



c/o: Michael Clark, Researcher
Email: michael@nu.org.za
Robyn Park-Ross, Researcher
Email: robyn@nu.org.za

22 January 2021

By email: Monique Africa
Project Support Manager
Chief Directorate: Public Private Partnerships
Department of Transport and Public Works
Western Cape Government
Monique.Africa2@westerncape.gov.za

To whom it may concern,

RE: NDIFUNA UKWAZI COMMENT ON THE PROVINCIAL GOVERNMENT OF THE WESTERN CAPE'S PROPOSED DISPOSAL OF THE FOUNDERS GARDEN SITE (ERF 187 OR UNREGISTERED ERF 282, ROGGEBAAI): Pre-immovable Asset Disposal

1. Ndifuna Ukwazi is a non-profit activist organisation and law centre that combines research, organising and litigation in campaigns to advance urban land justice in Cape Town. Our primary mission is to expand and protect access to affordable housing towards building a more just and equal city.
2. On 26 November 2020, the Western Cape Provincial Department of Transport and Public Works ("the Department") published a notice in the *Cape Times* inviting interested parties to submit comments on its intention to consider the disposal of 2.19 ha of public land, namely Erf 187 (Unregistered Erf 282), Roggebaai Founders Garden, by way of an open and competitive tender process.¹ The Department proposes to dispose of the parcel of land to either "an SHI or a private developer together with an SHI" to develop an "integrated high-rise, residentially-led mixed use development which maximises the provision of social housing".²
3. On 18 and 19 January 2021, Ndifuna Ukwazi requested additional information on the proposed disposal and development project per email from Ms Monique Africa, a Project Support Manager in

¹ See "Notice of intention to consider the disposal of erf 187 (unregistered erf 282) Roggebaai, Founders Garden", *Cape Times* (26 November 2020), p. 14.

² Western Cape Government, "Founders Garden Development Project: Information Document" V.0 (30 November 2020), p. 3.

the Chief Directorate: Public Private Partnerships in the Department. Ms Africa furnished us with an additional Founders Garden Development Project Information Document (“PID”) and provided answers to some of our questions.³

4. Ndifuna Ukwazi has read and considered the Department’s invitation to comment, the additional PID and answers provided by Ms Africa, and makes this submission to the Department in accordance with the invitation to submit written comments.
5. While we welcome the development of social housing on the Founders Garden site, our submission details the following concerns and proposed amendments;
 - 5.1. The portion of social housing within the project must be further maximised. In order to achieve this the Department must provide further mechanisms that can be used to advance the increased portion of social housing.
 - 5.2. Deeper down reach must be prioritised within the social housing component and must be included as a Development Objective. This must be balanced with the imperative to maximise the amount of social housing.
 - 5.3. Priority must be given to the fastest possible delivery of quality social housing within the project delivery timeframes. To ensure this, the Department should explore additional mechanisms to ensure and incentivise the urgent delivery of the social housing component.
 - 5.4. The Development Objectives must be amended to provide clarity and direction to the necessary physical design principles or approach to create conditions of equality and social integration across the development both in terms of the treatment and quality of housing, as well as access to amenities. This includes;
 - 5.4.1. The treatment and quality of housing must be consistent across the housing options to ensure equality of access to housing across the development regardless of tenure, income, class or race. The visual quality of all residential buildings and units must be consistent enough that (at the very least externally) it is not possible to distinguish the social and the open market housing.
 - 5.4.2. The Development Objectives must go further than outlining what the amenities are that must be developed as part of the project, and must provide clarity on the nature of these amenities to ensure that they are accessible to all residents of the development regardless of tenure, class, race or income.
 - 5.4.3. The design and layout of the development as a whole including the placement of the social housing within the site and within specific buildings must be done on an equitable basis that does not prejudice social housing tenants or condemn

³ Email correspondence with Ms Africa (18 and 19 January 2021).

them to worse living conditions than those in the open market housing (for example, by placing all the social housing in the worst location on the site or within a building).

- 5.5. That the tender documents and Development Objectives should include meaningful mechanisms that level the playing field to allow SHIs to compete on an equal footing with private developers in the bidding process by offering SHIs advantageous terms. This could be done through a variety of ways. Some examples include structuring the tender documents to give preference to the developer / SHIs that provides the largest percentage of social housing, by including provisions that expressly give preference to SHIs, exploring alternative funding sources to allow an SHIs to complete more effectively, or adopting measures used by other government entities to level the playing field such as the City of Cape Town's policy of offering public land to SHIs at a 10% nominal land value purchase price.
- 5.6. Further clarity is needed on the practicalities of the developers "opportunity to create further developable bulk" through the City of Cape Town's forthcoming inclusionary housing policy and through the tall building policy. In addition, this should only be permitted under the following conditions;
 - 5.6.1. If the developer complies with the provision of inclusionary housing as per the City of Cape Town's forthcoming inclusionary housing policy, and
 - 5.6.2. As long as the creation of further developable rights does not delay or compromise the delivery of the social housing component in any way.
6. Please see attached our comments on the Department's proposed disposal and development project on Erf 187 (Unregistered Erf 282).

Yours faithfully,

Ndifuna Ukwazi

(Per: Michael Clark, Researcher and Robyn Park-Ross, Researcher)

[Sent electronically]

22 January 2021

NDIFUNA UKWAZI'S COMMENT ON THE PROVINCIAL GOVERNMENT OF THE WESTERN CAPE'S PROPOSED DISPOSAL OF THE FOUNDERS GARDEN SITE (ERF 187 OR UNREGISTERED ERF 282, ROGGEBAAI): Pre-immovable Asset Disposal

INTRODUCTION

1. Ndifuna Ukwazi ("NU") is a non-profit activist organisation and law centre that campaigns to advance urban land justice in Cape Town through research, organising and litigation. Our primary mission is to expand, promote and protect access to affordable housing towards building a more just and equal city.
2. Over the last six years Ndifuna Ukwazi has been involved in legal, research and organising work around evictions, relocations, rental housing, the allocation of state-subsidised houses, and the promotion of social, transitional and inclusionary housing. We have published several resource guides, research reports and pamphlets on these issues. Ndifuna Ukwazi has also been involved in a series of important court cases dealing with land occupations, evictions, the provision of alternative accommodation, and the state's constitutional and legislative obligation to combat spatial apartheid and promote spatial, economic and racial justice and equality through expanding access to affordable housing. It is from this perspective that Ndifuna Ukwazi has considered the proposal to dispose of the Founders Garden site and the proposed development of an "integrated high-rise, residentially-led mixed use development which maximizes the provision of social housing".⁴
3. At the outset, we welcome the Department's commitment to pursue the delivery of social housing⁵ (which the PID states should constitute at least 45% of the residential GLA) through considering the disposal of the strategically located Founders Garden site on the basis that the site be used to advance spatial justice through the delivery of social housing. Ndifuna Ukwazi is strongly in support of measures that ensure greater access to decent, safe and genuinely affordable accommodation for low-income and working-class households throughout the City.
4. The Founders Garden site is exceptionally well-located, in terms of its proximity to public transport hubs, economic opportunities in the Cape Town CBD and various social amenities including hospitals and schools. It is well-located public land such as this site, which Ndifuna Ukwazi would like to see being released for the development of social and affordable housing. In particular, we are encouraged by the Department's insistence that any disposal of the site be subject to the

⁴ Western Cape Government, "Founders Garden Development Project: Information Document" V.0 (30 November 2020), p. 3.

⁵ The first documented clear commitment to develop the Founder's Garden site in the nature now intended that we are aware of was in the "Founders Garden Development Project: Virtual Engagement Document" V.0 (15 June 2020)

delivery of social housing (which according to the PID should constitute at least 45% of the residential GLA of the development), and the Department's decision to retain ownership of the site until such time as the social housing component of the development is completed and handed over to a social housing institution (SHI).

5. However, despite the potentially progressive intentions of the Department's proposed disposal and development project, experience has taught us that a commitment alone will not advance spatial justice, and that this must be coupled with necessary plans, financial commitment and political will. In addition, detailed clarity on the project vision and specific project parameters is essential to advance spatial justice. It is in this vein that Ndifuna Ukwazi's submission touches on a number of concerns that we have with the specifics of the development project including the details of the proposed disposal.
6. Our submission is structured as follows;
 - 6.1. Maximising social housing,
 - 6.2. Maximising deeper down reach,
 - 6.3. Urgency of the social housing delivery,
 - 6.4. Ensuring a socially just and socially integrated development,
 - 6.5. Proposed Land Disposal and Contract Model, and
 - 6.6. Inclusionary housing.

MAXIMISING SOCIAL HOUSING

7. The Department proposes that any disposal of the Founders Garden site be conditional on the delivery of a social housing component, which should constitute 45% of the residential GLA of the development. The PID indicates that this is to ensure that the core objective of the disposal and development project, namely "to develop an integrated high-rise, residentially-led mixed use development *which maximises the provision of social housing*", is realised.⁶
8. While we welcome the Department clearly articulating a minimum percentage of social housing that needs to be delivered in terms of the project and recognise that the intention behind the use of a mixed-use development model is to cross-subsidise the social housing component of the development, we do not believe that the current percentage requirements for social housing (45% of the residential GLA or *only* 33.75% of the total GLA of the development) can fairly be described as "maximising" social housing.

⁶ Western Cape Government, "Founders Garden Development Project: Information Document" V.0 (30 November 2020), p. 3 (emphasis added).

9. We submit that the Department's disposal of this prime public land should be subject to the delivery of an even higher percentage of social housing. This is a strategically important site, which would be very desirable to SHIs and private developers, and therefore should be leveraged to ensure the maximum social housing contribution that could be achieved within the constraints of the site.
10. While we understand that this minimum percentage is based on the current feasibility of the development, existing means and mechanisms that could assist in further subsidising the social housing component and making it feasible to provide a higher proportion of social housing appears to have been insufficiently explored. In order to further maximise the proportion of social housing in the development on the site, we strongly urge the Department to provide for mechanisms that can be used to advance the development objective of maximising the social housing. These mechanisms could include, for example, reducing the provision of parking, or the provision of the land at a nominal amount (discussed in more detail below) to an accredited SHI or to an SHI and developer partnership. These or similar mechanisms must be explored and clearly outlined in the Development Objectives of the project.

MAXIMISING DEEPER DOWN REACH

11. While the PID document states that the developer should either be “an SHI or a private developer together with an SHI for the social housing component”, we are concerned that the document does not clearly outline or designate requirements for the delivery of social housing across various social housing income brands. The Department may have assumed that this would be discussed between the private developer and their SHI partner, however, for purposes of clarity, we recommend that any tender document clearly state that SHI partners should be drawn into the project from the outset and should have final say over the nature of the social housing component, including, but not limited to, the power to ensure the development of social housing units is appropriate for different social housing income bands.
12. The prioritisation of deeper down reach by prioritising at the primary market for social housing and below (households earning up to R7500 a month) or setting clear requirements for the proportion of the social housing component reserved for the beneficiaries within the primary market for social housing, must be included in the Development Objectives of the project to ensure that the successful bidder is compelled to comply with this. This is essential to ensure that the project is targeted at residents who need housing the most. These are residents who are vulnerably housed, facing eviction and displacement or do not yet have decent homes. Maximising deeper down reach will ensure that the project advances the right to housing in the most meaningful way. The mechanisms suggested in the previous section, including, but not limited to, providing the land at a nominal cost or reducing the parking are examples of ways in which this can be achieved.
13. Maximising the amount of social housing must be balanced with maximising the deeper down reach of the social housing to ensure the most equitable outcome.

URGENCY OF THE SOCIAL HOUSING DELIVERY

14. Cape Town is facing an acute housing crisis which is only set to worsen as the economic impact of the COVID-19 pandemic and the resultant lockdown exacerbate inequality. Cape Town has a minimum housing backlog of 365 000.⁷ Compounded with this, in early 2019, the City registered the seventeenth highest year-on-year property inflation in the world at 9.1% (higher than any other city in Africa).⁸ The sheer extent of the housing backlog coupled with the growing lack of affordability of housing in Cape Town, create a crisis of vast proportions. The state at all levels has failed to respond to this pressing need by not delivering a single affordable housing unit within the Cape Town CBD and surrounds since 1994. This context necessitates the greatest urgency in the delivery of this important project, but specifically in the delivery of the social housing component of this project.
15. While the proposal that “[t]he site will only transfer from WCG to the developer upon practical completion of the social housing components and any External Facilities specified in the tender document”⁹ is essential in ensuring the delivery of the envisaged project, it does nothing to ensure the required urgency of delivery.
16. The main challenge to the delivery of proposed affordable and/or social housing projects in well-located areas in Cape Town, such as the 11 sites identified in the City of Cape Town’s *Woodstock, Salt River and Inner City Precinct Affordable Housing Precinct: Affordable Housing Prospectus*,¹⁰ is the glacial pace of implementation and development. We are aware that the Founders Garden site has already been envisaged for development for roughly a decade and intended specifically for mixed-use development including some form of affordable housing for at least the past few years. Yet, at this moment the Department is only at the point of Pre-immovable Asset Disposal Public Participation. This unjustly slow pace can no longer be tolerated in the realisation of this project, or any other well-located affordable housing project.
17. What is required going forward from all actors involved, including the Department and the successful developer and/or SHI, is a focus on swift delivery of the social housing component. This must be done to ensure that the open market components of the project (including residential) are not prioritised by the successful developer at the expense of the social housing delivery times. One necessary means to do this is to amend the Development Objectives. While these objectives currently include an objective that the “Project [is] to be delivered within the shortest period after

⁷ Shamiela Fisher, “City of Cape Town Committed to Tackling Housing Backlog”, Eyewitness News (2019) : <https://ewn.co.za/2019/02/25/city-of-ct-housing-backlog-sits-at-365-000-continues-to-rise-mayor>

⁸ Frank Knight, “Global Residential Cities Index: Q4 2019” (2019), p. 2: <https://content.knightfrank.com/research/1026/documents/en/global-residential-cities-index-q4-2019-7111.pdf>.

⁹ Western Cape Government, “Founders Garden Development Project: Information Document” V.0 (30 November 2020), p.

8

¹⁰ City of Cape Town, “Woodstock, Salt River and Inner City Precinct Affordable Housing Precinct: Affordable Housing Prospectus” (2017)

disposal of the site to the developer”¹¹, this must be amended to include an objective to specifically prioritise the fastest possible delivery of quality social housing. In support of this the Department should explore additional mechanisms to ensure and incentivise the urgent delivery of the social housing component.

ENSURING A SPATIALLY JUST AND SOCIALLY INTEGRATED DEVELOPMENT

18. The PID includes the following Development Objectives related to the quality of the urban environment and the nature of the public and social infrastructure and realm that the project aims to achieve;

“Offer a safe, secure and inspiring precinct where pedestrian movement and public urban spaces are prioritized and where sustainable design, construction and building operations achieve a low carbon impact on the City”

“Include an Early Childhood Development Centre and other appropriate public services and amenities reasonably necessary to support the socio-economic needs and interests of the residential target market”

“Ensure seamless integration with Artscape”

“Provide so far as financially feasible (a) basement parking for the Artscape Theatre Complex to compensate for that forfeited through the development of the South Tower block on Founders Garden, (b) a performance hall on the Artscape site, to potentially accommodate the Zip Zap Circus, and (c) other specified facilities for the benefit of the Artscape site, such as a porte cochère and additional rehearsal space, all of which facilities will be confirmed after final feasibility (together, the ‘External Facilities’);”¹²

19. These largely built environment focused Development Objectives are not sufficient to ensure a truly socially and spatially inclusive development and public realm. Not providing further clarity and direction to ensure a truly integrated environment would undermine the very intention of this project, and may result in social segregation within the development.
20. The Conradie Better Living model has resulted in a development where there is a degree of physical segregation between the various tenure/ housing options across the development. That is, the social housing, FLIPS and open-market housing are contained in separate buildings which will result in people of different class (and de facto race) living in separate blocks although sharing the public space within the development. While the use of this model in the Founder’s Garden development may be a necessary compromise of feasibility to ensure that it is possible to achieve

¹¹ Western Cape Government, “Founders Garden Development Project: Information Document” V.0 (30 November 2020), p. 3

¹² Western Cape Government, “Founders Garden Development Project: Information Document” V.0 (30 November 2020), pp. 3-4.

the project, the Department must first explore how this development could achieve a truly integrated neighbourhood through mixed income and tenure buildings. If this is not possible, and the social housing and open market housing will in fact be developed in separate buildings within the development, the Development Objectives must be amended to maximise integration across the development.

21. In our correspondence with Ms Monique Africa,¹³ we were furnished with the following response when we asked what conditions, principles or mechanisms Western Cape Provincial Government will provide to ensure social integration across the development;

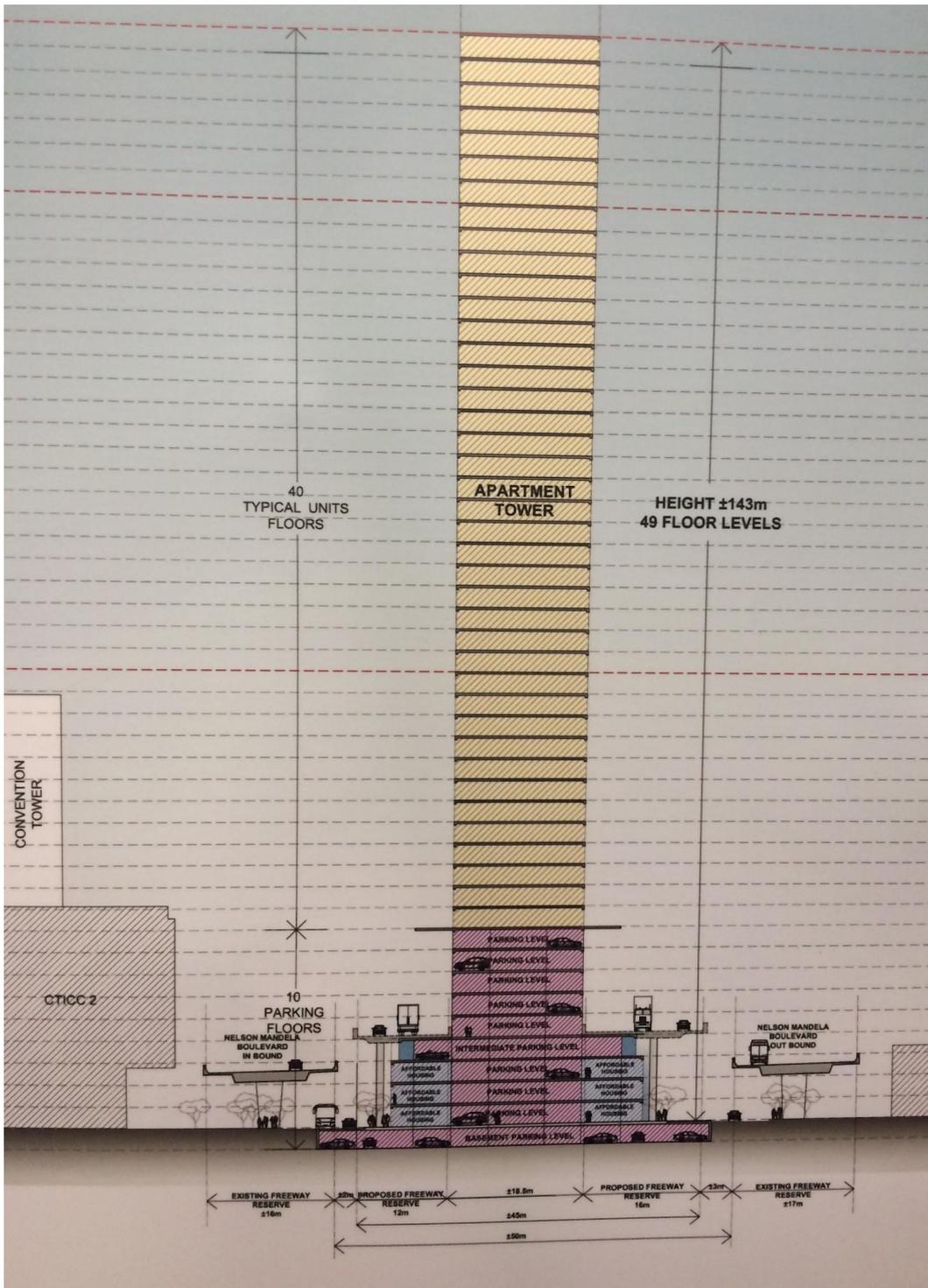
“...It is proposed that while social housing may be accommodated in separate blocks, the entire development is on 2 Ha of land and envisaged to be over 2000 units. The current proposal is that there will be a recreational park, Early Childhood Development Centre (at least one), community hall/meeting space, restaurants, convenience stores, work places, all included in the development and accessible to all residents. In addition the development would be in the central CBD that allows access to a vast range of services and facilities, including the Artscape Theatre right next door, for all residents. On this basis, social integration will happen.”¹⁴

22. Based on the information provided in the PID and the correspondence with Ms Monique Africa, we submit the following amendments to the Development Objectives to promote social integration within the project;
23. Firstly, the Development Objectives must direct the successful developer and/ or SHI to ensure that the treatment of all residential buildings is visually consistent and held to the same level of quality. This is necessary so that, at the least, there is no outward visual way to distinguish between the various housing options, therefore minimising the potential for discrimination towards residents of the social housing buildings. The quality of housing must be consistent across the housing options to ensure equality of access to housing across the development regardless of income, class or race.
24. Secondly, the Development Objectives must go further than outlining what the amenities to be developed as part of the project are, and must ensure that access to all amenities of the development will be inclusive and accessible. The provision of amenities that are not economically or otherwise accessible to all residents of the development will only mean continued social segregation. Only through the provision of amenities and services within the development that are inclusive and affordable to all, can the conditions for social integration be created.

¹³ See paragraph 3 for details of the correspondence

¹⁴ Western Cape Government, “Founders Garden Development Project: Information Document” V.0 (30 November 2020), pp. 3-4.

25. Lastly, the Development Objectives must ensure that the location and physical design of the social housing within the project does not prejudice the social housing tenants. An illustration of how this could happen exists right next door to the Founder's Garden site.
26. In the call for proposals for the Foreshore Freeway Project, the City of Cape Town ("the City") failed to specify essential criteria and details of the 'affordable housing' component, including its location within the project or quality. This resulted in one of the finalist proposals providing a discriminatory design that did not advance spatial justice. In the proposal (pictured below) the affordable housing component of the development (indicated in blue) was relegated not just below the level of the freeway but also literally located within the multi-storey parking lot of the building. Both of these factors would have had serious implications for noise, light and quality of life. By comparison the "typical" market related housing was to be located from floors 9 - 49 of the building with sweeping views of the city, mountain and sea. This does not constitute meaningful and just affordable housing.
27. The physical design of segregation and vastly divergent quality of housing placement within the building essentially results in the conditions of a type of vertical segregation. This would likely exacerbate social differences and tensions between the people in the affordable and open market housing.
28. It is imperative that the state at all levels builds on and improves the delivery of just affordable housing in well-located areas, rather than repeating the mistakes of past projects and other spheres of government. The Department must therefore learn from the mistakes of the City and provide explicit clarity to bidders that ensures an outcome like the design above is not possible within the parameters of the project. The Development Objectives must ensure that the bidders are directed to create a design and layout of the development as a whole that engenders equitable access to housing and the amenities of the development.



One of the finalist proposals for the Foreshore Freeway Project¹⁵

¹⁵ Image taken at public exhibition of the finalist proposals at the Cape Town Civic Centre in 2017

PROPOSED LAND DISPOSAL AND CONTRACT MODEL

29. The PID provides that the Department will dispose of the Founders Garden site through an “open and competitive tender process” in terms of which private developers (along with an SHI) or SHIs “bid at a price to acquire the land” on condition that such developers and/or SHIs “develop the site in accordance with MCG development objectives, rezoning conditions and development rights”.¹⁶ While this process appears, at face value, to be fair, the development objectives, rezoning conditions and developments are structured in such a way as to give undue preference to private developers and limit or prevent SHIs from bidding on a fair and competitive basis. This is due to the fact that the specifications of the development, as well as the requirement that the development take the form of a high-rise, could potentially exclude SHIs given their limited financial resources and dependence on subsidies.
30. When asked about the bidding process, Ms Africa noted that the
- “intention is for any disposal to be based on the highest bidder principle and subject to the GIAMA requirement to achieve best value for money as defined in that Act i.e. the optimization of the return on investment in relation to functional, financial, economic and social return.”¹⁷*
31. However, we assert that the Department is incorrect in equating the “best value for money” principle, as laid out in the Government Immovable Asset Management Act 19 of 2007 (GIAMA), with the highest monetary value offered by a bidder. The definition of “best value of money” in section 1 of GIAMA lists financial and economic returns as only two of the possible values that should be considered and optimised when disposing of public land.¹⁸ These values are listed alongside functional and social returns. The definition does not rank or prioritise one set of returns over another. In this context, we argue that a purposive interpretation of the Act would consider each of these returns are equally important.¹⁹ As a result, we assert that the Department would still be complying with the best value of money principle in terms of GIAMA if it optimised the social value of the development project by accepting a bid that maximises the social housing component of the development (even if the Department did not optimise the financial or economic return through the development).

¹⁶ Western Cape Government, “Founders Garden Development Project: Information Document” V.0 (30 November 2020), pp. 3-4.

¹⁷ Email correspondence with Ms Africa (18 and 19 January 2021).

¹⁸ See section 1 of GIAMA.

¹⁹ In support of this argument, we refer to sections 5(1)(f) and 13(3)(a) of GIAMA, which also place considerable emphasis on the social value of public land and the requirements that surplus assets only be disposed of if such disposal would serve a compelling social need. See also *Adonisi and Others v Minister for Transport and Public Works Western Cape and Others; Minister of Human Settlements and Others v Premier of the Western Cape Province and Others* (7908/2017; 12327/2017) [2020] ZAWCHC 87 (31 August 2020), paras. 302-306.

32. In practical terms, this means that tender documents and Development Objectives should include meaningful mechanisms that level the playing field to allow SHIs to compete on an equal footing with private developers in the bidding process by offering SHIs advantageous terms. This could be done through a variety of ways. Some examples include structuring the tender documents to give preference to the developer / SHIs that provides the largest percentage of social housing, by including provisions that expressly give preference to SHIs, exploring alternative funding sources to allow an SHIs to complete more effectively, or adopting measures used by other government entities to level the playing field such as the City of Cape Town’s policy of offering public land to SHIs at a 10% nominal land value purchase price.
33. We strongly support the inclusion of the condition in the tender documents and development objectives to only transfer ownership of the Founders Garden site on the condition that it deliver the requisite social housing (currently set at 45% of the residential GLA). We believe that this requirement *must* be included in the tender documents and development objectives as it is critical to incentivising the successful developers and/or SHIs and ensuring that the successful developer and/or SHIs act with the requisite urgency.

INCLUSIONARY HOUSING

34. One of the Development Objectives outlined in the PID is;
- “Provide the developer the opportunity to create further developable bulk from the precinct based on the City of Cape Town’s anticipated inclusionary housing policy and spatial development plans for the Foreshore Freeway Precinct and in particular the tall building policy”²⁰*
35. This objective does not provide clarity on how this would work or affect the rest of the development. While we are not against this objective in principle, further clarity must be provided on this and it must only be permitted under the following circumstances;
- 35.1. If the developer complies with the provision of inclusionary housing as per the City of Cape Town’s forthcoming inclusionary housing policy, and
- 35.2. As long as the creation of further developable rights does not delay or compromise the delivery of the social housing component in any way.

ENDS

²⁰ Western Cape Government, “Founders Garden Development Project: Information Document” V.0 (30 November 2020), pp. 3.