the Amendment Application, the open space system in terms of the Proposed Amendment consists of the following elements –

- *“A connected open space area consisting of the stream area and all Protea caffra patches with a 50 meter buffer, excluding a 50 meter buffer around the southern most isolated patch of Protea caffra trees;*
- *The isolated patch of Protea caffra in the centre of the site (0.1ha) is further also connected to the large open space and stream area, but without the 50 meter buffer.*

4.3.21. Notwithstanding the above, the Appellant disputes the statement in paragraph 4(b) of the Refusal that the historically transformed areas on the Property offer significant areas of conservation and that they contribute to biodiversity conservation, as these areas comprise large patches of *Hyparrhenia hirta* (thatch grass) that is typical of previously cultivated land. Hence the herbaceous species diversity and habitat structure has been transformed to a point that it will be unsuitable as a biodiverse area. These points were clearly unpacked in the expert investigation as set out in the Enviroguard Report.

4.3.22. The Appellant therefore submits that the Proposed Amendment does not seek to eliminate the inclusion of the “sensitive areas” in “*conservation areas*” and merely seeks to reduce the buffer area around 2 of the 5 “sensitive areas”. In other words, as is clear from the Amendment Application, although the Appellant seeks to relax the buffer, it still has no intention to develop in the sensitive areas. The Appellant therefore denies that the Proposed Amendment envisages any development within the sensitive areas as is alleged by the HOD in paragraph 4(b) of the Refusal. It is once again confirmed that the 2 areas where the relaxation of the buffer (Areas A and B on Figure 6B and Area 1, 2 and 3 of the Annexure C Diagram) is sought are historically transformed areas.

4.4. Ad paragraph 4(c) of the Refusal

4.4.1. The HOD alleges in paragraph 4(c) of the Refusal that –

4.4.1.1. The Proposed Amendment will reduce the open space and “*will negatively impact on the ecological functions of the site*”;

4.4.1.2. That the area which is to be developed is an important area and must be conserved “*as an ecological link or open space corridor link*”;

4.4.1.3. The Proposed Amendment is not “*compatible with the development guidelines for ridges, in particular where parts of this site constitute an untransformed “Class 3” ridge*”;

4.4.2. We have dealt with each of the aforesaid allegations separately below.

Reduction of open space and negative impact on the ecological functions of the Property

4.4.3. In paragraph 4(c) of the Refusal, the HOD alleges that the Proposed Amendment reduces the open space and “*will negatively impact on the ecological functions of the site*”.

4.4.4. It is submitted that since the Property is located on the “flat” areas between two ridges, with a slope of less than 5°, and where anthropogenic disturbances are present, a 50% open space, as is proposed by the Proposed Amendment, is considered appropriate for an urban development in a more natural area.

4.4.5. The Proposed Amendment attempts to consolidate the open space but still accommodate the Proposed Development, which are signs of a sustainable development. The purpose of the Proposed Amendment is not to reduce the open space but rather to motivate why historically transformed areas that include part of the 50m buffer proposed by the Department should not be used in a manner that will serve little purpose and possibly undermine the sensitivity of the Property.

4.4.6. As is further detailed in paragraph 3.6 above, from several perspectives, the proposed open space plan for the Proposed Development in terms of the Proposed Amendment is a very good example of an urban open space.

4.4.7. The Appellant denies the allegation made in paragraph 4(c) of the Refusal that the proposed amendment will “*negatively impact on the ecological functions of the site*”. This especially in light of the findings made by a specialist in the Enviroguard Report including, *inter alia*, the following recordals –

4.4.7.1. “*Some degradation of sections of the environment in particular the Themeda triandra grassland has taken place since 2009 which lowers its conservation value. The many secondary successional species and in specific the prominence of anthropogenic grass Hyparrhenia hirta indicate the degraded condition of sections of this grassland. Furthermore it is anticipated that if the area is not properly managed that this grass could potentially become dominant and encroach into the current natural Protea grassland area*”²²;

4.4.7.2. The sections set aside as open parkland areas represents areas that are pristine and high in species richness, “*thus the exclusion of these areas from development is supported and will contribute towards conserving the larger natural ecosystem*”²³;

4.4.7.3. “*The 50m buffer zone along the seasonal drainage channel incorporates all of the pristine vegetation and some degraded areas while the exclusion of the Protea veld areas (sic from development areas) ensures connectivity between existing natural areas outside the property towards the north, east and south*”²⁴;

4.4.7.4. “*The imposition of a 50 meter buffer zone along the edge of the ridge on the south would, from an ecosystem point of view, not achieve a “buffering” effect since the land is already degraded and the spread of weeds and secondary successional species into the pristine natural areas might be further enhanced. A buffer zone would serve no purpose other than conserving degraded land which will in all likelihood degrade even further once the area is developed. It would then negate the anticipated effect of the buffer zone. Unless these areas are actively rehabilitated (which still would not bring back all the original species - Van Oudtshoorn et al. 2011) it would serve no purpose to conserve an area comprising pioneer and secondary successional species*”²⁵.

4.4.8. The Enviroguard concludes that “*from a plant ecological and ecosystem point of view*

²² First paragraph under the heading “DISCUSSION” on page 5 of the Enviroguard Report.

²³ Second paragraph on page 6 of the Enviroguard Report.

²⁴ Fourth paragraph on page 6 of the Enviroguard Report.

²⁵ *Ibid.*

*the area as demarcated in the amended layout could be supported since the plan makes adequate provision for all natural areas to be conserved appropriately*²⁶.

4.4.9. It is therefore submitted that the Enviroguard Report confirms that the Proposed Amendment will not negatively impact in the ecological functionality of the Property and similarly will not negatively impact on the functionality of the ridge. It is submitted that the Proposed Amendment includes adequate opportunity for ecological corridors and links to fulfil this purpose.

4.4.10. In light of the above, the Appellant maintains that the proposed amendment as set out in the Amendment Application does not *"negatively impact on the ecological functions of the site"* as alleged by the HOD in paragraph 4(c) of the Refusal and the most sensitive areas will still be protected and still be adequately linked into the proposed consolidated open space system.

Ecological link

4.4.11. The HOD alleges in paragraph 4(c) of the Refusal that the Proposed Amendment would negatively affect the ecological link or open space corridor link in the area. This is denied by the Appellant and the Appellant confirms that the Proposed Amendment maintains the ecological link.

4.4.12. As set out under paragraph 3.2 on page 18 of the Amendment Application, *"currently the connectivity is very good in a north, south and eastern direction but the R28 has affected connectivity to the west somewhat"*. This is supported by the Enviroguard Report which records that *"there is no connectivity towards the west with all land already developed or used as old fallow fields with little climax vegetation present"*²⁷.

4.4.13. In respect of connectivity, the Enviroguard Report furthermore records that –

4.4.13.1. *"The inclusion of the smaller Protea caffra grassland area in the north-west also includes grassland and woodland areas and is directly linked to the more natural vegetation of the drainage channel in the north. The small Protea caffra grassland along the south-western edge (Annexure B) will also be preserved and has direct linkage with the natural Protea ridge in the south"*²⁸;

²⁶ Conclusion on page 7 of the Enviroguard Report.

²⁷ Fourth paragraph on page 6 of the Enviroguard Report.

²⁸ Third paragraph on page 6 of the Enviroguard Report.

4.4.13.2. *"The 50m buffer zone along the seasonal drainage channel incorporates all of the pristine vegetation and some degraded areas while the exclusion of the Protea veld areas ensures connectivity between existing natural areas outside the property towards the north, east and south"*²⁹;

4.4.13.3. *"It is not expected that the proposed development of the study site would have significant effect on habitat fragmentation (at least not on a large scale) since the proposed development, although located in a lower-lying mid-plateau area between the ridges, is already degraded and borders onto the R28. Thus the current land use of the property has already degraded the vegetation ecosystem, thereby providing little connectivity between the two ridges"*³⁰

4.4.13.4. *"It is not foreseen that the proposed development would have a negative effect on the ridge area in the south and should not affect the microclimate, water runoff, temperature or light of this ecosystem negatively"*³¹.

4.4.14. The Appellant once again highlights that nowhere in the Refusal is the contents or the credibility of the Enviroguard Report challenged by the HOD.

4.4.15. In light of the above, the Appellant submits that the Proposed Amendment ensures that the most sensitive areas are still adequately linked into the proposed consolidated open space system.

Compatibility with development guidelines for ridges

4.4.16. The HOD alleges in paragraph 4(c) of the Refusal that *"the proposed development is not compatible with the development guidelines for ridges, in particular where parts of this site constitute an untransformed "Class 3" ridge"*. However, the Refusal fails to provide any indication as to the manner in which the Proposed Amendment is not compatible with the Gauteng Ridges Guidelines, 2001 (as reviewed and updated in January 2004 and April 2006) ("**Ridges Guidelines**").

4.4.17. At the outset, the Appellant submits that the Ridges Guideline is just that, a guideline. This is confirmed on page 2 of the Ridges Guideline which records that *"it should be noted that this document is a guideline and that the Department accordingly reserves*

²⁹ Fourth paragraph on page 6 of the Enviroguard Report.

³⁰ Conclusion on page 7 of the Enviroguard Report.

³¹ *Ibid.*

the right to deviate from the guideline where appropriate". Accordingly, it is submitted that the Ridges Guideline cannot be applied in a rigid and inflexible manner without having any regard to site specific conditions. In this regard, please refer to paragraph 5.1 below.

- 4.4.18. The Appellant submits that the Amendment Application took into account the Ridges Guidelines and that the ecological sensitivity of the Property was taken into consideration when conceptualising the layout of the Proposed Amendment. As detailed in paragraphs 4.4.3 to 4.4.10 above, the Proposed Amendment includes an open space area conserving the *Protea caffra* grassland, which will allow for the conservation of the sensitive areas, which have not been degraded by past agricultural activities as well as allowing connectivity into the natural surrounding land and the larger ridge ecosystem.
- 4.4.19. Paragraph 4(c) of the Refusal records that the Property constitutes a Class 3 ridge, which in terms of the Ridges Guidelines means that the ridge has been transformed between 35% to 65%. In other words, the very classification of a Class 3 ridge is as a result of transformation that has taken place of between 35% and 65%. It is important to note that as set out in detail in the Amendment Application and in this Appeal, the requested relaxation of the buffer areas as stipulated in condition 1.25 of the EA is only in respect of the *Protea caffra* grassland areas on the southern open space area at the entrance of the site and the small *Protea caffra* area west and north of the existing house, which areas have already been disturbed by former agricultural activities. The prescribed 50m buffer around the drainage line on the northern boundary of the site as well as around the *Protea caffra* woodland north of the existing house and the *Protea caffra* tree and grassland areas to the east of the existing house, which represent the relatively untransformed areas, will be maintained. It is therefore submitted that the Proposed Amendment will not result in development on parts of the Property that constitute "an untransformed *Class 3* ridge" (own emphasis), as is alleged by the HOD in paragraph 4(c) of the Refusal. In other words, the subject matter of the Amendment Application pertains to those areas which have already been transformed by past agricultural activities and the untransformed areas will be maintained.
- 4.4.20. The Appellant submits that the purpose of the Ridges Policy is, *inter alia*, the protection of areas with habitats with potential red data species and this particular purpose is being met by the Proposed Amendment. With regard to potential red data species, please refer to paragraphs 4.5.13 to 4.5.18 below, which confirms that the initial investigations in 2010 found no evidence of the Albertina Sisulu orchard within or in close proximity to the Property. This was corroborated in consultation with the South African National

Biodiversity Institute (“**SANBI**”). A recent investigation has also not located a species within the border of the Property or in close proximity to it. The closest *Albertina Sisulu* orchid is situated 475 m south east of the Property, in respect of which a 600 m buffer has been incorporated as part of the Proposed Amendment.

4.4.21. The Appellant therefore submits that the Proposed Amendment is in fact compatible with the purpose of the Ridges Guideline and denies the allegation made in paragraph 4(c) of the Refusal that it is not.

4.5. Ad paragraph 4(d) of the Refusal

4.5.1. In terms of paragraph 4(d) of the Refusal, the HOD alleges that –

4.5.1.1. The Proposed Amendment will have a detrimental impact on *“the functionality of open space which is characteristic of a “Class 3” Ridge”*;

4.5.1.2. That according to the Gauteng Environmental Management Framework (“**GEMF**”), the Property *“is high control zone 2 outside zone 1 which required to be high conservation area”*;

4.5.1.3. The ecosystem on the Property *“is vital because it is the habitat for the extremely rare *Albertina Sisulu* orchid”*.

4.5.2. The Appellant has responded to each of the aforesaid allegations separately below.

Functionality of open space

4.5.3. It appears that the allegation made by the HOD in paragraph 4(d) of the Refusal fails to take into account that the Proposed Amendment does not seek to relax the buffer around all sensitive areas on the Property, but is only sought in respect of the *Protea caffra* grassland areas on the southern open space area at the entrance of the site and the small *Protea caffra* area west and north of the existing house, which areas have already been degraded by past agricultural activities. The prescribed 50m buffer around the drainage line on the northern boundary of the site as well as around the *Protea caffra* woodland north of the existing house and the *Protea caffra* tree and grassland areas to the east of the existing house, which represents the relatively untransformed areas, will be maintained. Furthermore, the Appellant confirms that notwithstanding the Proposed Development, there will be no development on any of the “sensitive areas”, as envisaged

in condition 1.25 of the EA.

- 4.5.4. As detailed in paragraphs 4.4.3 to 4.4.10 above as well paragraphs 3.5 to 3.8 above, the Appellant submits that the Proposed Amendment will not have a detrimental impact on the functionality of the open space on the Property as is alleged in paragraph 4(d) of the Refusal. Reference is once again made to the conclusion on page 7 of the Enviroguard Report which records that *"from a plant ecological and ecosystem functioning point of view the area demarcated in the amended layout could be supported since the plan makes adequate provision for all natural areas to be conserved appropriately"*.

The GEMF

- 4.5.5. The HOD records at paragraph 4(d) of the Refusal that in terms of the GEMF, the Property *"is high control zone 2 outside zone 1 which required to be high conservation area"*. In terms of the GEMF, zone 2 *"is sensitive to development activities. Only conservation should be allowed in this zone. Related tourism and recreation activities must be accommodated in areas surrounding this zone"*.
- 4.5.6. However, at the outset, the Appellant submits that even though a property may be recorded as zone 2 in terms of the GEMF, the specific factors of each property still need to be taken into account. In this regard, the Appellant submits that there are numerous instances where areas are listed as zone 2 in terms of the GEMF but such areas have already been impacted to such a degree that any conservation measures would in fact have no effect. In other words, the inclusion of a property in zone 2 in terms of the GEMF does not automatically mean that no development may occur on such property. In this regard, we respectfully submit that in the event that an outright prohibition of development in a zone 2 area is applied in terms of the GEMF, there would be no need for the listed activities published in terms of the NEMA as set out under GNR 983 of 4 December 2014 ("**GNR 983**") in respect of activities that require an environmental authorisation if they are undertaken within the Gauteng Province within *"sensitive areas identified in an environmental management framework adopted by relevant environmental authority"*. In terms of the NEMA, activities listed in the GNR 983 pertaining to developments within Gauteng within *"sensitive areas identified in an environmental management framework adopted by relevant environmental authority"* are not outrightly prohibited but do require an environmental authorisation.
- 4.5.7. Of relevance with regard to the above is the legal presumption of statutory interpretation

that statutes do not contain invalid or purposeless provisions. The intention of legislation can be taken to mean that it must be given effect to³². The common law presumption that statutes do not contain invalid or purposeless provisions gives effect to this "effect-directedness" of statute law. The general application of the presumption is based on the maxim *verba ita sunt intelligenda ut res magis valeat quam pereat* ("the words – of an instrument – are to be so construed that the subject-matter may rather be of force than come to naught")³³. In *Bader Bop (Pty) Ltd v National Union of Metal & Allied Workers of SA & others*³⁴ it was held that "it is also a presumption that the legislature does not intend to make any provision which is futile, nugatory, unnecessary or meaningless". "The ratio underlying the application of this common-law presumption of validity ... is that legislation must be construed so that it best serves its purpose".³⁵

- 4.5.8. Therefore, bearing in mind that in applying a strict interpretation in a zone 2 as referred to in the GEMF such that no development may occur within zone 2, there would be no need for the listed activities as set out in GNR 983 in respect of activities that occur within Gauteng within "sensitive areas identified in an environmental management framework adopted by relevant environmental authority". In terms of the presumption against purposeless provisions, it cannot be held that this is the purpose of the GEMF as this would render the aforesaid activities nugatory.
- 4.5.9. Notwithstanding the above, in terms of regulation 2(1)(c) of the Environmental Management Framework Regulations published under GNR 547 on 18 June 2010 ("**Framework Regulations**"), the information and maps included in environmental management frameworks are to be used in the "*consideration, as contemplated in section 24(4)(b)(vi) of the Act, of applications for environmental authorisations in or affecting the geographical areas to which those frameworks apply*". In other words, regulation 2(1)(c) of the Framework Regulations imply that the GEMF does not take away the discretionary powers of the competent authority to grant or refuse an application for an environmental authorisation, or for that matter an amendment application, but that the GEMF must be taken into consideration while exercising such discretion. Furthermore, regulation 5(2) of the Framework Regulations provide that "*if the Minister or MEC adopts with or without amendments an environmental management framework initiated in terms of regulation 3 the environmental management framework must be taken into account in the consideration of applications for environmental authorisation in or affecting the geographical area to which the framework applies*" (own

³² Paragraph 5 2(b) of Lourens du Plessis, "Re-Interpretation of Statutes" (2002).

³³ Paragraph 8 10 of Lourens du Plessis, "Re-Interpretation of Statutes" (2002).

³⁴ (2002) 23 ILJ 104 (LAC)

³⁵ Page 189 of Lourens du Plessis, "Re-Interpretation of Statutes" (2002).

emphasis).

- 4.5.10. Accordingly, in terms of the Framework Regulations, the GEMF must be *"taken into account in the consideration of applications for environmental authorisations"*, and by extension, amendments to environmental authorisations. It is therefore submitted that in exercising his discretionary powers in deciding whether or not to grant the Amendment Application, the HOD must still consider the specific facts pertaining to the Property and cannot apply the GEMF to outrightly prohibit any development on the Property.
- 4.5.11. Please also refer to paragraph 5.1 below, which confirms that the GEMF cannot fetter the discretionary powers of the HOD in deciding whether or not to grant the Amendment Application.
- 4.5.12. Reference is once again made to the conclusion on page 7 of the Enviroguard Report which records that *"from a plant ecological and ecosystem functioning point of view the area demarcated in the amended layout could be supported since the plan makes adequate provision for all natural areas to be conserved appropriately"*.

Albertina Sisulu orchid

- 4.5.13. Paragraph 4(d) of the Refusal alleges that the habitat on the Property *"is vital because it is a habitat for the extremely rare Albertina Sisulu orchid"*.
- 4.5.14. It is once again confirmed that the Amendment Application is only in respect of the *Protea caffra* grassland areas on the southern open space area at the entrance of the site and on sections of the small *Protea caffra* area west and north of the existing house, which areas have already been degraded by past agricultural activities. The prescribed 50m buffer around the drainage line on the northern boundary of the site as well as around the *Protea caffra* woodland north of the existing house and the *Protea caffra* tree and grassland areas to the east of the existing house, which represents the relatively untransformed areas, will be maintained.
- 4.5.15. With regard to potential occurrence of the Albertina Sisulu orchid, as set out in the Amendment Application, it is confirmed that the initial investigations in 2010 found no evidence of the Albertina Sisulu orchid within or in close proximity to the Property. This was corroborated in consultation with SANBI. A recent investigation has also not located a species within the border of the Property or in close proximity to it.

4.5.16. Notwithstanding the above, it should be noted that –

4.5.16.1. The creation of a consolidated open space area, that includes a 50m buffer around the 1:100 year floodline as well as the inclusion of a 50m buffer to the eastern ridge, has been argued by a specialist ecologist (see the Enviroguard Report) to be adequate to protect sensitive species from development impacts;

4.5.16.2. The majority of the site has historically been farmed and/or used for agricultural activities and that the more sensitive eastern areas have been buffered in accordance with condition 1.25 of the EA. In this regard, as set out in paragraphs 4.3.4 and 4.3.5 above, the Amendment Application is only in respect of 2 of the 5 buffered areas and it is submitted that the remaining 3 buffer areas are the least transformed of the buffer areas and provide adequate protection for any sensitive species that may occur on the Property;

4.5.16.3. The closest Albertina Sisulu orchid is located 475 m south east of the Property and the Proposed Amendment includes a buffer of 600m from such location.

4.5.17. It is therefore submitted that the open space as proposed in the Amendment Application effectively protects all the *Protea caffra* grassland including the eastern *Proteas* to allow for the protection of the habitat that could in future act as potential or real habitat for the Albertina Sisulu orchid species. The isolated *Protea caffra* patches that form the subject matter of the Amendment Application (i.e. in respect of which the relaxation of the buffer is requested) were rated moderate in 2009 and is not likely to offer habitat to the Albertina Sisulu orchid.

4.5.18. In light of the above, it is submitted that the impact of the Proposed Amendment on the Albertina Sisulu orchid is rated as low and that the Proposed Amendment adequately protects the habitat where the orchid may occur in the future.

4.6. Ad paragraph 4(e) of the Refusal

4.6.1. In terms of paragraph 4(e) of the Refusal, the HOD is of the view that the Proposed Amendment will "have a negative effect on the site which is regarded as an Irreplaceable Area and plays a critical role in supporting the ecological function of a ridge". The Appellant denies this allegation and submits that in making this allegation, the HOD failed to take into consideration that the Proposed Amendment is only in respect of the *Protea caffra* grassland areas on the southern open space area at the entrance of the

site and on sections of the small *Protea caffra* area west and north of the existing house, which areas have already been disturbed by former agricultural activities. The prescribed 50m buffer around the drainage line on the northern boundary of the site as well as around the *Protea caffra* woodland north of the existing house and the *Protea caffra* tree and grassland areas to the east of the existing house, which represent the relatively untransformed areas, will be maintained.

- 4.6.2. As is clear from the Amendment Application, an open space system has been developed such that the grassland and *Protea caffra* pockets as well as drainage line is included in a consolidated open space that would serve the role of protecting the eastern and northern ridge that remain as potential habitats for the Albertina Sisulu orchid as well as natural ridge ecosystems.
- 4.6.3. The Property remains within a transformed valley/inter-ridge area that has historically been used for agricultural activities that has largely replaced the vegetation layer with a mono-specific stand of *Hyparrhenia hirta* that offers little to no biodiversity value in comparison to areas further east and north of the Property that remain largely natural.
- 4.6.4. The Proposed Amendment includes the 50m buffers around habitat in the east and south east of the Property, as well as around the drainage line. These were the areas initially identified in 2009 by Eco Assessments to be areas requiring protection. The *Protea caffra* pockets that form the subject matter of the Amendment Application were never required to be protected, as these areas had been allocated a sensitivity of Moderate. It was however suggested that these pockets could be included as part of an open space system that would offer value to the Property. In this instance, a 50m buffer is considered to be unwarranted and unsustainable as is further set out in the Enviroguard Report. In this regard, it should be noted that the Proposed Amendment merely seeks to reduce the buffer of the *Protea caffra* patches that have already been degraded due to past agricultural activities but does not seek to develop in such areas (i.e. such *Protea* patches will be maintained).
- 4.6.5. With regard to the impact of the Proposed Amendment on the ecological functioning of the ridge, reference is once again made to the conclusion as contained on page 7 of the Enviroguard Report which provides that "*it is not foreseen that the proposed development would have a negative effect on the ridge area in the south and should not affect the microclimate, water runoff, temperature or light of this ecosystem negatively*".
- 4.6.6. The Enviroguard Report indicates that the grassland habitat has degraded since the Eco

Assessments Report in 2009³⁶. The Enviroguard Assessment confirms the habitat and conservation value of the *Protea caffra* veld and the drainage line. The most important points highlighted in the Enviroguard Report are:

- 4.6.6.1. The allocation of buffers to protect areas is not a perfect science (literature is referenced);
 - 4.6.6.2. The proposed buffers for the Proposed Amendment includes mostly 50 m as envisaged in condition 1.25 of the Authorisation, except around the southern isolated *Protea caffra* area at the entrance road and at the small *Protea caffra* pocket west of the existing house where no buffer will be provided;
 - 4.6.6.3. The allocation of a buffer without clear management objectives can have a negative impact on a nature area;
 - 4.6.6.4. The development of the degraded grassland will have little effect on the *Protea caffra* woodlands;
 - 4.6.6.5. From a plant ecological and ecosystem functioning point of view, the Proposed Amendment could be supported since the plan makes adequate provision for all natural areas to be conserved appropriately;
 - 4.6.6.6. It is not foreseen that the Proposed Amendment would have a negative effect on the ridge area in the south and should not affect the microclimate, water runoff, temperature or light of this ecosystem negatively.
- 4.6.7. The Enviroguard Report concludes that it is not expected that the Proposed Amendment would have a significant effect on habitat fragmentation since the Proposed Development, although located in a lower-lying mid-plateau area between the ridges, is already degraded and borders onto the R28. Therefore, the current land use of the Property has already degraded the vegetation ecosystem thereby effectively compromising the connection between the two ridges in this area.
- 4.6.8. The Appellant therefore submits that the Proposed Amendment will not have a negative impact on the Property as is alleged by the HOD in paragraph 4(e) of the Refusal.

³⁶ Last paragraph on page 5 of the Enviroguard Report.

5. GROUNDS OF APPEAL

5.1. First ground: Rigid and inflexible application of the Ridges Guidelines and the GEMF

- 5.1.1. It is submitted that in making his decision to refuse the Amendment Application, the HOD placed unwarranted reliance on the Ridges Guidelines and the GEMF.
- 5.1.2. As set out in paragraphs 4.5.5 to 4.5.12 above, in terms of the legal presumption of statutory interpretation that statutes do not contain invalid or purposeless provisions and in terms of regulations 2(1) and 5(2) of the Framework Regulations, the GEMF must be "*taken into account in the consideration of applications for environmental authorisations*", and by extension, amendments to environmental authorisations, however, in exercising his discretionary powers in deciding whether or not to grant the Amendment Application, the HOD must still consider the site-specific facts pertaining to the Property and cannot apply the GEMF to outrightly prohibit any development on the Property.
- 5.1.3. Furthermore, the HOD cannot apply the Ridges Guidelines in a ridged and inflexible manner, as is evident from paragraph 4(c) of the Refusal. In this regard, the Appellant respectfully refers the MEC to the case of *Hentru Developers & Contractors CC v Hanekom NO and another*³⁷ wherein the Court ruled amongst other things that the then Gauteng Department of Agriculture, Conservation, Environment and Land Affairs should have taken into account site specific reports on the probable impact of a development on the environment. The Appellant submits that from this ruling, it is clear that a rigid adherence by the HOD to policy alone, and thereby dismissing applications for authorisation without a proper consideration of the facts presented to it, will not be condoned. It is further submitted by the Appellant, that the very basis of this Appeal is as a result of the HOD adhering rigidly and inflexibly to the Ridges Guidelines at the expense of assessing and considering the merits of the findings and conclusions procured by the various specialists mandated to provide their professional opinions in respect site specific conditions and attributes pertaining to the Proposed Amendment.
- 5.1.4. The strict adherence by the HOD to the content of the Ridges Guidelines has resulted in a decision having been made which is both unreasonable and unjustifiable given the lack of reasons furnished therefore in addition to the documentation submitted to the Department in support of the Amendment Application and the measures it proposes to

³⁷ 2005 JOL 15650 (T).

mitigate any purported impacts which the Proposed Amendment may have.

- 5.1.5. It follows from the above that the Appellant takes issue and rejects the HOD's reliance on the Ridges Guidelines in considering the Amendment Application on the basis that at best, the document should serve to guide the HOD in deciding whether or not to grant the Amendment Application. The Ridges Guideline cannot serve to act as the basis *per se*, of refusing the Amendment Application without adequate reasons for coming to this conclusion and taking into account the merits of the Amendment Application. This position is confirmed in the Ridges Guideline itself, which records at page 2 that it "*should be noted that this document is a guideline and that the Department accordingly reserves the right to deviate from the guideline where appropriate*".
- 5.1.6. It is furthermore submitted that neither the Ridges Guidelines nor the GEMF can be utilised to smother the element of discretion altogether. In this regard the MEC's attention is drawn to the legal position as summarised by Judge Human in *Computer Investors Group Inc v Minister of Finance*³⁸ -

"Where a discretion has been conferred on a public body by a statutory provision, such a body may lay down a general principle for its general guidance, but it may not treat this principle as a hard and fast rule to be applied invariably in every case. At most it can only be a guiding principle, in no way decisive. Every case that is presented to the public body for its decision must be considered on its merits. In considering the matter the public body may have regard to a general principle, but only as a guide, not as a decisive factor. If the principle is regarded as a decisive factor, then the public body will not have considered the matter, but will have prejudged the case without having regard to its merits. The public body will not have applied the provisions of the statutory enactment." (Our emphasis)

- 5.1.7. As has been set out above, it is submitted that at most, the Ridges Policy and the GEMF can be applied as guidelines when considering the Amendment Application but the HOD still has to apply his discretionary powers to the merits and site-specific factors of the Amendment Application. It is submitted that in exclusively referring to the Ridges Guidelines and the GEMF in the Refusal as reasons for the refusal of the Amendment Application, the HOD failed to apply his mind to the merits and site-specific factors of the Amendment Application. In this regard, it is highlighted that nowhere in the Refusal does the HOD challenge the contents and/or findings of the Amendment Application, in

³⁸ 1979 (1) SA 879 (T) at 898.

particular the Enviroguard Report. As such, the HOD failed to apply his mind to the relevant issues of the Amendment Application.

5.1.8. Accordingly, we submit that in the HOD refusing the Amendment Application by applying the Ridges Guidelines and the GEMF in a ridged and inflexible manner –

5.1.8.1. The HOD was biased or reasonably suspected of bias³⁹;

5.1.8.2. The action was taken because relevant considerations were not considered⁴⁰;

5.1.8.3. The action was taken arbitrarily or capriciously⁴¹;

5.1.8.4. The action itself is not rationally connected to the information before the administrator⁴²;

5.1.8.5. The action itself is not rationally connected to the reasons given for it by the HOD⁴³; and/or

5.1.8.6. The action is otherwise unconstitutional or unlawful⁴⁴.

5.2. **Second Ground – Refusing the Amendment Application without taking into account relevant information**

5.2.1. Paragraph 4(a) of the Refusal records that “*the development must not exceed 60% because the other part is highly sensitive*”.

5.2.2. It is once again confirmed that the Amendment Application is only in respect of the *Protea caffra* grassland areas on the southern open space area at the entrance of the site and on a section of the small *Protea caffra* area west and north of the existing house, which areas have already been degraded by past agricultural activities. The prescribed 50m buffer around the drainage line on the northern boundary of the site as well as around the *Protea caffra* woodland north of the existing house and the *Protea caffra* tree and grassland areas to the east of the existing house will be maintained. In other words, the Amendment Application is only applicable to those areas that have already been

³⁹ Section 6(2)(a)(iii) of the PAJA.

⁴⁰ Section 6(2)(e)(iii) of the PAJA.

⁴¹ Section 6(2)(e)(vi) of the PAJA.

⁴² Section 6(2)(f)(ii)(cc) of the PAJA.

⁴³ Section 6(2)(f)(ii)(dd) of the PAJA.

⁴⁴ Section 6(2)(i) of the PAJA.

transformed by past agricultural activities and can therefore not be deemed to be “*highly sensitive*”.

- 5.2.3. Furthermore, as set out in paragraph 4.2.3 and 4.2.4 above, the Proposed Amendment will result in the development of approximately 6.36 hectares of the Property which equates to a footprint of approximately 50%, which therefore still falls within the 60% development allowed for in terms of condition 1.22 of the EA⁴⁵.
- 5.2.4. Therefore, the allegation made in paragraph 4(a) of the Refusal clearly indicates that the HOD failed to consider the contents of the Amendment Application in making his decision.
- 5.2.5. Paragraph 4(b) of the Refusal alleges that “*the proposed request is not a relaxation but a complete removal of the buffer*” and further records that the sensitive areas as referred to in the condition 1.25 of the EA need to be incorporated into conservation areas and therefore no development may take place in such area. As set out in paragraph 4.3 above, paragraph 4(b) of the Refusal clearly indicates that the HOD failed to take into considerations the fact that the Amendment Application is only in respect of 2 of the 5 buffer areas and further that the Amendment Application merely seeks to reduce the buffer area and does not seek to allow development in the “sensitive areas”. In other words, the Proposed Development does not amount to “*a complete removal of the buffer*”.
- 5.2.6. Paragraph 4(c) of the Refusal records that the Proposed Amendment will negatively impact on the “*ecological functions of the site*”. It is submitted that the Proposed Amendment will not negatively impact on the ecological functions of the Property. As is clearly recorded in the Enviroguard Report, which forms part of the Amendment Application, “*it is concluded that from a plant ecological and ecosystem point of view the area as demarcated in the amended layout could be supported since the plan makes adequate provision for all natural areas to be conserved appropriately*”⁴⁶ and “*it is not foreseen that the proposed development would have a negative effect on the ridge area in the south and should not affect the microclimate, water runoff, temperature or light of this ecosystem negatively*”⁴⁷. It is therefore submitted that the reasons provide for in paragraph 4(c) of the Refusal clearly indicates that the HOD failed to apply his mind to the contents of the Amendment Application including the Enviroguard Report as

⁴⁵ See section 4.1 of the Amendment Application.

⁴⁶ Conclusion on page 7 of the Enviroguard Report.

⁴⁷ *Ibid.*

attached to such application.

5.2.7. Still further, paragraphs 4(d) of the Refusal records that the Property “*is vital because it is the habitat for the extremely rare Albertina Sisulu orchid*”. However, as set out in paragraphs 4.5.13 to 4.5.18 above, no evidence of the Albertina Sisulu orchid has been located within the border of the Property or in close proximity to it, which findings are corroborated in consultation with SANBI. The closest orchid is situated 475 m south east of the Property and the Proposed Amendment includes a buffer of 600m from such location. Furthermore, as set is detailed in the Amendment Application, the creation of a consolidated open space area, that includes a 50m buffer around the 1:100 year floodline as well as the inclusion of a 50m buffer to the eastern ridge, has been argued by a specialist ecologist (see the Enviroguard Report) to be adequate to protect sensitive species from development impacts. Therefore, paragraph 4(d) of the Refusal once again indicates that the HOD failed to take into consideration the Amendment Application and the Enviroguard Report as was attached to such application in making his decision in respect of the Amendment Application.

5.2.8. Paragraph 4(e) of the Refusal once again alleges that the Proposed Amendment will have “*a negative effect on the site ... and plays a critical role in supporting the ecological function of a ridge*” and that no development is permitted in the original open space. As set out in paragraph 4.6 above, the Appellant emphatically denies that the Proposed Amendment will have a negative impact the ecological functioning of the ridge and once again refers to the Enviroguard Report which records that “*it is concluded that from a plant ecological and ecosystem point of view the area as demarcated in the amended layout could be supported since the plan makes adequate provision for all natural areas to be conserved appropriately*”⁴⁸ and “*it is not foreseen that the proposed development would have a negative effect on the ridge area in the south and should not affect the microclimate, water runoff, temperature or light of this ecosystem negatively*”⁴⁹. It is therefore once again submitted that the HOD clearly has failed to take into account the Amendment Application and the Enviroguard Report in making his decision in respect of the Amendment Application.

5.2.9. Accordingly, we submit that in the HOD refusing the Amendment Application without

⁴⁸ Conclusion on page 7 of the Enviroguard Report.

⁴⁹ *Ibid.*

applying his mind to the Amendment Application and the Enviroguard Report –

5.2.9.1. The HOD was biased or reasonably suspected of bias⁵⁰;

5.2.9.2. The action was taken because relevant considerations were not considered⁵¹;

5.2.9.3. The action was taken arbitrarily or capriciously⁵²;

5.2.9.4. The action itself was not rationally connected to the information before the administrator⁵³; and/or

5.2.9.5. The action is otherwise unconstitutional or unlawful⁵⁴.

5.3. Third Ground: The decision to refuse the Amendment Application is not rationally connected to the purpose for which it was taken.

5.3.1. It appears from paragraphs 4(a) to 4(e) of the Refusal that the HOD refused the Amendment Application on the basis that the Proposed Amendment will negatively impact on the ecological functioning of the Property and that the site is vital for the Albertina Sisulu orchid. Although, as set out throughout the Amendment Application and in this writing, the Appellant denies such allegation, what the Refusal fails to take into consideration is the negative impact on the environment should the Proposed Amendment not be approved.

5.3.2. As set out in section 4.1 on page 20 of the Amendment Application, in the event that the Amendment Application is not granted, the Appellant would not be able to proceed with the Proposed Development as it would not be economically feasible to do so. In this regard, it is important to note that the Proposed Development will formally protect the open spaces such that the degraded buffer areas can be managed for increased diversity by introducing natural seeds from the areas as well as forb species that are diminished in these areas. Therefore, with proper management measures as are proposed by the Appellant as part of the Proposed Amendment the current environmental status of the Property can be improved.

⁵⁰ Section 6(2)(a)(iii) of the PAJA.

⁵¹ Section 6(2)(e)(iii) of the PAJA.

⁵² Section 6(2)(e)(vi) of the PAJA.

⁵³ Section 6(2)(f)(ii)(cc) of the PAJA.

⁵⁴ Section 6(2)(i) of the PAJA.

5.3.3. Therefore, in the event that the Proposed Amendment is not approved, the Proposed Development cannot come to fruition and the associated environmental improvements would also not occur.

5.3.4. It is therefore submitted that although the Refusal provides as reasons that the Proposed Amendment would have a negative affect on the environment, the opposite may result and the current degradation of the environment on the Property may continue. This especially in light of the fact that if the Proposed Development is established, the Appellant will implement management measures which will improve the environment. Therefore, the Appellant submits that the Refusal is not rationally connected to the reason for which it was taken.

5.3.5. Therefore, we submit that in the HOD refusing the Amendment Application on the basis that the Amendment Application will have a negative impact on the environment, the action was –

5.3.5.1. Taken arbitrarily or capriciously⁵⁵;

5.3.5.2. Not rationally connected to the purpose for which it was taken⁵⁶;

5.3.5.3. Not rationally connected to the purpose of the empowering provision⁵⁷;

5.3.5.4. Not rationally connected to the information before the administrator⁵⁸; and/or

5.3.5.5. Not rationally connected to the reasons given for it by the administrator⁵⁹.

5.4. Fourth Ground: The decision to refuse the Amendment Application was materially influenced by an error of law.

5.4.1. Paragraph 3(d) of the Refusal records that the HOD relied on the precautionary principle in making his decision to refuse the Amendment Application. However, as set out in paragraph 4.1 above, the precautionary principle is only applicable in instances where there are "*limits of current knowledge about the consequences*"⁶⁰ of the Proposed Amendment.

⁵⁵ Section 6(2)(e)(vi) of the PAJA.

⁵⁶ Section 6(2)(f)(ii)(aa) of the PAJA.

⁵⁷ Section 6(2)(f)(ii)(bb) of the PAJA.

⁵⁸ Section 6(2)(f)(ii)(cc) of the PAJA.

⁵⁹ Section 6(2)(f)(ii)(dd) of the PAJA.

⁶⁰ See section 2(4)(a)(vii) of the NEMA.

- 5.4.2. In light of the contents of the Amendment Application, especially the Enviroguard Report, which sets out detailed findings and conclusions in respect of the Proposed Amendment and its impact on the environment, the Appellant submits that there are no "*limits of current knowledge about the consequences*" of the Proposed Amendment and therefore the precautionary principle cannot be applied in respect of the Amendment Application.
- 5.4.3. It is important to note that nowhere in the Refusal has the findings or the conclusions in the Enviroguard been challenged by the HOD. Furthermore, as is detailed in paragraph 5.2 above, it is submitted that the HOD has failed to take into account the contents of the Enviroguard Report.
- 5.4.4. Furthermore, paragraph 4(b) of the Refusal makes reference to "*an off-set*". However, as detailed in paragraphs 4.3.13 to 4.3.16 above, "an off-set" refers to the last resort in instances where there are no mitigation measures to "*avoid, minimize and rehabilitate/ restore impacts*". The Appellant submits that appropriate mitigation measures to "*avoid, minimize and rehabilitate/ restore impacts*" have been incorporated in the Proposed Amendment and accordingly, no off-sets are applicable to the Proposed Development or the Proposed Amendment. It is once again confirmed that none of the sensitive areas will be removed and/or disturbed by the Proposed Amendment and all sensitive areas will remain, including, *inter alia*, the drainage line and the *Protea Caffra* situated on the Property. In other words, the sensitive areas will be retained even with the Proposed Amendment and there is no need for an offset.
- 5.4.5. Therefore, it is submitted that in the HOD refusing the Amendment Application on the basis that the precautionary principle is applicable and that "off-sets" have allegedly been applied in respect of the Proposed Development, the action was materially influenced by an error of law⁶¹.

6. CONCLUSIONS ON THE GROUNDS OF APPEAL

- 6.1. The HOD refused the Amendment Application as a result of the rigid and inflexible application of the Ridges Guidelines and the GEMF. As is clear from legal principles, common law as well as the Framework Regulations, the Ridges Guidelines and the GEMF can be taken into account by the HOD when making a decision in respect of the Amendment Application, however, the Ridges Guidelines and the GEMF may not fetter the discretionary powers of the HOD in making his decision.

⁶¹ Section 6(2)(d) of the PAJA.

- 6.2. Furthermore, it is clear from the findings of the HOD as recorded in the Refusal that the HOD failed to consider relevant facts as contained in the Amendment Application and the Enviroguard Report. This especially in respect of allegations in the Refusal that the Proposed Amendment –
- 6.2.1. Seeks to exceed the 60% footprint as prescribed in condition 1.22 of the EA, which as set out in the Amendment Application is not the case. The Proposed Amendment will result in a development footprint of approximately 50% which still falls below the prescribed 60%;
 - 6.2.2. Seeks to completely remove the buffers prescribed in condition 1.25 of the EA, when in fact only 2 of the 3 buffer areas form the subject matter of the Amendment Application;
 - 6.2.3. Will have a negative affect on the ecological link and ecological functioning of the Property, when the specialist findings as set in the Enviroguard Report record that this is not the case. In this regard, reference is made once again to the conclusion on page 7 of the Enviroguard Report, which records that *“from a plant ecological and ecosystem point of view the area as demarcated in the amended layout could be supported since the plan makes adequate provision for all natural areas to be conserved appropriately”*;
 - 6.2.4. Will have a negative impact on the ecological functioning of the Property since the Property is a vital habitat for the Albertina Sisulu orchid, when the Amendment Application clearly indicates that this is not the case. As is set out in the Amendment Application, in terms of investigations as between 2009 and 2018, which have been corroborated by SANBI, no orchids on or in close proximately to the Property have been found and the closet orchid is 475 m south east of the Property, in respect of which orchid, a 600 m buffer has been incorporated into the Proposed Amendment.
- 6.3. The decision of the HOD to refuse the Amendment Application is not rationally connected to the purpose for such refusal in that, although the Refusal provides as reasons for the refusal of the Amendment Application that the Proposed Amendment would have a negative effect on the environment, the opposite may in fact be true in that the current degradation of the environment on the Property may continue, this bearing in mind that in the event that the Proposed Amendment is not approved, the Appellant will not be in a position to development the Property as it would not be feasible for the Appellant, in which instance, the associated improvements and management of degraded areas on the Property as proposed by the Appellant would not occur.
- 6.4. The decision of the HOD to refuse the Amendment Application on the basis of the precautionary

principle and on the alleged off-sets applied is as a result of an error of law. Neither the precautionary principle or off-sets find application to the Proposed Amendment.

6.5. Accordingly, we submit that the administrative action of the HOD in respect of refusing the Application was –

6.5.1. The HOD was biased or reasonably suspected of bias⁶²;

6.5.2. The action was materially influenced by an error of law⁶³

6.5.3. The action was taken because relevant considerations were not considered⁶⁴;

6.5.4. Taken arbitrarily or capriciously⁶⁵;

6.5.5. Not rationally connected to the purpose for which it was taken⁶⁶;

6.5.6. Not rationally connected to the purpose of the empowering provision⁶⁷

6.5.7. Not rationally connected to the information before the administrator⁶⁸;

6.5.8. Not rationally connected to the reasons given for it by the administrator⁶⁹; and/or

6.5.9. The action is otherwise unconstitutional or unlawful⁷⁰.

7. **RELIEF SOUGHT**

7.1. In terms of section 43(6) of the NEMA, the MEC may, "*after considering such an appeal, confirm, set aside or vary the decision, provision, condition or directive or make any other appropriate decision, including a decision that the prescribed fee paid by the appellant, or any part thereof, be refunded*".

7.2. For the reasons set out above, the Appellant requests that the MEC, in terms of section 43(6)

⁶² Section 6(2)(a)(iii) of the PAJA.

⁶³ Section 6(2)(d) of the PAJA.

⁶⁴ Section 6(2)(e)(iii) of the PAJA.

⁶⁵ Section 6(2)(e)(vi) of the PAJA.

⁶⁶ Section 6(2)(f)(ii)(aa) of the PAJA.

⁶⁷ Section 6(2)(f)(ii)(bb) of the PAJA.

⁶⁸ Section 6(2)(f)(ii)(cc) of the PAJA.

⁶⁹ Section 6(2)(f)(ii)(dd) of the PAJA.

⁷⁰ Section 6(2)(i) of the PAJA.

of the NEMA –

7.2.1. Sets aside the decision of the HOD to refuse the Amendment Application; and

7.2.2. Substitute the decision of the HOD to refuse the Amendment Application, as set out in the Refusal, with the decision to grant the Amendment Application for the Proposed Amendment.


8. CONCLUDING RECORDALS

8.1. The Appellant notes for the record that all the documentation submitted as part of this appeal statement and the footnotes herein forms part of the submission of the Appellant to the MEC in support of this appeal. The Appellant reserves the right to amplify its appeal submission if any new information becomes available.

8.2. Please be advised that our failure to deal with any matter raised in the Refusal should not be viewed as any acknowledgement of such fact, matter or statement and the Appellant's rights in this respect and otherwise remain fully reserved.

8.3. Should the MEC require any further information in order to make a decision concerning the above, it is kindly requested that the Appellant be provided with an opportunity to submit such further information.

Signed at Brooklyn on this the 17 July 2018.



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