



REPORT TO MUNICIPAL PLANNING TRIBUNAL

ITEM NO **MPTSW23/06/19**

CASE ID	70447340
CASE OFFICER	Y Jafta
CASE OFFICER PHONE NO	021 444 9536
DISTRICT	Southern
REPORT DATE	28 May 2019

WARD 74: APPLICATION FOR ADMINISTRATIVE PENALTY IN TERMS OF THE CITY OF CAPE TOWN MUNICIPAL PLANNING BY-LAW, 2015 (MPBL): ERF 8727 HOUT BAY, 25 PARK AVENUE

1 EXECUTIVE SUMMARY

Property description	Erf 8727 Hout Bay
Property address	25 Park Avenue
Site extent	8 727m ²
Current zoning	Rural
Current land use	Tourist accommodation
Overlay zone applicable	Hout Bay Local Area Overlay Zone
Submission date	28 February 2019
Subject to PHRA / SAHRA	No
Any unauthorised land use / building work?	Yes, a tourist accommodation establishment (accommodating 7 guest bedrooms as well as manager's accommodation) is operating on the property without the necessary consent.
Has owner applied for the determination of an administrative penalty	No
Has the City Manager applied to the MPT for an order that a person who is contravening the MPBL must pay an administrative penalty in an amount determined by the MPT	No
Has the City issued a demolition directive i.t.o section 128 of the MPBL? If yes, an administrative penalty may not be applied for.	No
Has the City served a notice on the owner or other person in respect of the unlawful land use or building work which required the owner or other person to apply for the determination of an administrative penalty?	No

2 DECISION AUTHORITY

For decision by the Municipal Planning Tribunal.

3 BACKGROUND / SITE HISTORY

- 3.1 An application for subdivision of the subject property into 2 portions and departure relating to the minimum erf subdivision size was approved by an authorised official on 11 May 2018. The final notification was issued on 14 May 2018. This approval has not been acted on.

- 3.2 An application for consent for tourist accommodation and departures relating to parking and a common boundary setback was submitted on 5 March 2019. The application is currently at additional information stage.

4 SUMMARY OF APPLICANT'S MOTIVATION

The applicant's motivation is attached as Annexure C and may be summarised as follows:

- A separate application to regularize the unauthorised land use has been submitted.
- The property has been used as tourist accommodation since 2004.
- The current owners were misinformed by the estate agent about the permitted uses on the property.
- There are no title deed restrictions prohibiting the property from being used for tourist accommodation.
- The municipal valuation of the property is R6 000 000.00.
- The extent of the contravention is 62% of the total floor area.
- The owners are foreigners and lay people and were under the perception that tourist accommodation was permitted on the property.
- The owners have never contravened the By-Law or previous planning law.
- The owners are not able to cease operation as the facility is their only source of income.

5 ASSESSMENT OF APPLICATION

- 5.1 The unauthorized land use is in contravention of Items 112 (as the operation of the tourist accommodation requires consent in the Rural zone), the 113 (relating to existing building from the 5m common boundary setback) and 137 (relating to parking, 10 in lieu of 11 parking bays are provided) of the Development Management Scheme (DMS).
- 5.2 In terms of section 129(7)(b) of the By-Law, an administrative penalty for the land use contravention may not be more than 100% of the municipal valuation of the area that is used unlawfully.
- 5.3 The municipal value of the property is R6 000 000.00 as per GV2015 (see Annexure D).
- 5.4 Effectively, the entire property is being used for the unauthorised use. Thus an amount which is not more than 100% of R6 000 000.00 may be imposed as an administrative penalty.
- 5.5 The following factors need to be considered when determining an appropriate administrative penalty, as contemplated by section 129(8) of the By-Law:
- a) **The nature, duration, gravity and extent of the contravention**
Nature – The unauthorised land use relates to a tourist accommodation facility which is permitted with consent in a Rural zone.

Duration – According to the applicant, the contravention has existed since 2004 (15 years) when the current owners purchased the property. The contravention has thus existed for a long time.

Gravity – The gravity of the contravention is not particularly serious considering the size of the property and that it is surrounded by other large properties. The property is also well treed. It is noteworthy that the operation of the facility is also not in compliance with the Guest Accommodation Policy relating to the provision of on-site parking for shuttles, buses and overland trucks. However, given the small scale of the tourist accommodation, this does not have a material negative impact.

Extent – The extent of the contravention is large considering that effectively the entire property is used for the operation of the tourist accommodation.

b) The conduct of the person involved in the contravention

According to the applicant, the owners of the property were misinformed by the estate agent who sold them the property. It is conceivable that the owners were unaware of the planning laws and regulations when they purchased the property, however, ignorance of the law is not a legitimate excuse. The conduct of the owners cannot be condoned.

c) Whether the unlawful conduct was stopped

The unlawful conduct was not stopped.

d) Whether a person involved in the contravention has previously contravened by this By-Law or any other planning law

As far as can be ascertained, the person involved in the contravention has not previously contravened by this By-Law or any other planning law.

- 5.6 In view of the abovementioned considerations, and particularly the duration and extent of the contravention, a R10 000.00 administrative penalty is recommended for the tourist accommodation.

6 REASONS FOR DECISION

Reasons for the recommended decision may be summarised as follows:

- 6.1 The unauthorised land use is in contravention of Items 112, 113 and 137 of the Development Management Scheme.
- 6.2 The contravention relates to a use permitted with consent in Rural zone.
- 6.3 The gravity of the contravention is not particularly serious.
- 6.4 The duration of the contravention has been long.
- 6.5 The extent of the contravention is large.
- 6.6 The owners may have been misled by the estate agent who sold them the property, however, ignorance of the law is not a valid excuse for contravention of the law. The conduct of the owner cannot be condoned.
- 6.7 As far as can be ascertained, the current owner has not contravened the By-Law or any other planning law.

5 RECOMMENDATION

580

In view of the above, it is recommended that:

- a) That an administrative penalty in the amount of R10 000.00 be determined in terms of section 129 of the City of Cape Town Municipal Planning By-Law, 2015 in respect of the tourist accommodation on Erf 8727 Hout Bay, as per the plan drawn by Hof Design Architecture, drawing number 8727/19/01, and dated 6 February 2019.

ANNEXURES

Annexure A	Locality plan
Annexure B	Site development plan
Annexure C	Applicant's motivation
Annexure D	Municipal valuation
Annexure E	Title deed



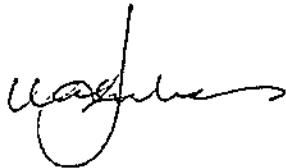
Section Head : Land Use Management

Comment

Name P Hoffa

Tel no 021 444 7724

Date 2019-05-28



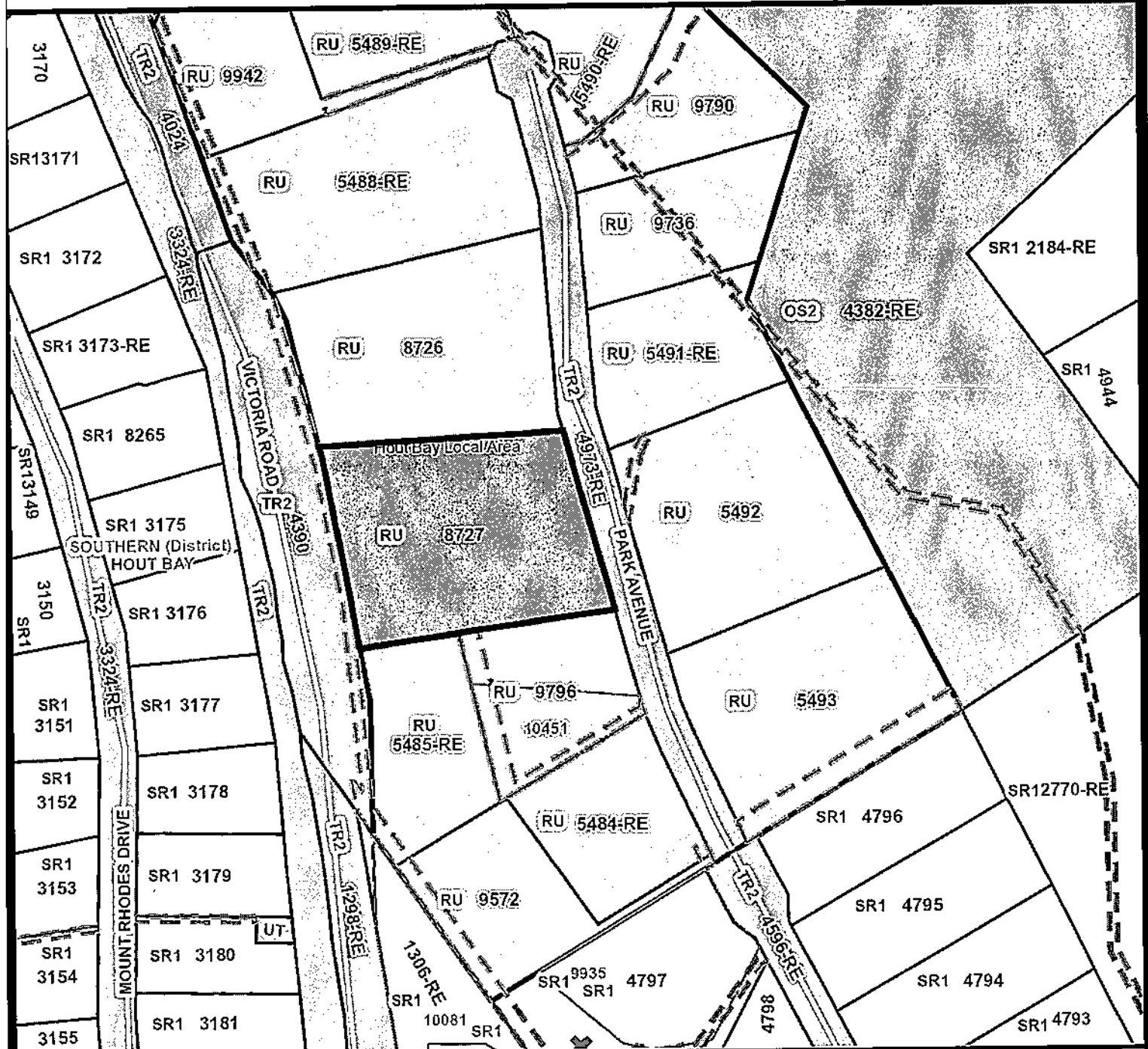
District Manager

Name U Gonsalves

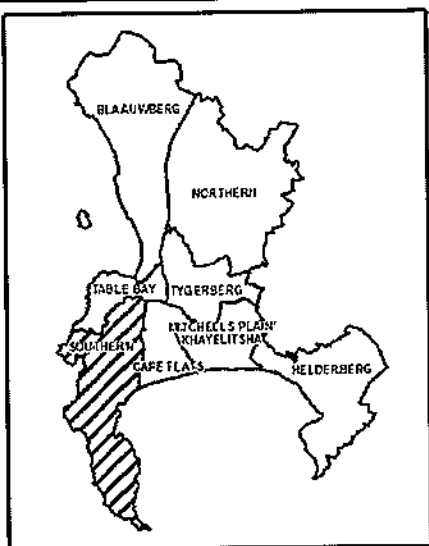
Comment

Tel no 021 444 7720

Date 2019-05-28



Overview



Erf: 8727

Allotment: HOUT BAY

Ward: 74

District: SOUTHERN

Suburb: HOUT BAY

Sub Council: Subcouncil 16



1:2 408

Notices Served

Support
Received

Petition
Signatory



Objections
Received



Generated by:

Date: Friday, 17 May 2019

File Reference:



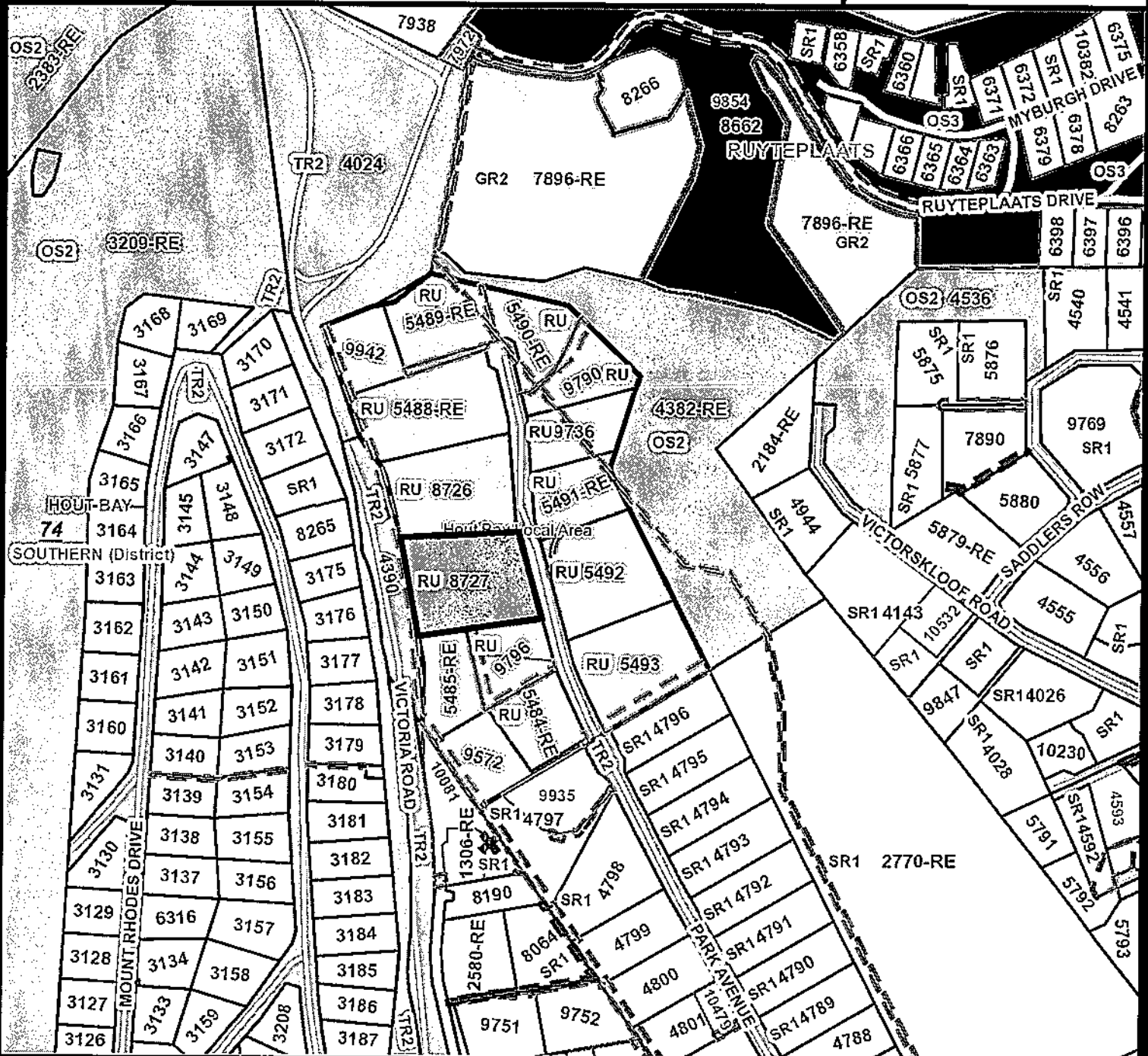
CITY OF CAPE TOWN
ISIXEKO SASEKAPA
STAD KAAPSTAD

Making progress possible. Together.

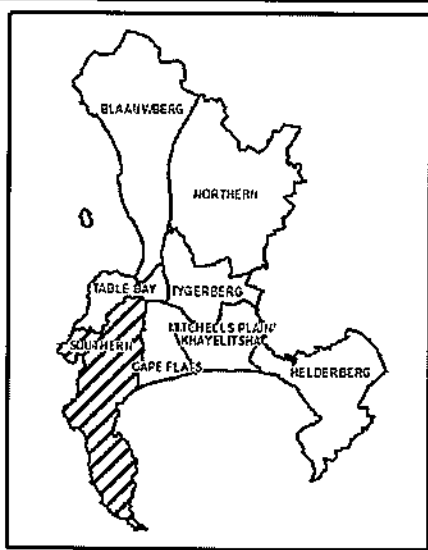
PLANNING AND BUILDING DEVELOPMENT MANAGEMENT LOCALITY MAP

ANNEXURE :

580



Overview



Erf: 8727

Allotment: HOUT BAY

Ward: 74

District: SOUTHERN

Suburb: HOUT BAY

Sub Council: Subcouncil 16



1:5 000

Notices Served



Support
Received



Petition
Signatory



Objections
Received



Generated by:

Date: Friday, 17 May 2019

File Reference:



CITY OF CAPE TOWN
ISIXEKO SASEKAPA
STAD KAAPSTAD

Making progress possible. Together.

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
PORTABAGUEST LODGE FOR:
MR. P.M. & V.S. BARNABE

ERF 8727
HOUT BAY
NO 25 PARK

MAIN DWELLING

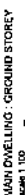
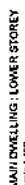
Scale 1 : 100	REV:
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Date: 06 February 2019



J. W. Smith Associates, Inc.
design
ARCHITECTURE

drawn by: J. W. Smith II
24 HUNTERS HILL ROAD
PO BOX 1847
78068
Tel: (979) 796-1731
Fax: (979) 796-4887
Call: (813) 335-4324
E-mail: jwsmith@jwsmith.com
J.W. Smith II, P.E., P.O. Box 1847, 78068



586

ERF 8727 HOUT BAY: APPLICATION FOR THE DETERMINATION
OF AN ADMINISTRATIVE PENALTY IN TERMS OF SECTION
42(r) OF THE CITY OF CAPE TOWN MUNICIPAL PLANNING BY-
LAW, 2015:

MEMORANDUM OF MOTIVATION

FEBRUARY 2019

Prepared for submission to the City of Cape Town
On behalf of the owner by M. A. Smith



M A Smith
Town and Regional Planner

3 Earl Street Hout Bay, 7801
Tel (021) 790 7889
Fax: 086 689 9042
Cell: 083 270 1702
Email: mikesmith@mweb.co.za

1. INTRODUCTION

- 1.1 Application is hereby made in terms of section 42(r) of the City of Cape Town Municipal Planning By-Law for the determination of an administrative penalty, as contemplated in section 129(1) of the By-Law with respect to Erf 8727 Hout Bay.
- 1.2 A separate application has been submitted in terms of section 42(i) of the City of Cape Town Municipal Planning By-Law for consent to use the existing buildings on Erf 8727 Hout Bay for tourist accommodation, in the form of a resort comprising seven guest bedrooms and a manager's suite, and for permanent departures, namely item 137 of the DMS – to permit 10 on-site parking bays in lieu of 11 bays and item 113(c)(ii) of the DMS - to permit the existing cottage to be 3m in lieu of 5m from the common boundary, in terms of section 42(b) of the By-Law.
- 1.3 The property has been used as a guest house by the owners since 2004 when they emigrated from France and bought the property. The guest house is known as *Intaba Lodge*.
- 1.4 At the time of transfer the owners (Pierre-Marie and Valerie Barnabe) were informed by the real estate agent and the transferring attorney that the property could be used as a Guest House.

2. OWNERSHIP AND PROPERTY DETAILS

2.1 Title Deed Ownership and Extent

- 2.1.1 The property is owned by Pierre-Marie and Valerie Brigitte Barnabe, held by Deed of Transfer No. T1638/2004. The property is not mortgaged
- 2.1.2 The property is 8 572m² in extent. A subdivision application was recently approved by council. The newly created portion has not yet been registered with the Deeds Office.

2.2 Locality

- 2.2.1 It is situated at No 25 Park Avenue in Hout Bay. Park Avenue is accessed via Valley Road.

2.3 Title Deed Restrictions

- 2.3.1 There are no restrictive conditions of title contained in the deed of transfer that prohibit the property from being used for tourist accommodation as proposed.
- 2.3.1 A conveyancer's certificate has been submitted with the application for consent and departures, which confirms the above statement

2.4 SG Diagram

- 2.4.1 The property is shown as Erf 8727 on SG Diagram No. 4758/2001, which has been submitted with the application documents.

2.5 Existing and Surrounding Land Uses

- 2.5.1 The property comprises a main dwelling house a separate cottage (second dwelling) a solarium and an outbuilding which are all used as guest bedrooms. (See Aerial Photograph and SDP).
- 2.5.2 The property is situated in upper Park Avenue, surrounded by upmarket houses on large rural erven to the north, south and east, and is bonded by Victoria Road to the west



Figure 1: Locality Plan showing the property in relation to the surrounding Properties in Park Avenue

2.6 Zoning

- 2.6.1 The subject property is zoned *Rural (RU)*.
- 2.6.2 The surrounding erven to the north, east and south are zoned *Rural (RU)*, and those to the west are zoned *Single Residential 1 (SR1)*.

2.7 Mandate

M. A. Smith is authorized to submit this application on behalf of the registered owners by the power of attorney submitted with this application .

3. ADMINISTRATIVE PENALTY - LAND USE CONTRAVENTION

- 3.1 The property has been used as a guest house by the owners since 2004 when they bought the property.
- 3.2 At the time of transfer the owners were informed by the real estate agent and the transferring attorney that the property could be used as a Guest House.
- 3.3 Since a guest house / resort / tourist accommodation is only permissible in the *Rural* zone with consent of council, it is therefore necessary to apply for the determination of an administrative penalty in terms of section 129(1) of the By-Law.

4. MUNICIPAL VALUATION AND EXTENT OF THE CONTRAVENTION

- 4.1 The municipal valuation of the property is R6 million (see Rates account, page 2), and the property is 8 572m² in extent, therefore the property is valued at R700.00 per square meter.
- 4.2 Since the extent of the contravention is the seven guest bedrooms and private living areas which are let out for a profit, and since the combined total in m² of these rooms is 367m², then a total of 367m² can be construed as the contravention (See SDP).
- 4.3 The total floor area of the buildings is 585m², therefore the extent of the contravention is 62% of the total floor area.

5. MITIGATING CIRCUMSTANCES

- 5.1 The owners are foreigners and lay people and were unaware of the permitted land uses in terms of the property's zoning (*RU*) and were under the illusion that the property could legally be run as a guest house.
- 5.2 The owners have never contravened the By-Law or a previous planning law before. This should be considered
- 5.3 The owners have invested their life savings in the property and it is their only source of income, hence they are not able to cease running the guest house.

6. CONCLUSION

- 6.1 This application is for the determination of an administrative penalty in terms of section 42(r), as contemplated in sections 129 and 130 of the City of Cape Town Municipal Planning By-Law, 2015.
- 6.2 The owners bought the property in 2004, at which time they begin using it as a guest house.

- 6.3 The owners have never contravened this By-law or any other previous planning law.
- 6.4 It is therefore respectfully requested that lenience is shown in this case.

Rates for 2018/2019 Financial Year**Residential Tariff: 0.007154****Non-Residential Tariff: 0.014308****Residential Exclusion: R 200,000.00**

Property Reference	SPM009819900000
Property Type	RES
Erf/Farm Number	8727
Physical Address	PARK HOUT BAY
Total Extent	8572.0000
Existing Use	B05
Allotment Area	HOUT BAY
Rating Category	NON-RESIDENTIAL

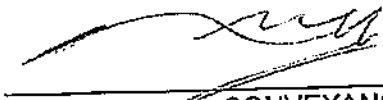
Value of Property	R 6,000,000.00
Residential Exclusion	R 0.00
Rateable Value	R 6,000,000.00
Estimated Annual Rates	R 85,848.00
Estimated Monthly Rates	R 7,154.00

ANNEXURE E

203
Vavatzanidis Inc
10 Beckham Street
Gardens
CAPE TOWN
8001

592

Prepared by me


CONVEYANCER
Neuhoff G.P.C.

SEEL REG DUTY	R.
FOOI FEE	R. 500,00

T000001638 / 2004

DEED OF TRANSFER

BE IT HEREBY MADE KNOWN THAT

Gideon Petrus Conradie Neuhoff

appeared before me, REGISTRAR OF DEEDS, at CAPE TOWN, the said
appearer being duly authorised thereto by a Power of Attorney which said Power
of Attorney was signed at PAARL on 25 November 2003 granted to him by

ADRIENNE MARGARET PFAFF
Identity Number 550507 0234 08 6
Married out of community of property




And the appearer declared that his said principal had, on 13 September 2003, truly and legally sold by Private Treaty, and that he, the said Appearer, in his capacity aforesaid, did, by these presents, cede and transfer to and on behalf of:

1. **PIERRE-MARIE BARNABE**
Born on 22 August 1956
Married, which marriage is governed by the laws of FRANCE
2. **VALERIE BRIGITTE SEBILLEAU-BARNABE**
Born on 9 September 1964
Married, which marriage is governed by the laws of FRANCE

their Heirs, Executors, Administrators or Assigns,

**ERF 8727 HOUT BAY, IN THE CITY OF CAPE TOWN, CAPE DIVISION,
PROVINCE OF THE WESTERN CAPE;**

**IN EXTENT 8572 (EIGHT THOUSAND FIVE HUNDRED AND SEVENTY TWO)
SQUARE METRES**

 **FIRST REGISTERED** and still held by Certificate of Consolidated Title No. CC T3281/2002 with Diagram S.G. No. 4758/2001 annexed thereto

1. WITH REGARD TO THE ENTIRE PROPERTY:

- A. **SUBJECT** to the conditions referred to in Deed of Transfer No. T10028/1946.
- B. **SUBJECT FURTHER** to the servitude referred to in the endorsement dated 26th October 1905 on Deed of Transfer No. 4483/1896 relative to certain water rights granted subject to conditions to the owners of the properties conveyed by Deed of Transfer Nos 9947/1905 and 9948/1905.
- C. **SUBJECT FURTHER** to the terms of an endorsement dated the 19th September 1983 on said Certificate of Consolidated Title No T47581/1982 which reads as follows:

Remainder.

By Deed of Transfer No. T39245/1983 dated this day the remainder of Erf 4382 meas 86,2935 ha. held hereunder is subject to the following conditions imposed by the Administrator in terms of Section 9 of the Ordinance No. 33 of 1934 when approving the subdivision of Erf 4382:

- (a) The owner of this erf shall without compensation, be obliged to allow gas mains, electricity-, telephone-, and television cables and/or wires and main and/or other waterpipes and the sewage and drainage, including stormwater of any other erf or erven to be conveyed across this erf, and surface installations, such as mini-substations, meter kiosks and service pillars to be in stalled thereon if deemed necessary by the local authority and in such manner and position as may from time to time be reasonably




594

required. This shall include the right of access to the erf at any reasonable time for the purpose of constructing, altering, remove or inspecting any works connected with the above.

- (b) The owner of this erf shall be obliged, without compensation, to receive such material or permit such excavation on the erf as may be required to allow use of the full width of the street and provide a safe and proper slope to its bank owing to difference between the levels of the street as finally constructed and the erf, unless he elects to build retaining walls to the satisfaction of and within a period to be determined by the local authority.

- 2. **WITH REFERENCE TO THE FIGURE ABxF ON DIAGRAM SG NO. 4758/2001, SUBJECT FURTHER** to the following condition contained in Deed of Transfer No. T 23376/90 imposed by the Western Cape Regional Services Council when approving the subdivision of Erf 4973 Hout Bay in terms of Section 25 of Ordinance No 15 of 1985 that there shall be no access from the land hereby conveyed to Victoria Road, Hout Bay.

The block contains two handwritten marks. On the left is a large, stylized signature that appears to be 'S' with a loop. On the right is a smaller, simpler mark that looks like a checkmark or a stylized '1'.

WHEREFORE the said Appearer, renouncing all right and title which the said

ADRIENNE MARGARET PFAFF, Married as aforesaid

heretofore had to the premises, did in consequence also acknowledge her to be entirely dispossessed of, and disentitled to the same, and that by these presents, the said

1. **PIERRE-MARIE BARNABE, Married as aforesaid**
2. **VALERIE BRIGITTE SEBILLEAU-BARNABE, Married as aforesaid**

their Heirs, Executors, Administrators or Assigns, now are and henceforth shall be entitled thereto, conformably to local custom, the State, however reserving its rights, and finally acknowledging the purchase price to be the sum of R3 900 000,00 (THREE MILLION NINE HUNDRED THOUSAND RAND).

IN WITNESS WHEREOF, I the said Registrar, together with the Appearer, have subscribed to these presents, and have caused the Seal of Office to be affixed thereto.

THUS DONE and EXECUTED at the Office of the Registrar of Deeds at Cape Town on 9 January 2004



g.g.

In my presence



REGISTRAR OF DEEDS

