



c/o: Michael Clark, Researcher
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21 February 2022

To: Ms Ruby Gelderbloem
Director: Property Management
Economic Opportunity & Asset Management Department
City of Cape Town
ruby.gelderbloem@capetown.gov.za

For attention: Ms Nompumelelo Faku
Professional Officer: Property Management
Economic Opportunity & Asset Management Department
City of Cape Town
nompumelelo.faku@capetown.gov.za

To whom it may concern,

RE: NDIFUNA UKWAZI OBJECTION TO THE LEASE RENEWAL OF ERVEN 1366 AND 1370, HOFMEYR STREET, ORANJEZICHT (WATERHOF BIRD SANCTUARY) TO CAPE WATERS (PTY) LTD

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 primary mission is to expand and protect access to affordable housing towards building a more just and equal city.
2. On 21 January 2022, 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 renew the lease of approximately 5 164m² of public land, namely Erven 1366 and 1370, Hofmeyr Street, Oranjezicht, Cape Town to Cape Waters (Pty) Ltd, the current lessee, at a tariff rental of R3 900 per annum (including VAT).¹ According to the notice, the proposed lease period is for 10 years, with an option to renew for another 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 gardening purposes, although the notice also makes reference to a "bird sanctuary/nature reserve".

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

Board of trustees:
Shuaib Manjra (Chair)
Mercy Brown-Luthango
Michael Evans
Ruth Hall
Phumeza Mlungwana
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¹ "Lease of Waterhof Bird Sanctuary, Erven 1366 and 1370 Oranjezicht, Hofmeyr Street to Cape Waters (Pty) Ltd and their successors in title for gardening (bird sanctuary / nature reserve) purposes", *Cape Argus* (21 January 2022).



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”),² 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 public land is “not required for the provision of the minimum level of basic municipal services”, the City will receive a benefit as the site is “underutilized”, “surplus”, that “no demand exists” for the land and that the lease would “relieve the council of a maintenance burden” and that “no loss will be incurred” by the City.³
4. On 21 February 2022, Ndifuna Ukwazi requested additional information on the lease per telephone call from Ms Nompumelelo Faku, a Professional Officer in the City’s Property Holding Branch, and Ms Jenny Booth, a professional assisting the proposed lessee to renew the lease. In particular, we requested information about the reasons for the granting of the long-term right over the property, as well as information about the expected benefits, proceeds, gains or losses that are likely to be incurred as a result of the lease. Ms Jenny Booth confirmed that the piece of land is ordinarily not open to the public (in certain circumstances, concessions may be made for the public to access the space), but is currently being used exclusively by one of the adjacent property owners. This raises questions about whether this public land is being used for a public purpose.
5. Ndifuna Ukwazi has read and considered the City’s invitation to comment and makes this submission to the City in accordance with the invitation to submit written comments.
6. As will be demonstrated, it is our view that leasing well-located City-owned land at a discounted rate to a private entity for its exclusive use 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 promote spatial transformation is irrational and unreasonable. The City’s approach of reflexively renewing long-term rights over land for gardening 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 central Cape Town.
7. We also contend that the vague benefits, proceeds and reasons outlined by the City to justify the granting of long-term leases over public land in its notice 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.

² See Regulation 37 of the MATR.

³ “Lease of Waterhof Bird Sanctuary, Erven 1366 and 1370 Oranjezicht, Hofmeyr Street to Cape Waters (Pty) Ltd and their successors in title for gardening (bird sanctuary / nature reserve) purposes”, *Cape Argus* (21 January 2022).

8. 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 the City to commit to making other suitable public land in the immediate vicinity (such as the City land on which Gardens Bowling Club is situated) available for the development of social or affordable housing.
9. Please see attached our objection to the City's proposed lease of the Erven 1366 and 1370, Hofmeyr Street, Oranjezicht, Cape Town to Cape Waters (Pty) Ltd.

Yours faithfully,
Ndifuna Ukwazi
(Per: Michael Clark, Researcher)

[Sent electronically]

NDIFUNA UKWAZI OBJECTION TO THE LEASE RENEWAL OF ERVEN 1366 AND 1370, HOFMEYR STREET, ORANJEZICHT TO CAPE WATERS (PTY) LTD

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 seven 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 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*,⁴ 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 proposed lease of the Erven 1366 and 1370, Hofmeyr Street, Oranjezicht, Cape Town to Cape Waters (Pty) Ltd (and its successors in title) and objects to the conclusion of the lease on the basis set out in this submission.

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. Twenty-seven 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. The City continues to be split in two: The majority of Black and Coloured families live in

⁴ 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>.

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.

7. While this spatial inequality has its historical origin in the colonial and apartheid eras,⁵ the provision of state-subsidised housing has also done little to redress Cape Town's entrenched spatial apartheid, with housing delivery failing to keep pace with the considerable backlog. In 2019, the Western Cape provincial housing backlog stood at over 600 000 families, of which 365 000 are in the City of Cape Town alone.⁶ And these figures only refer to the families that qualify for fully state-subsidised homes, approximately 75% of the population of Cape Town qualify for some form of housing assistance.⁷ The overwhelming scale of the need means that the City itself believes that it will be over 70 years before it can eradicate the housing backlog.⁸
8. In fact, spatial inequality has been exacerbated since the end of apartheid.⁹ 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 matters – it 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 perform worse, gang violence is rife, substance abuse is more common, and social amenities such as schools, hospitals and clinics are hard to find. 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

⁵ 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.

⁶ See Q Qukulu, "About 600,000 Cape residents on housing waiting list, says Human Settlements MEC", *Cape Talk* (11 July 2020); and S Fischer, "City of CT committed to tackling backlog", *Eye Witness News* (September 2018).

⁷ See Ndifuna Ukwazi, *Inclusionary Housing: Measuring Access to Residential Development by Race and Class* (November 2018).

⁸ See City of Cape Town, "Municipal Spatial Development Framework" (25 April 2018), p. 220.

⁹ Professor Sue Parnell, a professor in the Environmental and Geographical Sciences Department at the University of Cape Town, recently provided expert evidence in the Western Cape High Court stating that central Cape Town "remains vastly less densified and diverse than it was fifty years ago". See *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, para 35. The judgment is available at: <https://jmp.sh/qIPgThH>.

on transport compared a global average of 5-10%.¹⁰ This means poor and working-class people spend long hours commuting and contribute to congestion and pollution on the roads.

10. 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.¹¹ Far-flung townships and informal settlements therefore end up trapping the poor in a cycle of structural poverty.¹²
11. 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 in the context of the COVID-19 Pandemic

12. 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 – even after the economic fallout from the COVID-19 pandemic.
13. The average sale price for a home in Cape Town in 2018 was R1 513 254 (the highest in South Africa), a price that less than five per cent of households in the City are able to afford.¹³ The Cape Town housing and property market has the largest share of luxury properties (41% of all residential properties are valued at over R1 200 000).¹⁴ 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).¹⁵
14. According to figures based on the 2011 Census Data (that have been adjusted for inflation), 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.¹⁶ In 2019, Stats SA found that the median income of a South African is R13 546 per

¹⁰ City of Cape Town Transport, *Transport Development Index* (2016).

¹¹ 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).

¹² 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.

High Level Panel, *Report of the High Level Panel*, p. 81.

¹³ Centre for Affordable Housing Finance in Africa (CAHF), *Cape Town's Residential Property Market: Size, Activity and Performance* CAHF Research Report (2019), p. 1; and CAHF, *Cape Town's Residential Property Market: Size, Activity and Performance* CAHF Research Report (2018), p. 45 available at <https://housingfinanceafrica.org/app/uploads/Cape-Town-Residential-Property-Market-FINAL-REPORT-Feb-2018-2.pdf>.

¹⁴ CAHF, *Cape Town Housing Market Report*, p. 1.

¹⁵ 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>.

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

annum, or just R1 129 per month.¹⁷ This put 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.

15. The economic fall-out as a result of the COVID-19 outbreak has, however, exacerbated existing social challenges including spatial inequality, and perpetuated the affordable housing crisis. In many respects, the economic burden of the virus has, and will continue to be, disproportionately borne by the poor and working-class. According to Stats SA, 2.2 million people lost their jobs in the early months of the pandemic¹⁸ – most of which were concentrated among already disadvantaged groups.¹⁹ Many of these losses have remained permanent with 1.38 million people who lost their jobs still not having been reabsorbed into the economy.²⁰ South Africa has reached a record high unemployment rate at 46.6% (according to the expanded definition) – meaning that almost half of the working age population of South Africa is without employment.²¹ The staggering levels of inequality are undeniably unsustainable, as was clear from the social unrest that shook large parts of the country last year.
16. The economic devastation wrought by the COVID-19 pandemic has had a profound impact on poor and working class people's ability to pay for and access housing.²² Many were driven into homelessness or were forced to occupy vacant or unused land when paying their rent became impossible.
17. And while the majority of poor and working class families' ability to pay for decent housing has been deeply affected by the COVID-19 pandemic, Cape Town's property and rental market has managed to rebound dramatically.²³ The enduring effect of Cape Town's property market, which continues to be categorised by increases in property values in the lower-income market,²⁴ and rents that have increased above pre-pandemic levels,²⁵ mean that only the wealthy can afford to live in well-located areas close to economic nodes.
18. 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.

¹⁷ Stats SA, "Inequality Trends Report" (2019).

¹⁸ Stats SA, "Quarterly Labour Force Survey: 2nd Quarter 2020" (September 2020), available <http://www.statssa.gov.za/?p=13633>.

¹⁹ 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, Spaull, "The jobs reckoning is here: 3 million jobs lost".

²⁰ Stats SA, "Quarterly Labour Force Survey: 2nd Quarter 2020".

²¹ Stats SA, "Quarterly Labour Force Survey: 3rd Quarter 2021" (2021), available at: <http://www.statssa.gov.za/?p=14957>.

²² PayProp, "Rental Index: Quarterly South African Residential Market Data – Q2 2021" (2021), available at: https://dl.airtable.com/attachments/5c4bd3009bed422cbe12c1cf5c1e8fa0/812f391a/PayProp-RentalIndex_2021_Q2.pdf.

²³ First National Bank (FNB), "Property Barometer" (February 2022), available at: <https://www.fnb.co.za/downloads/economics/reports/2022/propertyBarometerFeb.pdf>.

²⁴ FNB, "Property Barometer" (February 2022).

²⁵ FNB, "Property Barometer" (February 2022).

19. 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.²⁶ 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.²⁷
20. The COVID-19 outbreak has therefore had 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

21. The City has consistently blamed this spatial injustice on a lack of available well-located land that could be used for social and/or affordable housing.²⁸ 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, of which a large proportion is unused or under-utilised given its potential.²⁹
22. 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 legacy.³⁰ 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.³¹

²⁶ NIDS-CRAM, "Synthesis Report Wave 2" (2020), p. 4, available: <https://cramsurvey.org/wp-content/uploads/2020/09/1.-Spaull-et-al.-NIDS-CRAM-Wave-2-Synthesis-Findings.pdf>. 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/>.

²⁷ NIDS-CRAM, "Synthesis Report Wave 2", p. 4.

²⁸ See, for example, P Grobbelaar, "Cape Town hurts housing", *Property 24* (6 July 2011).

²⁹ According to the City's own policies it owns 87 000 pieces of land, and while not all of that land is not well-located or suited for the development of affordable housing, much of that land will be well-located and suited for housing development. See 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. See also, generally, Ndifuna Ukwazi, *City Leases*, p. 1.

³⁰ 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).

³¹ 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).

23. However, despite the potential that this public land holds, the City has continued to dispose of a large chunk of the public land it owns by selling or leasing this land to private entities (often without including a condition for social and/or affordable housing to be developed).
24. A research report published by Ndifuna Ukwazi in 2019 investigated the City's practice of leasing out public land and delivered some concerning findings.³² 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.
25. 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;
 - 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.
26. 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

27. 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

28. 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,

³² See Ndifuna Ukwazi, *City Leases*, pp. 3-5.

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”.

29. 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,³³ and section 26 sets out the state’s obligation to progressively realise the right to housing.³⁴ These obligations cannot be divorced from, but rather give context to, the state’s responsibility, at all levels of government, to advance spatial justice.

30. These obligations have recently been affirmed in the *Adonisi* case, 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.”³⁵

31. 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.³⁶ 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.

32. It should be noted that the City acknowledges that it has an obligation to address spatial inequality,³⁷ and also recognises that it has a duty to utilise well-located state land for this purpose.³⁸ However, 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.

³³ 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.”

³⁴ Section 26 of the Constitution reads:

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

(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.”

³⁵ See *Adonisi*, para 94. See also, generally, the comments of the court in relation to the constitutional obligation to redress spatial apartheid.

³⁶ 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.

³⁷ See *Adonisi*, paras 442-443, which refer to the affidavit of Cape Town City Manager Lungelo Mbandazayo.

³⁸ See *Adonisi*, paras 452-457, which refer to the affidavit of Cape Town City Manager Lungelo Mbandazayo.

33. 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”.³⁹ 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.
34. 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.
35. 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

36. 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”).
37. 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,⁴⁰ spatial sustainability⁴¹ and spatial efficiency.⁴²
38. As the Western Cape High Court noted in the *Adonisi* case:

³⁹ 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.”

⁴⁰ See s 7(a)(iii) of SPLUMA and ss 59(1)(a) and (g) of LUPA.

⁴¹ See ss 7(b)(iv)-(vii) of SPLUMA and ss 59(2)(a)(vi)-(vii) and 59(2)(g) of LUPA.

⁴² See ss 7(c)(i) and (ii) of SPLUMA and s 59(3)(b) of LUPA.

"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."⁴³

39. 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.
40. 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

41. 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.
42. 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.
43. In particular, before the municipality can grant long-term 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.⁴⁴ 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.⁴⁵ Failure to follow these prescripts may result in a disposal or granting of long term rights being declared unlawful.
44. 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.

⁴³ See *Adonisi*, para 444.

⁴⁴ See section 35 of the MATR, read with the Management of Certain of the City of Cape Town's Immovable Property Policy.

⁴⁵ See section 34 of the MART.

45. 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”.⁴⁶ 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.

Management of Certain of the City of Cape Town’s Immovable Property Policy

46. 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.

47. 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”.⁴⁷

48. 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. OBJECTION TO THE LEASE RENEWAL OF ERVEN 1366 AND 1370, HOFMEYR STREET< ORANJEZICHT, CAPE TOWN TO CAPE WATERS (PTY) LTD

49. The City is considering the renewal of the lease of approximately 5 164m² of public land, namely Erven 1366 and 1370, Hofmeyr Street, Oranjezicht, Cape Town to Cape Waters (Pty) Ltd, the current lessee, at a tariff rental of R3 900 per annum (including VAT). According to the notice, the lease will be for a period of 10 years (the notice did not specify what the notice of termination period for the renewed lease might be).

50. The piece of land that is subject to the proposed lease is exceptionally well-located. It is situated in Cape Town’s commercial, retail and leisure heartland where work opportunities in many different sectors abound. The site is very close to various primary schools and high schools,⁴⁸ social facilities (including a host of libraries, museums and galleries), various hospitals (including the Gardens Medi-Clinic and Booth Memorial Hospital), relatively close to the Cape Town

⁴⁶ See section 36(a) of the MATR.

⁴⁷ See s 6 of Management of Certain of the City of Cape Town’s Immovable Property Policy.

⁴⁸ Cape Town High School, Garden’s Commercial High School, Good Hope Seminary School, Vista High School, Jan van Riebeeck High School, St Mary’s Primary School and Jan van Riebeeck Primiere Skool are all within walking distance of the site.

Central Police Station, close to the University of Cape Town's Hiddingh Campus, and close to various publicly accessible green spaces.

51. The piece of land is also part of a much larger piece of City-owned land, all of which could provide a unique opportunity to develop affordable or social housing in central Cape Town.
52. The site is located within a few hundred metres of the Cape Town Urban Development Zone, an area within which the City has sought to encourage private-sector led development alongside public sector-led transport facilities, and is on the edge of metropolitan node in terms of the Table Bay District Plan. The site is also located within an area that enjoys bus and taxi public transit, particularly close to various bus and taxi routes. Densifying in the Cape Town Urban Development Zone is a critical element to the City's transit oriented development plans and would take advantage of the already established public transit backbone and significant economic activity in the CBD.
53. The prime location of the site, as well as the fact that it remains largely undeveloped (as it currently has very few permanent structures), means that it is ideal for the development of social housing. Ndifuna Ukwazi therefore objects to the proposed lease of the site to Erven 1366 and 1370, Hofmeyr Street, Oranjezicht, Cape Town for the reasons elaborated on below.

Aligning the City's practice with its legislative obligations and political commitments

54. The City of Cape Town's current housing policy is largely dictated by its policy of Transport Orientated Development ("TOD") in terms of which the City is committed to developing social and affordable housing along various transport nodes and in close proximity to economic nodes. This approach recognises that the location of housing is important. It is in terms of this approach that the City in 2017 committed to releasing 11 sites in Woodstock, Salt River and the inner-city for development of affordable housing. In the last four years, only one of these sites, the Pickwick transitional housing project which houses a dozen occupants on a temporary basis, has been completed. This shows that much more needs to be done to address the housing and segregation crisis outlined above.
55. A key component of the City's prioritisation of TOD is the recognition in policy and through public commitments that its plans for TOD must be reflected in the way that it manages its own assets.
56. As mentioned above, the site that the City proposes leasing is located within the Cape Town Urban Development Zone, an area specifically earmarked by the City for transit orientated development. As such, it would make little sense to lease the land in question to a private entity when it could instead be used to further the City's stated priority of social transformation and social integration. To lease this land to the Cape Waters (Pty) Ltd would run contrary to the City's plans, policies and publicly stated commitment to spatial transformation.

57. The site therefore offers the City a perfect opportunity to marry its practice with its legislative obligations and political commitments by using this well-located public land for the development of social housing.

Irrational and unreasonable lease of strategically located asset

58. In accordance with the requirements set out in the Municipal Asset Transfer Regulations (“MATR”) enacted in terms of the Municipal Finance Management Act (“MFMA”),⁴⁹ 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.

59. The City proposes to grant long-term rights over the land in question to the lessee on the basis that the public land was “not required for the provision of the minimum level of basic services”, the City site is “underutilised”, “surplus” and that “no demand exists” for the land, that leasing the site would “relieve the council of a maintenance burden” and that “no loss will be incurred” by the City.

60. We assert that the City has not provided any evidence in support of its assumption that the use of the land for gardening 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 gardening purposes 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 gardening purposes 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 Cape Town City Centre area to support its claim that the land’s use as a sporting and recreational facility supersedes its use as social and/or affordable housing.

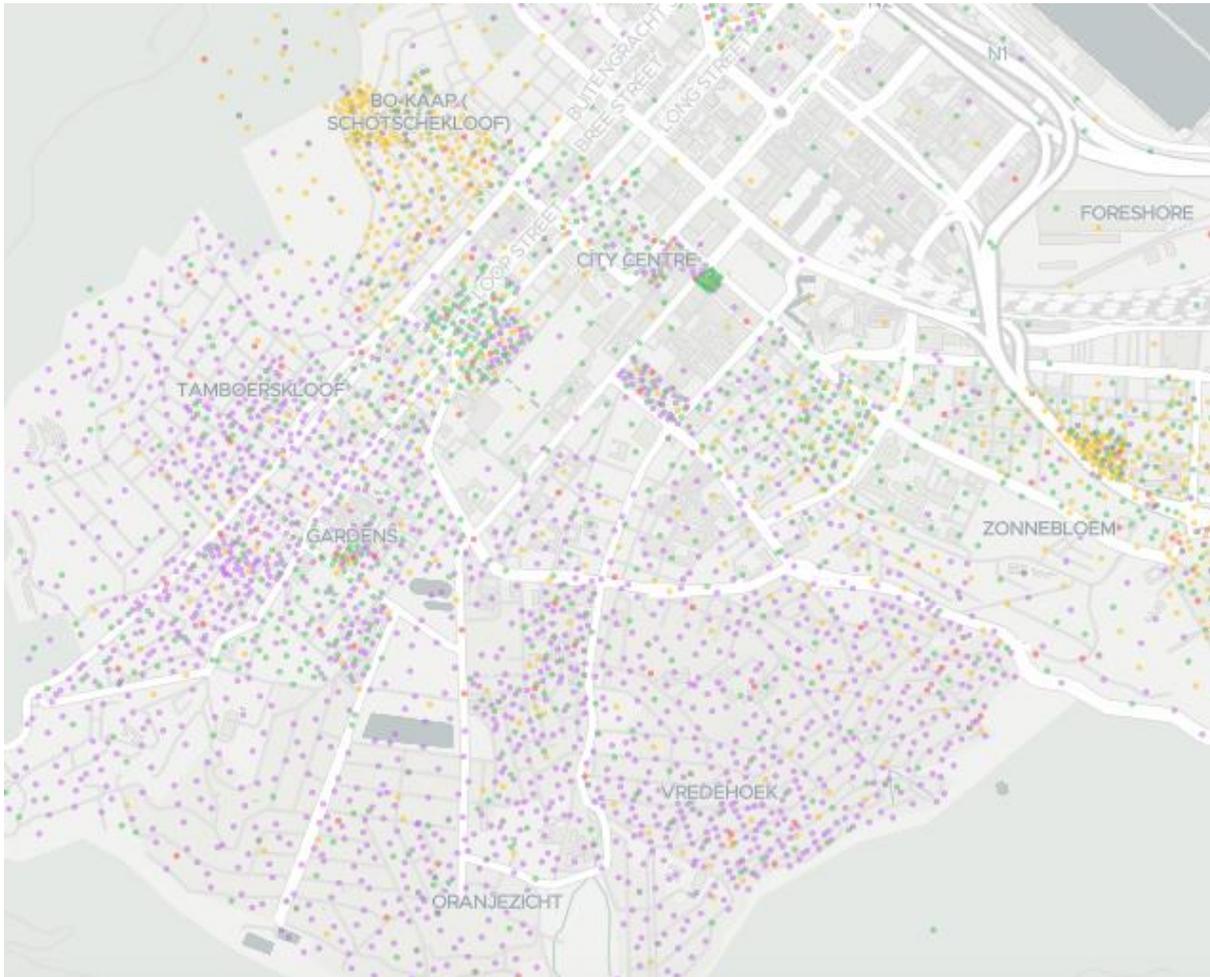
⁴⁹ See Regulation 37 of the MATR.

61. 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".⁵⁰ 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 suitable for sporting and recreational purposes rather than the using it for the development of social and/or affordable housing as is required by its legislative obligations and public commitments.
62. We contend that the 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.

Promoting social inclusivity

63. The land that the City proposes to lease to Cape Waters (Pty) Ltd is located in the centre of area historically reserved for White people. In fact, with the exception of isolated suburbs like the Bo-Kaap and District Six, the CBD and its immediate surrounding areas have remained predominantly White since the end of apartheid 27 years ago.

⁵⁰ See section 36 of the MATR.



Adrian Firth's Race Dot Map spatialises 2011 Census data and clearly depicts segregation in the area – with the area around District Six, where the apartheid state conducted forced removal and land clearing, and the Bo-Kaap representing the only areas not predominantly occupied by White people. Each dot represents approximately 25 people. Green represents Black people, Orange represents Coloured people and Purple represents White people.

64. By developing social or affordable housing at the site, the land could offer a vital opportunity to promote social inclusivity between communities that have historically been segregated as a result of race and/or class. If the City were to pursue a social, affordable housing, or a mixed-income housing development on this public land it could encourage and promote spatial transformation in a meaningful way.
65. Ndifuna Ukwazi strongly urges the City to use the public land that is subject to disposal as a “seam rather than a barrier”.⁵¹ Through using the site for affordable housing, this land can begin to advance reform by pulling together communities rather than using land to entrench barriers and keep them apart.

⁵¹ See K Lynch, *The Image of the City* (1960). See also Jacobs, *The Death and Life of Great American Cities*, p. 267.

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

66. 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).
67. 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.
68. 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 tactic "to postpone the conversation to get these leases out the door and then they can't be challenged for another 10 years".⁵²
69. 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 Erven 1366 and 1370 are 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.

F. CONCLUSION

70. For the reasons outlined above, Ndifuna Ukwazi objects to the City's proposed lease of Erven 1366 and 1370, Hofmeyr Street, Oranjezicht, Cape Town to the Cape Waters (Pty) Ltd.
71. Leasing out this strategically located City-owned land instead of using it for transformation and redress, to advance spatial justice through the delivery of affordable housing in line with Transit Oriented Development is irrational and unreasonable. The proposed lease is unacceptable, especially 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 spatial inequality in the inner-city area and the City as a whole.

⁵² 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>.

72. We contend that the City's failure to provide sufficient justification for the lease fails to comply with the requirements of the MFMF and the MATR. In particular, the City's proposed lease is in direct conflict with the requirements that the land not be "required for the minimum level of basic municipal services". This is because the as the property is needed for the municipality's provision of minimum level of basic services, namely the provision of social or affordable housing in a context of dire housing need and an acute housing affordability crisis.
73. The City's failure to clearly and conclusively state its reasons of the lease are is also deeply concerning. We contend that this 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.
74. We therefore call on the City to refrain from leasing the property to Cape Waters (Pty) Ltd and to commit to investigating the feasibility of using the site for the development of social and/or affordable housing.

Yours faithfully,
Ndifuna Ukwazi
(Per: Michael Clark, Researcher)