

Reference: HM/DELEGATIONS/CITY OF CAPE TOWN
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 Date: 1 April 2016



**ANNEXURE TO ITEM
 C 10/04/16**

The City Manager
 For attention: Executive Director, Energy, Environmental & Spatial Planning (Japie Hugo)

BY HAND

Dear Sir

**DELEGATION OF POWERS FROM HERITAGE WESTERN CAPE TO THE CITY OF CAPE TOWN IN
 TERMS OF THE PROVISIONS OF THE NATIONAL HERITAGE RESOURCES ACT (ACT 25 OF 1999)**

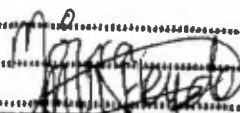
In terms of section 26(1)g of the National Heritage Resources Act (NHRA, Act 25 of 1999), Heritage Western Cape (HWC) may delegate all or any of its powers under the NHRA to a local authority or any other body which is competent to perform such functions, by agreement with such authority or body. The Environment and Heritage Resource Management (EHRM) Branch of the City of Cape Town was assessed and found to be competent in terms of section 6(a)ii of the NHRA in 2013.

Since this time, HWC and EHRM officials have been negotiating the delegation of certain powers in terms of S26 of the NHRA and have, to this end, prepared an agreement of delegation. This agreement was presented to the HWC Council at their meeting on 16 March 2016, where the agreement was adopted by the Council, subject to the City of Cape Town accepting the delegation.

It is therefore requested that you consider the proposed agreement and the delegations contained therein, and present same to your Council for adoption.

Yours Sincerely


 Mxolisi Dlamuka
 Chief Executive Officer
 Heritage Western Cape

ENERGY, ENVIRONMENTAL & SPATIAL PLANNING	
RECEIVED AT THE EXEC DIRECTOR'S OFFICE	
16 APR 2016	
Time:	
By: (print name)	
Signature:	

www.westerncape.gov.za/cas

AGREEMENT

Entered into between:



HERITAGE WESTERN CAPE

("HWC")

and



CITY OF CAPE TOWN
ISIXEKO SASEKAPA
STAD KAAPSTAD

THE CITY OF CAPE TOWN

("the City")

(hereinafter, "the Parties")

For the delegation of powers and functions by HWC to the City in respect of the management of activities relating to Grade III heritage resources and certain other places protected under the National Heritage Resources Act 25 of 1999, excluding Grade I and Grade II heritage resources.

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WHEREAS the Parties recognise and wish to give effect to the principles of co-operative governance in Chapter 3 of the Constitution of the Republic of South Africa (the Constitution), in particular the duties of organs of state to co-operate with one another in mutual trust and good faith by fostering friendly relations, assisting and supporting one another, and co-ordinating their actions with one another (section 41(1)(h)).

WHEREAS section 238 of the Constitution provides that an executive organ of state in any sphere of government may-

- (a) delegate any power or function that is to be exercised or performed in terms of legislation to any other executive organ of state, provided the delegation is consistent with the legislation in terms of which the power is exercised or the function is performed; or
- (b) exercise any power or perform any function for any other executive organ of state on a delegation basis.

WHEREAS the National Heritage Resources Act 25 of 1999 (the Act) sets out a system of heritage management based on the three spheres of governance – national, provincial and local. In terms of the Act, the responsibility to manage Grade III heritage resources lies with the competent local authority, although the management functions in Cape Town are currently administered by the provincial heritage resources authority, namely HWC.

WHEREAS section 26 of the Act empowers the MEC responsible for cultural matters to make regulations to enable a heritage resources authority to delegate in writing any of its functions or powers under the Act to, *among others*, a local authority which is competent to perform such functions, by agreement with such authority.

WHEREAS the Western Cape Provincial Minister of Cultural Affairs and Sport has promulgated Regulations (Provincial Notice 336 of 2002) allowing for the delegation of functions and powers of HWC to a local authority which is competent to perform such functions, by agreement with such local authority.

WHEREAS the City applied to HWC for assessment of its competence as provided for in terms of section 8 of the Act and, upon assessment of the Environmental and Heritage Management Branch of the City's Environmental Resource Management Department, HWC recognised the City as competent.

WHEAREAS the Parties are desirous that the City be delegated certain powers and functions of HWC to manage activities relating to Grade III heritage resources and certain other places within the City's municipal boundaries protected under the Act, that are not Grade I or Grade II heritage resources.

WHEREAS the Parties agree that the purposes of this Agreement include:

- A. promotion of the efficient and effective management of heritage resources within the municipal boundaries of the City;
- B. streamlining the assessment process for development applications falling within the ambit of the Act;
- C. where appropriate, enabling decision-making in terms of the Act to be made at local authority level; and
- D. promoting decision-making at the level most suited to the management of the heritage resource in question.

NOW WHEREFORE the Parties conclude this Agreement to record and implement this Delegation.

1 INTERPRETATION

1.1 The clause headings are for convenience only and must be disregarded for the purposes of interpretation.

1.2 In this Agreement, unless the context indicates otherwise:

1.2.1 "**Act**" means the National Heritage Resources Act 25 of 1999 and includes regulations in terms of the Act;

1.2.2 "**Agreement**" means this agreement and any annexure, and includes an amendment, substitution, addition or Protocol to the Agreement,

provided that the amendment, substitution or addition is signed by the Parties;

- 1.2.3 "**Business Day**" means a day from Monday to Friday excluding a public holiday;
- 1.2.4 "**City**" means the City of Cape Town Municipality, established in terms of the *Local Government: Municipal Structures Act 117 of 1998* read with the *Province of the Western Cape: Provincial Gazette 5588* dated 22 September 2000, or its successor;
- 1.2.5 "**Department**" means the department within the City which has been assessed by HWC to be competent in terms of section 8 of the Act.
- 1.2.6 "**Effective Date**" means the date contemplated in clause 2.2;
- 1.2.7 "**HWC**" means Heritage Western Cape, the provincial heritage resources authority established in terms of section 23 of the Act read with the *Province of the Western Cape: Provincial Gazette 5937* dated 25 October 2002, or its successor;
- 1.2.8 "**Parties**" means the parties to this Agreement, namely the City and HWC;
- 1.2.9 "**Permission**" when referring to the Act, includes a permit, licence, authorisation, consent and decision that a development may proceed;
- 1.2.10 "**SAHRA**" means the South African Heritage Resources Agency established in terms of section 11 of the Act; and
- 1.2.11 "**this Delegation**" means the powers and functions in clause 3.1 delegated by HWC to the City in terms of this Agreement.
- 1.3 Unless inconsistent with the context, an expression denoting: any gender shall include the other gender; a natural person shall include a juristic person and vice versa; and the singular shall include the plural and vice versa.

- 1.4 Words or phrases not specifically defined shall be assigned their meaning as provided in the Act. Where the Act does not provide such meaning, the normal grammatical meaning shall be assigned.
- 1.5 If any provision of this Agreement is held to be unenforceable then all remaining provisions will remain in full force and effect.

2 COMMENCEMENT AND DURATION

- 2.1 This Agreement commences on the Effective Date.
- 2.2 The Effective Date is a date agreed by the Parties in writing, such date to be within one year of the date of last signature to this Agreement but not before the City has implemented a tracker system contemplated in clause 9.1.3;
- 2.3 Subject to clauses 2.4 and 2.5, this Agreement will remain effective indefinitely.
- 2.4 Either Party may terminate this Agreement (or part thereof) in writing, by giving the other Party three months' written notice of its intention to do so.
- 2.5 HWC may revoke this Delegation (or part thereof) in writing:
- 2.5.1 if, upon reassessment in terms of section 8(6)(d) of the Act, HWC assesses the City to no longer be competent to perform functions under the Act; or
- 2.5.2 if the City breaches a material term of the Agreement and fails to remedy such breach despite reasonable notice to do so.

3 POWERS AND FUNCTIONS DELEGATED TO THE CITY

- 3.1 In terms of section 26 of the Act, and subject to the terms and conditions in this Agreement, HWC delegates the following powers and functions to the City:
- 3.1.1 the implementation and administration of section 34 of the Act (which concerns permission for the alteration or demolition of a structure or a part of a structure which is older than 60 years) except for a structure

that is graded as Grade I, Grade II or formally protected in terms of the Act at national or provincial level;

3.1.2 the implementation and administration of section 35(5) of the Act (which concerns archaeological and paleontological remains);

3.1.3 the implementation and administration of section 38 of the Act (which concerns impact assessment and decision-making in relation to certain categories of development) except where the development may impact upon a Grade I or Grade II heritage resource, a place protected in terms of section 36, or a place formally protected in terms of the Act at national or provincial level; and

3.1.4 any other matter provided for in an addendum to this Agreement which is signed by the Parties.

3.2 The City accepts this Delegation.

4 DECISION-MAKING BY THE CITY

4.1 The City undertakes that its Council will sub-delegate the functions and powers delegated to the City under this Delegation to officials who have been found to be competent by HWC in terms of section 8(6) of the Act, and who occupy appropriate positions within the Department who may exercise the function or power only with and subject to the written authorisation of its Director.

4.2 Only officials within the Department as contemplated in clause 4.1 may exercise a function or power under this Delegation.

4.3 In implementing this Delegation, when appropriate the City must advise a person undertaking or proposing to undertake an activity:

4.3.1 that the activity may entail a contravention of section 35(4) or another provision of the Act; and

4.3.2 to obtain a necessary permission in terms of the Act.

- 4.4 In implementing this Delegation the City must apply, where relevant:
- 4.4.1 the general principles of heritage management in section 5 of the Act;
 - 4.4.2 HWC policies ; and
 - 4.4.3 City heritage policies.
- 4.5 When necessary the City may obtain advice on a matter from an external specialist advisor.

5 CONSULTATION WITH OR REFERRAL TO HWC

- 5.1 If the City has reason to believe a proposed development contemplated in this Delegation may affect a meteorite site or archaeological or palaeontological heritage resource protected by section 35 of the Act, the City must notify HWC as soon as reasonably possible and request its comment or requirements in terms of section 38 of the Act.
- 5.2 The City must refer the following matters in this Delegation to HWC for assessment and decision by HWC:
- 5.2.1 any matter where the Department in terms of this Delegation elects not to exercise the power or function;
 - 5.2.2 an application concerning a proposed development that may impact on a place which:
 - (a) is formally protected in terms of the Act at national or provincial level;
 - (b) is graded as Grade I or Grade II in terms of the Act;
 - (c) is protected in terms of sections 35 or 36 of the Act; or
 - (d) has not yet been graded and which the City proposes to be a Grade I or Grade II heritage resource based on grading criteria in the Act or published by SAHRA or HWC.

5.2.3 When referring a matter contemplated in clause 5.2.2(d), the City must provide HWC with a motivation for the proposed grading.

5.3 Should HWC not provide comment or requirements within 15 business days of the notification contemplated in clause 5.1 and clause 5.2, then the City may decide the matter without such comment or requirements.

6 MATTER IN WHICH THE CITY MAY HAVE AN INTEREST

6.1 Where the City has the power under this Delegation to decide a matter concerning a property owned or controlled by the City or where the City is the developer or part of the development team for a project that may impact a heritage resource, and the matter has not been referred to HWC in terms of clause 5.2, the City must notify HWC and afford it 15 business days to determine whether the matter should be decided by HWC or the City.

6.2 If HWC determines that it will decide the matter, it must:

6.2.1 provide the City 15 business days, or such longer period as may reasonably be agreed, to comment; and

6.2.2 take into consideration any such comment when deciding the matter.

6.3 If HWC determines that the City may decide the matter or in the absence of a determination by HWC within the period contemplated in clause 6.1, then the City may decide the matter.

6.4 HWC may provide the City with a schedule of types of activities and types of properties under the ownership or control of the City for which it does not require notification in terms of clause 6.1.

7 APPEAL

7.1 Since this Agreement prohibits a person or structure in the City other than those contemplated in clause 4.1 from exercising a function or power contemplated in this Delegation, the City does not have the power to decide a matter contemplated in this Delegation by way of an internal appeal to an appeal authority of the City.

- 7.2 To the extent that a matter is appealable, the person seeking to appeal may do so only in terms of sections 38(6) and 49 of the Act, read with Regulation 12 of the Regulations published under PN 336 on 25 October 2002.
- 7.3 When notifying an interested person about a decision against which an appeal may be lodged, the City must inform such person:
- 7.3.1 about their right of appeal;
 - 7.3.2 the appeal procedure; and
 - 7.3.3 that the decision does not come into effect until the expiry of the time within which an appeal may be lodged or until a validly lodged appeal is finally decided.

8 ENFORCEMENT OF THE ACT

- 8.1 Either the City or HWC may take legal steps, including criminal prosecution, to enforce compliance with the Act against a person who:
- 8.1.1 undertakes an activity without a necessary permission under the Act which the City has the power to give under this Delegation; or
 - 8.1.2 contravenes a condition of a permission issued by the City under this Delegation.

9 OBLIGATIONS OF THE CITY

- 9.1 The City must:
- 9.1.1 ensure that it maintains its established competence in terms of section 8 of the Act;
 - 9.1.2 continue to identify, assess and re-assess heritage resources as part of the on-going updating and maintenance of its heritage resources information system;
 - 9.1.3 develop and implement an electronic tracker system for the management of applications and decisions made under this Delegation;

- 9.1.4 in consultation with HWC, determine fees that a developer must pay to the City for the exercise of a power or function in terms of this Delegation;
- 9.1.5 share with HWC information under control of the City regarding the exercise of the City's powers and functions in terms of this Agreement;
- 9.1.6 provide HWC with access to all relevant information and records including the regulation of decision-making contemplated in clause 4.1; and
- 9.1.7 annually provide the HWC with a report on the implementation of this Delegation if requested by HWC.

10 OBLIGATIONS OF HWC

10.1 HWC must:

- 10.1.1 refer to the City all matters contemplated in this Delegation;
- 10.1.2 provide the City with access to information under HWC's control including case files and heritage management policies and processes relating to matters and places which the City must administer under this Delegation;
- 10.1.3 within 15 working days of taking a decision to grade a heritage resource as Grade II, notify the City and supply it with the statement of significance;
- 10.1.4 provide the City with access to HWC's register of heritage conservation bodies;
- 10.1.5 if requested by the City, provide in-house training to City officials upon signature of this Agreement to assist the City in implementing this Delegation; and

11 NATURE OF THE RELATIONSHIP

- 11.1 This Agreement does not create an employment relationship, partnership, joint venture or agency between the Parties.
- 11.2 Neither Party has the authority or right to bind the other Party to any third party.

12 GOOD FAITH, CO-OPERATION AND REASONABLENESS

- 12.1 The Parties must:

12.1.1 display utmost good faith in all their dealings with each other;

12.1.2 use their best endeavours to co-operate as contemplated in this Agreement.

- 12.2 In their dealings with each other for purposes of this Agreement, the Parties undertake to act reasonably and not do anything that might prejudice or detract from the powers or functions of each other, or the implementation of this Agreement.

- 12.3 The Parties must continue to co-operate with one another by maintaining and advancing agreement on matters of interpretation and procedures relevant to this Delegation.

- 12.4 Should either Party anticipate any problem which would have the effect of hindering its performance under this Agreement, it must as soon as possible report the details thereof to the other Party.

13 DISPUTE RESOLUTION

- 13.1 The Parties must strive to resolve any dispute which arises between them concerning the interpretation or implementation of this Agreement amicably through consultation and negotiation.

- 13.2 Should there be no resolution of the dispute in terms of clause 13.1, the Parties must further attempt to resolve the dispute through the engagement of

the Director of the Department and the CEO of HWC or their respective nominee(s).

- 13.3 Should the dispute remain unresolved after implementation of clause 13.2, then the Parties must apply the further provisions of section 41 to section 45 of the Intergovernmental Relations Framework Act 13 of 2005.

14 APPLICABLE LAW

- 14.1 This Agreement is governed by and must be construed in accordance with the law of the Republic of South Africa.
- 14.2 All disputes, actions, and other matters in connection therewith must be determined in accordance with this Agreement and such law.

15 DOMICILIA AND NOTICES

- 15.1 A notice required or permitted to be given in terms of this Agreement is valid and effective only if in writing and if received or deemed to have been received by the addressee.
- 15.2 The Parties choose as their *domicilia citandi et executandi* the following addresses:

HWC:

The CEO: Heritage Western Cape
3rd Floor, Protea Assurance Building,
Greenmarket Square, Cape Town
Email: Ceoheritage@westerncape.gov.za

THE CITY:

The Director: Environmental Resource Management Department
7th Floor, 44 Wale Street, Cape Town
Email: Osman.Asmal@capetown.gov.za

- 15.3 A notice under this Agreement must be addressed to the Party at its *domicilium* and may be sent by email or pre-paid registered post, or delivered by hand.
- 15.4 A notice:

- 15.4.1 sent by email, is deemed, unless the contrary is proved, to have been received on dispatch if it is transmitted before 16:30 on a business day or otherwise on the next business day;
- 15.4.2 sent by pre-paid registered post, is deemed, unless the contrary is proved, to have been received on the seventh day after posting;
- 15.4.3 delivered by hand, is deemed to have been received, unless the contrary is proved, on the date of delivery, if such date is a business day or otherwise on the next business day.

15.5 Either Party may, by notice in writing to the other, change its *domicilium* to any other address within the Republic of South Africa, provided that the change will become effective 15 business days after service of the notice.

16 SUCCESSION

16.1 This Agreement binds a successor to either Party.

17 WHOLE AGREEMENT

17.1 This Agreement constitutes the whole agreement and supersedes any previous agreement between the Parties regarding the subject matter of this Agreement.

17.2 No variation of this Agreement will be of force or effect unless reduced to writing and signed on behalf of the Parties.

18 TRANSITIONAL ARRANGEMENTS

18.1 HWC must assess and decide an application, Notice of Intent to Develop or Impact Assessment which is:

- 18.1.1 submitted to and accepted by HWC before the Effective Date and which is still undecided on or after the Effective Date; or
- 18.1.2 submitted to HWC before the effective date, but returned to the applicant or proponent for additional information to be furnished.

18.2 HWC remains responsible for administering a matter where HWC took a decision which requires compliance with a condition to the satisfaction of HWC.

SIGNED at **CAPE TOWN** on

2016

FOR THE CITY

The signatory warrants that the City has authorised this signing on behalf of the City

Name: _____

Title: _____

WITNESS 1

Name: _____

Title: _____

WITNESS 2

Name: _____

Title: _____

SIGNED at **CAPE TOWN** on

2016

FOR HWC

The signatory warrants that HWC has authorised this signing on behalf of HWC

Name: _____

Title: _____

WITNESS 1

Name: _____

Title: _____

WITNESS 2

Name: _____

Title: _____