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**24 October 2021**

To: Ms Ruby Gelderbloem  
Director: Property Management  
Economic Opportunity and Asset Management Department  
City of Cape Town  
[ruby.gelderbloem@capetown.gov.za](mailto:ruby.gelderbloem@capetown.gov.za)

**For attention:** Ms Gerda Du Plessis  
Section Head: Leasing  
Property Holding Branch  
Economic Opportunity and Asset Management Department  
City of Cape Town  
[susarah.duplessis@capetown.gov.za](mailto:susarah.duplessis@capetown.gov.za)

To whom it may concern,

**RE: NDIFUNA UKWAZI COMMENT ON PROPOSED LEASE OF PORTION OF ERF 477, JANSEN ROAD, MILNERTON TO MILNERTON TENNIS CLUB**

1. Ndifuna Ukwazi is a non-profit activist organisation and law centre that combines research, community organising and litigation in campaigns to advance urban land justice in Cape Town. Our

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Ndifuna Ukwazi is a not-for-profit trust (IT 540 - 2001)(NPO 094 - 737).

Board of Trustees: Shuaib Manjra (Chairperson), Ruth Hall,  
Phumeza Mlungwana, Mercy Brown-Luthango, Michael Evans

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primary mission is to expand and protect access to affordable housing towards building a more just and equal city.

2. On 23 September 2021, the City of Cape Town (“the City”) published a notice in the *Cape Argus* inviting interested parties to comment and/or object to its plans to consider leasing 7 699m<sup>2</sup> of City-owned land, namely a Portion of Erf 477, Jansen Road, Milnerton to the Milnerton Tennis Club for a rental amount determined by the City’s sporting tariff, which is currently R1 145 per annum (inclusive of VAT).<sup>1</sup> According to the notice, the proposed lease period is for 10 years (the notice did not specify what the notice of termination period for the renewed lease might be). The proposed lessee plans on using the site for sporting and recreational purposes.
3. In accordance with the requirements set out in the Municipal Asset Transfer Regulations (“MATR”) enacted in terms of the Municipal Finance Management Act (“MFMA”),<sup>2</sup> the City provided information about the expected benefits, proceeds, gains or losses and provided reasons for the granting of the long-term lease over the property. The City proposes to grant long-term rights over the land in question to the lessee on the basis that the lease will “generate an annual tariff income for the City”, the City will receive a benefit in the form of “receiving revenue” and that “no loss will be incurred” by the City.<sup>3</sup> However, it should be noted that the expected benefits, proceeds and reasons for the City to lease the Milnerton Tennis Club land is repeated *verbatim* to justify the granting of long term rights over two other large City-owned parcels of land in the same notice in the *Cape Argus*.<sup>4</sup>
4. Ndifuna Ukwazi has read and considered the City’s invitation to comment and makes this comment to the City in accordance with the invitation to submit written comments.
5. As will be demonstrated, it is our view that leasing well-located City-owned land at a discounted rate to a private entity instead of using it for transformation and redress, to advance spatial justice through the delivery of affordable housing in line with the City’s constitutional and legislative obligations to

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<sup>1</sup> See “Lease of Portion of Erf 477, Jansen Road, Milnerton to Milnerton Tennis Club”, *Cape Argus* (23 September 2021), p. 13.

<sup>2</sup> See Regulation 37 of the MATR.

<sup>3</sup> “Lease of Portion of Erf 477, Jansen Road, Milnerton to Milnerton Tennis Club”, *Cape Argus* (23 September 2021), p. 13.

<sup>4</sup> See “Lease of Portions of Erven 2315, 2316, 2317, 2316, 2327 and 5282 Kraaifontein, 9th Avenue, Belmont Park, Kraaifontein (Paarl) to Kraaifontein Duiwe Vereniging”, *Cape Argus* (23 September 2021), p. 13; and “Lease of Portion of Erf 455, Durbanville, Off De Villiers Road, Durbanville to Durbanville Rugby Club”, *Cape Argus* (23 September 2021), p. 13

promote spatial transformation is irrational and unreasonable. The City's approach of reflexively renewing long term rights over land for sporting and recreational purposes without first considering whether the public land could be used for the development of social and/or affordable housing is insufficient in the context of a profound housing and segregation crisis faced by the City and the opportunity the parcel of land offers the City to redress social inclusivity in the Table View and Milnerton areas.

6. We also contend that the City's approach of 'copying and pasting' the same expected benefits, proceeds and reasons to justify the granting of long-term leases over public land in three consecutive notices in the same *Cape Argus* shows that the City has not genuinely engaged with the legal requirements for granting a right to use, control and manage the land, and that it has not sufficiently grappled with the reasons for the lease, the expected benefits, proceeds, gains or losses that may result as a result of the granting of these rights.
7. Ndifuna Ukwazi therefore objects to the proposed lease and calls on the City to commit to investigating the feasibility of using the land for the development of social and/or affordable housing; and, if the City determines that the land is not suitable for the development of social or affordable housing, urge it to commit to making other suitable public land in the immediate vicinity available for the development of social or affordable housing.
8. Please see attached our comment to the City's proposed grant of a lease over a Portion of Erf 477, Jansen Road, Milnerton to Milnerton Tennis Club.

Yours faithfully,

**Ndifuna Ukwazi**

**(Per: Michael Clark, Researcher)**

**[Sent electronically]**

## NDIFUNA UKWAZI COMMENT ON PROPOSED LEASE OF A PORTION OF ERF 477, JANSEN ROAD, MILNERTON TO MILNERTON TENNIS CLUB

### A. INTRODUCTION

1. As mentioned in our cover letter, Ndifuna Ukwazi is a non-profit activist organisation and law centre that campaigns to advance urban land justice in Cape Town through research, community 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 five years Ndifuna Ukwazi has been involved in legal, research and community organising work around evictions, relocations, rental housing, the allocation of state-subsidised houses, and the promotion of social, transitional and inclusionary housing. We have 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.
3. In 2019, Ndifuna Ukwazi published a research report, *City Leases: Cape Town's Failure to Redistribute Land*,<sup>5</sup> which shed light on the manner in which the City of Cape Town ("the City") is disposing of many of the strategically important pieces of public land that it owns by leasing this land out for private use often at discounted rents.
4. It is from this perspective that Ndifuna Ukwazi has considered the City of Cape Town's plans to consider leasing 7 699m<sup>2</sup> of City-owned land, namely a Portion of Erf 477, Jansen Road, Milnerton to the Milnerton Tennis Club for a rental amount determined by the City's sporting tariff (currently R1 145 per annum (inclusive of VAT)), for a period of 10 years for sports and recreational purposes.

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<sup>5</sup> See N Budlender, J Sendin and J Rossouw, *City Leases: Cape Town's Failure to Redistribute Land*, Ndifuna Ukwazi Research Report (2019), available at: <https://www.dropbox.com/s/c524q5x89yrtcc/Ndifuna%20Ukwazi%20%28NU%29%20City-Leases-Cape-Towns-Failure-to-Redistribute-Land.pdf?dl=0>.

## B. CAPE TOWN'S APARTHEID SPATIAL LEGACY AND EXCLUSIONARY HOUSING MARKET

5. Some general comments on Cape Town's apartheid spatial legacy and exclusionary housing market, and the need for affordable housing, warrant mentioning.

### *Cape Town's Apartheid Spatial Legacy*

6. The legacy of colonial and apartheid spatial planning continues to dominate Cape Town's geography. Almost 30 years after apartheid, Cape Town remains the most spatially divided city in the country – with residential settlement patterns still segregated along race and class lines.
7. The City continues to be split in two: The majority of Black and Coloured families live in densely populated, peripheral townships and informal settlements where most are trapped in a cycle of poverty; while (predominantly) White people inhabit the well-located residential areas of Cape Town where jobs, transport facilities and social amenities are plentiful.
8. While this spatial inequality has its historical origin in the colonial and apartheid eras,<sup>6</sup> it has been exacerbated since the end of apartheid. Post-apartheid housing policy has prioritised scaling up of state-subsidised housing by developing larger-scale housing projects in peripheral areas where land is usually more affordable. This approach has had the unintended consequence of reproducing spatial inequality and social exclusion by creating poverty traps on the outskirts of the city far from economic opportunities and social amenities.
9. Where you live in the city determines your opportunities in life and the quality of services you receive. Living on the urban periphery makes you poor and keeps you poor. Many of these peripheral areas have limited access to basic services, forcing families to share an insufficient number of temporary outdoor toilets and collect water from communal standpipes. The schools in these areas generally

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<sup>6</sup> During the colonial era until the end of apartheid, various laws were used to systematically dispossess Black and Coloured people of their land. Millions of Black and Coloured people were forcibly removed from the cities and dumped in peripheral areas far away from any existing social and support networks, hospitals, schools, and jobs. See, for example, M Clark, *Pathways out of Poverty: Improving Farmdwellers' Tenure Security and Access to Housing and Services*, Association for Rural Advancement (AFRA) Research Report (2017), pp. 8-10; and S Wilson, J Dugard and M Clark, "Conflict Management in an Era of Urbanisation: Twenty Years of Housing Rights in the South African Constitutional Court", *South African Journal on Human Rights* (2025), 31(3), pp. 472-477.

perform worse, gang violence is rife, substance abuse is more common, and social amenities such as schools, hospitals and clinics are hard to find.

10. Poor and working-class people spend a disproportionate component of their income and time on unreliable transport. In Cape Town, low-income earners spend on average 45% of their earnings on transport compared a global average of 5-10%.<sup>7</sup> This means poor and working-class people spend long hours commuting and contribute to congestion and pollution on the roads.
11. Critically, research shows that there is a direct relationship between where people live in South African cities and the likelihood that they will find employment opportunities.<sup>8</sup> Far-flung townships and informal settlements therefore end up trapping the poor in a cycle of structural poverty.<sup>9</sup>
12. This spatial inequality, inverse densification and urban sprawl costs poor and working-class families more every day and costs the City more in the long term. The present spatial distribution is unsustainable socially, economically and environmentally.

### ***Cape Town's Exclusionary Housing Market***

13. One of the primary drivers of spatial inequality in Cape Town is the City's acute housing affordability crisis – with stubbornly high rents and property prices. The City's failure to regulate land and property markets has meant that it has remained inaccessible to most poor and working-class families.
14. The average property value for a home in Cape Town in 2016 was R1 513 254 (the highest in South Africa), a price that less than 5% of households are able to afford.<sup>10</sup> Internationally, Cape Town was forecast to lead the annual price growth for residential properties for 2021 globally, matched only by

<sup>7</sup> City of Cape Town Transport, *Transport Development Index* (2016).

<sup>8</sup> See, generally, J Budlender and L Royston, *Edged Out: Spatial Mismatch and Spatial Justice in South Africa's Main Urban Areas*, Socio-Economic Rights Institute of South Africa (SERI) Research Report (2016).

<sup>9</sup> See Budlender and Royston, *Edged Out*, p. 2. See also the High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change (High Level Panel), *Report of the High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change* (November 2017), p. 81.

<sup>9</sup> High Level Panel, *Report of the High Level Panel*, p. 81.

<sup>10</sup> Centre for Affordable Housing Finance in Africa (CAHF) *Cape Town' Residential Property Market: Size, Activity and Performance* CAHF Research Report (2018) 45 available at <https://housingfinanceafrica.org/app/uploads/Cape-Town-Residential-Property-Market-FINAL-REPORT-Feb-2018-2.pdf>; and CAHF *Cape Town Housing Market Report* (2020) 3 available at <https://housingfinanceafrica.org/app/uploads/2020/10/Cape-Town-Property-Report-2020.pdf>.

Shanghai,<sup>11</sup> and in 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).<sup>12</sup> The effect of property inflation is even more worrying when broken down by market share as property prices in middle-priced and lower-priced markets continue to increase.<sup>13</sup> Property prices in lower-priced markets, in particular, indicate a year-on-year inflation “in the double digit territory”.<sup>14</sup> In practical terms, this has meant that the number of available affordable housing units in Cape Town has actually *decreased* in recent years.<sup>15</sup>

15. According to 2011 Census Data, 75% of households in Cape Town earn less than R18 000 a month (the figure rises to 92% for black households), and most people cannot afford to pay more than R3000 a month in rent or R281 000 to own.<sup>16</sup> In 2019, Stats SA found that the median income of a South African is R13 546 per year, or just R1 129 per month.<sup>17</sup> This puts rent and homeownership in well-located areas close to economic nodes out of reach for most middle-class South Africans, let alone the poor or working class.
16. The enduring effect of Cape Town’s property bubble, beyond inflation increases in property values, and soaring rents mean that only the very wealthy can afford to live in well-located areas close to economic nodes.
17. As a result, middle class residents and private property developers are increasingly eyeing traditionally working-class neighbourhoods – driving property prices in those areas. The overall effect has been that poor and working-class families are increasingly forced out of well-located areas to the urban periphery as a result of gentrification or large-scale evictions.

### **COVID-19 has exacerbated existing inequalities**

<sup>11</sup> Frank Knight ‘Prime Global Forecast 2021’ (2021) 4 available at <https://content.knightfrank.com/research/379/documents/en/prime-global-forecast-2021-7626.pdf>.

<sup>12</sup> Frank Knight ‘Global Residential Cities Index: Q4 2019’ (2019) 2 available at <https://content.knightfrank.com/research/1026/documents/en/global-residential-cities-index-q4-2019-7111.pdf>.

<sup>13</sup> First National Bank (FNB), “Cape Town Sub-Regional House Prices” (August 2019), p. 1: <https://www.fnb.co.za/downloads/economics/reports/2019/CapeTownSub-RegionalHousePricesAug.pdf>.

<sup>14</sup> FNB, “Cape Town Sub-Regional House Prices” (August 2019), p. 1.

<sup>15</sup> CAHF *Cape Town Residential Property Market* 45.

<sup>16</sup> See Ndifuna Ukwazi, *Inclusionary Housing: Measuring Access to Residential Development by Race and Class* (November 2018).

<sup>17</sup> Statistics South Africa (Stats SA), *Inequality Trends in South Africa: A Multidimensional Diagnostic of Inequality* (2019): <http://www.statssa.gov.za/publications/Report-03-10-19/Report-03-10-192017.pdf>.

18. The economic fall-out as a result of the COVID-19 outbreak has exacerbated existing social challenges including spatial inequality, and increased the need for well-located affordable housing. In many respects, the economic burden of the virus has, and will continue to be, disproportionately borne by the poor and working-class. Data shows that the economic impact of the COVID-19 pandemic, the consequent economic recession and the national lockdown, has led to significantly higher rates of unemployment, diminished incomes and higher rates of hunger.
19. The South African National Income Dynamics Study – Coronavirus Rapid Mobile Survey (NIDS-CRAM), a survey of a representative sample of 7 000 South Africans, found that between February and April 2020, 3 million South Africans lost their jobs, and a further 1.5 million lost their income (through being furloughed).<sup>18</sup> This represents a 18% decline in employment, with the number of employed persons dropping from 17 million in February to only 14 million in April.<sup>19</sup> The study also found that 1-in-3 (33%) income earners in February did not earn an income in April, representing a massive decline in employment and other income generating activities.<sup>20</sup> The vast majority of these job losses were concentrated among already disadvantaged groups, including those in the informal economy, women, the youth and less educated. Women were particularly hard hit, accounting for up to 2 million of the 3 million job losses.<sup>21</sup> Concerningly, none of the people who lost their jobs between February and April were reemployed between May and July and only half of those that were furloughed were reabsorbed into the labour force.<sup>22</sup> This indicates that the losses could be long-lasting and potentially even permanent.<sup>23</sup>
20. This economic devastation has profoundly impacted poor and working-class people's ability to pay for and retain access to housing. A nationwide survey of 80 000 tenants in South Africa, indicates that the pandemic has negatively affected the tenure security of many poor and working-class

<sup>18</sup> See NIDS-CRAM, "Overview and Findings: NIDS-CRAM Synthesis Report Wave 1" (2020), p. 3, which can be found, alongside all the NIDS-CRAM working papers at the NIDS-CRAM website, available: <https://cramsurvey.org>. See also, for a summary of the results, Spaul, "The jobs reckoning is here: 3 million jobs lost".

<sup>19</sup> NIDS-CRAM, "Overview and Findings: NIDS-CRAM Synthesis Report Wave 1", pp. 3-5.

<sup>20</sup> See NIDS-CRAM, "Overview and Findings: NIDS-CRAM Synthesis Report Wave 1", p. 4. The NIDS-CRAM data confirms preliminary data from Statistics South Africa ("StatsSA"). See StatsSA, "Results from Wave 2 Survey on the Impact of the COVID-19 Pandemic on Employment and Income in South Africa" (May 2020), available: <http://www.statssa.gov.za/publications/Report-00-80-03/Report-00-80-03May2020.pdf>.

<sup>21</sup> NIDS-CRAM, "Overview and Findings: NIDS-CRAM Synthesis Report Wave 1", p. 5; Spaul, "The jobs reckoning is here: 3 million jobs lost".

<sup>22</sup> NIDS-CRAM, "Synthesis Report Wave 2" (2020), p. 1, available: <https://cramsurvey.org/wp-content/uploads/2020/09/1.-Spaul-et-al.-NIDS-CRAM-Wave-2-Synthesis-Findings..pdf>.

<sup>23</sup> NIDS-CRAM, "Synthesis Report Wave 2", p. 1.

households.<sup>24</sup> The survey found that 78.8% of tenants' income has been negatively affected by COVID-19 and that this has affected tenants' ability to pay their rent. In fact, only 37% could afford to pay their rent in full and a staggering 22% couldn't pay their rent at all.

21. The economic impact of the COVID-19 pandemic was also unevenly distributed spatially – with people in rural and peri-urban areas (i.e. people living on the outskirts of cities in townships or informal settlements) being disproportionately negatively affected by losses in jobs and income-generating activities.<sup>25</sup> In fact, according to the second wave of the NIDS-CRAM survey people living in peri-urban areas were twice as likely to be unemployed than people living in the suburbs.<sup>26</sup>
22. These findings indicate that the COVID-19 outbreak will have a devastating impact on the right of access to adequate housing to many poor and working-class households and, consequently, heightened the urgent need for well-located social and affordable housing.

### C. PUBLIC LAND HAS THE POTENTIAL TO ADDRESS SPATIAL APARTHEID

23. The City has consistently blamed this spatial injustice on a lack of available well-located land that could be used for affordable housing.<sup>27</sup> The City is not wrong when it says that suitable land is extremely scarce in central or well-located areas – it is expensive to buy and will only become more so in the future. But the City is missing the most obvious solution: It already owns vast tracts of land in well-located areas - according to the City's own policy documents it owns 87 000 pieces of public land<sup>28</sup> - of which a large proportion is unused or under-utilised given its potential.<sup>29</sup>
24. By unlocking and releasing well-located state land for the development of social or affordable housing, the City could alleviate the housing affordability crisis and reverse the City's apartheid

<sup>24</sup> The survey and report were compiled in May 2020 by a residential rental proptech platform - Flow. See Flow, "How COVID-19 has affected South African tenants", *Flow Findings Research Report* (May 2020), available: <https://flow.rent/tenants>.

<sup>25</sup> NIDS-CRAM, "Synthesis Report Wave 2", p. 4. See also I Turok, "Four lessons to learn from the state's management of COVID-hit townships", *Business Day* (4 October 2020), available: <https://www.businesslive.co.za/bd/opinion/2020-10-04-ivan-turok-four-lessons-to-learn-from-states-management-of-covid-hit-townships/>.

<sup>26</sup> NIDS-CRAM, "Synthesis Report Wave 2", p. 4.

<sup>27</sup> See, for example, P Grobbelaar, "Cape Town hurts housing", *Property 24* (6 July 2011).

<sup>28</sup> While not all of this land is not well-located or suited for the development of affordable housing, some of it certain is. City of Cape Town, "Management of Certain of the City of Cape Town's Immovable Property Policy" (26 August 2010), Ref No C54/08/10, cl. 5.2.

<sup>29</sup> See, generally, Ndifuna Ukwazi, *City Leases*, p. 1.

legacy.<sup>30</sup> The City should embrace the ‘social value’ of public land, and adopt a more transparent and socially orientated approach to the portfolio of state assets. This is in line with the recommendations to alleviate poverty and inequality in the context of urban land rights issued by the High Level Panel on the Assessment of Key Legislation and Acceleration of Fundamental Change and the Mandela Initiative.<sup>31</sup>

25. However, despite the potential that this public land holds, the City has continued to lease out a large chunk of the public land it owns to private entities for discounted amounts.<sup>32</sup>

26. A research report published by Ndifuna Ukwazi in 2019 investigated the City’s practice of leasing out public land and delivered some concerning findings.<sup>33</sup> This report highlighted the City’s myopic approach of the value of public land and its failure to prioritise public land for the development of social and/or affordable housing. The failure to use prime public land in this way is a significant missed opportunity.

27. In the research report, Ndifuna Ukwazi urged the City to:

27.1 Establish or delegate a coordinated department responsible for land management with clear powers and responsibilities to proactively manage all its public land to ensure that it meets its broad constitutional and legislative obligations to redistribute land and balance the competing interests of different departments that need access to land;

<sup>30</sup> See Ndifuna Ukwazi, *City Leases*. See also M Clark, “Cape Town’s course of injustice: Subsidising the rich to exclude the poor”, *Daily Maverick* (28 January 2020).

<sup>31</sup> See High Level Panel, *Report of the High Level Panel*; and M Clark and LR Circolia, “Informalisation, Urban Poverty and Spatial Inequality”, Mandela Initiative Brief (2018).

<sup>32</sup> As noted in our cover letter, the City’s current sporting tariff is R1 058 per year. See City of Cape Town, “2029/2020 Budget” (May 2019), Annexure 6 – Tarriffs, Fees and Charges Book, Economic Opportunity and Asset Management – Property Management, p. 6.2: [http://resource.capetown.gov.za/documentcentre/Documents/Financial%20documents/Ann6\\_2019-20\\_Property%20Management.pdf](http://resource.capetown.gov.za/documentcentre/Documents/Financial%20documents/Ann6_2019-20_Property%20Management.pdf). It should also be noted that the City’s Property Management Department has encouraged private organisations to rent public land at these low rates, see City of Cape Town, “Applying to Buy or Lease Municipal Land” (August 2019):

[https://resource.capetown.gov.za/documentcentre/Documents/Procedures.%20guidelines%20and%20regulations/PropertyManagement\\_Applying%20to%20buy%20or%20lease%20land.pdf](https://resource.capetown.gov.za/documentcentre/Documents/Procedures.%20guidelines%20and%20regulations/PropertyManagement_Applying%20to%20buy%20or%20lease%20land.pdf).

<sup>33</sup> See Ndifuna Ukwazi, *City Leases*, pp. 3-5.

27.2 Immediately review its largest and most well-located parcels of public land, proactively rezone them, negotiate the end of leases, and decline to renew leases or dispose of land where land is needed for housing; and

27.3 Tender land, at a nominal amount, to social housing institutions or private companies that can develop the greatest proportion of affordable housing for families earning between R3 500 and R18 000 a month and ensure homes are affordable to rent or buy in perpetuity.

28. With these comments in mind, Ndifuna Ukwazi turns to the constitutional and legislative obligations with which the City is compelled to comply.

#### **D. CONSTITUTIONAL AND LEGISLATIVE IMPERATIVE TO PROMOTE SPATIAL JUSTICE**

29. This section describes the City's obligations under law, with a particular focus on the City's constitutional obligation to address spatial apartheid by promoting the development of well-located social and/or affordable housing.

##### ***The Constitution***

30. The Constitution of the Republic of South Africa, 1996 ("the Constitution") recognises South Africa's history of forced removals and dispossession and places obligations on the state to proactively redress past injustice. This is clearly evident from the preamble of the Constitution, which states that the Constitution was enacted in order to "heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights".

31. Section 25(5) of the Constitution places an obligation on the state to ensure that citizens progressively gain access to land on an equitable basis,<sup>34</sup> and section 26 sets out the state's obligation to progressively realise the right to housing.<sup>35</sup> These obligations cannot be divorced from,

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<sup>34</sup> See section 25(5) of the Constitution, which reads:

"The state must take reasonable legislative and other measures, within available resources, to foster conditions which enable citizens to gain access to land on an equitable basis."

<sup>35</sup> Section 26 of the Constitution reads:

"(1) Everyone has the right to have access to adequate housing.

but rather give context to, the state’s responsibility, at all levels of government, to advance spatial justice.

32. These obligations have recently been affirmed in *Adonisi v Minister for Transport and Public Works: Western Cape; Minister of Human Settlements v Premier of the Western Cape Province (Adonisi)*,<sup>36</sup> where Judge Gamble wrote:

“[I]t is fair to say that the statutory and policy framework which finds its origins in the Constitution and the legislation mandated thereunder, renders it necessary for both the [Western Cape] Province and the City [of Cape Town] to redress the legacy of spatial apartheid as a matter of constitutional injunction. The constitutional and statutory obligations of these tiers of government to provide access to land and housing on a progressive basis, encompass the need to urgently address apartheid’s shameful and divisive legacy of spatial injustice and manifest inequality.”<sup>37</sup>

33. When read together these rights imply that the state has a duty to do more than simply building homes where-ever – the *location of housing delivery becomes a crucial component of the realisation of this right*.<sup>38</sup> It is therefore not sufficient for the City to claim that it has fulfilled its obligations to provide housing by developing housing opportunities on cheap land on the periphery of the City, as this type of housing is likely to replicate the very spatial inequality these constitutional provisions seek to undo.
34. It should be noted that the City acknowledges that it has an obligation to address spatial inequality,<sup>39</sup> and also recognises that it has a duty to utilise well-located state land for this purpose.<sup>40</sup> However,

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(2) The state must take reasonable measures, within available resources, to achieve the progressive realisation of this right.

(3) No-one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.”

<sup>36</sup> *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*, Judgment, Western Cape High Court (31 August 2020), Case Nos 7908/2017 and 12327/2017. The judgment is available at: <https://imp.sh/qIPgThH>.

<sup>37</sup> See *Adonisi*, para 94. See also, generally, the comments of the court in relation to the constitutional obligation to redress spatial apartheid.

<sup>38</sup> United Nations Committee on Economic, Social and Cultural Rights, *General Comment No 4: The Right to Adequate Housing (Art. 11(1) of the Covenant)* (13 December 1991), UN Doc E/1992/23.

<sup>39</sup> See *Adonisi*, paras 442-443, which refer to the affidavit of Cape Town City Manager Lungelo Mbandazayo.

<sup>40</sup> See *Adonisi*, paras 452-457, which refer to the affidavit of Cape Town City Manager Lungelo Mbandazayo.

in spite of this acknowledgement, the City has been hesitant to use its own well-located land to redress spatial apartheid through the development of social and/or affordable housing.

35. The obligation to combat spatial injustice is not just an abstract future promise, it is a constitutional duty that needs to be prioritised with urgency. Section 273 of the Constitution provides that all constitutional obligations must be performed diligently and without delay as failing to do so “not only undermines [the Constitution] but also deprives the bearers of constitutional rights of timeous performance of the obligations owed to them”.<sup>41</sup> For this reason we believe that the City has, and continues to breach, its obligations to redress spatial apartheid every time it makes a decision to dispose of underutilised well-located public land that it owns by way of sale or lease.
36. We believe that the obligations imposed by sections 25(5) and 26 of the Constitution require the City to take positive steps to redress spatial inequality by proactively managing all its public land. This means that the City is required to review its largest and most well-located parcels of leased public land, proactively identify the public land it owns that would be suitable for the development social and/or affordable housing, proactively rezone these parcels of land, negotiate the end of leases, and decline to renew leases where land is needed for the development of social and/or affordable housing.
37. Only by taking these steps, will the City ensure that it meets its broad obligations to redistribute land and balance the competing interests of different departments that need access to land.

### **SPLUMA and LUPA**

38. The Spatial Planning and Land Use Management Act (2013) (“SPLUMA”) is national legislation which aims to advance spatial transformation. It articulates the obligations on the state to advance and support the development of spatially just cities. These obligations are reinforced in the Western Cape Land Use and Planning Act (2014) (“LUPA”).

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<sup>41</sup> See *District Six Committee and Others v Minister of Rural Development & Land Reform and Others* 2019 4 All SA 89 (LCC), p. 15, which goes on to state: “A strong commitment to performing constitutional obligations without delay, diligently and conscientiously contributes not only to the consolidation of democracy and greater respect for the Constitution but also engenders confidence amongst all that the law can and does indeed work and that the imperatives contained in the Constitution are much more than paper promises but promises of substance that can be enforced.”

39. SPLUMA and LUPA set out progressive development principles which must apply to spatial planning, development and land use management when considering any application that impacts on or may impact on the use and development of land at all levels of government, including at the local level. These principles include spatial justice,<sup>42</sup> spatial sustainability<sup>43</sup> and spatial efficiency.<sup>44</sup>

40. As the Western Cape High Court noted in the *Adonisi* case:

“SPLUMA is the very legislation that seeks to advance the breaking down of the barriers of apartheid spatial planning, and both the [Western Cape] Province and the City [of Cape Town] are duty bound to implement it to the best of their abilities. While they may not have done so in the past, they are obliged to do so, both presently and in the future.”<sup>45</sup>

41. Importantly, SPLUMA and LUPA should not only apply to how the state governs how others use land, but also to how it uses its own land. Land use and land management should be guided by the same principles, whether driven by the private or public sector.

42. The overall effect of these provisions is that the City is also required to use its own land to give effect to spatial transformation and should proactively review the land that it owns, and consider how this land could be used to more actively give effect to spatial justice; and social, economic and racial inclusion.

### ***Municipal Finance Management Act***

43. The Local Government: Municipal Finance Management Act (2003) (“MFMA”) is a national piece of legislation that aims to regulate and secure the sound and sustainable management of financial affairs of local government. The MFMA, along with the Municipal Asset Transfer Regulations (“MATR”) enacted in terms thereof, sets out the requirements that municipalities are obliged to follow before disposing of or granting long term rights over immovable property that they own.

<sup>42</sup> See s 7(a)(iii) of SPLUMA and ss 59(1)(a) and (g) of LUPA.

<sup>43</sup> See ss 7(b)(iv)-(vii) of SPLUMA and ss 59(2)(a)(vi)-(vii) and 59(2)(g) of LUPA.

<sup>44</sup> See ss 7(c)(i) and (ii) of SPLUMA and s 59(3)(b) of LUPA.

<sup>45</sup> See *Adonisi*, para 444.

44. Sections 34 and 36 of the Municipal Asset Transfer Regulations (“MATR”) that were enacted to provide for the granting of rights to use, control and manage public land, set out a clear process that a municipality is required to follow before it can grant long term rights over immovable property it owns.
45. In particular, before the municipality can grant long-terms rights over a property, it is required to embark on a public participation process. The public participation process to be followed for property that is valued at over R10 million and leased out for a period over 3 years, is set out in section 35 of the MATR.<sup>46</sup> The process requires a municipality to provide clear reasons for the granting of the long-term rights over the property, as well as the expected benefits, proceeds, gains or losses that may result as a result of the granting of these rights.<sup>47</sup> Failure to follow these prescripts may result in a disposal or granting of long term rights being declared unlawful.
46. It is also important to note that the City has embarked on a longstanding practice of following a similar public participation process in relation to all the property that it grants long term rights over, irrespective of the value of the property. For example, in a notice published in the *Cape Argus* on 16 April 2021, the City advertised the lease of 24m<sup>2</sup> in Camps Bay to Sonnekus Body Corporate which was accompanied by the reasons for the granting of the lease, as well as the benefits, proceeds, gains and losses that may result from the granting of the lease.<sup>48</sup>
47. The MATR requires the City to show that the asset is not “required for the municipality’s own use during the period for which the right is to be granted”.<sup>49</sup> We believe that the proposed lease clearly fails to comply with this requirement as the property is needed for the municipality’s own use during the period, namely for the provision of social and/or affordable housing in a context of dire housing need and an acute housing affordability crisis. Well-located land that is able to be used for the development of social or affordable housing should not be leased out or should only be leased out if such disposal is subject to a condition to develop affordable housing.

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<sup>46</sup> See section 35 of the MATR, read with the Management of Certain of the City of Cape Town’s Immovable Property Policy.

<sup>47</sup> See section 34 of the MART.

<sup>48</sup> See “Portions of Erf 2317 Camps Bay, Argyle Street, Camps Bay to Sonnekus Body Corporate”, *Cape Argus* (16 April 2021), p. 19.

<sup>49</sup> See section 36(a) of the MATR.

***Management of Certain of the City of Cape Town's Immovable Property Policy***

48. The Management of Certain of the City of Cape Town's Immovable Property Policy provides a practical framework for the management of the City's property.
49. According to the Policy, the City's property management must adhere to a number of core management principles. These include the "best and optimal" utilisation of a property; the best interests of the City's local community; the City's own strategic objectives (as reflected in its policies and by-laws); and the use of the City's property "to promote social integration, to redress existing spatial inequalities, to promote economic growth, to build strong, integrated and dignified communities and to provide access to residential opportunities, services, amenities, transport and opportunities for employment".<sup>50</sup>
50. According to the Immovable Property Policy, property management must therefore give due regard to the City's own strategic objectives and prioritise spatial transformation.

**E. COMMENT ON THE POSPOSED LEASE OF A PORTION OF ERF 477, JANSEN ROAD, MILNERTON TO THE MILNERTON TENNIS CLUB**

51. The City is considering the lease of 7 699m<sup>2</sup> of City-owned land, namely a Portion of Erf 477, Jansen Road, Milnerton to the Milnerton Tennis Club to be used for sporting and recreational purposes for a rental amount determined by the City's sporting tariff (currently R1 145 per annum (inclusive of VAT)), for a period of 10 years.
52. The land that the City proposes to lease out as a club house is well-located. The area within which the site is located is close to various primary schools and high schools, recreational and social facilities (this includes the Intercare Day Hospital Century City). The site is also in close proximity to Century City and industrial areas, which offer potential employment opportunities to a large number of people. It is also a sought-after area as a result of the public transport linkages between Cape

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<sup>50</sup> See s 6 of Management of Certain of the City of Cape Town's Immovable Property Policy.

Town CBD and Table View, due to the considerable My Citi Bus infrastructure in Milnerton and Table View.

53. The land is also in close proximity to a variety of other sports grounds, including the Tygerhof Sports Grounds, and the sports facilities at De Grendel Spesiale Skool and Milnerton High School. Given the proximity of so many sports facilities, we would have expected the City to investigate whether some of the sports facilities could be amalgamated to release public land for the purposes of developing well-located social and/or affordable housing.
54. Various political and local government officials in the City have, over the years, called for nationally-owned parcels of land in the immediate vicinity of the Milnerton Tennis Club site, namely the Ysterplaat and Wingsfield military bases and Acacia Park, to be released for the development of social and/or affordable housing. The Milnerton Tennis Club site therefore offers the City with a prime opportunity to encourage the national government to release land for the development of affordable housing by releasing its *own* land in the same area for the development of affordable housing.

***Potentially irrational and unreasonable lease of strategically located asset***

55. In accordance with the requirements set out in the Municipal Asset Transfer Regulations (“MATR”) enacted in terms of the Municipal Finance Management Act (“MFMA”),<sup>51</sup> the City provided information about the expected benefits, proceeds, gains or losses and provided reasons for the granting of the long-term lease over the property.
56. The City proposes to grant long-term rights over the land in question to the lessee on the basis that the lease with “generate an annual tariff income for the City”, the City will receive a benefit in the form of “receiving revenue” and that “no loss will be incurred” by the City.<sup>52</sup> However, it should be noted that the expected benefits, proceeds and reasons for the City to lease the Milnerton Tennis

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<sup>51</sup> See Regulation 37 of the MATR.

<sup>52</sup> “Lease of Portion of Erf 477, Jansen Road, Milnerton to Milnerton Tennis Club”, *Cape Argus* (23 September 2021), p. 13.

Club land is repeated *verbatim* to justify the granting of long term rights over two other large City-owned parcels of land in the same notice in the *Cape Argus*.<sup>53</sup>

57. We contend that the City's approach of 'copying and pasting' the same expected benefits, proceeds and reasons to justify the granting of long-term leases over public land in three consecutive notices in the same *Cape Argus* shows that the City has not genuinely engaged with the legal requirements for granting a right to use, control and manage the land, and that it has not sufficiently grappled with the reasons for the lease, the expected benefits, proceeds, gains or losses that may result as a result of the granting of these rights.
58. We are also concerned that the City has not provided any evidence in support of its assumption that the use of the land for sporting and recreational facilities is a more productive or desirable use of the land. We contend that the City's constitutional and legislative obligations hold the City to a higher standard. The City is required to demonstrate, with reference to objective supporting documentation, why it believes that the land should be used for sporting and recreational facilities rather than the development of social or affordable housing. It is not clear from the notice published in the *Cape Argus* that the need for sporting and recreational facilities outweighs the urgent need for affordable housing, spatial transformation, social inclusivity and desegregation. The City has not provided any statistics on the housing needs and/or housing market in the Milnerton and Table View areas to support its claim that the land's use as a sporting and recreational facility supersedes its use as social and/or affordable housing.
59. The City's constitutional and legislative obligations require a municipality to take an active, enquiring approach to public land management by questioning whether well-located public land could be used in a way that would give effect to its developmental duties and, particularly, whether the asset would be "required for the municipality's own use during the period for which the right is to be granted".<sup>54</sup> We contend that the City has not appropriately applied this test, because if it had, it would have provided a more detailed and evidence-based justification for why it deemed the land to be more

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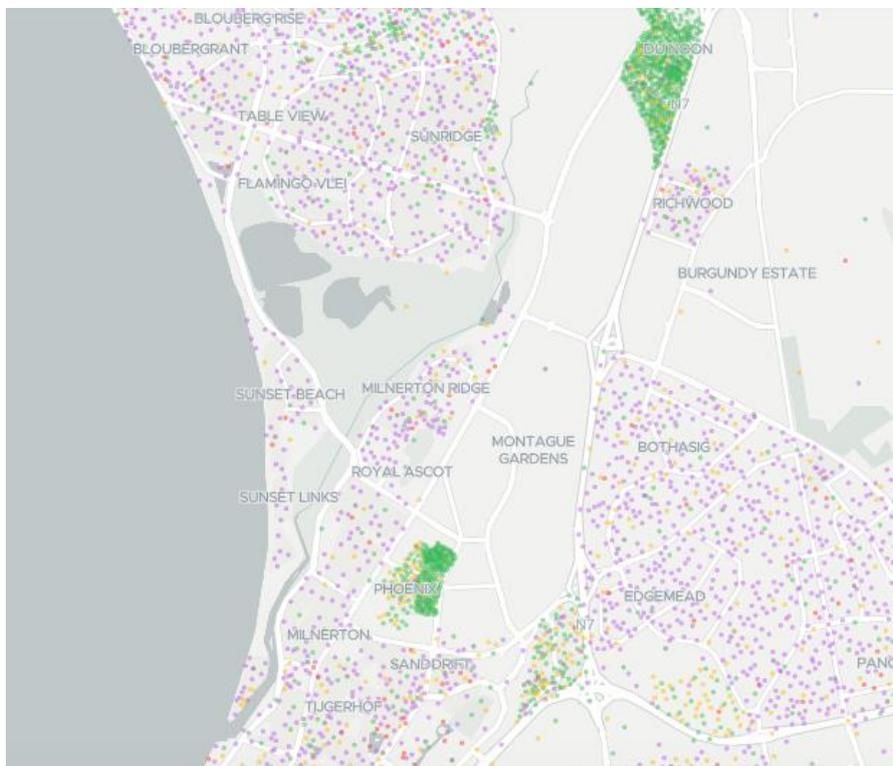
<sup>53</sup> See "Lease of Portions of Erven 2315, 2316, 2317, 2316, 2327 and 5282 Kraaifontein, 9th Avenue, Belmont Park, Kraaifontein (Paarl) to Kraaifontein Duiwe Vereniging", *Cape Argus* (23 September 2021), p. 13; and "Lease of Portion of Erf 455, Durbanville, Off De Villiers Road, Durbanville to Durbanville Rugby Club", *Cape Argus* (23 September 2021), p. 13

<sup>54</sup> See section 36 of the MATR.

suitable for sporting and recreational purposes rather than the using it for the development of social and/or affordable housing as is required by it legislative obligations and public commitments.

**Promoting social inclusivity**

60. The land that the City proposes to lease for the use of the Milnerton Tennis Club is located in an area that is still largely segregated. Most of the suburbs in the area are predominantly White, while suburbs of Phoenix and De Noon are predominantly occupied by Black households. Another key difference is that two suburbs predominantly occupied by Black households is more densely populated – highlighting the inverse densification that characterises the rest of Cape Town.



*Adrian Firth's Race Dot Map spatialises 2011 Census data and clearly depicts the segregation in the Milnerton and Table View areas. Each dot represents approximately 25 people. Green represents Black households, Orange represents Coloured households and Purple represents White households.*

61. By developing social and/or affordable housing at the site, the land could also offer a vital opportunity to promote social and economic inclusivity between communities that have historically been segregated as a result of race and/or class. If the City were to pursue a social and/or affordable

housing development on this public land it could encourage and promote spatial transformation in a meaningful way.

62. Ndifuna Ukwazi strongly urges the City to use the public land as a “seam rather than a barrier”.<sup>55</sup> Through using the site for affordable housing, this land can begin to advance reform by pulling together communities rather than keeping them apart.

***The City is obliged to take positive steps to promote spatial transformation***

63. It is not enough for the City to automatically renew the granting of long-term rights over public land for the sporting and recreational purposes without first investigating whether the site might be suitable for the development of social and/or affordable housing. The City needs to provide clear evidence to support its proposed renewal of leases over municipal land.
64. The City has a constitutional and legislative obligation to combat spatial inequality, and is therefore required to proactively investigate whether well-located land it owns is suitable for the development of social or affordable housing (in particular, the City should commit to conducting assessments to determine whether the development of social and affordable housing is feasible in relation to *all* well-located land that it owns).
65. If such an assessment indicates that a parcel of land is not suitable for the development of social or affordable housing, the City is required to take positive steps to proactively identify public land in well-located areas that *is* suitable for the development of social and affordable housing; and make that land available for such development.
66. Without a firm commitment from the City to making alternative public land available for the development of social or affordable housing, the City’s insistence that individual sites are unsuitable for housing development are, at best, a dereliction of duty and, at worse, an intentional diversion

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<sup>55</sup> See K Lynch, *The Image of the City* (1960). See also Jacobs, *The Death and Life of Great American Cities*, p. 267

tactic “to postpone the conversation to get these leases out the door and then they can’t be challenged for another 10 years”.<sup>56</sup>

67. Ndifuna Ukwazi therefore submits that the City’s constitutional and legislative mandate to promote spatial transformation means that the City should commit to conducting a feasibility study to determine whether social and/or affordable housing can be developed on the site. If the City determines that the Portion of Erf 477 is not suitable for the development of social or affordable housing after producing concrete evidence to support its decision, then it must commit to making other suitable public land in the immediate vicinity available for the development of social or affordable housing.

## G. CONCLUSION

68. For the reasons outlined above, Ndifuna Ukwazi calls on the City to commit to investigating the feasibility of using the site for the development of social and/or affordable housing; and, if the City determines that the site is not suitable for the development of social or affordable housing, urge it to commit to making other suitable public land in the immediate vicinity available for the development of social or affordable housing.
69. We also urge the City to consider our research report documenting the City’s practice of leasing public land and implement the recommendations outlined therein immediately.

Yours faithfully,

**Ndifuna Ukwazi**

**Per: Michael Clark, Researcher**

**[Sent electronically]**

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<sup>56</sup> See P Luckhoff, “City’s arguments for leasing prime Rondebosch land to golf club are ‘pathetic’”, *Cape Talk* (23 January 2020), available: <http://www.capetalk.co.za/articles/372823/city-s-arguments-for-leasing-prime-rondebosch-land-to-golf-club-are-pathetic>.