



REPORT TO MUNICIPAL PLANNING TRIBUNAL

ITEM NO **MPTSW53/11/19**

CASE ID	70469211
CASE OFFICER	Y Jaffa
CASE OFFICER PHONE NO	021 444 9536
DISTRICT	Southern
REPORT DATE	29 October 2019

WARD 58: APPLICATION FOR ADMINISTRATIVE PENALTY IN TERMS OF THE CITY OF CAPE TOWN MUNICIPAL PLANNING BY-LAW, 2015 (MPBL): ERF 64506 CAPE TOWN AT KENILWORTH, 104 SECOND AVENUE, HARFIELD VILLAGE

1 EXECUTIVE SUMMARY

Property description	Erf 64506 Cape Town at Kenilworth
Property address	104 Second Avenue, Harfield Village
Site extent	515m ²
Current zoning	General Residential Subzone GR4
Current land use	Shop and dwelling house
Overlay zone applicable	Harfield Village Local Area Overlay Zone
Submission date	6 August 2019
Subject to PHRA / SAHRA	Yes
Any unauthorised land use / building work?	A shop is operating on the property without the necessary approval. There is also unauthorised building work relating to the shop.
Has owner applied for the determination of an administrative penalty	Yes
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 The subject property has been used as a shop and for residential purposes for many years. According to the applicant he believed that the use was operating as a lawful non-conforming use right. However, as the onus is on

the applicant to prove lawful non-conforming use rights, the applicant failed to do so. It was also discovered that (at an unknown point in time) the internal configuration of the shop was changed. Therefore, this Department is of the opinion that the operation of the shop does not qualify as a lawful non-conforming use right and required the submission of this administrative penalty application. The applicant never submitted an application for the determination of a non-conforming use.

- 3.2 A building plan application proposing additions and alterations to the dwelling house and shop on the property was submitted on 13 June 2016. The plan was not cleared because it triggered a land use application for Council's consent to permit work in the Harfield Village Local Area Overlay Zone.
- 3.3 A similar building plan application to the one detailed in 3.2 above was submitted on 26 June 2018. This application also entailed the addition of a store room associated with the shops. The plan was not cleared because the use of shops is not permitted in General Residential Subzone GR4.
- 3.4 An application for rezoning (from General Residential Subzone GR4 to Local Business Zone 2), Council's approval to permit leaving the property in reverse gear and departures related to setbacks and parking was submitted on 14 January 2019. The application is ready for report writing; 1 timeous and 1 late objection were received. Therefore, the decision will be made by the MPT once this administrative penalty process has been finalised.

4 SUMMARY OF APPLICANT'S MOTIVATION

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

- There are no title deed restrictions prohibiting the use of the property for shops.
- The property is and has always been used as a shop; this is evident on the City's 1944-1966 survey imagery of the area.
- In 1940 approval was granted to the then owner to permit the conversion of one living room to a shop.
- The existing shop uses more floor space than was approved.
- The property should have been allocated a business zoning at the introduction of the first zoning scheme.
- A rezoning application was submitted in order to regularise the existing situation; no further development is proposed.
- According to the City, there are no records of previously approved plans.
- A small portion of the building (stores 1 & 2) was enclosed by a previous owner; the current owner was of the assumption that the existing situation had been approved.

- The property is not located within a heritage protection overlay zone.
- The building on the property is graded and is of heritage significance.
- The current owner took ownership of the property in 2013.
- The gravity of the contravention is not significant.
- The owner of the property did not knowingly contravene the MPBL.
- The floor space of the shop is 192m².
- The current owner is ethical and has not previously contravened this By-Law or any previous planning laws.

5 ASSESSMENT OF APPLICATION

- 5.1 The unauthorized use and building work is in contravention of Items 40 and 137 of the Development Management Scheme (DMS) relating to use and parking respectively. The use of shops is not permitted in the General Residential Subzone GR4 zone and only 1 bay in lieu of 5 parking bays are provided on the property for the shop and the dwelling house. In addition, Items 141(1)(b), 140(2)(c) and 176(8)(a) of the DMS are contravened in relation to reversing across a sidewalk into Second Avenue, having a carriageway crossing of 4m in lieu of 5m, and having parking in front of the front façade of the building.
- 5.2 In terms of section 129(7)(a) of the By-Law, an administrative penalty for a building work contravention may not be more than 100% of the value of the building, construction and engineering work unlawfully carried out.
- 5.3 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.
- 5.4 The applicant has indicated that the extent of the unauthorized building work is 36m². Based on the table of building values attached to the Standard Operating Procedure for Administrative Penalties (for warehouses) the maximum value of the administrative penalty is calculated as follows:
- $$36\text{m}^2 \times \text{R}7020.00 = \text{R}252\,720.00$$
- 5.5 The municipal value of the property is R2 330 000.00 as per GV2018 (see Annexure D).
- 5.6 Calculation of the maximum land use penalty:

$$\frac{\text{Total Municipal Value of property (R2 330 000.00)}}{\text{Total area of property (515m}^2\text{)}} \times \text{Total Unlawful Area (252m}^2\text{)} = \text{R1 140 116.50}$$

5.7 An amount which is not more than 100% of R1 392 836.50 may be imposed as an administrative penalty for both the land use and the building work contraventions.

5.8 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 unauthorized land use relates to a shop that is not permitted in the GR4 zone. The unauthorized building work relates to extensions to the shop.

Duration – According to the applicant, the shop has been operating on the property for ±79 years. It is not clear at what point in time the lawful non-conforming use rights ceased, but it is clear that the duration of the land use contravention has been long. It appears from aerial photography that the unauthorized building work occurred in 2015. The duration of the building work contravention is thus also long.

Gravity – The gravity of the contravention is not particularly serious considering the fact a shop on this property has now become part of the character of the area. (Corner shops are not uncommon throughout Harfield Village). It must also be noted that on-street parking is part of the character of the area.

Extent – The area used by the shop measures 252m². The extent of the contravention is thus large.

b) **The conduct of the person involved in the contravention**

According to the applicant, the current owner bought the property under the impression that the uses on the property had been approved. Even though this might be true, when purchasing a property one is expected to receive building plans from the seller and not just accept the seller's word. In this regard it must be noted that the main person who controls the trust that owns the property is a professional architect with many years of experience in the development/ building industry.

With regard to the unauthorized building work, according to the applicant the current owner was not responsible for this. The current owner purchased the property in 2013. However, it clearly appears from aerial photography that the unauthorized building work occurred in 2015 and thus the applicant's statements in this regard are not correct.

In this regard it must be noted that Section 78 of the MPBL states that:

(1) An applicant must ensure that –

- (a) no misrepresentation is made to the City;
- (b) the City is not misled;
- (c) all information furnished to the City is accurate; and
- (d) the application does not omit any relevant information.

(2) A person who contravenes subsections (1)(a) or (1)(b) is guilty an offence and upon conviction is liable to the penalties contemplated in sections 133(2) and 133(3).

It is clear that the applicant provided inaccurate information and made a misrepresentation to the City.

The conduct of the owner cannot be condoned.

c) **Whether the unlawful conduct was stopped**

The unlawful conduct has not been 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 owner of the property has not previously contravened this By-Law or any other planning law.

- 5.9 In view of the abovementioned considerations, and in particular the conduct of the owner, this Department recommends that an administrative penalty of **R5 000.00** be imposed.

6 REASONS FOR DECISION

Reasons for the recommended decision may be summarised as follows:

- 6.1 The use of shops and additions thereto are in contravention of Items 40, 137, 141(1)(b), 140(2)(c) and 176(8)(a) of the Development Management Scheme.
- 6.2 The duration of the contravention is long.
- 6.3 The gravity of the contravention is not serious.
- 6.4 The extent of the contravention is large.
- 6.5 According to the applicant, the current owner bought the property under the impression that the uses on the property had been approved. Even though this might be true, when purchasing a property one is expected to receive building plans from the seller and not just accept the seller's word. In this regard it must be noted that the main person who controls the trust that owns the property is a professional architect with many years of experience in the development/ building industry.
- 6.6 With regard to the unauthorized building work, according to the applicant the current owner was not responsible for this. The current owner purchased the property in 2013. However, it clearly appears from aerial photography that the unauthorized building work occurred in 2015 and thus the applicant's statements in this regard are not correct. The conduct of the owner cannot be condoned.
- 6.7 As far as can be ascertained, the current owner has not previously contravened this By-Law or any other planning law.

7 RECOMMENDATION

In view of the above, it is recommended that:

- a) An administrative penalty in the amount of **R5 000.00** be determined in terms of Section 129 of the City of Cape Town Municipal Planning By-Law, 2015 in respect of Erf 64506 Cape Town at Kenilworth regarding the unauthorised shop and building work as shown on the plan drawn by David

Hellig & Abrahamse, with drawing number L12225/Erf 64506 Ground floor,
dated 29 October 2019.

ANNEXURES

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



Section Head : Land Use Management

Name P Hoffa

Tel no 021 444 7724

Date 2019-10-29

Comment



District Manager

Name U Gonsalves

Tel no 021 444 7720

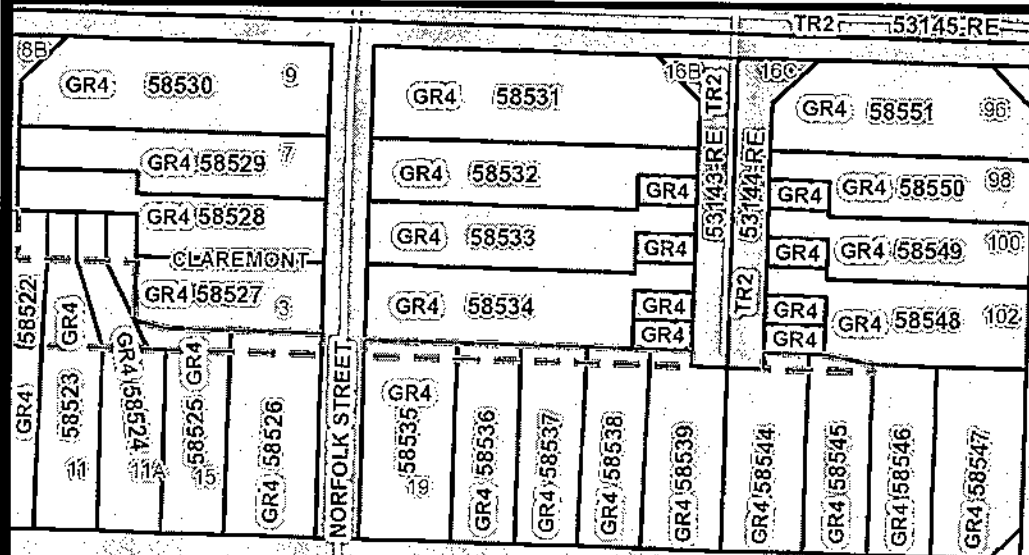
Date 2019-10-29

Comment

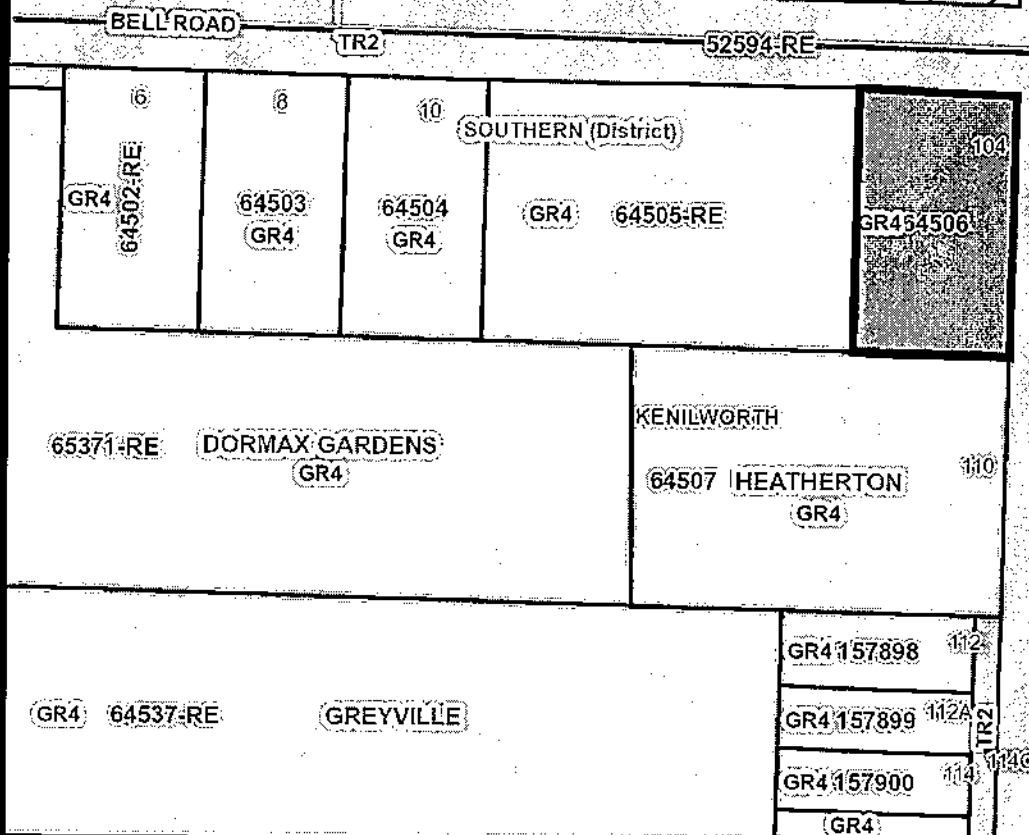
PLANNING AND BUILDING DEVELOPMENT MANAGEMENT LOCALITY MAP

2688

ANNEXURE : A

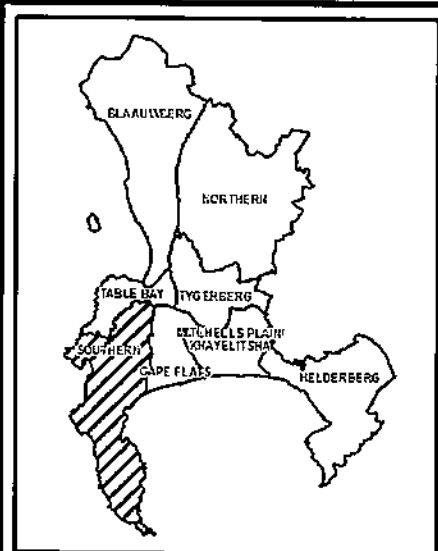


LB2 53388	GR4 53382
LB2 53387	GR4 176812
	GR4 176813
GR4 57826	GR4 53384
GR4 57827	GR4 53385



20	20A	20B	22C	22D
163012	163013	163014	163015	163016
GR4 64656				
GR4 161748	105A	64667-RE	GR4 64657-RE	
GR4 64666			65750	65751
GR4 64665			64658	GR4
GR4 64664-RE			64659	GR4
GR4 64663				

Overview



Erf: 64506

Allotment: CAPE TOWN

Ward: 58

District: SOUTHERN

Suburb: KENILWORTH

Sub Council: Subcouncil 20



1:848

Notices Served



Support
Received



Petition
Signatory



Objections
Received



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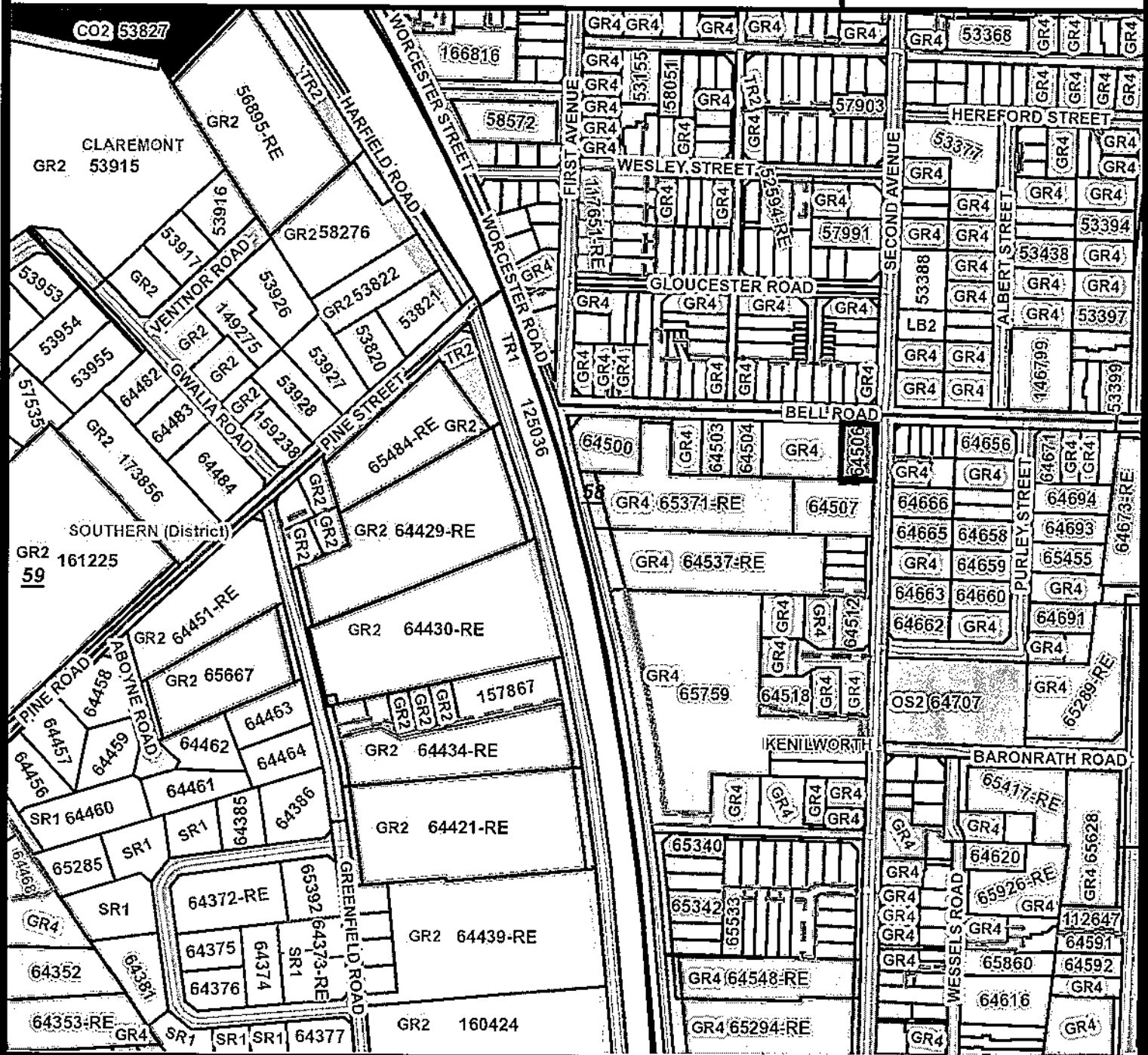
Date: Tuesday, 29 October 2019

File Reference:



CITY OF CAPE TOWN
ISIXEKO SASEKAPA
STAD KAAPSTAD

Making progress possible. Together.



Overview

Erf: 64506

District: SOUTHERN

Allotment: CAPE TOWN

Suburb: KENILWORTH

Ward: 58

Sub Council: Subcouncil 20



1:2 977

Notices Served



Support
Received



Petition
Signatory



Objections
Received



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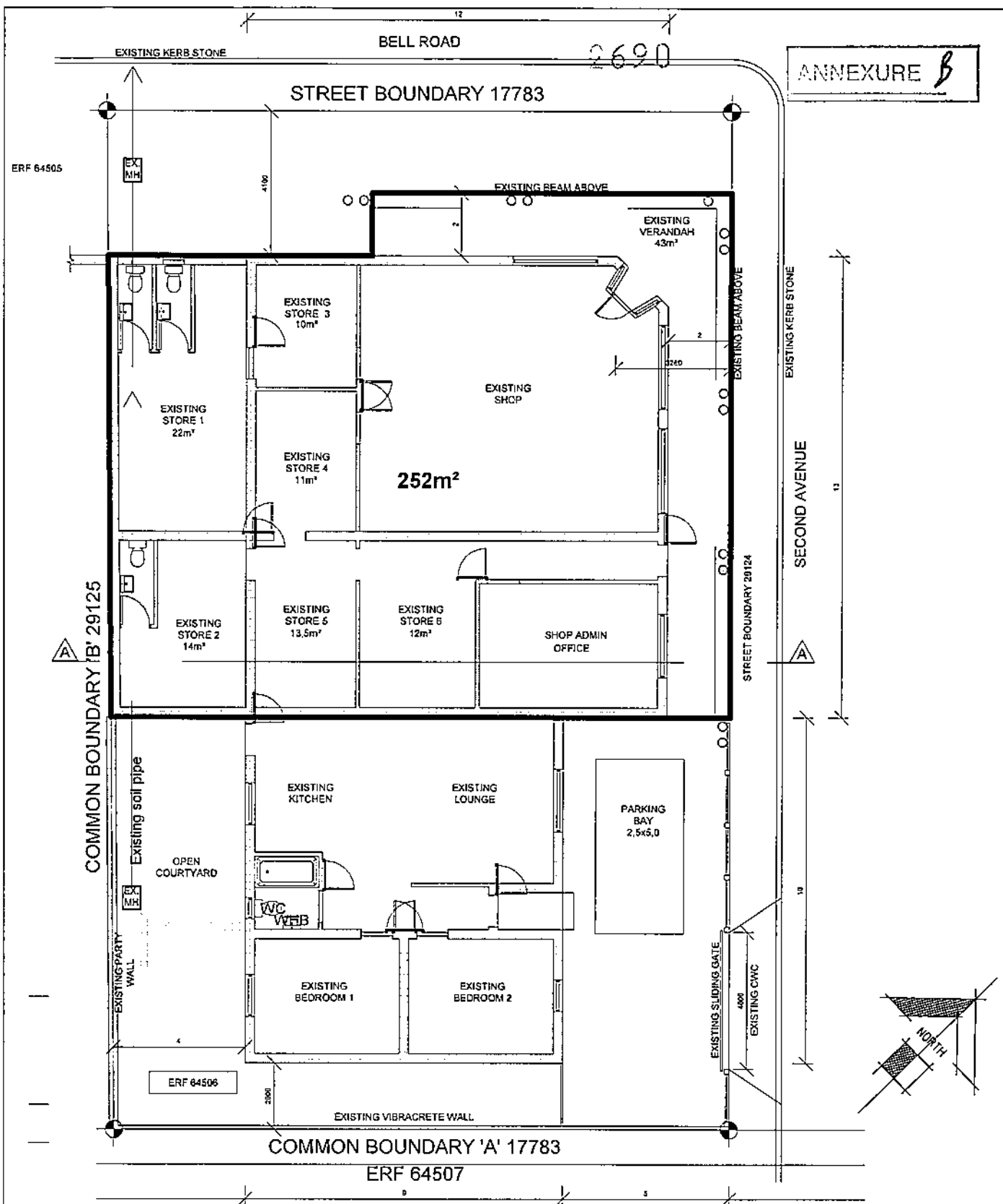
Date: 14 October 2019

File Reference:



CITY OF CAPE TOWN
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GROUND STOREY & SITE PLAN

date	29 October 2019
scale	1 / 150
drawing ref & no.	L12225/Erf 64506 Ground floor (fa)

dh+a

david hellig + abrahamse

professional land surveyors

2nd floor wale street chambers

38 wale street, cape town

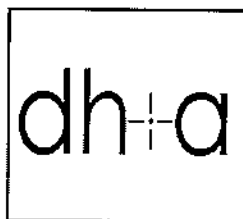
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**APPLICATION FOR DETERMINATION OF AN
ADMINISTRATIVE PENALTY IN TERMS OF
SECTION 42 (r) OF THE CITY OF CAPE TOWN:
MUNICIPAL PLANNING BY-LAW (2015)**

**ERF 64506 CAPE TOWN AT KENILWORTH
NO. 104 SECOND AVENUE, HARFIELD VILLAGE**



david hellig + abrahamse
professional land surveyors
2nd floor wale street chambers
38 wale street
+27 21 426 2613
info@dhaa.co.za www.dhale.co.za

1. PROPERTY INFORMATION AND PROPOSAL

- 1.1 Erf Number
- 1.2 Address
- 1.3 Extent
- 1.4 Title Deed
- 1.5 Title Deed Conditions
- 1.6 Owner
- 1.7 Zoning
- 1.8 Application
- 1.9 Background Information
- 1.10 Location
- 1.11 Heritage
- 1.12 Existing Land Use
- 1.13 Surrounding Land Use

2. DESIRIBILITY

- 2.1 Motivation in terms of Section 129 (8) of the Municipal Planning By-Law (2015)

3. CONCLUSION**Annexures**

- 1. Signed application form
- 2. Power of attorney
- 3. Title Deed
- 4. Noting Sheet
- 5. S.G. Diagram
- 6. Approval Documents
- 7. Locality Plan
- 8. As-built Plans

1. PROPERTY INFORMATION, PROPOSAL AND DESIRABILITY**1.1 Erf Number:**

Erf 64506 Cape Town at Kenilworth

1.2 Address:

104 Second Avenue

1.3 Extent:

Erf size: 515 m²

Existing dwelling unit: 90 m²

Existing shop: 192 m²

1.4 Title Deed:

T18975/2013

1.5 Title Deed Conditions:

There are no restrictive title deed conditions which would prohibit or impinge the proposal; this is confirmed in the Conveyancer's Certificate

1.6 Owner:

Eric Otten Childrens Trust

1.7 Zoning:

General Residential, Sub Zone GR4

1.8 Application:

Application is made in terms of Section 42 (r) of the MPBL for the determination of an administrative penalty as contemplated in Section 129 (1) of the MPBL.

1.9 Background Information:

The subject property is and always has been used as a shop and comprises a residential component which is shown as 'Kyora' on the City's 1944-1966 survey imagery of the area.

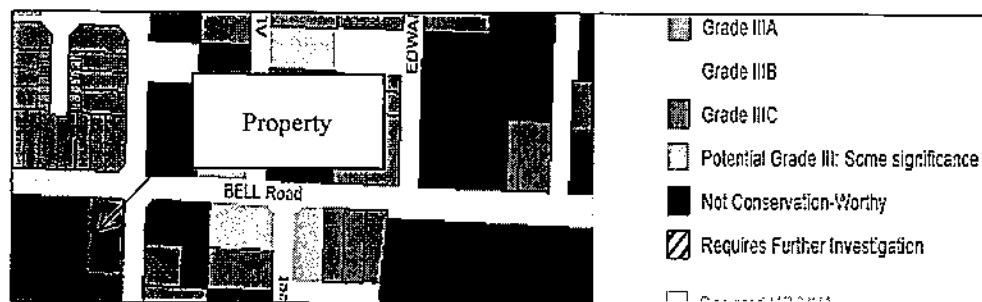
In 1940 approval was granted to the then owner Mr. M, Polliack to permit the conversion of one living room to business purposes (grocery shop) at the subject property which was at that time known as 'Cornerways'. Although the existing shop makes use of more floor space than that which was approved, the use for business purposes has not changed. We are of the opinion that the property should have been allocated a Business zoning when the first zoning scheme was introduced. A separate Rezoning application (Case 70438852) was submitted in order to regularise the existing situation, no further development is proposed. According to the City there are no records of approved building plans. A small portion measuring $\pm 36\text{m}^2$ of the existing building was enclosed by a previous owner, the current owner inherited this and was of the assumption that all building work had been passed. The area which was enclosed comprises Store's 1 & 2 as shown on the attached as-built plan.

1.10 Location:

The property is situated within Harfield Village on the corner of Second Avenue and Bell Road. The site is easily accessible and enjoys good access to; schools, religious institutions, restaurants and shops.

1.11 Heritage:

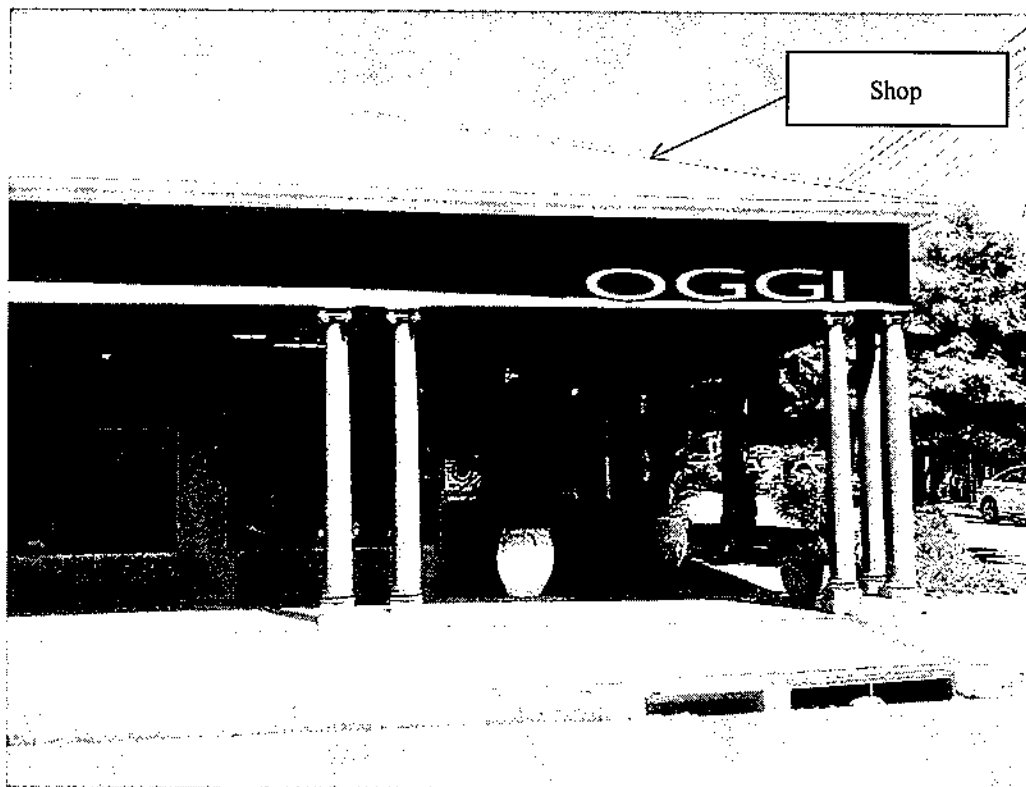
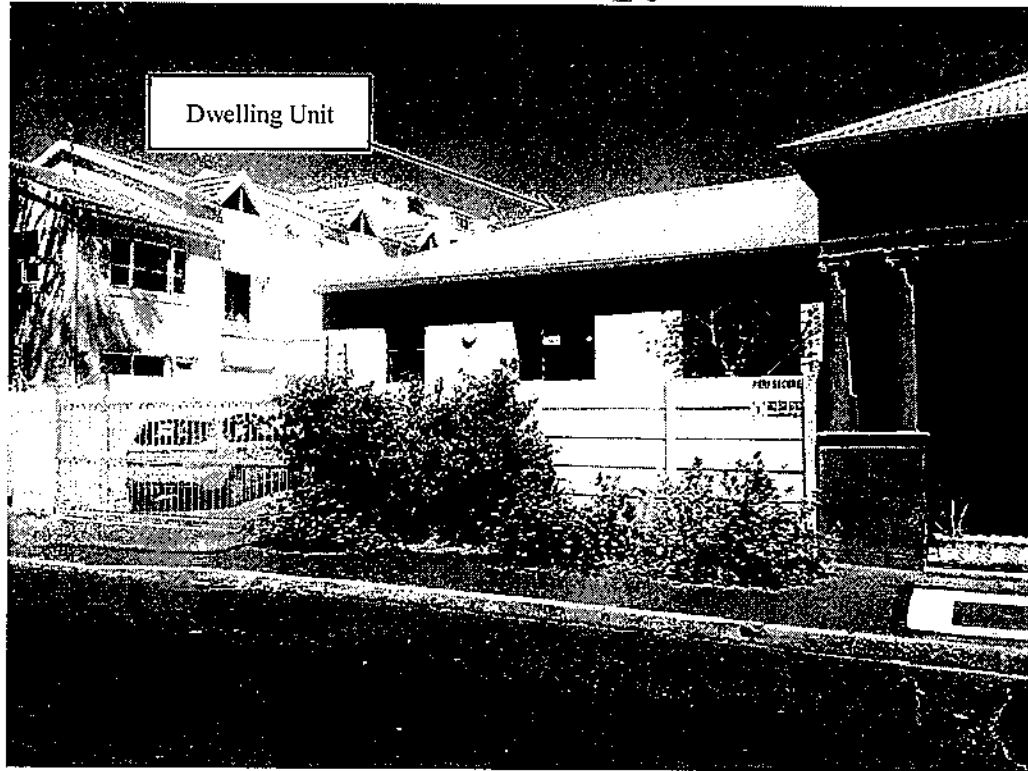
The subject property is not located within a declared or proposed Heritage Protection Overlay Zone (HPOZ). The existing building is older than 60 years is Graded IIIC.



Extract from the Zoning Viewer

1.15 Existing Land Use

The existing single building on the property comprises a shop and dwelling unit, these uses are illustrated in the below photographs.



1.16 Surrounding Land Use

There are numerous other properties in Second Avenue which are zoned for business use, Erven 53387 & 53388 are situated ± 50 metres to the northeast of the property, these properties are used for Local Business (LB2) use and thus the existing land-use is compatible with other uses within in the immediate area.

2.0 DESIRABILITY OF THE APPLICATION

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The desirability of the application is measured against the criteria of Section 129 (8) of the MPBL:

When determining an appropriate administrative penalty, the Municipal Planning Tribunal must consider at least the following factors –

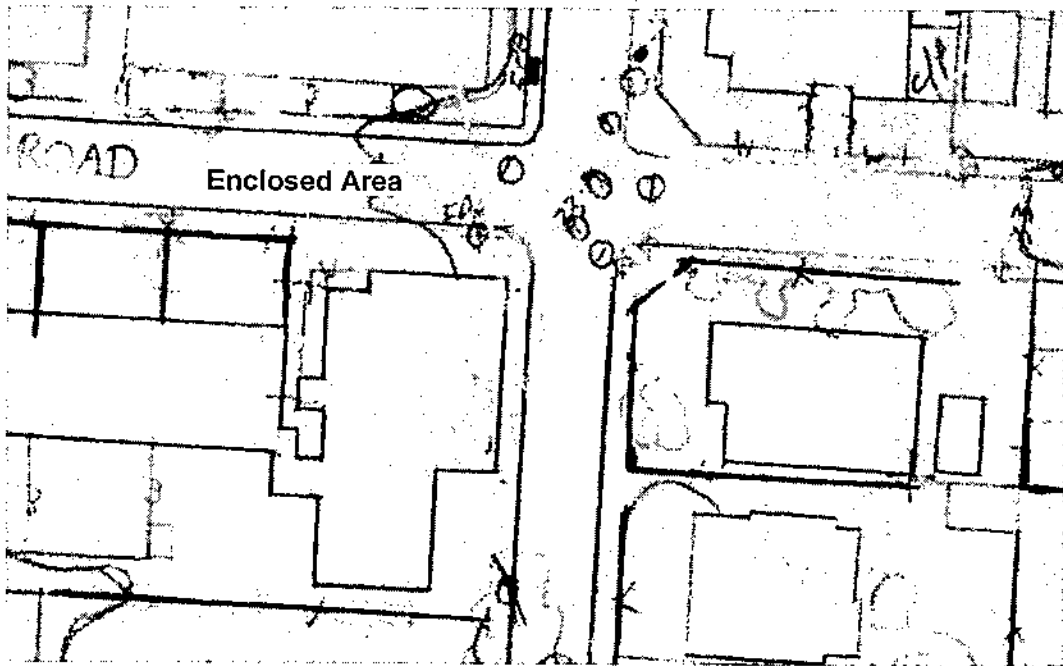
a) The nature, duration, gravity and extent of the contravention

The nature: The nature of the contravention relates to the use of the property for a grocery shop which has existed since 1940. A small portion of the existing building measuring 36m² was enclosed by a previous owner and it appears that there are no approved building plans for this addition. The portion which was enclosed consists of Store's 1 & 2 as indicated on the attached as-built plan.

Duration: The property has been used as a shop since 1940, i.e. 79 years. The current owner took transfer of the property in 2013 and thus the duration in this respect is approximately 6 years. The 36m² unauthorised enclosure took place after 1974; it is not known exactly when the work was carried out, however it was before the transfer of the property to the current owner.

Gravity: The gravity of the unauthorised land-use is not significant; the current owner was of the understanding that the property comprised business rights and all building work had been approved. Therefore, they did not knowingly contravene the By-Law. The property has been used for a shop since 1940 without creating any negative impact.

Extent: In 1940 approval was granted to the then owner Mr. M, Polliack to permit the conversion of one living room to business purposes (grocery shop) at the subject property which was at that time known as 'Cornerways'. Presently, the floor space for the shop is 192m², this is indicated on the as-built plans. As shown in the below image the enclosure was done after 1974 and prior to the transfer of the property to the current owner.



City's 1974 Topographical Map

(b) The conduct of the person involved in the contravention

The current owner has submitted a Rezoning application to align the existing land-use with the correct zoning. Furthermore, as soon as the owner was made aware of the unauthorised use they requested the applicant to make application for the determination of an administrative penalty. The current owner inherited the land-use as well as the building work, therefore the conduct of the owner is ethical and they have demonstrated that they wish to legalise all land-use and building work on the property.

(c) Whether the unlawful conduct was stopped

The unlawful conduct is on-going.

(d) Whether a person involved in the contravention has previously contravened this By-Law or a previous planning law.

The owner has not previously contravened the By-Law or a previous planning law.

3. CONCLUSION

The unauthorised land-use does not negatively impact on the character of the area, rather the use of a portion of the property for a shop is desirable and has served the local community for almost 80 years. There is minimal impact on the neighbouring properties and up until the rezoning application was submitted no complaints had been received from abutting property owners. Furthermore the current owner inherited the land-use and was of the understanding that the property comprised business rights.

Based on the above we kindly request that the administrative penalty fee is Nil.

DAVID HELLIG & ABRAHAMSE

Professional Land Surveyors



CITY OF CAPE TOWN
ISIXEKO SASEKAPA
STAD KAAPSTAD

CCT011030300000



2699

OWNER NAME: THE ERIC OTTEN CHILDREN TRUST

PUBLIC NOTICE CALLING FOR INSPECTION OF THE 2018 GENERAL VALUATION ROLL AND LODGING OF OBJECTIONS This communication contains: • The new valuation of the property. • Public inspection and objection process. • Public inspection venues. • General questions and answers.	ISAZISO ESIJOLISWE KULUNTU SEKHWELO LOKUBA KUHLIOLWE ULUHLU LEZOQINGQO-MAXABISO NGOKUPHANGALELEYO LWANGO-2018 NOKUNGENISWA KWEZICHASO Le mbalelwano iqulathe: • Uqingqo-maxabiso olutsha lwepropati, • Ingcaciso yenkqubo yohlolo luluntu kwaneyokufaka isichaso. • Uluhlu lweendawo zohlolo zoluntu • Imibuzo ngokubanzi neempendulo.	OPENBARE KENNISGEWING OOR BESIGTING VAN DIE ALGEMENE WAARDASIELYS VIR 2018 EN INDIENING VAN BESWARE Hierdie kommunikasie bevat: • Die nuwe waardasie van die eiendom • Proses vir openbare insae en beswaar • Lokale vir openbare insae • Algemene vrae en antwoorde
In terms of the provisions in sections 48 and 49 of the Municipal Property Rates Act, Act 6 of 2004, hereinafter referred to as the Act, I hereby furnish the particulars which are applicable to the under-mentioned property included in the 2018 General Valuation Roll.	Ngokwemimiselo yamacandelo-48 nele-49 oMithetho ongamaXabiso eePropati zikaMasipala onguNomb.6 wango-2004, nekuthi emva koku kubhekiselwe kuwo ngokuba nguMithetho, ke ngoko ndinikezela ngeenkukacha apho zijoliswe kwipropati ekhankanywe ngezantsi apha ebandakanyiweyo kuLuhlu loQingqo-maxabiso ngokuphangaleleyo lwango-2018.	Ingevolge die bepalings van artikel 49 en 49 van die Wet op Munisipale Eiendomsbelasting, Wet 6 van 2004, hierna die Wet genoem, verskaf ek die besonderhede wat betrekking het op die ondergenoemde eiendom wat in die bogenoemde algemene waardasielys vir 2018 ingesluit is.
Registered / other description of the property Inkcazelo ebhalisiweyo okanye elolunye uhlobo yepropati Geregistreerde / ander beskrywing van die eiendom	64506 CAPE TOWN CCT011030300000	
Rating Category of Property Udidi lweXabiso lePropati Graderingskategorie Kategorie Van Eiendom	BUSINESS AND COMMERCIAL	
Physical Address Idilesi yeNdawo Fisieke adres	104 SECOND KENILWORTH	
Extent of the land Ubukhulu bomhlaba Grootte Van Grond	514	
Effective Date Umhla Wokuqaliswa Intreedatum	01-07-2019	
Market Value Ixabiso leNtengiso Markwaarde	R 2,330,000	

Municipal Valuer / uMqinqqi-maxabiso kaMasipala / Munisipale Waardeerder

For more information:

Sharecall: 086 010 3089

Fax: 0865886042

Email: valuationobjection@capetown.gov.za

Web:

www.capetown.gov.za/propertyvaluations/

Ngolwazi oluthe vetshe:

Inombolo yoncedo: 086 010 3089

Ifeksi: 0865886042

Iimeyile: valuationobjection@capetown.gov.za

Iwebhusayithi:

www.capetown.gov.za/propertyvaluations/

Vir meer inligting:

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Web:

www.capetown.gov.za/propertyvaluations/