

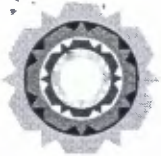
ITEM NUMBER: C 18/05/16

*RECOMMENDATION FROM THE EXECUTIVE MAYOR: 17 MAY 2016*

**MC 48/05/16 UNLAWFUL COMMENCEMENT OF ACTIVITIES IN TERMS OF THE NATIONAL ENVIRONMENTAL MANAGEMENT ACT SECTION 24G: RECTIFICATION AND THE PAYMENT OF ADMINISTRATIVE FINE IN RESPECT OF THE WALLACEDENE 24G FINES: DEVELOPMENT ON PUBLIC OPEN SPACES**

It is **RECOMMENDED** that:

- (a) Council authorise the payment to the Western Cape Government Department of Environmental Affairs & Development Planning (DEA&DP) of the Section 24G administrative fine of R40 000.00 (excl. VAT) for unlawful commencement of work of Roads Construction over Public Open Spaces
- (b) authority be granted to the City Manager to approve the processing of the payment of the fine.



REPORT TO COUNCIL

DATE 2016 -05- 17

1. ITEM NUMBER : MC 48/05/16

2. SUBJECT

UNLAWFUL COMMENCEMENT OF ACTIVITIES IN TERMS OF THE NATIONAL ENVIRONMENTAL MANAGEMENT ACT SECTION 24G: RECTIFICATION AND THE PAYMENT OF ADMINISTRATIVE FINE IN RESPECT OF THE WALLACEDENE 24G FINES: DEVELOPMENT ON PUBLIC OPEN SPACES

ISIHLOKO

UKUQALISWA KWEMISEBENZI NGOKUNGEKHO-MTHETHWENI  
NGOKWECANDELO0-24G LOMTHETHO WESIZWE ONGOLAWULO  
LOKUSINGQONGILEYO: UKULUNGISWA NOKUHLAWULWA KWEZOHLWAYO  
EZINGEZOLAWULO NGOKUJOLISWE KWICANDELO-24G  
ELINGGEZOHLWAYO LASE-WALLACEDENE: UPHUHLISO KWIMITHABALALA  
YAMABALA OLUNTU

ONDERWERP

ONREGMATIGE AANVANG VAN AKTIWITEITE INGEVOLGE DIE NASIONALE WET OP OMGEWINGSBESTUUR, ARTIKEL 24G: REGSTELLING EN DIE BETAAL VAN ADMINISTRATIEWE BOETES TEN OPSIGTE VAN DIE WALLACEDENE 24G-BOETES: ONTWIKKELING VAN OPENBARE OOP RUITES

LSU G3209

3. STRATEGIC INTENT

- Opportunity City
- Safe City
- Caring City

*Objective 3.2: Ensure increased access to innovative human settlements for those who need it.*

- Inclusive City
- Well-run City

Making progress possible. Together.

TTH

**4. PURPOSE**

**112**

The purpose of this report is to advise Council of the City's obligations in terms of Section 24G of the National Environmental Management Act (NEMA) and thereby authorise the City Manager to authorise the payment of a Section 24G administrative fine issued to the City in 2012 in respect of Roads Constructed over Public Open Spaces in Wallacedene. Payment of the fines did not occur since the City felt that a very strong motivation can be made to waive the imposition of the fines, based on the legal background to the Wallacedene development, and hardships under which the residents were living at the time (which were recognized by the court).

**5. FOR DECISION BY**

- This report is for noting only/information only.
- This report is for decision by:
- Council

**6. EXECUTIVE SUMMARY**

The City was notified of 4 (four) Administrative fines for 4 (four) instances where roads were constructed over Public Open Spaces (POS) in Wallacedene. Fines were issued against the following erven:

- Erf 14138 Wallacedene
- Erven 14482 and 16121 Wallacedene
- Erf 22883 Wallacedene
- Erf 13282 Wallacedene

The intent was to re-zone the subject properties (and this has been done in most cases) but construction commenced before the re-zoning approvals were granted, resulting in the fines to the amount of R40 000 for all affected POS. It was felt that a very strong motivation can be made to waive the imposition of the fines, based on the legal background to the Wallacedene development, and hardships under which the residents were living at the time.

The Mooitrap area was subject to flooding. The City therefore had to speedily start planning, and several processes were soon running in parallel.

It is true that the construction started before the environmental processes were completed, and approved. Nobody's rights were infringed by the loss of the POS, which were small barren, and undeveloped at the time.

The speedy development was done in the public interest, and was not in any way willful - it was intended to assist people suffering harsh living conditions.

However, the appeal period has lapsed, and it appears that the City will have to pay the fines.

The case as presented was given to the Municipal Public Accounts Committee (MPAC) to investigate. The matter has been discussed by the MPAC subcommittee but has not yet been referred to MPAC for a decision. The subcommittee will be meeting in April 2016 to finalise another NEMA case and then a report regarding all NEMA cases will be submitted to MPAC.

## 7. RECOMMENDATIONS

Not delegated: for decision by Council:

It is recommended that:

- a) Council authorise the payment to the Western Cape Government Department of Environmental Affairs & Development Planning (DEA&DP) of the Section 24G administrative fine of R40,000.00 (excl. VAT) for unlawful commencement of work of Roads Construction over Public Open Spaces.
- b) Council grant authority to the City Manager to approve the processing of the payment of the fine.

## IZINDULULO

Azgunyaziswanga: isiggibo seseBhunga:

Kundululwe ukuba:

- a) IBhunga maligunyazise ukuhlawulwa kwiSebe lobuRhulumente bePhondo laseNtshona Koloni elileleMicimbi yokuSingqongileyo noCwangciso loPhuhliso (DEA&DP) kwesohlwayo esingezolawulo esingecandelo-24G esingama-R40 000 (ngaphandle kweRhafu-ntengo) ngokujoliswe ekuqalisweni komsebenzi ngokungekho-mthethweni wolwakhiwo LweeNdela kwiMithabalal yamaBala.
- b) IBhunga malinikezele igunya kuMphathi weSixeko ukuba aphumeze ukunikezelwa kwentlawulo yesohlwayo.

## AANBEVELINGS

Nie gedelegeer nie: vir besluitneming deur die Raad:

Daar word aanbeveel dat:

- a) Die Raad goedkeuring verleen vir die betaling van die artikel 24G administratiewe boete van R40 000 (BTW uitgesluit) aan die Wes Kaapse regering se department van omgewingsake en ontwikkelingsbeplanning (DEA&DP) vir die onregmatige aanvang van padkonstruksiewerk op openbare oop ruimtes.
- b) Die Raad magtiging aan die Stadsbestuurder verleen om die verwerking van van die betaling van die boete goed te keur.

## 8. DISCUSSION/CONTENTS

The Municipal Systems Act requires that local authorities provide services in a financially and environmentally responsible and sustainable manner.

The National Environmental Management Act (NEMA) makes provision for the Minister of Environmental Affairs to identify activities which may not commence without prior environmental authorisation. These activities are specified in the Environmental Impact Assessment (EIA) Regulations.

It is an offence to commence with a listed activity without first obtaining environmental authorisation by undertaking an EIA. NEMA defines significant criminal penalties for unlawful commencement.

However, NEMA also provides for the “rectification” of unlawful facilities in Section 24G. This section allows for a person “who has committed an offence” of unlawful commencement to apply for rectification by undertaking a post-facto EIA. The MEC or the Minister can then authorise or refuse the Section 24G application. Before a decision can be made, the applicant must pay an ‘administrative fine’ of up to R5 million.

In the case of the Wallacedene roads built over public open spaces the Section 24G fine is R40,000. Since this fine has not been paid, no decision has been issued by DEA&DP in respect of the rectification of the unlawful commencement of a listed activity. As such, the activity remains unlawful.

The amount of the Section 24G administrative fine is determined by the competent authority in terms of NEMA. In the Western Cape, the Provincial Department of Environmental Affairs and Development Planning (DEA&DP) is the competent authority. Section 24G is an administrative provision and does not remove the liability for criminal prosecution.

### **Background of how roads were build over public open spaces**

The intent was to re-zone the subject properties from POS to the appropriate zonings (and this has been done in most cases), but construction commenced

before the re-zonings were approved, resulting in the fines of about R40 000. It was felt at the time that a very strong motivation can be made to waive the imposition of the fines, based on the legal background to the Wallacedene development, and hardships under which the residents were living.

The intentions of the project were to speedily assist those living in desperate situations. The pressure to deliver housing arises from the poverty in which many people are forced to exist. So, the intentions were good, but one unforeseen result was an oversight which resulted in an unlawful commencement, which in turn was addressed by the Section 24G application, as the law allows. It is unfortunate that the process was not timeously concluded, but that is not the fault of the City as the consultants had agreed to pay, but did not do so.

The Mooitrap area was subject to flooding. The City therefore had to speedily start planning, and several processes were soon running in parallel.

It is true that the construction started before the environmental processes were complete, and approved. Nobody's rights were infringed by the loss of the POS, which were small and undeveloped at the time.

The speedy development was done in the public interest, and was not in any way willful - it was intended to assist people suffering harsh living conditions.

### **Rectification**

In order to remedy the situation, the City and their appointed consultants compiled and submitted a Section 24G rectification application in August 2011 to the DEA&DP. This application included an EIA report, a site inspection to assess possible environmental damage and a record of the public participation processes followed. The DEA&DP accepted the application but warned that a fine would be imposed on the City for the contravention. As this is a shared responsibility between the city and the consultants they are not willing to pay. **The City can no longer afford to delay the payment of this fine because DEA&DP have threatened to take legal action against the City if the matter is not resolved that could be more expensive.**

#### **8.1. Constitutional and Policy Implications**

None

#### **8.2. Sustainability Implications**

Does the activity in this report have any sustainability implications for the City?

No

Yes

8.2.1 Environmental Impact Assessment (EIA) procedures have in the past been identified as a cause for delays to service delivery. The City of Cape Town initiated an Environmental Compliance Strategy in 2007

and has developed a range of tools and skills to support City EIA applications.

Financial support was received in 2013 from the Urban Settlement Development Grant (USDG) for the creation of a three year contract position of EIA Projects Officer in the Environmental Resource Management Department (ERMD). The EIA Projects Officer, together with existing ERM staff, is tasked with supporting and facilitating City applications for environmental authorisation, especially those that serve informal settlements. This includes project screening and advice on EIA requirements, project specifications for procurement, adjudication of tenders for Environmental Assessment Practitioners and assistance with EIA project management and reporting.

8.2.2 The contents of this report are in line with the Integrated Metropolitan Environmental Policy (IMEP). Environmental compliance was identified as one the strategic priorities for the IMEP Agenda 2009 – 2014.

**8.3. Financial Implications**

The City is required to pay a fine in the amount of R 40 000 for the reasons outlined above.

**Operating Budget Provisions:**

Cost Centre	:	19040002
Cost Centre Description	:	Management Housing Development
Budget Provision 2015/2016	:	R 63 000
Spent to date/Committed	:	R 23 000
Cost Element	:	413410
Cost Element Description	:	Penalties, Fines and Interest Paid
Balance Available	:	R 40 000
Funds Required (this report)	:	R 40 000

*Handwritten note:*  
 N. Pieterse  
 21/4/2016

*Stamp:*  
 Operating Budget  
 26 APR 2016  
 Checked by: [Signature]

**8.4. Legal Implications**

Section 48 of NEMA was repealed by the NEM: Amendment Act 30 of 2013. As a result, NEMA is binding on the state, including criminal liability. Delays to the payment of this Section 24G administrative fine have resulted in possible further legal action by DEA&DP (Annexure B).

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Since the Section 24G fine has not been paid, the development is not authorised and continues to represent the unlawful commencement of a listed activity.

#### 8.5. Staff Implications

Does your report impact on staff resources, budget, grading, remuneration, allowances, designation, job description, location or your organisational structure?

No

Yes

#### 8.6. Risk Implications

Detailed Risk Implications have been submitted directly to the Chief Risk Officer to be dealt with according to the risk management process.

#### 8.7. Other Services Consulted

Environmental Resource Management Department  
(Mr. K Wiseman – 021 487 2283)

Assisted in drafting this report based on a similar report he drafted that was approved by Council dated 2 December 2013.

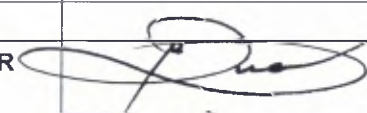
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### ANNEXURES

- Annexure A - Funding available extract
- Annexure B - Notifications of payment of administrative fines.
- Annexure C - Notice of referral of the Section 24G application to criminal enforcement.



FOR FURTHER DETAILS CONTACT : 118

NAME	Herman Steyn
CONTACT NUMBERS	021-400-3649
E-MAIL ADDRESS	Herman.Steyn@capetown.gov.za
DIRECTORATE	Human Settlements: New Market Development
FILE REF NO	
SIGNATURE : DIRECTOR	 19/04/2016

EXECUTIVE DIRECTOR

NAME Dr. Ivan Bromfield

DATE 21/4/2016

COMMENT:

CHIEF FINANCIAL OFFICER (EXECUTIVE DIRECTOR: FINANCE)

NAME K. T. Sunday

DATE 26/04/2016

COMMENT:

REPORT COMPLIANT WITH THE PROVISIONS OF COUNCIL'S DELEGATIONS, POLICIES, BY-LAWS AND ALL LEGISLATION RELATING TO THE MATTER UNDER CONSIDERATION.

LEGAL COMPLIANCE

NON-COMPLIANT

NAME Joan-Mari Holt

TEL 021 400 2753

DATE 28/04/2016

COMMENT:

Certified as legally compliant: <sup>JMH</sup>  
Based on the contents of the report.

A. G. Davis

EXECUTIVE DIRECTOR: COMPLIANCE AND  
AUXILIARY SERVICES (ED: CAS)

SUPPORTED FOR ONWARD SUBMISSION  
TO MAYOR  / MAYCO  / COUNCIL

NOT SUPPORTED

REFERRED BACK

DATE

5/5/2016

COMMENT:

THAT MPAC CONSIDERS  
THE MATTER TO SECTION  
32 OF THE MFMA AND  
THEN RECOMMEND TO COUNCIL

J. J. Merwe

COMMENT:

ACTING

MAYORAL COMMITTEE MEMBER

~~G. B. Van Minnen~~ CLLR JFH v/d MERWE

NAME

JFH v/d MERWE

DATE

09/05/2016