
ORAL SUBMISSIONS – SUB-COUNCIL – 24 AUGUST 2020

1. Thank you for the opportunity to appear before this Sub-council today. For the record, my name is Nicholas Smith. I am an attorney, and I represent Mr. Robby Brink, who is the registered owner of *Erf 2690 Cape Town* which is situated at 15 Beta Road in Bakoven. I take the record (63 pages in total) as read.
2. I intend using the opportunity afforded me this morning to underscore the most important aspects of the matter before you, both on the facts as they appear in the record; and also as regards this sub-council's role as a commenting authority in this matter, rather than the ultimate decision-maker.
3. I want to start by placing on record that my client is an unabashed and ardent supporter of the National Sea Rescue Institute and its mission. My client and his wife assisted in organising the NSRI's annual Christmas party for many years (which my client's wife organised, and my client part-funded). This is not a matter about personal relationships however – it is about the proper and lawful exercise of the City's discretion in deciding whether to conclude a lease agreement which will allow for the exclusive use of an extremely valuable resource (at least three parking bays in Bakoven, and possibly more, depending on the parking configuration) being removed from public circulation. As matters stand, a lease will also have at least the very real potential of excluding public pedestrian access which has been enshrined by many years' practice.
4. My client (like other Bakoven residents, including Advocate Wayne Coughlan, a senior member of the Cape Bar; and Mr. Graham Bean who as I understand it is a senior attorney in private practice) has registered his objection to the proposed conclusion of a lease agreement between the City and the applicant. I submit that my client's objections are based on substantively good grounds.

Those are that the asserted use to which the leased land will be put (parking for NSRI members when called out for emergency sea rescue) and the actual use to which the applicant has put the land in terms of its current temporary occupation rights, are strikingly at odds. The other objectors have also raised very real and well-expressed concerns regarding ongoing pedestrian public access to, and use of, the subject-property that neighbours and other beach-goers currently enjoy. [See page 7 of the *Report to Sub-council 16*, and highlight the concerns raised there by Mr. Graham Bean.]

5. I intend traversing three main aspects this morning. They are:

- 5.1. Firstly a very brief synopsis of Sub-council's role (as a commenting authority here, rather than the ultimate decision-maker);
- 5.2. Secondly, I will highlight certain portions of the *Report to Sub-council 16* in support of the submissions that I will make this morning as to the prematurity of the matter being before sub-council today for purposes of anything more than an interim comment; and
- 5.3. third, I will make some concluding submissions which are based on an objective review of the *Report to Sub-council 16* and its annexures, and which will include some recommendations on how to ensure that the best and most equitable use of the subject-property by all parties with an interest in it can be explored and achieved, in a process to be led by the City's Property Management, which must be done before the matter serves before this sub-council again in due course, for purposes of sub-council's final comment.

Sub-council 16's role in this application

- 6. The Sub-council is commenting on the proposed conclusion of the lease of City land, rather than making a decision on the conclusion of the agreement. The latter responsibility lies with Council in this instance.

7. I submit therefore that my task today, and this Sub-council's assignment (or terms of reference) in its commenting function today, are both made somewhat easier by in respect of this being a commenting function (rather than what might be seen as the more formal strictures of having to make a decision i.e. take administrative action, with all of the consequences attendant upon that act).
8. The Sub-council's role is clearly spelled out in the Report – it is to comment to the competent authority (i.e. Council) *“on the granting of rights to use, manage or control City immoveable assets such as land, ... and to recommend conditions of approval where deemed necessary”*.¹
9. In order to assist the Sub-council in delivering suitably informed (and therefore rational) comments on the merits of the application to lease in due course, it is important to show why Sub-council is not in a position to do so yet and in the context of today's tabling of the application.

Relevant extracts in the Report to Sub-council 16

10. The issues I intend traversing under this head show why more dialogue and consideration is required between the parties with an interest in this matter, before this Sub-council can reasonably be expected to give a suitably informed (and therefore rational) comment on the merits of the matter.
11. The so-called *“Factors motivating recommendation”* (which pertain specifically to the City officials' recommendations to this Sub-council in the paragraph directly below the tabulated motivating factors) provide an early indication that the necessary consideration has not been given to the matter yet by the City's officials.

¹ See page 1 of the Report to Sub-council 16.

12. The motivating factors are 3 in number, and in my submission do not stand objective scrutiny when considered objectively. The first factor (leasing the land relieves the City of the maintenance burden) is thoroughly discredited by at least one of the objectors (Mr. Bean) in his written objection.
13. In that objection he says the following:² *“The erf under consideration is maintained by various neighbours, including ourselves, and not by the City. The contentions in your notice that the erf is “under utilised” and that it is a “maintenance burden” for the City is accordingly without merit and untrue.”*
14. The second factor is nonsensical: *“A market related rental for a non-profit lifesaving and sea rescue organisation rental income will be generated.”*
15. I submit that the same applies to the third motivating factor (*“better utilisation of City land”*). This cannot be correct on the facts of the application, as I will show shortly.
16. We will return to paragraph 5 (the City’s recommendations for consideration and comment by Sub-council 16) at the conclusion of my address to you this morning.
17. As regards paragraph 6 of the application (under the heading *“Background”*) I want to make 2 points in support of my submission that the application is not yet ripe for this sub-council’s final comment.
18. The first point relates to the reference in the first paragraph under sub-paragraph 6.1 on page 5 of the City’s report, to the following: *“The [NSRI] made application to lease [the subject-property] for parking purposes. The parking will be utilised for sea rescue personnel to park their vehicles in the event of a call out.”*

² See the first objection that forms part of Annexure B to the *Report to Sub-council 16* (at page 26 of the record).

19. Regarding this reference (specifically to parking for purposes of a call out) I make the following submissions. The leased area presently has chained access, which implies that at any time when there is not a call out (i.e. 99% of the time) then this area is sterilized, for the exclusive use of the NSRI, for parking. This cannot be a rational use of the subject-property when parking is at such a premium in Bakoven. What the facts also show currently (and this is explicitly acknowledged by the applicant) is that the applicant's members are already in the habit of parking on the subject-property for NSRI activities that go beyond call-outs. What has transpired during the current occupation by the applicant appears to be an abuse of the proposed stated use, in that the area (which has been physically secured by the use of a chain and notice) is being used *ad hoc* by NSRI members for purposes which have nothing to do with the stated intention to which the leased property is advertised to be put. This also begs the question – is this right and fair when one considers the stated intention for the lease, with specific reference to call-outs?

20. (While I note that in response to the objections on this aspect the applicant refers to additional uses and parking of unbranded cars by members so that they can attend special operations, training, meetings, maintenance etc., this poses an additional question: Were these wider proposed uses part of the notification circulated by the City to potentially interested and affected parties? The wider uses connote more physical occupation of the area than would be the case with call-outs only, and if this is the applicant's real intention then that must be brought to all parties with an interest in the application because it is a different application to the one advertised.)

21. My second submission regarding the background goes to the stipulated legal requirements for alternative proposals. The officials who prepared the Report refer to the fact that no alternatives were received; and objections received were addressed. On my reading of the record, I respectfully dispute both statements. There might have been no concrete alternative proposal (for example an alternative lease to a private collective at commercially applicable

rates (on the City's own version, a commercial lease of the property for parking would ordinarily bring in R8,000 per month³); or putting the property to another use) but the idea of dealing with the NSRI's needs in a different but probably more equitable and efficient way, was in fact well-canvassed by the objectors who took the time and trouble to deliver written objections.

22. In this instance, Sub-council must be alive to the suggestion by one of the objectors to the effect that before any decision is made, a proper survey should be conducted by the City. This will enable the City to make an informed and rational decision. That objector then traverses 5 substantive issues that are likely to form the beginnings of a list of considerations that need to be taken into account in this matter. What I am suggesting to Sub-council is we need to look before we leap here.
23. Further evidence that sufficient homework has not yet been done in this matter is the consistent theme raised by objectors regarding pedestrian public access, which has been enshrined for many years. Even though that is raised consistently in the objections (and is dealt with by the applicant, by referring to it being amenable to "clearing the adjacent areas on the erf" without specifying what is meant thereby), no provision whatsoever has been made in that regard, and in the recommendations set out for this Sub-council at paragraph 5 of the *Report to Sub-council 16*.
24. I submit that the objector's suggestion of a proper survey by the City, before embarking on a process that could culminate in the effective exclusion of the area in question from use as a public parking resource, albeit with entrenched pedestrian access rights, must be taken up by the City's officials, at the behest of this sub-council.
25. The objections have one clear theme – they all include alternatives to the City concluding this lease on the conditions presented, and the possibility of a

³ See annexure I.

proposed use (or uses) for the subject-property that balance/s all the different (and not necessarily competing) needs on the subject-property. I submit that these initiatives should be investigated as part of the proposed survey, and in due course implemented as agreed uses for the property. It is important in this regard to note that the applicant's CEO agrees to be willing to accommodate alternatives.

26. It is also important to note is that the NSRI enjoys current temporary occupation rights and undertaking the suggested survey (and whatever else might be required, like a properly structured workshop for the parties to express their position) will not negatively impact on the existing situation. What it will do is afford sub-council greater comfort regarding the latter making suitably considered comments in due course, to the City's decision-maker.
27. I submit that in regard to the proposed survey, some vision and collaboration is required and it will probably be appropriate for the City to convene a workshop with the relevant parties/stakeholders. That would have to be done by the City's Property Management Department and the objective would be to discuss how best to accommodate, to the extent reasonably possible, all of the interests at issue here as expressed by the letters of support, objection and comment that form part of the record in this matter. The process should be driven by the relevant officials in Property Management and should precede any expectation of comment by Sub-council 16, so that this Sub-council can make an informed comment in due course.
28. I would point out for present purposes that the current conditions set out in the *"recommendations for consideration and comment by the [sub-council]"* are entirely insufficient to ensure that all interests are adequately considered and included (I have already given the example of the applicant's undertakings regarding enshrining public pedestrian access and how that has not been included as a condition of approval).

29. In conclusion I submit that it is entirely reasonable for this Sub-council to oblige such a process before it can reasonably be expected to provide an informed comment to the competent authority, and such conditions as might be appropriate, in exercising its delegated function in this application and in respect of delivering informed (and therefore rational) comment to the competent authority in terms of Part 24, Delegation 10(1).
30. Those are my submissions.

PREPARED AT CAPE TOWN ON THIS 24th DAY OF AUGUST 2020

Per: N.D. SMITH

Nicholas Smith Attorneys
2nd Floor
114 Bree Street
Cape Town
8001
Tel: 021 424 5826
Fax: 021 424 5825
Ref: NDS/sg/B47-001