

POLICY

CITY-WIDE LAND RESTITUTION

APPROVED BY COUNCIL: 31 OCTOBER 2001
C 18/10/01

C 18/10/01

EXCO 42/10/01

CITY-WIDE LAND RESTITUTION POLICY

RESOLVED that:

- (a) the City of Cape Town support land restitution and will undertake its responsibilities as provided for by the Restitution of Land Rights Act (22 of 1994)
- (b) the City will assist the Land Claims Commission and claimants in respect of gathering information from existing Council records required by the Commission to verify the claims. Such Council assistance may include planning and legal advice.
- (c) the City will be proactive in compiling a comprehensive restitution database for claims within the metropolitan area
- (d) the City will endeavour to ensure appropriate and integrated development of land affected by restitution and to this extent will be informed by the legal opinion dated 18 June 2001 (attached to the report as Annexure C)
- (e) the City may endeavour to make land directly subject to restitution, i.e. restoration of original land, available to the Land Claims Commission on a negotiated basis
- (f) where City-owned land has been identified as alternative land, the availability of such land for restitution purposes will have to be assessed by the City in terms of its metropolitan locality, City policies, development frameworks for the area, etc. Such land would be made available to the Commission on a negotiated basis
- (g) the City will honour the intention of the Restitution of Land Rights Act by imposing a moratorium on the long-term lease, sale and/or redevelopment of vacant municipal land which is directly subject to a land claim registered with the Land Claims Commission (for restoration of original land), until such time as the claim has been resolved. Where the City and the Commission have, through negotiation, reached agreement on the availability of a site as alternative land for restitution, the City will place a moratorium on the long-term lease, sale and/or development of such land
- (h) the City may consider making municipal land available free of charge to claimants where national government does the same, on condition that the wider community also benefits from the availability of this land (for example, residents other than claimants should also be given the opportunity of being housed on such land)

(i) the City, in acknowledging that development related to restitution is “special or unique”, may consider assisting financially in instances where the land affected by restitution is strategically located in terms of the City-wide context and the development not only benefits the claimants but also the broader community. Such assistance will only be for community-based development and not for private, commercial or industrial type development

(j) the City will, where possible, assist in the restoration of rental occupation to original tenants (claimants) through the re-allocation of tenancies to claimants

(k) the City’s financial commitment to land restitution be subject to the Integrated Development Plan (IDP) prioritisation and budgetary provisions for the City.

Extract from report is attached [\[go to next page/s\]](#).

Previous policy decision: -

File Ref. No. (HO 14/3/7/P)

ANNEXURE A**CITY-WIDE POLICY ON LAND RESTITUTION****1. INTRODUCTION:**

On 14 March 2001 the Planning and Environment Portfolio Committee after considering a report entitled "Land Restitution Claims: Overview" resolved, *inter alia*, to draft and adopt a metropolitan-wide policy on land restitution taking into account the Senior Legal Counsel opinion on the City's obligations towards land restitution, as well as all policies and decisions of disestablished Councils in the metropole. This resolution was ratified by the Executive Committee on 24 April 2001.

The settlement of land claims is the responsibility of the Commission on Restitution of Land Rights and not the local authority. However, land restitution is still of significance to the Cape Town City Council in terms of Council's vision, its moral and legal obligations and its planning responsibilities. In proposing a City-wide land restitution policy it is therefore considered necessary briefly to explain the legal framework for land restitution and the restitution process, as well as the significance of land restitution to the City Council. Consequently, this report has been set out in three main parts, viz: Firstly, the legal framework for restitution; secondly the importance of land restitution to the City; and finally, the City's role in land restitution in the metropole is proposed in a number of policies for political consideration.

The audit of all former policies and decisions of the disestablished Councils in the metropole, which have been taken into consideration in the drafting of this policy, is the subject of a separate report which is attached as Annexure B.

2. LEGAL CONTEXT**2.1 Restitution of Land Rights Act**

The Restitution of Land Rights Act (Act 22 of 1994) was passed by Parliament to restore or compensate people for their land rights lost as a result of racially discriminatory laws or practices, after 19 June 1913. Land claims can be lodged on private, public or municipal owned land.

Restitution of land rights may take place by restoring the land itself (i.e. return of the original land), providing alternative state owned land, financial compensation or priority access to a state housing scheme. The form restitution will take will depend on the circumstances of each claim. Restitution is applicable to both owners and non-owners (tenants).

The settlement of claims is the responsibility of the Commission on Restitution of Land Rights, a branch of the National Department of Land Affairs set up by the

Government in terms of the Act to specifically deal with all restitution claims.

2.2. Procedure for settling claims:

The procedure for settling the land claims as set out in terms of the Act is *summarised* as follows:

Phase 1: Lodgement

The closing date for lodging claims was 31 December 1998. All claims were required to be lodged with the Commission. Once claims have been received they are registered on the Commission's database.

Phase 2: Screening

The Commission checks claims for acceptance in terms of the criteria set by the Act; this process is known as the *validation* of claims. It is ascertained if the claim is a community claim or an individual claim.

Phase 3: Publication of Notice:

If the claim is accepted, the Commission publishes it in the Government Gazette and the newspaper. This is to inform other parties who may have a stake or interest in the claim.

Phase 4: Preparation for negotiations:

The Commission produces a case report on the claim. Claims are also subject to a process of *verification* whereby the Commission checks if the claims have been made by legitimate claimants. In other words, the Commission must check if the claimants did reside on the properties or in the area/s indicated. This verification process may, in the case of tenancy claimants, involve checking old records such as past electricity and water accounts. In this phase the Commission also presents options to help claimants make informed choices. The land is valued and the valuation is used to help parties agree on just and equitable compensation.

Phase 5: Negotiation:

The Commission brings parties together to negotiate the settlement of a claim. Parties can be current landowners, developers, local councils or any other party that may be affected by the claim. Where necessary, the Commission uses mediation to help parties resolve disputes. If mediation fails, the Commission refers the disputes to the Land Claims Court.

Phase 6: Settlement of claims:

Once agreement on how to settle a claim has been reached, the Commission refers the agreement to the Land Claims Court to have it made a Court ruling. To avoid delays the Act was amended so that parties could settle claims out of Court. The Minister of Land Affairs can now make awards for restitution without having to refer the agreement to Court. This can be done where parties have reached an amicable solution on how to settle a claim. Many claims will now be

settled through this administrative method. This agreement is, in terms of the Act, termed a section 42D Framework Agreement and entitles the claimants to be awarded land or financial compensation.

Appeals against the Court's decision are referred to the Supreme Court of Appeal or the Constitutional Court. In terms of the Act, claimants may also lodge a claim directly with the Land Claims Court.

As indicated above, the process of settling a claim is a time consuming process, solely dependent on the Commission on Restitution of Land Rights.

3. THE IMPORTANCE OF LAND RESTITUTION TO COUNCIL

3.1 *Council's Vision and moral responsibilities:*

Council's vision for the City calls for commitment to be responsive to the needs of the people, ensuring access to opportunities and accountability to all its people. Restitution of land rights is the restoration of land (i.e. return of original land) or equitable redress in terms of financial compensation, alternative state land or access to a state housing scheme to people dispossessed of their rights through racially discriminatory laws or practices enacted after 1913. Land restitution provides the opportunity for the integration of previously segregated communities, the potential rebuilding of communities and the associated healing of past political actions. Although the settlement of claims is the responsibility of the Commission, the City's involvement in land restitution offers the potential to achieve some of Council's objectives as outlined in its vision statement.

3.2 *Legal obligations and associated financial implications:*

The City's legal obligations to land restitution (in terms of the Restitution of Land Rights Act) arise out of orders of the Land Claims Court or from agreements voluntarily entered into with the claimants.

In terms of section 35 of the Act, the Land Claims Court may make the following orders:

- “(a) the restoration of land, a portion of land or any rights in land in respect of which a claim or any other claim is made to the claimant...;
- (b) the State to grant the claimant an appropriate right in alternative state-owned land, and where necessary, order the State to designate it;
- (c) the State to pay the claimant compensation;
- (d) the State to include the claimants as a beneficiary of a State support programme for housing or the allocation and development of rural land;
- (e) the grant to the claimant of any alternative relief.”

Legal opinion obtained from Senior Legal Counsel in March 2001 concluded that

in certain circumstances it would be consistent with the purpose of the Act, and fair and equitable, to permit the Land Claims Court to make an order involving restitution or compensation against any sphere of government, if the circumstances warrant it. The advocates advised that in appropriate circumstances, for example, where the City's predecessors confiscated land pursuant to a racially discriminatory law or practise, the Land Claims Court would be competent to make an order against the City in terms of section 35 (b) to (e) of the Act. For example, it could order the City to grant a claimant appropriate rights in alternative City owned land or to pay a claimant financial compensation. Court Orders of such a nature will have substantial financial implications for the City; the extent of which can only be determined once the Order has been made.

3.3. *Planning, development control and servicing implications for the City:*

The redevelopment of land awarded to claimants has planning, development control and servicing implications for the City. The extent of these implications will vary depending on the ownership of the land and the land restitution policies to be adopted by Council. It is fundamental that the applicable planning policies are taken into consideration in the redevelopment of land awarded to claimants.

- Where claims are lodged on *private* land the City will play the normal statutory role, in other words, a primarily development control function where applications for rezoning may be considered, building plans assessed etc.
- Council's role in respect of *state* owned land is similar to that of privately owned land, except where the land in question is of strategic importance. Such strategic importance may be due to the land's metropolitan locality, and/or its cultural or historical significance. In such instances Council's involvement in ensuring holistic, integrated planning is fundamental. The Wingfield site which is subject to the Ndabeni Land Claim, is an example of a strategically located site which if properly planned and developed, could assist Council to achieve important social and economic objectives.
- Where land subject to restitution is *municipal* owned, Council's full involvement is required. Land may be subject to a direct claim (for restoration) or it may be land which has been identified as an alternative land by claimants and/or the Commission. Issues which need to be considered in such instances include the availability of Council owned land for restitution purposes, the cost thereof (if any), servicing of land, planning policies for the area etc.

In the case of the *Tramway Road* Claim, the Council, on 24 April 2001, confirmed the former City of Cape Town's decision to transfer the land known as the Tramway Park to the claimants free of charge, subject to conditions being imposed by the Manager: Municipal Property. These conditions have subsequently been incorporated into the draft Section 42 D Framework Agreement prepared for Tramway Road, to be signed by the claimants, the Department of Land Affairs and the City. In terms of this draft Agreement the land, once it has been appropriately rezoned, consolidated and the relevant

environmental regulations complied with by the City, will be transferred to the claimants. The rezoning of the land by the City will enable appropriate conditions and development parameters to be imposed to ensure that future development is in accord with the surrounding built environment. In terms of section 42(1) of the Land Restitution Act the State will cover the transfer costs or alternatively the costs will be waived in terms of section 42(2) of the Act. The rezoning and related costs accrued to the City will be paid by the State in terms of the Restitution Planning Grant (an amount of R1440,00 per claimant). The Restitution of Land Rights Act entitles claimants to a Restitution Planning Grant; the purpose of which is to assist communities in planning their settlement needs. The services covered by the grant include legal and financial assistance, land use planning, infrastructure planning, land surveying etc. The Restitution Planning Grant is paid directly by the State to the professional consultants or local authority responsible for the planning work and not to the claimants.

It is in terms of the land claims (for restoration or alternative land) on municipal owned land specifically and to a lesser extent on strategic state owned land that Council needs to develop a metropolitan-wide policy on how to deal with land restitution.

In June 2001 the City obtained a legal opinion from advocates LA Rose-Innes S.C. and PBH Farlam on the applicability of the Land Use Planning Ordinance to land restored or awarded to claimants. The legal opinion concludes that "the local and provincial authorities' powers in terms of the participatory process is substantially circumscribed where land is sought to be subdivided or rezoned to permit the occupation of land by successful claimants in accordance with a judgement of the Land Claims Court". Compliance with normal legal requirements as stipulated in the Land Use Planning Ordinance (LUPO) is a prerequisite to the development of land awarded or restored to claimants. However, the relevant official or delegated authority (City or PAWC) cannot refuse to permit the claimants to live on restored land and thus would have little, or no, discretion, in respect of a planning application which seeks to rezone the property for residential use and to subdivide it to permit the claimant families to have their own homes (i.e. restoration of rights lost). However, the City may exercise its discretion in respect of permitting other business and/or commercial uses. A copy of the legal opinion is annexed (Annexure C).

3.4. *Time frame for completion of the restitution process:*

To date only a few claims have been settled by the Commission and the process of settling land claims is expected to continue for at least 5 more years. In land restitution cases involving municipal land the Commission has in some instances approached the respective authorities for information to assist in the Commission's function of verifying the claims. As more claims are gazetted and verified, the Commission will need to consult with the City continually. The City's role in assisting the Commission will therefore continue and increase in the future, hence the importance of adopting a City position on land restitution.

4. **BACKGROUND TO THE CITY-WIDE LAND RESTITUTION POLICIES**

The following policies are proposed to be adopted for the Cape Town metropolitan area. The individual policy statements proposed are indicated in *italics*, and where considered necessary the background and/or reasoning for each policy is provided.

1. *The City supports land restitution and will undertake its responsibilities as provided for by the Restitution of Land Rights Act (22 of 1994).*

Such responsibilities may arise out of orders of the Land Claims Court or from agreements entered into with the claimants (Refer to section 3.2: Legal obligations and associated financial implications). The City will need to take responsibility for the potential financial implications which may arise from the Court Orders and agreements.

2. *The City, where reasonably possible, will assist the Land Claims Commission and claimants in respect of gathering information from existing Council records required by the Commission to verify the claims. Such Council assistance may, where reasonably possible, include planning and legal advice.*

Such actions may involve:

Providing data/information free of charge to the Land Claims Commission to aid in the validation and verification of land claims. It is envisaged that this process will continue and increase in future as more claims are gazetted and the verification of more claims gets underway.

Engagement with claimants or their representative(s) and the Commission from the outset of the restitution process to facilitate the speedy settlement of claims. In cases where the restoration of the original land is not possible and claimants are seeking alternative land as a form of restitution, the City may assist the Commission in the identification of suitable alternative land. Although such land may be owned by the State, the City can provide invaluable information in terms of the suitability of the land, servicing requirements, compatibility with existing and proposed uses, planning policies etc.

On 24 April 2001 the Executive Committee resolved to “....establish a process at senior level regarding the disposal and land use of state and provincial land in the metropole”. Much vacant land available for restitution purposes (as alternative land) is owned by the National Department of Public Works, for example in Simon’s Town. This emphasises the importance of undertaking an integrated planning exercise regarding the allocation of land with the relevant stakeholders, viz. the City and State. It would be beneficial when undertaking such a planning exercise for the Commission to have processed claims to the point where it is known where alternative land is required and the extent thereof

(i.e. how many claimants).

3. *The City will be proactive in compiling a comprehensive restitution data base for claims within the metropolitan area.*

According to the Land Claims Commission a total of 11 928 claims have been lodged in the Western Cape, of which approximately 9000 to 10 000 fall within the metropolitan area (new City of Cape Town). Of the approximate 4000 gazetted claims in the Western Cape 3860 have, to date, been settled.

In terms of the Restitution of Land Rights Act once notice of a land claim has been published in the government gazette no land transactions (including the sale, exchange, lease, subdivision, rezoning and development) in respect of the land may take place without the regional land claims commissioner been given one months written notice of the intentions of the land transaction/s. This implies that the City should be aware of all private, municipal and state owned land subject to land claims. This knowledge should be taken into account in the assessment of all development/land use applications (the City's application forms for land use changes should accordingly be amended to reflect this information), as well as the preparation of development plans and frameworks (local IDPs) etc.

4. *The City will endeavour to ensure appropriate and integrated development of land affected by restitution and to this extent will be informed by the legal opinion dated 18 June 2001 (attached as Annexure C).*

Integrated development implies that future development should comply with existing Council policies, and that claimants are integrated into the broader community. The appropriate and integrated development of land affected by restitution is particularly important where the land is of strategic significance.

As detailed in section 3.3 (Planning, development control and servicing implications for the City), the City cannot refuse an application for rezoning and/or subdivision on land restored to the claimants where such an application seeks to permit the claimants to use the land for residential purposes (i.e. for the restoration of rights lost). However, the City may exercise its discretion in respect of permitting other business and/or commercial uses.

5. *The City may endeavour to make land directly subject to restitution (i.e. restoration of original land) available to the Land Claims Commission on a negotiated basis.*

This policy is specifically relevant where the City benefited as a result of people being dispossessed in terms of racially discriminatory laws or practices, after 19 June 1913, and the City is therefore morally obligated to make such land available.

6. *Where City owned land has been identified as alternative land the availability of such land for restitution purposes will have to be assessed, by the City, in terms of its metropolitan locality, City policies, development frameworks for the area etc. Such land may be made available to the Commission subject to negotiation.*

This policy is specifically relevant where the City benefited as a result of people being dispossessed in terms of racially discriminatory laws or practices, after 19 June 1913. In such instances the City may be legally obligated in terms of the Restitution of Land Rights Act (an order of the Land Claims Court) to grant a claimant appropriate rights in alternative City owned land. City-owned land will only be made available as "alternative land" for restitution purposes once the City has satisfied itself that the Land Claims Commission has adequately explored the availability of all state and provincial owned land for restitution purposes. Such City-owned land will only be made available to the Commission subject to negotiation and in terms of the City's Policy relating to the Management and Administration of Council's Immovable Property. The Land Claims Commission is responsible for settling all land claims and it is only once the City is approached by the Commission (possibly accompanied by the claimants or their representative) for alternative land that such discussions and negotiations will be entered into. In other words, the City does not have a responsibility towards assisting individual claimants to find alternative land for restitution purposes.

7. *The City will honour the intention of the Restitution of Land Rights Act by imposing a moratorium on the long term lease, sale and /or redevelopment of vacant municipal land which is directly subject to a land claim registered with the Land Claims Commission (for restoration of original land), until such time as the claim has been resolved. Where the City and Commission have, through negotiation, reached agreement on the availability of a site as alternative land for restitution, the City will place a moratorium on the long term lease, sale and/or development of such land.*

Leasing of publicly-owned land should be entertained where it leads to environmental improvements and community benefit, provided the lease is short term and any capital improvements made by the lessee are not chargeable to Council upon the end of the lease. Land might also be leased where it is shown to Council's satisfaction that the use of it and its development, is for a community purpose to which key affected stakeholders agree. This Policy is applicable only in cases where agreement has been reached on the availability of City-owned land. The policy, therefore, does not imply that former resolutions taken by the respective local authorities to alienate Council owned properties should be rescinded to accommodate individual claimants looking for alternative land.

8. *The City may consider making municipal land available free of charge to claimants where National Government does the same on condition that the wider community also benefits from the availability of this land. (For example, residents*

other than claimants should also be given the opportunity of being housed on such land).

The availability of alternative vacant City land for restitution will have to be assessed on merit in terms of locality, City policies for the area etc . This policy emphasises the importance of undertaking an integrated planning exercise with the State.

9. *The City in acknowledging that development related to restitution is "special or unique", may consider assisting financially in instances where the land affected by restitution is strategically located in terms of the City wide context and the development not only benefits the claimants but also the broader community. Such assistance will only be for community based development and not private, commercial or industrial type development.*

Such assistance could be towards planning, the provision of bulk infrastructure and community facilities. In the case of the Tramway Road Restitution Claim the City has assisted the claimants by making the land available free of charge for community housing (i.e. housing only for the claimants or their beneficiaries).

10. *The City will, where possible, assist in the restoration of rental occupation to original tenants (claimants) through the reallocation of tenancies to claimants.*

This policy is only applicable where tenants were evicted from Council accommodation in terms of racially discriminatory laws or practices, after 19 June 1913, and where such rental stock is available .

11. *The City's financial commitment to land restitution be subject to the Integrated Development Plan (IDP) prioritization and budgetary provisions for the City.*

As detailed in section 3.2 (Legal obligations and associated financial implications) the Land Claims Court may, where the City's predecessors confiscated land pursuant to a racially discriminatory law or practise, order the City to grant a claimant appropriate rights in alternative City owned land or to pay a claimant financial compensation. Court Orders of such a nature will have substantial financial implications for the City; the extent of which can only be determined once the Order has been made. A number of the proposed restitution policies also have *potential* financial implications for the City. Similarly, the extent of these financial implications cannot be determined at this stage and will vary depending on the details of each specific restitution case. For example, if City owned land is directly affected by a claim (i.e. for restoration of the original land to claimants); or where City owned land has been identified as an alternative site for claimants; the number of claimants and the area of land required etc.

The settling of land claims by the Land Claims Commission has not yet progressed to the point where the details of each individual land claim is known.

Without such details being available it is not possible to ascertain the financial implications of land restitution to the City of Cape Town. Consequently detailed budgetary allocations in respect of restitution, having regard to the City's priorities, cannot be finalised. However, it is important that Council makes allowance for the potential financial implications that may arise out of an order of the Land Claims Court or as a result of any of the above policies being implemented.

5. RECOMMENDATION

It is recommended that the City adopt the following policies:

1. That the City supports land restitution and will undertake its responsibilities as provided for by the Restitution of Land Rights Act (22 of 1994).
2. That the City, where reasonably possible, will assist the Land Claims Commission and claimants in respect of gathering information from existing Council records required by the Commission to verify the claims. Such Council assistance may, where reasonably possible, include planning and legal advice.
3. That the City will be proactive in compiling a comprehensive restitution data base for claims within the metropolitan area.
4. That the City will endeavour to ensure appropriate and integrated development of land affected by restitution and to this extent will be informed by the legal opinion dated 18 June 2001 (as attached as Annexure C).
5. That the City may endeavour to make land directly subject to restitution (i.e. restoration of original land) available to the Land Claims Commission on a negotiated basis.
6. That where City owned land has been identified as alternative land the availability of such land for restitution purposes will have to be assessed, by the City, in terms of its metropolitan locality, City policies, development frameworks for the area etc. Such land may be made available to the Commission on a negotiated basis.
7. The City will honour the intention of the Restitution of Land Rights Act by imposing a moratorium on the long term lease, sale and /or redevelopment of vacant municipal land which is directly subject to a land claim registered with the Land Claims Commission (for restoration of original land), until such time as the claim has been resolved.

Where the City and Commission have, through negotiation, reached agreement on the availability of a site as alternative land for restitution, the City will place a moratorium on the long term lease, sale and/or development of such land.

8. That the City may consider making municipal land available free of charge to claimants where National Government does the same on condition that the wider community also benefits from the availability of this land. (For example, residents other than claimants should also be given the opportunity of being housed on such land).
9. That the City in acknowledging that development related to restitution is "special or unique", may consider assisting financially in instances where the land affected by restitution is strategically located in terms of the City wide context and the development not only benefits the claimants but also the broader community. Such assistance will only be for community based development and not private, commercial or industrial type development.
10. That the City will, where possible, assist in the restoration of rental occupation to original tenants (claimants) through the reallocation of tenancies to claimants.
11. That the City's financial commitment to land restitution be subject to the Integrated Development Plan (IDP) prioritization and budgetary provisions for the City.

ANNEXURE B**AUDIT: LAND RESTITUTION**

On 14 March 2001 the Planning and Environment Portfolio Committee after considering a report entitled "Land Restitution Claims: Overview " resolved, *inter alia*, that an audit be prepared of all policies and decisions of disestablished Council's in the Cape Town metropole..." This resolution was ratified by the Executive Committee on 24 April 2001.

The purpose of the audit is to assist in the drafting of a land restitution policy for the metropole. Subsequent to the Planning and Environment Portfolio Committee's resolution, the individual local authorities in the metropole were requested to provide the Cape Town Administration with their relevant resolutions pertaining to any former policies and decisions in respect of land restitution. These resolutions, will where considered relevant and applicable, be used to assist in the drafting of a City-wide land restitution policy.

This report lists the policies and decisions of the former Councils. Only the relevant resolutions pertaining to land restitution have been extracted from the former Council resolutions. Each local authority is dealt with individually .

BLAAUWBERG ADMINISTRATION**PROPOSED WEST COAST BIOSPHERE RESERVE: SALDANHA BAY - KOEBERG: INFORMATION AND PROGRESS REPORT**

RESOLVED: (March 1997)

- (a) That the Blaauwberg Municipality supports the principle of establishing a Biosphere Reserve as shown in the attached report marked as Annexure "A", subject to the necessary public participation and in particular the support from the Atlantis community being obtained and that a balanced and integrated development and conservation philosophy be established in conjunction with the future needs of Atlantis community.
- (b) That the Blaauwberg Municipality supports the decision taken by cabinet to oppose any restitution claims in the southern core conservation area, falling within the municipal area, i.e. Erven 979 and 980 and that in regard to Groote Springfontyn, which has already been sold, it be established what the status of the restitution claim is and furthermore what the position is regarding the registration of a servitude in respect of services which are located on the land.
- (c) That the financial implications and proportional costs as well as information as to how other concerned parties intend opposing restitution claims form the subject of a further report to Council.

FARM GROOTE SPRINGFONTEIN NO 1, CAPE DIVISION

RESOLVED (December 1997)

- (a) That consideration of opposing the Land Restitution Claim in respect of Farm Groote Springfontein No 1 Cape Division at the hearing to be held by the Land Claims Court at the end of September, be deferred, pending the outcome of the preliminary hearing currently being held on 25-26 August 1997, whereafter Mr G Rushton will further advise the Council on the way forward.
- (b) That the Chief Executive Officer be requested to consider appropriate means of communicating the current situation to the community.

RESOLVED: (December 1998)

- (a) That the action taken by the Chairperson of the Executive Committee, Ald Mellet and the Chief Executive Officer in consultation with Mr G Rushton of the Council's legal advisors, Findlay & Tait, to institute Court Proceedings in terms of Paragraph 3 of the Order of the Court dated 10 November 1997 and to take such ancillary or related action as may be necessary in regard to the Land Restitution matter relating to the farm Groote Springfontein be confirmed.

The following information pertaining to the Groote Springfontein case is considered necessary:

The Farm Groote Springfontein was expropriated by the State in terms of the Group Areas Act and earmarked for the "Coloured" population. The former owners entered into an agreement with the Provincial Government and Housing Board to purchase the land; the sale of the land was subject to the approval of the Land Claims Court. The Blaauwberg Municipality opposed the sale of the farm and lodged an objection with the Land Claims Court on the grounds that the former owners had received adequate compensation. In October 1997 the Land Claims Court ruled that the claimants had received just and equitable compensation at the time of dispossession. The claimants then proceeded to purchase the land back from the Provincial Government. The Blaauwberg Municipality was still opposed to the sale of the farm for development reasons. The parties eventually settled the matter out of court and the former owners (claimants) bought their land back from the provincial government.

The Groote Springfontein case therefore has no direct bearing on the drafting of a City wide restitution policy.

FARM CRUYWAGENSKRAAL**RESOLVED:** (October 1999)

- (a) That in response to the request from the Provincial Administration: Western Cape for Council's view point on the matter, the Manager Urban Planning and Economic Development be authorised to inform PAWC that the Council is opposed to the land restitution claim on the farm Cruywagenskraal on the

following grounds :

This Council is committed to the PAWC Cabinet policy on bio- regional planning principles and accordingly supports the proposed Cape West Coast Biosphere Reserve that emanated from this policy. In order to protect the integrity of the proposed Cape West Coast Biosphere Reserve, this Council is of the opinion that this land, together with the other applicable existing state owned land, should be retained in state ownership and incorporated into the proposed southern core conservation area.

- (b) That the West Coast Biosphere Committee be informed, accordingly.

CAPE TOWN ADMINISTRATION:

PROPOSAL TO PREPARE AN URBAN RESTITUTION POLICY FOR THE CITY OF CAPE TOWN

RESOLVED:(28August 1997)

- (1) That the CTM agree to investigate its role in land restitution and support the process of land restitution for residents dispossessed by Apartheid laws and other discriminatory laws and practices.
- (2) That an inter-departmental Restitution Task Team under the management of the Executive Director: Planning and Economic Development be established to:
 - formulate an urban restitution policy for the City of Cape town;
 - advise and assist with specific restitution cases; and
 - report directly to the Executive committee.
- (3) That the City Manager undertake the following actions:
 - Mapping where, when and under what legislation forced removals took place in the municipal areas (Urban Policy/Urban Studies)
 - Establishing an information desk to assist claimants to obtain property information, maps etc (Land Information)
 - Indicate to claimants what development projects are planned in which they may become involved as a form of restitution (Planning and Housing)
 - To seek clarification from the Land Claims Commission and Department of Land Affairs as to the policy on the restoration of original land in urban areas to claimants (Legal Advisor, Urban Policy).
 - Investigate the role other cities are playing in the restitution process (Urban Policy)

WINGFIELD:

RESOLVED: (31October 2000)

- (1) That the proposed claim boundaries be approved.
- (2) That the City only commit itself to the necessary Agreements in terms of the principles and conditions as contained in the approved Memorandum 'Towards a Draft Framework Agreement'.
- (3) That authority be delegated to the City Manager to sign the Settlement Agreement and Implementation Agreement as required by the Land Claims Court.

The Memorandum 'Towards a Draft Framework Agreement' states that the City would seek priority funding for the provision of bulk services for the community housing component of the claim only on the 2000/2001 budget. Community housing was defined as that which qualifies for the Provincial Housing Subsidy. The bulk services for commercial, industrial or private housing is to be funded by the developer of the land.

TRAMWAY ROAD

RESOLVED: (31 October 2000)

- (1) That City Land situated at Tramway Park, Sea Point West comprising the erven 102,103,105,106,107,110,113,126 and portion of erven 125 and 843 Sea Point West, in extent approximately 7 620m² be offered to the Tramway Park Land Restoration Committee (those claimants who have chosen restoration of the land) free of charge subject to the terms and conditions to be imposed by the Manager : Municipal Property in the exercise of her delegated powers.
- (2) That an agreement be entered into between the City, Land Claims Commissioner and the claimants in terms of the Restitution of Land Rights Act 22/1994 to give effect to 1 above.

DISTRICT SIX

RESOLVED: (23 November 1999)

Policies adopted for the management of publicly-owned land in District Six:

- (1) No publicly-owned land subject to a restitution claims should be sold until the settlement of claims is complete to the Council's satisfaction, following which the future of the land should be decided on. In this regard, Council will satisfy itself as to how its use would satisfy Council's strategic objectives, the principles of the Municipal Spatial Development Framework and any plans for District Six that have been approved by Council.
- (2) Leasing of publicly-owned land should be entertained where it leads to environmental improvements and community benefit, provided the lease is short

term and any capital improvements made by the lessee are not chargeable to Council upon the end of the lease.

- (3) Land might also be leased where it is shown to Council's satisfaction that the use of it and its development, is for a community purpose to which key affected stakeholders agree.

Moratorium on development of vacant Council-owned land:

- (1) Council agreed to their being a moratorium on development of Council-owned land, and other publicly -owned land(provided Council can get that agreement), but not on privately or institutionally owned land. Council has no legal basis not to accept development plans on privately and institutionally owned land.

Transfer/availability of Council owned free of charge:

RESOLVED: (8 August 1991)

1. Council agreed in principle to contribute all vacant Council-owned land in District Six, free of charge, for the redevelopment process.

RESOLVED: (15 February 1994)

1. Council approved the donation of the Council owned vacant erven in District Six save that which is required for the Canterbury Street widening scheme to the Cape Town Community Land Trust.
2. Council resolved to instruct the City Administrator's Estate Manager to arrange the transfer of the said portions of land, once the report dealing with the location and extent of services on the land has been received from the City Planner.

The Cape Town Community Land Trust was established for holding the remaining vacant land in District Six out of the market, and to facilitate the preparation and implementation of a broadly agreed upon plan for the redevelopment of the area.

RESOLVED: (23 November 2000)

- (1) Council noted the contents of the Draft Framework Agreement subject to the approval of the State Legal Advisor. *(The Draft Framework Agreement was prepared in terms of the Restitution of Land Rights Act (Act 22 of 1994) for the settlement of the District Six tenancy claims for signature by the Cape Town City Council, the Department of Land Affairs and the District Six Beneficiary Trust).*
- (2) Council re-affirmed its previous decision regarding making Council owned land available in District Six for restitution purposes at no cost.

The section 42 D Framework Agreement prepared in terms of the Restitution of Land Rights Act (Act 22 of 1994) for the settlement of the District Six tenancy claims was signed by the former Cape Town City Council, the Department of Land Affairs and the District Six Beneficiary Trust on 26 November 2000. The Framework Agreement legally binds the Council to transfer the vacant land in District Six (owned by the City and the Provincial Housing Development Board) for restitution purposes, free of charge. The signing of this Framework Agreement gives legal effect to earlier resolutions taken by the City Council in 1991, 1994 and November 2000.

HAMDULAY-BRAAF (ERF 21719 KENSINGTON)

RESOLVED: (31 October 1999)

- (1) That the following erven be sold to the claimants at cost price:

Erf 21901	12 th Avenue, Kensington	R14 075
Erf 113408	12 th Avenue, Kensington	R14 075
Erf 113409	12 th Avenue, Kensington	R14 075
Erf 113410	12 th Avenue, Kensington	R14 075
Erf 113411	12 th Avenue, Kensington	R14 075
Erf 145193	Ventura Street, Kensington	R12 335
- (2) That the original family home on Erf 21719 , 6th Avenue Kensington, be restored to the family at no cost.
- (3) That the Municipality pay the sum of R31 000 towards the demolition of the old family home and the provision of plumbing, sewerage and electrical wiring in respect of a new dwelling to be erected on the site.
- (4) That plan scrutiny fees be waived in respect of Mrs S van Wyk and Messrs A April, M Arendse and M Hilario when they re-submit their plans in respect of their undeveloped erven.

CAPE METROPOLITAN COUNCIL

RICHMOND PARK CEMETERY SITE

RESOLUTION: (9 November 1999)

- (1) The Head: Legal Services be authorised to appoint appropriate legal representation to oppose the claim for restitution of the land.

The claim was opposed on the grounds that the dispossession of land resulted from the need for a cemetery and not due to racially discriminatory laws or practises.

SOUTH PENINSULA ADMINISTRATION

MUNICIPAL PROPERTIES IN SIMON'S TOWN:

RESOLVED: (24 November 1998)

- (1) That the Regional Land Claims Commissioner be requested to facilitate the proposed meeting with the Ministers of Land Affairs and Public Works.
- (2) That the Regional Land Claims Commissioner be advised that pending agreement on an integrated policy with regard to public land in its area, the Council is not prepared to cede land at no cost for any purpose.

2.1 That should the State however cede its own land in Simon's Town for restitution and land development purposes at no cost, South Peninsula Municipality would consider doing likewise with vacant municipal-owned land in Simon's Town.

RESOLVED: (16 August 1999)

- (1) Property which is superfluous to Municipal requirements, is appropriately zoned and not subject to any title deed restrictions should be alienated.

Although this resolution is not directly related to land restitution it is relevant as the enactment of this resolution has resulted in objections been lodged by the Return to Simon's Town Committee on the grounds that the municipal land should be considered as alternative land for claimants (i.e a form of land restitution).

PORTION OF ERF4724 CONSTANTIA (PORTIONS 10 AND 11 FARM: SILLERY FARM)

RESOLVED: (18 November 1999)

- (1) That the restoration of the rights in land to the claimants be supported in principle.
- (2) That the process as prescribed in the Restitution of Land Rights Act, Act 22 of 1994, be allowed to run its course.

STEURHOF COUNCIL RENTAL STOCK

RESOLVED:

The former Cape Town City Council took a decision to restore occupation to original tenants (claimants) through consequent reallocation of tenancies to claimants. This reallocation of tenancies to claimants is still continuing to date as units become available.

HELDERBERG, OOSTENBERG AND TYGERBERG ADMINISTRATION

There are no resolutions pertaining to restitution in any of the above MLC's.

n:\wpdocs\lraudit.wpd. (May2001)

EX PARTE: **CITY OF CAPE TOWN**

IN RE: **RESTITUTION OF LAND RIGHTS : The Meaning Of
Section 42B(2) Of The Restitution Of Land Rights Act**

OPINION

Introduction

1. We have been briefed by **THE CITY OF CAPE TOWN** (hereafter “the City”) to provide an opinion on the meaning and implications of section 42B(2) of the Restitution of Land Rights Act, 22 of 1994 (as amended) (“the Restitution Act”). (Junior counsel has previously provided the City with written advice dated 9 April 2001 on this aspect.)
2. Section 42B reads as follows:

 “42B Certain laws not applicable in respect of land restored or awarded
 (1) **The laws governing the subdivision of agricultural land shall not apply in respect of any subdivision undertaken in order to restore or award land to any claimant in terms of this Act.**
 (2) **The laws governing the establishment of townships shall not apply to land restored or awarded to any claimant in terms of this Act, as long as that land is predominantly occupied by that claimant.”**
3. The City has asked us to advise, in particular, whether the Land Use Planning Ordinance 15 of 1985 (C) (“LUPO”) is applicable to land restored or awarded to

claimants in terms of section 35(1) of the Restitution Act. Are the successful claimants (and / or their successors in title) free to ignore the strictures of LUPO when occupying and developing the land?

The “laws governing the establishment of townships”

4. The laws dealing with the establishment of townships are essentially the township or land use ordinances in force in the various provinces on the coming into force of the new constitutional order in April 1994. These are: the Town-planning and Townships Ordinance 15 of 1986 (T), the Town Planning Ordinance 27 of 1949 (N), the Townships Ordinance 9 of 1969 (O), and LUPO.
5. The ordinances of the erstwhile Transvaal, Orange Free State and Natal provinces use essentially the same terminology (making reference to the “establishment of townships”) and prescribe a similar procedure. LUPO sets out somewhat different procedures and moreover employs a different terminology – what is referred to elsewhere in the country as the establishment of townships is called the “subdivision of land”. In order to establish what is meant in the Restitution Act by the “establishment of townships” it is therefore advisable to have recourse to an ordinance such as the Transvaal Town-planning and Townships Ordinance, rather than focusing, in the first instance, on LUPO.
6. Chapters III and IV of the Transvaal ordinance provide for the establishment of townships (by, respectively, an owner of land and a local authority). The establishment of a township involves, in the first instance, an application to the local authority for the declaration of land as an “approved township”. If the

- application is approved, the applicant must, within a specified period, lodge for approval with the Surveyor-General such plans and diagrams as are necessary for the establishment of a township. Thereafter, the general plan and diagram must be lodged with the Registrar of Deeds. Once that step has been successfully completed, the Premier, by notice in the Provincial Gazette, declares the township an approved township. Erven in the township may now be sold and the transfer of erven registered.
7. We were informed by town-planners employed by the City that a township can only be established in respect of land not hitherto incorporated in a township – in other words, land that has hitherto been part of what is generally referred to as a “farm”. Once land is included within a general plan for an approved township (and designated as an “erf”¹), it can therefore apparently no longer serve as the basis for the “establishment of a township”. Any compartmentalization of such land will involve “subdivision” of an existing erf or estate, rather than the establishment of a township.
 8. We cannot find anything in the relevant provisions that would gainsay the opinion expressed by the town-planners with whom we consulted. Their interpretation would also not result in any inconsistency between section 42B(2) of the Restitution Act and section 42B(1) thereof, which deals with the “laws governing the subdivision of agricultural land” (and declares that they are not applicable in

¹ An “erf” is defined in section 1 of the Transvaal ordinance as meaning “land in an approved township registered in a deeds registry as an erf, lot, plot or stand or as a portion of the remainder of any erf, lot, plot or stand or land indicated as such on the general plan of an approved township, and includes any particular portion of land laid out as a township which is not intended for a public place, whether or not such

respect of any subdivision undertaken in order to restore or award land to any claimant). Subsection (2) would, if the town-planners' interpretation is adopted, follow on from subsection (1) and include agricultural land that is not intended to be subdivided but rather to be converted from farm land into a township – with the result that the Subdivision of Agricultural Land Act, 70 of 1970 would thereafter not be applicable. (The definition of “agricultural land” in section 1 of that Act excludes land “which is a township as defined in section 102(1) of the Deeds Registries Act, 1937 (Act 47 of 1937),² but excluding a private township as defined in section 1 of the Town Planning Ordinance, 1949 (Ordinance 27 of 1949 of Natal), not situated in an area of jurisdiction or a development area referred to in paragraph (a) [which excludes from the definition of ‘agricultural land’ land that is situated in the area of jurisdiction of a municipal council, city council ...]”).)

9. As mentioned, LUPO uses the phrase “subdivision of land” to cover what would be regarded, elsewhere in South Africa, as “the establishment of townships”.³ It is therefore of no assistance in the present enquiry. LUPO's predecessor, The Townships Ordinance 33 of 1934 (C), did use the terminology found in the various townships and town-planning ordinances still in force in the rest of South

township has been recognized, approved or established as such in terms of this Ordinance or any repealed law”.

² In section 102(1) of the Deeds Registries Act, 47 of 1937, “township” is said to include – (a) a group of pieces of land, or of sub-divisions of a piece of land, which are combined with public places and are used mainly for residential, industrial or similar purposes, or are intended to be so used; (b) any combination of such groups which is suitable for registration in one register; (c) any area of land registered or recognized at the commencement of this Act in a deeds registry as a township if a general plan thereof is filed in that deeds registry or in the office of the surveyor-general concerned; and (d) any township established, approved, proclaimed or otherwise recognized as such under any law.

³ See **Jeannie van Wyk *Planning Law* (1999) at 184.**

Africa. The usage in that Ordinance would not, however, appear to conclusively support or contradict the interpretation advanced in paragraph 7 above. (The erstwhile Cape Townships Ordinance drew a distinction between “an approved township or subdivided estate” and a “minor subdivision”.⁴ The term “establishment” was seemingly only used in relation to a township or subdivided estate (as the definition of “establish” or “establishment” indicates). In that context, it was stated to include an “extension” of the township or the subdivided estate.)

10. If, as would appear to be the case, the “establishment of townships” covers only the process applicable to the establishment of approved townships on land that had previously been classified as farm land, what is the meaning to be accorded to the underlined words in the following quote from the beginning of section 42B(2) of the Restitution Act: “the laws governing the establishment of townships”? Would the whole of the Transvaal Town-planning and Townships Ordinance and the whole of LUPO be inapplicable to land restored or awarded under the Restitution Act (on the basis that part of those laws govern the establishment of townships), or would only the Chapters or sections relating to the establishment of townships be excluded (and not the sections dealing with zoning, subdivisions, the approval and amendment of town-planning schemes and so forth)?

⁴ The latter was defined as meaning “any land subdivided or laid out, whether by actual survey, the erection of buildings or structures or in any other manner – (a) into not more than ten erven, stands, lots or plots for residential, industrial, occupational or similar purposes ...; or (b) into any number of pieces for any purpose other than that mentioned in paragraph (a)”.

11. Like the previous question (i.e., the meaning of the phrase “the establishment of townships”) this one permits of no definite answer. We emphasize that section 42B(2) of the Restitution Act is ambiguously worded and no interpretation can be advanced with any certainty.
12. On balance, we are, however, of the opinion that all that is meant to be excluded by section 42B(2) of the Restitution Act would be any legislative provisions pertaining to the establishment of townships. In contradistinction legislative provisions applicable to a township which is already established would not be excluded. Thus, where an existing erf in an approved township has to be subdivided to cater for an award restoring or awarding land to successful claimants, the provisions in the various ordinances governing rezoning and subdivision would still be applicable.
13. This would, in our view, be a sensible outcome. An erf cannot be rezoned or subdivided (and the subdivisions cannot be allocated their own erf numbers) without application being made to the relevant officials. If successful claimants were not required to submit such applications, they would therefore not be able to obtain title deeds for subdivided portions. Any building they may construct could also be contrary to the zoning scheme. This would not only cause difficulties for the local authorities but also for the claimants themselves, who would in all probability require finance from banks or other financial institutions, which would in turn require security to be given. A claimant who does not have a title deed for a subdivision or who proposes to erect a structure contrary to the uses permitted by the zoning may well not be able to get a bond and thus be unable raise finance

to develop his or her land. It must also be remembered that successful claimants will be dependent on a local authority for services such as water, electricity, sewage, refuse removal and so forth. It would accordingly not ultimately be in the interests of successful claimants if they were able to plan a subdivision of a large erf without any reference to the municipality's interests and the existing municipal infrastructure.

14. It must further be borne in mind that, elsewhere in South Africa, were the claimants to be impeded by the town-planning or township establishment ordinances or any other law which was perceived to "have a dilatory or adverse effect on the proposed land development", the claimants could apply to have the land declared a "land development area" in terms of Chapter VI of the Development Facilitation Act, 67 of 1995. (That Act is not in operation in the Western Cape.)

The situation pertaining to LUPO

15. No distinction is drawn in LUPO between the establishment of townships and the subdivision of erven in a township. Both are regulated by Chapter III of LUPO (which contains sections 22 to 32 thereof). As far as LUPO is concerned, particular provisions or chapters are therefore not permanently inapplicable in respect of successful land claimants under the Restitution Act. Instead, where the restoration or awarding of land involves the establishment of a township, the relevant sections in Chapter III (dealing with the subdivision of land generally)

- will be excluded. Where, on the other hand, the restoration or awarding of land requires the subdivision of an existing erf in an approved township, the claimants will not be exempt from the usual procedures stipulated in LUPO.
16. The practical implications in the latter scenario would be as follows. A successful claimant would still be obliged to apply in writing for the granting of a subdivision in terms of section 24(1) of LUPO; the requirements relating to advertising, objections and comments flowing therefrom (and found in section 24(2) of LUPO) would also be applicable. The Premier would be permitted to grant or refuse the application in terms of section 25(1) of LUPO. Furthermore, it would seem that – because an application for subdivision as contemplated in section 22(1) of LUPO would be required – there would still be an obligation on successful land claimants to apply for the zoning appropriate for the usage for which the Land Claims Court has earmarked the property prior to commencing with a subdivision.
 17. It would, however, appear to us that the local and provincial authorities’ powers in terms of the participatory process outlined above would be substantially circumscribed where land is sought to be subdivided or rezoned to permit the occupation of land by successful claimants in accordance with a judgment of the Land Claims Court. Thus, in circumstances in which the Land Claims Court awards land to a “communal property association” (registered in terms of the Communal Property Associations Act 28 of 1996), and approves the association’s plan for the division of land amongst its members (see *In re Kranspoort Community* 2000 (2) SA 124 (LCC) at 186A-D), it is difficult to see how a local

authority could refuse to recommend the approval of a rezoning or subdivision to permit the occupation for residential purposes of the land, or how the restitution process could be held up, or blocked, by the Premier of a Province. The relevant officials would not appear to have been accorded any discretion as to the suitability of the land for occupation by the successful claimants. Officials would, however, appear to have been left with a residual discretion, to be exercised responsibly and in accordance with principles of administrative justice, where, for example, a community who have been dispossessed of their homes are desirous of using the land restored to them by the Land Claims Court not for residential dwellings but for, say, industrial purposes – a use for which they had historically not utilized the land.

18. For the sake of completeness, we should also mention that section 42B of the Restitution Act is expressly made subject to the restored or awarded land being “predominantly occupied by that claimant”. Therefore, even where there is an establishment of a township (as defined above), the successors in title of a successful claimant (whether they succeed to the entire land or a portion thereof) would not be exempt from Chapter III of LUPO. It should also be noted that, where successful claimants establish townships they would still be required to have building plans approved, and to comply with building plans, and so forth.

The application to the Wingfield and Tramway Road sites

19. In conclusion, we shall consider the implications of the above analysis for the restitution claims relating to the land situated at Tramway Park (Sea Point West) and Wingfield.
20. The Tramway Road land claim involves a claim by former residents and descendants of dispossessed families (who were, by and large, dispossessed of their homes around 1960). They want to return to the land from which they were removed (which is presently a public open space) and to recreate the street as they remembered it looked in 1960.
21. The redevelopment of the area would accordingly not involve the “establishment of a township”. As a result, in our view, residents would be required to submit a rezoning application and apply to subdivide the land, in terms of LUPO. The relevant officials could not, however, refuse to permit the claimants to live on the Tramway Park property and thus would have little, or no, discretion, in respect of an application which seeks to rezone the property for residential use and to subdivide it to permit each family to have its own home and to have a road in the same position as in 1960.
22. The Wingfield land claim has been brought by the Ndabeni Communal Property Trust, who represent the community removed from Ndabeni to Langa, Woodstock or District Six in the late 1920’s and early 1930’s. The claimants have requested alternative state-owned land at Wingfield. The land in question, although largely vacant, has been allocated erf numbers and is included in an approved township. (Part of the land earmarked for the claimants falls within the remainder of Erf

21204, Cape Town, which was surveyed in 1931 and is zoned for community facilities. Part of the land is made up of Erf 149174, Maitland (which is also zoned for community facilities). The remainder of the designated area is situated within Erf 8151.)

23. The subdivision of the land can therefore not be categorised as the “establishment of a township”. The successful claimants would therefore, in our view, have to comply with LUPO in full. Having said that, the claimants could not be prevented from rezoning the land to permit General Residential Use and from subdividing the erven to permit all the claimants to have their own homes. The extent to which the land can be used for business or commercial purposes may, however, be a matter in respect of which the City officials and the relevant Provincial Minister retain some discretion.

L A ROSE-INNES S.C.

P B J FARLAM

**Chambers
Cape Town
18 June 2001**