



c/o: Michael Clark, Researcher
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23 November 2020

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

For attention: Ms Janice Nieuwoudt
Professional Officer: Property Management
Economic Opportunity and Asset Management Department
City of Cape Town
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To whom it may concern,

RE: NDIFUNA UKWAZI OBJECTION TO THE LEASE RENEWAL OF ERF 14888, NEWMARKET STREET TO GROWTHPOINT PROPERTIES LTD

1. Ndifuna Ukwazi is a non-profit activist organisation and law centre that combines research, organising and litigation in campaigns to advance urban land justice in Cape Town. Our primary mission is to expand and protect access to affordable housing towards building a more just and equal city.

2. On 23 October 2020, 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 8 478m² of public land, namely Erf 14888, Newmarket Street, Cape Town to Growthpoint Properties Ltd, the current lessee, at a rental of R91 800 per month (including rates and excluding VAT).¹ According to the notice, the lease period “shall be structured over a 3 x 3 year cycle” - which presumably means that the initial lease will be concluded for a period of three years, with an option to renew for a further three 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 as a parking lot. The City proposes to renew the lease over the site on the basis that it is “not required for the provision of a minimum level of basic municipal services” and is “underutilised, surplus to the Council’s requirements, no demand exists for same, and the lease will furthermore relieve (sic) council of a maintenance burden and generate funds for the City or Cape Town”.²
3. 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.
4. As will be demonstrated, it is our view that leasing out this strategically located City-owned land to a private company instead of leveraging it to advance spatial justice through the delivery of affordable housing in line with the City’s own plans for the site, as set out in the City’s *Woodstock, Salt River and Inner City Affordable Housing Prospectus* is irrational and unreasonable.³ 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.
5. Moreover, the rationale for the lease of the site on the basis that it “is not required for the provision of a minimum level of basic municipal services” is flawed. We contend that the property is needed for

¹ See “Renewal of lease: City land, portion of erf 14888 Cape town situated at Newmarket Street, Cape Town to Growthpoint Properties Ltd and its successors-in-title for parking purposes”, *Cape Argus* (23 October 2020), p. 12.

² See “Closure and disposal of Portions of Erven 10845 and 10852”, *Cape Argus*, p. 12.

³ See City of Cape Town, “Woodstock, Salt River and Inner City Affordable Housing Prospectus” (2017), p. 19, available:

https://www.tct.gov.za/docs/categories/1313/TDA_Inner_City_Housing_Prospectus_Interactive_28092017.pdf. The prospectus specifically earmarks the site for the development of social housing.

the provision of the minimum level of a basic service, namely the provision of social or affordable housing in a context of dire housing need and an acute housing affordability crisis. Moreover, the lease of the property is in direct conflict with the City's own policies that identify and prioritise the site for the development of social housing.

6. It is also deeply concerning that the City's notice simply reiterates the wording of the provisions of the Municipal Finance Management Act ("MFMA") that regulate the disposal of public property to justify the granting of the right to use, control and manage the asset, by stating that the reasons of the lease are that the property is "not required for the provision of a minimum level of basic municipal services". The City's justification of the lease essentially consists of a "copy and paste" exercise, in terms of which the requirements of the MFMA are published verbatim as justification for the lease. 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 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 renewal. We call on the City to refrain from leasing the property to Growthpoint properties Ltd and to commit to urgently taking steps to developing social housing on the site as it publicly committed to doing in the *Woodstock, Salt River and Inner City Affordable Housing Prospectus*.
8. Please see attached our objection to the City's proposed lease of portions of erf 14888, Newmarket Street, Cape Town to Growthpoint Properties Ltd.

Yours faithfully,

Ndifuna Ukwazi

(Per: Michael Clark, Researcher)

[Sent electronically]

NDIFUNA UKWAZI OBJECTION TO THE LEASE RENEWAL OF ERF 14888, NEWMARKET STREET TO GROWTHPOINT PROPERTIES 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, organising and litigation. Our primary mission is to expand, promote and protect access to affordable housing towards building a more just and equal city.
2. Over the last six years Ndifuna Ukwazi has been involved in legal, research and organising work around evictions, relocations, rental housing, the allocation of state-subsidised houses, and the promotion of social, transitional and inclusionary housing. We have 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. Last year, Ndifuna Ukwazi published a research report, *City Leases: Cape Town's Failure to Redistribute Land* (2019),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 proposal to lease approximately 8 478m² of prime public land to Growthpoint Properties Ltd and objects to the conclusion of the lease on the basis set out in this submission.

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>.

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-six 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 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 In the 2018/2019 financial year, the City provided and upgraded only 5 692 homes.⁸ The overwhelming

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 City of Cape Town, "2019/2020 Adjusted Budget – May 2020: Annexure 4.1: Corporate Scorecard – Quarter 4 2020 Amendments" (May 2020), p. 1.

scale of the need means that the City itself believes that it will be over 70 years before it can eradicate the housing backlog.⁹

8. In fact, spatial inequality has been exacerbated since the end of apartheid.¹⁰ 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.
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%.¹¹ This means poor and working-class people spend long hours commuting and contribute to congestion and pollution on the roads.

⁹ See City of Cape Town, “Municipal Spatial Development Framework” (25 April 2018), p. 220.

¹⁰ 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://jimp.sh/qIPgThH>.

¹¹ City of Cape Town Transport, *Transport Development Index* (2016).

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.¹² Far-flung townships and informal settlements therefore end up trapping the poor in a cycle of structural poverty.¹³
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 sale price for a home in Cape Town is the highest in South Africa and buying a home is unaffordable for the vast majority of residents. In early 2019, the City registered the seventeenth highest year-on-year property inflation in the world at 9.1% (higher than any other city in Africa).¹⁴ The effect of property inflation is even more worrying when delineated by market share and area. Property prices at the highest end of the market have decreased slightly, but property prices in middle-priced and lower-priced markets continue to increase.¹⁵ In lower-priced markets the year-on-year inflations is "in the double digit territory".¹⁶
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

¹² 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).

¹³ 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.

¹⁴ 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>.

¹⁵ 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>.

¹⁶ FNB, "Cape Town Sub-Regional House Prices" (August 2019), p. 1.

R3000 a month in rent or R281 000 to own.¹⁷ In 2019, Stats SA found that the median income of a South African is R13 546 per annum, or just R1 129 per month.¹⁸ 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

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).¹⁹ This represents a 18% decline in employment, with the number of

¹⁷ See Ndifuna Ukwazi, *Inclusionary Housing: Measuring Access to Residential Development by Race and Class* (November 2018).

¹⁸ Stats SA, "Inequality Trends Report" (2019).

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

employed persons dropping from 17 million in February to only 14 million in April.²⁰ 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.²¹ 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.²² 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.²³ This indicates that the losses could be long-lasting and potentially even permanent.²⁴

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 households.²⁵ 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-

²⁰ NIDS-CRAM, "Overview and Findings: NIDS-CRAM Synthesis Report Wave 1", pp. 3-5.

²¹ 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>.

²² NIDS-CRAM, "Overview and Findings: NIDS-CRAM Synthesis Report Wave 1", p. 5; Spaul, "The jobs reckoning is here: 3 million jobs lost".

²³ 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>.

²⁴ NIDS-CRAM, "Synthesis Report Wave 2", p. 1.

²⁵ 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>.

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

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 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
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 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”, 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/>.

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 polices 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).

25. 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).³²
26. A research report published by Ndfuna Ukwazi in 2019 investigated the City's practice of leasing out public land and delivered some concerning findings.³³ 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, Ndfuna 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.

³² 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 – Tariffs, 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. 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.

³³ See Ndfuna Ukwazi, *City Leases*, pp. 3-5.

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,³⁴ and section 26 sets out the state's obligation to progressively realise the right to housing.³⁵ These obligations cannot be divorced from, 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 the *Adonisi* case, where Judge Gamble wrote:

³⁴ 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."

³⁵ 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."

“[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.”³⁶

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*.³⁷ 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,³⁸ and also recognises that it has a duty to utilise well-located state land for this purpose.³⁹ 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.
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”.⁴⁰ For this reason we believe that the City has, and

³⁶ See *Adonisi*, para 94. See also, generally, the comments of the court in relation to the constitutional obligation to redress spatial apartheid.

³⁷ 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.

³⁸ See *Adonisi*, paras 442-443, which refer to the affidavit of Cape Town City Manager Lungelo Mbandazayo.

³⁹ See *Adonisi*, paras 452-457, which refer to the affidavit of Cape Town City Manager Lungelo Mbandazayo.

⁴⁰ 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.”

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”).
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,⁴¹ spatial sustainability⁴² and spatial efficiency.⁴³
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]

⁴¹ See s 7(a)(iii) of SPLUMA and ss 59(1)(a) and (g) of LUPA.

⁴² See ss 7(b)(iv)-(vii) of SPLUMA and ss 59(2)(a)(vi)-(vii) and 59(2)(g) of LUPA.

⁴³ See ss 7(c)(i) and (ii) of SPLUMA and s 59(3)(b) of LUPA.

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.”⁴⁴

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.

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

43. 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.
44. 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”.⁴⁵
45. 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 ERF 14888, NEWMARKET STREET TO GROWTHPOINT PROPERTIES LTD

⁴⁴ See *Adonisi*, para 444.

⁴⁵ See s 6 of Management of Certain of the City of Cape Town’s Immovable Property Policy.

46. The City is considering the lease of approximately 8 478m² of prime public land, namely a portion of erf 14888, Newmarket Street, Cape Town to Growthpoint Properties Ltd, the current lessee, at a rental of R91 800 a month (including rates and excluding VAT). According to the notice, the lease period “shall be structured over a 3 x 3 year cycle” - which presumably means that the initial lease will be concluded for a period of three years, with an option to renew for a further three years (the notice did not specify what the notice of termination period for the renewed lease might be). The main reasons identified by the City for leasing out the site is that the land is “not required for the provision of a minimum level of basic municipal services” and is “underutilised, surplus to the Council’s requirements, no demand exists for same, and the lease will furthermore relief (sic) council of a maintenance burden and generate funds for the City or Cape Town”.⁴⁶
47. 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, as well as being located at the entrance to the Woodstock / Salt River corridor running along Sir Lowry Street. The site is very close to various primary schools and high schools, social facilities (including the Cape Town and Woodstock libraries), various clinics (including the District Six and Chapel Street Clinics), equal distance from the Cape Town Central Police Station and the Woodstock Police Station, and close to the Cape Town University of Technology (CPUT)’s main campus.
48. The site is located along 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. The site is also located within an area that enjoys bus, taxi and train public transit, particularly close to various bus, train and taxi routes. In fact, the site is located next to the Russell Street MyCiti bus stop and the Cape Town Central Train Station, the busiest train interchange in Cape Town, is located only a couple of hundred metres from the site. Densifying along the transportation nodes in Woodstock and Salt River are a critical element of the City’s transit oriented development and would take advantage of the already established public transit backbone and the rail corridor.

⁴⁶ See “Closure and disposal of Portions of Erven 10845 and 10852”, *Cape Argus*, p. 12.

49. Most importantly, in 2017 the City itself has identified and earmarked the site for the development of social housing in its *Woodstock, Salt River and Inner City Prospectus* as a result of its prime location and suitability for social housing.⁴⁷ In the prospectus, the City stated that despite potential limitations of the site being located on reclaimed land, that the site should provide a minimum of 300 social housing units - thereby offering opportunities for 300 families who ordinarily would be excluded to gain access to opportunities and amenities in the City centre and Woodstock.⁴⁸ The City's own policies and plans therefore specifically identify this site as an important site on which social housing should be developed - a usage that stands in direct conflict with the City's proposal to lease this land to Growthpoint Properties Ltd as a parking lot.
50. The prime location of the site, as well as the City's own public commitments to develop the site for social housing, means that it is ideal for the development of social housing. Ndifuna Ukwazi therefore objects to the proposed lease of the site to Growthpoint Properties Ltd for the reasons elaborated on below.

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

51. The City of Cape Town's *Woodstock, Salt River and Inner-City Prospectus* specifically identified 11 parcels of City-owned land in the Woodstock, Salt River and Inner City precinct for the development of social housing and requested property developers and social housing institutions (SHIs) to submit proposals for the development of these sites. The portion of erf 14888, Newmarket Street, which the City proposed to lease out to Growthpoint Properties Ltd is one of these sites identified in the prospectus for the development of social housing. However, much more needs to be done to address the housing and segregation crisis outlined above.
52. While the City later withdrew the requests for proposals for various of these sites, various officials including Mayor Dan Plato and MayCo Member for Human Settlements Malusis Booi unequivocally affirmed their commitment to developing the Newmarket Street site into social housing.⁴⁹ The City's

⁴⁷ City of Cape Town, "Woodstock, Salt River and Inner City Affordable Housing Prospectus", p. 19.

⁴⁸ City of Cape Town, "Woodstock, Salt River and Inner City Affordable Housing Prospectus", p. 19.

⁴⁹ B Herron, "Throwing down the gauntlet to the mayor - the truth matters", *Daily Maverick* (15 August 2019), available at: <https://www.dailymaverick.co.za/opinionista/2019-08-15-throwing-down-the-gauntlet-to-the-mayor-the-truth-matters/>.

existing plans therefore include the development of the site in question into social housing, in direct conflict with its proposal to lease out the site as a parking lot.

53. Moreover, the City'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. This approach recognises that *the location of housing is important*. It is in terms of this approach that the City proposed developing the 11 sites into social housing.
54. A key component of the City's prioritisation of Transit Orientated Development 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.
55. As mentioned above, the site that the City proposes leasing is located within the Voortrekker Road Corridor Integration Zone, an area specifically earmarked by the City for transit orientated development, and was specifically identified for the development of social housing. As such, it would make little sense to lease the land in question to a private company when it could instead be used to further the City's stated priority of integration. Not only would this delay the development of social housing, which the City has already publicly committed to, but it would also run contrary to the City's plans, policies and publicly stated commitment to spatial transformation.
56. 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

57. The City's primary rationale for the proposed lease is that the site is "not required for the provision of a minimum level of basic municipal services" and is "underutilised, surplus to the Council's requirements, [and] no demand exists for same".

58. This language seems to be borrowed from sections 14(1) and (2) of the Local Government: Municipal Finance Management Act (2003) (“MFMA”), a national piece of legislation that aims to regulate and secure the sound and sustainable management of financial affairs of local government and, in particular, the management of the assets of local government. Section 14(1) and (2) of the MFMA provides that a municipality may not transfer ownership of immovable property unless the municipal council has decided “on reasonable grounds” that the land “is not needed to provide the minimum level of basic municipal services”. While this is a standard that applies to the determination of whether a municipality can legally dispose or permanently transfer property, the notice published by the City in the *Cape Argus* uses this language to justify the conclusion of a lease. It is therefore apt to consider the legal standard that this language imposes on the City’s justification of the lease.
59. In *Oranje Water CC v Dawid Kruiper Local Municipality* (“*Oranje Water*”),⁵⁰ the Northern Cape High Court was asked to give meaning to the phrase “minimum level of basic services” in the context of the functions and obligations of local government. In determining what this phrase meant, the court analysed various pieces of legislation, including section 153 of the Constitution, the Local Government: Municipal Systems Act, the MFMA and the Housing Act (1997).⁵¹ The court found that there was

“a distinction between 'basic municipal services' and 'municipal services'. The legislative framework referred to above, supports such distinction. In this context parks and recreation are in fact a 'municipal service' but do not fall under 'basic municipal services'. In such context, 'basic municipal services' includes the provision of water, sanitation, electricity, roads, storm water drainage and transport. I am fortified in this conclusion by the wording of s14(2)(a) which is to the effect that the municipality decided that the asset is not needed ‘... to provide the minimum level of basic municipal service.’ (emphasis added) In my view 'parks and recreation', in a different and better time in our shared future may well come to be regarded as a minimum level of basic municipal service. However, in our present context of service delivery protests relating to the continued reality of the 'bucket system' for sanitation and the lack of

⁵⁰ *Oranje Water CC v Dawid Kruiper Local Municipality*, Judgement, Northern Cape High Court, Case No 2150/2016 (6 July 2018): <http://www.saflii.org/za/cases/ZANCHC/2018/42.html>.

⁵¹ *Oranje Water*, paras. 37-43.

potable water, *inter alia*, being reported on a daily basis in communities all over our country, this is clearly not so.”⁵²

60. According to the court, the “minimum level of basic municipal services” is “inextricably linked to the requirement to uplift poor and disadvantaged communities that fall under the jurisdiction of local government”.⁵³
61. Ndifuna Ukwazi submits that the *Oranje Water* case clearly indicates that the provision of social and/or affordable housing constitutes “a minimum level of basic services” in the context of Cape Town’s housing affordability crisis. Accordingly, well-located land that is able to be used for the development of social or affordable housing should not be disposed of by way of lease or sale or should only be disposed of if such disposal is subject to a condition to develop social and/or affordable housing.
62. We also assert that sections 34 and 36 of the Municipal Asset Transfer Regulations (“MATR”) that were enacted in terms of the MFMA and provide for the granting of rights to use, control and manage public land, require more from a municipality than to simply request whether internal service departments require the property for the provision of a minimum level of basic services. Instead, these provisions require a municipality to take an active, enquiring approach 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”. We contend that the City has not appropriately applied this test, because if it had, it would have come to the inevitable conclusion that its own policies, plans and public commitments clearly indicate that the site is required for its own use, namely the development of social housing.
63. We further contend that the City cannot lease the property to Growthpoint Properties Ltd as it has not complied with its own rationale for the lease of the land. In this regard, we assert that the property is needed for the provision of the minimum level of a basic service, namely the provision of social or affordable housing in a context of dire housing need and an acute housing affordability crisis.

⁵² *Oranje Water*, para. 41 (original emphasis).

⁵³ *Oranje Water*, para. 43.

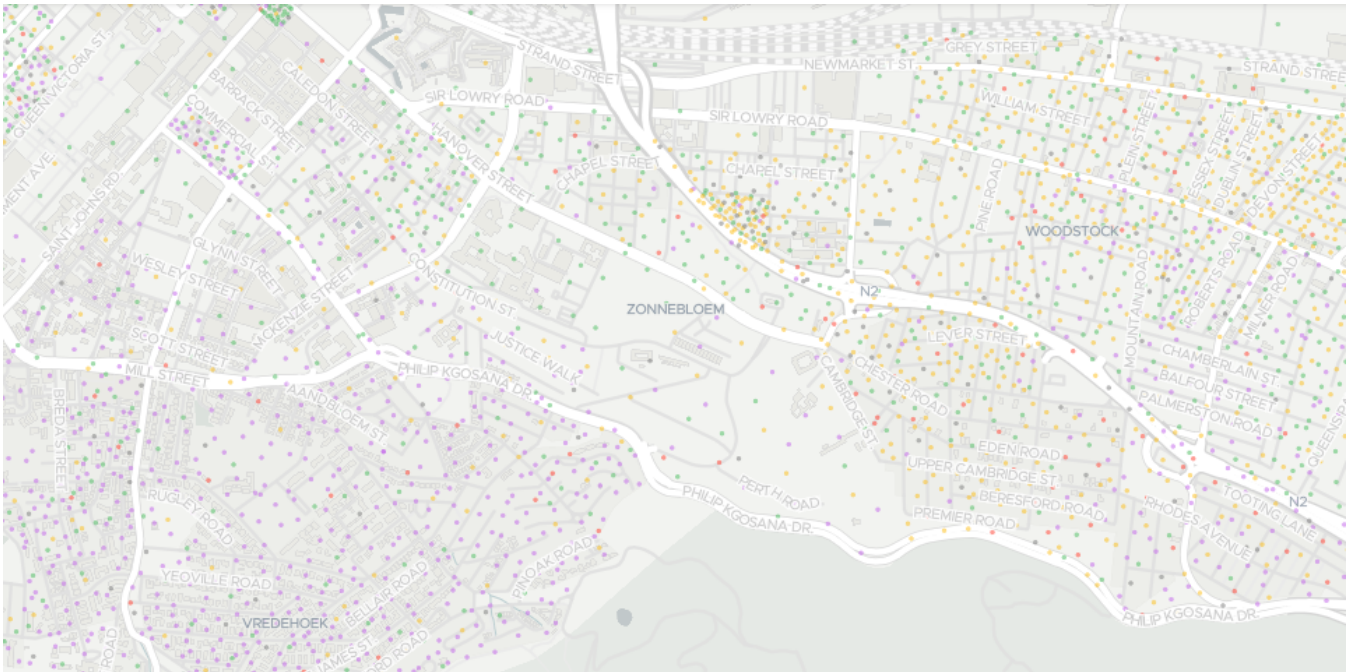
Moreover, the lease of the property is in direct conflict with the City's own policies and strategic plans that prioritise the development of the site into social housing.

64. The MATR also 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".⁵⁴ We believe that the proposed lease clearly fails to comply with this requirement as the City's own affordable housing prospectus identified and earmarks the land in question for the development of social housing.
65. For these reasons, we contend that the proposed lease does not yield an adequate economic or community value in light of the City's stated priorities around spatial transformation, inclusive development in along the Voortrekker Road Corridor Integration Zone and the development of social housing as outlined in the City's affordable housing prospectus.

Promoting social inclusivity

66. The land that the City proposes to lease to Growthpoint Properties Ltd is located on the border of two historically segregated areas. The suburbs to the East – Woodstock, Salt River, District Six and Zonneblome – are racially mixed but predominantly Coloured areas, while the suburbs to the South and West – the CBD, Gardens, Vredehoek, Oranjezicht – are predominantly White areas.

⁵⁴ See section 36(a) 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 train tracks represent a segregating line. Each dot represents approximately 25 people. Green represents Black people, Orange represents Coloured people and Purple represents White people.

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

68. The revered urban land use specialist, Jane Jacobs, has written about how large tracts of land designated to a particular land use or imposing infrastructure (like train tracks or highways) can function as borders or physical barriers to segregate people. She warns that these “borders divide up cities into pieces” and “can tear a city to tatters”.⁵⁵ The constellation of roads and railway lines around the site, as well as the large vacant land in District Six that was cleared during apartheid forced removals, act as such a barrier that separates various residential areas that, historically, were separated as a result of race.

⁵⁵ J Jacobs, *The Death and Life of Great American Cities*, pp. 257-269.

69. However, the public land that the City proposes leasing presents a critical opportunity to promote social and economic inclusion. If the City were to pursue social, affordable, mixed-income or student housing on this public land it could encourage and promote spatial transformation in a meaningful way. As Kevin Lynch, Associate Professor of Planning at the Massachusetts Institute of Technology, writes:

“An edge may be more than simply a dominant barrier if some visual or motion penetration is allowed through it – if it is, as it were structured to some depth with the regions on either side. It then becomes a seam rather than a barrier, a line of exchange along which two areas are sewn together.”⁵⁶

70. Ndifuna Ukwazi strongly urges the City to use the public land that is subject to disposal as a “seam rather than a barrier”. 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.

F. CONCLUSION

71. For the reasons outlined above, Ndifuna Ukwazi objects to the City’s proposed lease of portions of erf 14888, Newmarket Street, Cape Town to Growthpoint Properties Ltd.

72. 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 and the City’s own *Woodstock, Salt River and Inner-City Prospectus* 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.

73. We contend that the City’s justification of the lease is unconvincing and fails to comply with the requirements of the MFMF and the MATR. In particular, the City’s claims that the land “is not needed

⁵⁶ See K Lynch, *The Image of the City* (1960). See also Jacobs, *The Death and Life of Great American Cities*, p. 267.

to provide the minimum level of basic municipal services” is unfounded as the property is needed for the provision of the minimum level of a basic service, namely the provision of social and/or affordable housing in a context of dire housing need and an acute housing affordability crisis. Moreover, the lease of the property is in direct conflict with the City’s own policies, strategic plans and affordable housing prospectus.

74. We would also like to note that the City’s notice simply reiterates the wording of the provisions of the MFMA that regulate the disposal of public property to justify the granting of the right to use, control and manage the asset, by stating that the reasons of the lease are that the property is “not required for the provision of a minimum level of basic municipal services”. The City’s justification of the lease therefore consists of a “copy and paste” exercise, in terms of which the requirements of the MFMA are published verbatim as justification for the lease. 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 has not sufficiently grappled with the reasons for the lease, the the expected benefits, proceeds, gains or losses that may result as a result of the granting of these rights.
75. We therefore call on the City to refrain from leasing the property to Growthpoint Properties Ltd and rather to commit the the process outlined in its affordable housing prospectus to use the land for the development of social housing.

Yours faithfully,

Ndifuna Ukwazi

(Per: Michael Clark, Researcher)