



CITY OF CAPE TOWN
ISIXEKO SASEKAPA
STAD KAAPSTAD

DEVELOPMENT MANAGEMENT INFORMATION GUIDELINES SERIES

REMOVAL, SUSPENSION AND AMENDMENT OF RESTRICTIVE CONDITIONS AND TRADITIONAL SERVITUDES

12



What are restrictive title deed conditions, why are they necessary, and how do they influence the use and development of property?

Making progress possible. Together.

This booklet forms part of a series published by the City of Cape Town to help you understand and make better use of the planning system.

LANGUAGE POLICY:

In line with the City of Cape Town's language policy, any booklet in this series is also available in Afrikaans and isiXhosa on request by e-mailing lums@capetown.gov.za.

LEGAL DISCLAIMER:

Although based on law, the information provided in this booklet is presented in an informal and plain language format for the purposes of providing advice on development matters and procedures to customers and members of the public. Should there be any discrepancy with provisions in the underlying legislation, the actual legislation takes precedence and should be consulted directly.

Alternatively, please obtain independent professional advice on the matter. The City of Cape Town does not accept any liability for any action taken on the basis of the information contained herein.

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ABOUT RESTRICTIVE CONDITIONS AND TRADITIONAL SERVITUDES¹



Then and now ...

An application to alter, suspend or remove a restrictive condition used to be dealt with in terms of the Removal of Restrictions Act of 1967, with the provincial MEC as the decision-maker. Since the repeal of the Removal of Restrictions Act, applications can now be made to the City in terms of its 2015 Municipal Planning By-law (MPBL), with the City as the decision-maker. In addition, the Land Use Planning Act of 2014 (LUPA) and the Spatial Planning and Land Use Management Act of 2013 (SPLUMA) contain certain requirements that must also be met. The combined effect of this means that the way of processing, considering and approving applications has changed.



What is a restrictive condition for the purposes of the MPBL?

The MPBL, LUPA and SPLUMA all define “restrictive condition”. While the MPBL and LUPA’s definitions are the same, SPLUMA provides a slightly broader definition of the term.

SPLUMA defines a restrictive condition as **“any condition registered against the title deed of land restricting the use, development or subdivision of land concerned”**. All title deed restrictions, including servitudes, are therefore covered.



1 Since the applicable legislation is complex, this brochure is very technical and can unfortunately not be simplified any further. The staff at your local district planning office will however assist with further explanations and clarifications.

The MPBL and LUPA both define a restrictive condition as **“any condition registered against the title deed of land restricting the use, development or subdivision of land concerned, excluding servitudes creating real or personal rights”**.

Therefore, both LUPA and the MPBL exclude a servitude from the definition of a restrictive condition.

The type of servitude referred to in the MPBL and LUPA definition is called a “traditional servitude”. This could be praedial (affecting two or more erven) or personal (being in favour of a specified person), and has the distinctive characteristics of a servitude. It is created AFTER township establishment by means of a deed attested by a notary public and executed by the owners of the dominant and servient tenements (praedial servitude), or by the owner of the encumbered land and the person in whose favour it is created (personal servitude).

This brochure focuses on cases where a land use proposal conflicts with a restrictive condition or traditional servitude applicable to the property. For certain types of restrictive conditions, the City requires the owner to apply for an amendment, suspension or deletion of the restrictive condition in terms of section 42(g) of the MPBL before it can consider the land use application. For other types of restrictive conditions and traditional servitudes, such an application is not mandatory, although the presence of the restrictive condition will affect the advertising as well as the assessment of the land use application. This is explained in the next section.



Importantly also, the owner remains bound by the restrictive condition even if a land use application is approved in conflict with the condition. Rectification of a conflict condition may be in the owner’s interest even if it is not mandatory for the land use approval.

CATEGORIES OF RESTRICTIONS, AND WHETHER APPLICATION IS REQUIRED



(a) Restrictive conditions imposed by a government body in terms of Townships Ordinance 33 of 1934 or Land Use Planning Ordinance 15 of 1985 (mandatory removal)

Application must be made in terms of section 42(g) and 42 (j) of the MPBL.

This category includes conditions imposed by the Administrator or the City when approving developments in terms of the Townships Ordinance 33 of 1934, the Land Use Planning Ordinance 15 of 1985 (LUPO) or any other law repealed by LUPA, and these conditions were also required to be inserted into the title deed.



The City **may not** grant planning approval for a land use that would contravene a restrictive title deed condition imposed in terms of LUPO, the Townships Ordinance or another law repealed by LUPA. In practice, most of these conditions would have been imposed by the Administrator in terms of the Townships Ordinance.

An application for the amendment, suspension or deletion of these restrictive conditions should be submitted at the same time that the planning application is submitted.

These title conditions are deemed to be conditions imposed in terms of the MPBL. In this regard, section 142(1) of the MPBL provides as follows: **“Any approval...granted or in force in terms of a law repealed by the Land Use Planning Act, and in existence immediately before the commencement of the Land Use Planning Act...where applicable is regarded to have been issued, granted or occurred in accordance with this by-law subject to the conditions under which it is issued.”** Therefore, an application to amend a condition of approval must also be submitted simultaneously in terms of section 42(j) of the MPBL, as

these conditions also form part of a planning approval applicable to the property. This application will be processed in the same way as any other application for the amendment of conditions of approval provided for in section 101 of the MPBL.

Note that conditions imposed under the previous Ordinances such as the Townships Ordinance 13 of 1927 or the 1913 Ordinance are not subject to section 142(1) of the MPBL, so no application in terms of section 42(j) is required in this case.



(b) Developer's restrictive conditions imposed at the time when the township was created

In many older developments, the developer of the township imposed restrictive conditions at the time when the township was created. These conditions are not conditions of approval granted or deemed to have been granted in terms of the MPBL.

The City is not required to enforce compliance with the developer's restrictive conditions (such as those imposed by Garden Cities/Cape Marine Suburbs) and can therefore grant a planning approval for a land use that would contravene the developer's restrictive conditions.

Such planning approval does not release the owner from the duty to comply with the title deed restrictions, and the beneficiaries of such title deed restriction may enforce compliance with these restrictions. Owners are therefore advised to apply for the removal of these restrictions.

When processing the land use application that conflicts with a developer's restrictive condition, the case officer must keep in mind that these restrictions will also confer rights on the beneficiary of the title deed restrictions i.e. the owners of the erven in whose favour the conditions were registered. These beneficiaries must be considered when determining to whom the land use application should be advertised. For more on this, turn to "Advertising the application" later on in this brochure.

CATEGORIES OF RESTRICTIONS, AND WHETHER APPLICATION IS REQUIRED

Furthermore, in terms of section 99(2)(e) of the MPBL, a decision-maker must consider the impact of a proposed land use that conflicts with a title deed restriction on the rights conferred in the restrictive title deed condition, no matter how this condition was imposed. If the proposed land use application would substantially affect existing rights as contained in the restrictive condition, the land use application may be refused. To avoid this, owners should also apply for the removal of the restrictive condition.

If the owner submits an application to amend, suspend or remove a developer's restriction, it should be processed in the same way as a restrictive condition (see paragraph (a) above).

No application in terms of paragraph 42(j) is required, since developer's conditions are not statutory conditions of approval, and section 142(1) of the MPBL does not regard these as conditions of approval.



(c) Restrictions imposed by a government body in terms of laws that predate Townships Ordinance 33 of 1934

These would, for example, include conditions of approval imposed under Ordinance 13 of 1927, or even the Ordinance of 1913.

For the same reasons explained in paragraph (b) above, no application for amendment of conditions in terms of section 42(j) of the MPBL is required, as section 142(1) of the MPBL does not regard these as conditions of approval.



(d) Traditional servitude

A traditional servitude includes all restrictions relating to the use, development or subdivision of land found in a title deed and imposed **after** township establishment. A traditional servitude in itself does not preclude the processing and granting of a land use application that conflicts with a title deed restriction.

This type of servitude could be praedial (affecting two or more erven) or personal (being only in favour of a specified person). The City will require the owner to appoint a conveyancer to determine whether a condition is a restrictive condition or a traditional servitude, and if it is a traditional servitude, whether it is personal or praedial. The type of servitude determines who is affected (as it confers rights on the beneficiaries of the restrictions) and, therefore, who to advertise to, and also helps to assess the impact of a land use application on existing rights in terms of section 99(2)(e) of the MPBL.

In terms of section 99(2)(e) of the MPBL, a decision-maker must consider the impact of a proposed land use that conflicts with a title deed restriction on the rights conferred in the restrictive title deed condition. If the proposed land use application would substantially affect existing rights as contained in the restrictive condition, the land use application may be refused. To avoid this, owners should also consider the removal of the traditional servitude.

A land use approval in terms of the MPBL that conflicts with restrictions contained in a traditional servitude does not absolve the owner from complying with the traditional servitude, and the beneficiaries of the servitude may in fact enforce compliance.

Currently there is no process to consider application relating to traditional servitudes in the MPBL as there is no specific reference to such an application type. If the owner wishes to amend, suspend or remove a traditional servitude restriction, then that can only be achieved by mutual agreement between all the affected parties or by application to the courts. In such cases the owner would need to obtain independent advice and the services from a legal practitioner.

CATEGORIES OF RESTRICTIONS, AND WHETHER APPLICATION IS REQUIRED

Application for the removal of a title deed restriction is **not required** where...

...a court order has been obtained for the deletion of one or more of the conditions.

...a personal restrictive condition has been removed by agreement or by notarial deed of cancellation.

...the restrictive condition has racially discriminatory provisions,² and section 28 of the General Law Second Amendment Act 108 of 1993 applies.

...the restrictive condition was imposed by a person who is deceased.

...the restrictive condition was imposed by a company that has been deregistered.

...the restrictive condition was a personal one, and the applicant has shown that the condition has either been met or has lapsed.



2 According to section 13(1) of the General Law Second Amendment Act, any provision in a title deed of any immovable property prohibiting or restricting the transfer, hypothecation or letting of such property to, or the possession, occupation or use of such property by, any person of a particular population or ethnic group or who is not of a particular population or ethnic group, is cancelled. These types of conditions have no legal status.



APPLYING FOR THE AMENDMENT, SUSPENSION OR DELETION OF A RESTRICTIVE CONDITION IN TERMS OF THE MPBL



The pre-application consultation in terms of section 70 of the MPBL

An application for amendment, suspension or deletion of a restrictive condition is subject to a pre-application consultation in terms of section 70(2) of the MPBL. The set procedure in that provision must be followed and there must be a record of the pre-application consultation.

Failure to follow the pre-application consultation procedure will mean that the City cannot accept the application, in terms of section 73(1)(a) of the MPBL.

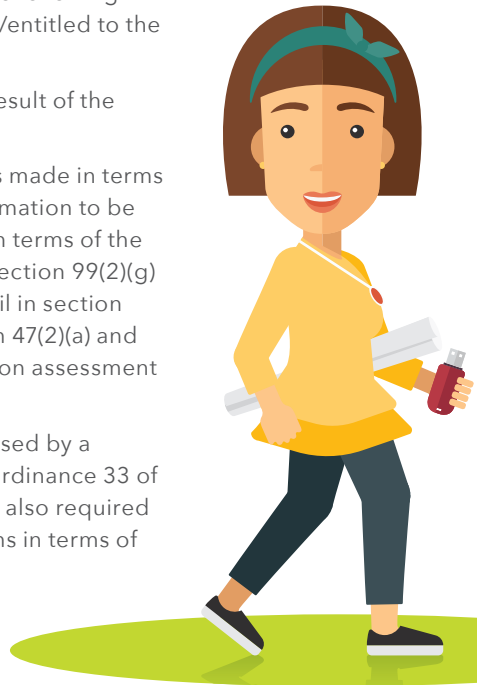


Content of the application

The applicant will need to submit the following:

- a) The certified copy of the title deed, as required in terms of section 48(2)(a) of the MPBL. If the current title deed does not clearly identify who imposed the condition, the owner must submit the version of the title deed that does contain this information.
- b) The mortgage bond holder's consent to the application, if relevant, as required in terms of section 48(2)(b) of the MPBL.
- c) The relevant information set out in section 71 of the MPBL.
- d) A conveyancer's report dealing with the following:
 - whether the condition was imposed in terms of legislation and by a statutory body in terms of the Townships Ordinance 33 of 1934 or LUPO 15 of 1985. This is crucial, as it determines whether the City is obliged to refuse to process a land use application until an application for the amendment, suspension, deletion of a restrictive condition is received. In other words, is it a condition of approval imposed by a statutory body at the time of township approval? This also determines whether an application in terms of section 42(j) is required.

- whether the condition was imposed by a developer or other private person or by a statutory body in terms of an Ordinance that predates the Townships Ordinance 33 of 1934.
 - whether the condition is a traditional servitude, and if so, who can enforce it and in whose favour it is.
- e) If relevant, whether a company or person in whose favour a condition exists is still in operation or alive (as the case may be).
 - f) Where an application is made in terms of section 42(g), the purpose of the restrictive conditions imposed under the preamble to the conditions, and the purpose of the restrictive condition that is the subject of the application.
 - g) A copy of the general plan or diagram for the township that was established, or showing which properties are subject to/entitled to the benefit of the restriction.
 - h) The character of the area as a result of the restrictive conditions.
 - i) In cases where an application is made in terms of section 42(g), sufficient information to be able to assess the application in terms of the relevant criteria referred to in section 99(2)(g) of the MPBL and set out in detail in section 39(5)(a) - (f) of LUPA and section 47(2)(a) and (b) of SPLUMA (see the section on assessment of applications later on).
 - j) Where the restriction was imposed by a government body in terms of Ordinance 33 of 1934 or LUPO, an application is also required for the amendment of conditions in terms of section 42(j).



APPLYING FOR THE AMENDMENT, SUSPENSION OR DELETION OF A RESTRICTIVE CONDITION IN TERMS OF THE MPBL



Motivating the application for amendment, suspension or removal

The applicant must motivate the application, explaining the nature and purpose of the restrictive condition as set out in that particular section of the title deed. The applicant must also provide evidence to support his/her detailed motivation. If there is insufficient reason for the removal of the restrictive condition, this may be considered an “arbitrary deprivation” in terms of section 25(1) of the Constitution.³

The judgement in the *Van Rensburg* case established that an official may not motivate on his/her own accord if there is no evidence to support the motivation. Therefore, while case officers may be able to explain why the title deed restrictions were imposed in the first place, the primary motivation must come from the applicant or his/her representative.



3 Keep in mind that section 47(2) of SPLUMA requires the removal to be done in accordance with section 25 of the Constitution in the absence of written consent to such removal.





It is important that an application is advertised correctly. The following is a summary of the requirements:



For a restrictive condition

Applications concerning a restrictive condition require public notice as well as notice to every property in the township. Advertising will not be waived under any circumstances and occurs in terms of section 42(g).

Once an application is made to remove, suspend or delete a restrictive condition, the minimum requirements in section 43(1)(g), 39(2)(b) and 44(2)(b) of LUPA apply. These requirements set a stricter standard for advertising and override the advertising requirements in the MPBL. The requirements apply to government-imposed restrictive conditions, conditions imposed by developers at township approval stage, as well as conditions imposed under ordinances predating the Townships Ordinance 33 of 1934 where an owner chooses to apply for their removal in terms of section 42(g). However, the requirements do not apply to restrictions regarded as traditional servitudes.

LUPA requires notice to both the public and the owner of every property.

Public notice must be in line with section 43 of LUPA and also comply with the requirements of section 21 of the Municipal Systems Act. Notice to the public occurs by means of a press advert and this requirement cannot be waived.

Notice to property owners is prescribed by section 39(2) of LUPA, which requires a notice to be served in accordance with section 44 of LUPA on (i) any person mentioned in the title deed for whose benefit the restrictive condition applies, and (ii) any

other person whose rights or legitimate expectations will be affected if the matter or application is approved. Note: It does not say “adversely” affected. Therefore, the former category would include persons named in a personal restrictive condition, while the latter would include an owner of a dominant tenement in a praedial restrictive condition. Where a condition has been imposed in terms of the Townships Ordinance 33 of 1934, the application needs to be advertised to the entire township, as there are reciprocal obligations involved.



For a traditional servitude

Should applications concerning a traditional servitude be processed by the City in the future, then the mandatory advertising requirements of LUPA will not apply. As explained above, these advertising requirements apply to restrictive conditions only, not traditional servitudes. This means that the standard advertising requirements of the MPBL apply. The nature of the traditional servitude will determine the extent of the advertising.



For advertising to the state

In terms of section 47(4) of SPLUMA, where an application is submitted to remove, amend or suspend a restrictive condition (including a traditional servitude) that operates for the benefit of the state, a written notice of such application must be given in the prescribed manner to the organ of state responsible for the administration of the law or the performance of the function to which such condition relates.



ASSESSING AN APPLICATION RELATING TO A RESTRICTIVE CONDITION OR TRADITIONAL SERVITUDE - THE CRITERIA

Reminder of what the City may and may not consider

The City **may not** consider granting an application for planning approval for a land use that would contravene government-imposed restrictive conditions imposed in terms of the 1934 Townships Ordinance, the Land Use Planning Ordinance 15 of 1985 or the MPBL, without an application for the amendment, suspension or deletion of such condition (or the granting of consent in terms of the restrictive condition).

The City **may** consider granting an application for planning approval for a land use that would contravene:

- (a) restrictive conditions that are conditions of planning approval imposed in terms of ordinances that predate the 1934 Townships Ordinance, such as the 1913 and 1927 ordinances;
- (b) restrictive conditions imposed by developers; and
- (c) traditional servitudes.

In considering the above, the City must have due regard to the criteria outlined below.





Criteria in section 39(5) of LUPA

These considerations must be motivated in an application for the amendment, suspension or deletion of a restrictive condition, and not of a traditional servitude.

- (a) The interests of the **beneficiary** (those who are entitled to enforce the condition) are considered in terms of section 39(5)(a), (b) and (f). Subsection (a) deals with the financial or other value of the rights conferred by a restrictive condition, while subsection (b) addresses the personal benefit to the beneficiary. Subsection (f) looks at the remaining rights the beneficiary will continue to enjoy if the application is granted.
- (b) The interests of the **applicant** are considered in terms of section 39(5)(c). Here, only “personal benefits” are relevant. Apparent financial and other values are not taken into account.
- (c) The interests of **society** are considered in terms of section 39(5)(d) and (e). Subsection (d) is about the social benefit (see definition below) of not removing the restrictive condition, and subsection (e) about the social benefit of indeed removing it.



Definition of “social benefit”

“Social benefit” refers to the broader society, and not the owners who are entitled to enforce the restrictive conditions, as they are catered for in section 39(5)(a), (b) and (c). This is similar to the public-interest consideration in SPLUMA (see below). There may for example be a social benefit to maintaining a restriction on the use of land for open space or educational purposes. On the other hand, there may also be a social benefit to preventing urban sprawl, which would be possible by removing a restrictive condition that prevents densification.

ASSESSING AN APPLICATION RELATING TO A RESTRICTIVE CONDITION OR TRADITIONAL SERVITUDE - THE CRITERIA



Criteria in SPLUMA

Section 47(2) of SPLUMA provides that a removal, amendment or suspension of a restrictive condition must occur:

- “(a) in accordance with section 25 of the Constitution and SPLUMA;
- (b) with due regard to the respective rights affected and to the public interest; and
- (c) in the prescribed manner if such suspension, amendment or removal will deprive any person of property as contemplated in section 25 of the Constitution.”

If written consent for the removal or amendment of a restrictive condition is included in the application, the factors in (a)-(c) above do not apply. If there is no written consent, however, the decision-maker must decide whether section 25 of the Constitution is triggered or not.

These criteria apply to both restrictive conditions and traditional servitudes.



Criteria in section 99 of the MPBL

These criteria apply to the assessment of both restrictive conditions and traditional servitudes.



POWER TO AMEND OR ALTER A CONDITION OF PLANNING APPROVAL AS CONTEMPLATED IN THE TITLE DEED

A condition imposed in terms of the 1934 Townships Ordinance or the Land Use Planning Ordinance 1985 is regarded to have been imposed in terms of the MPBL. In other words, it is treated the same as a condition of approval imposed in terms of the MPBL.

Here are a few examples:

"Imposed by the Administrator of the Province of the Cape of Good Hope in approving the general plan of...viz."

"As being in favour of the registered owner of any erf in the township and subject to amendment or alteration by the Administrator under the provisions of section 18(3) of Ordinance 33 of 1934:

(a) That this erf be used for residential purposes only ..."



As such, two applications must be made, namely:

- (a) an application to amend the condition or remove the condition in terms of section 42(g) of the MPBL; and
- (b) an application to amend or remove a condition of planning approval (which is deemed to have been imposed in terms of the MPBL). This application will be made in terms of section 42(j) of the MPBL. This is a normal planning application to amend a condition of approval.

Also, the advertising and assessment process will be the same as that for restrictive conditions.



POWER TO GRANT CONSENT, APPROVAL OR RELAXATION IN TERMS OF A RESTRICTIVE CONDITION

Some title deed restrictions confer the power on the Administrator or the City to grant consent in terms of a title deed restriction. As the City is the successor to the Administrator, such application must be made in terms of section 42(h) of the MPBL.

The minimum requirements of section 39(1) of LUPA do not apply to consent, approval or relaxation in terms of a restrictive condition. This type of application is subject to the general participation requirements set out in the MPBL, including the requirements for advertising in terms of section 84.





Right of appeal

The decision to amend, suspend or remove a restrictive condition servitude is subject to appeal in terms of section 108 of the MPBL. Parties will be notified of their right to lodge an appeal. The appeal authority is the Executive Mayor of the City of Cape Town.





Endorsement by Registrar of Deeds in terms of section 49

If the application is approved, the City must place a notice to this effect in the Provincial Gazette. The City must also notify and forward a copy of the provincial notice to the Registrar of Deeds. The Registrar must then make any appropriate entries in and endorsements on any relevant register, title deeds, diagram or plan as may be necessary to reflect this.

This is done free of charge, although it is the owner's obligation to provide the Registrar with all the necessary information in terms of section 47(5) of SPLUMA. This must be done within the prescribed period and in the prescribed manner.

Note that it will be a requirement of building plan submission as well as a section 137 of the MPBL transfer clearance to obtain proof from the Registrar that the title deed has been applied for or that the title deed has been endorsed.

CITY IS THE SUCCESSOR TO OTHER GOVERNMENT BODIES REFERRED TO IN TITLE DEEDS

In terms of section 39(4) of LUPA, a reference to the approval by the Administrator or Townships Board in a restrictive condition is a reference to approval by a municipality, except where Province acquires private law rights.

Section 45(6) of SPLUMA provides that where a condition of title, a condition of establishment of a township or an existing scheme provides for a purpose with the consent or approval of the Administrator, a Premier, the Townships Board or any controlling authority, such consent may be granted by the municipality. In such circumstances, references to the Administrator, a Premier, the Townships Board or controlling authority is regarded as a reference to the municipality.





CONTACT DETAILS

For any further questions about land use management issues, contact your nearest development management office on the numbers provided below:

Table Bay District

Media City Building, 2nd Floor, cnr. Adderley Street and Hertzog Boulevard,
Cape Town

Postal address: PO Box 4529, Cape Town, 8000

Email address: Tablebay.hub@capetown.gov.za

Blaauwberg District

Municipal Building, 87 Pienaar Road, Milnerton

Postal address: PO Box 35, Milnerton, 7435

Email address: Blaauwberg.hub@capetown.gov.za

Northern District

Kraaifontein Administrative Building, Brighton Road

Postal address: PO Box 25, Kraaifontein, 7569

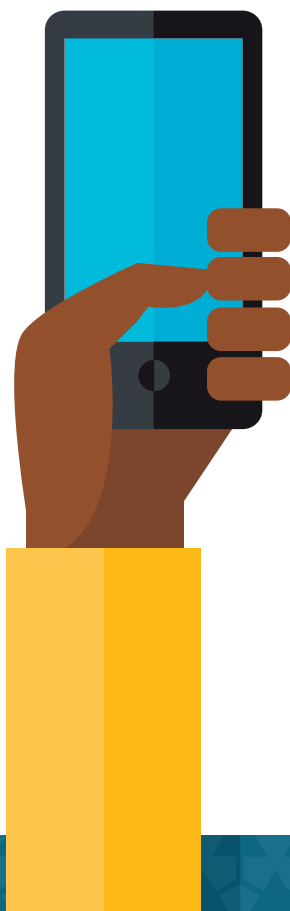
Email address: Northern.hub@capetown.gov.za

Tygerberg District

Parow Administrative Building,
cnr. Voortrekker Road and Tallent Street

Postal address: Private Bag X4, Parow, 7499

Email address: Tygerberg.hub@capetown.gov.za





Helderberg District

Somerset West Administrative Building, cnr. Andries Pretorius and Victoria streets

Postal address: PO Box 19, Somerset West, 7129

Email address: Helderberg.hub@capetown.gov.za

Mitchells Plain/Khayelitsha District

Stocks and Stocks Complex, Ntlazane Road, Ilitha Park, Khayelitsha

Postal address: Private Bag X93, Bellville, 7535

Email address: Khayemitch.hub@capetown.gov.za

Cape Flats District

Ledger House, cnr. Aden Avenue and George Street, Athlone Postal address: PO Box 283, Athlone, 7760

Email address: CapeFlats.hub@capetown.gov.za

Southern District

Plumstead Administrative Building, cnr. Main and Victoria roads

Postal address: Private Bag X5, Plumstead, 7801

Email address: Southern.hub@capetown.gov.za

<http://planning.capetown.gov.za>



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