

- c) The rental will be adjusted annually in terms of the rental tariff structure as approved by council;
- d) The Land will be used for garden and security purposes only and no structures other than the existing structures will be permitted within the leased area;
- e) Any alterations or deviations to electricity services necessary as a consequence of the proposal or requested by the applicant will be carried out at the applicant's cost;
- f) Unrestricted access to the leased to the lease area where a water meter exists.

Information: Wilson Baartman



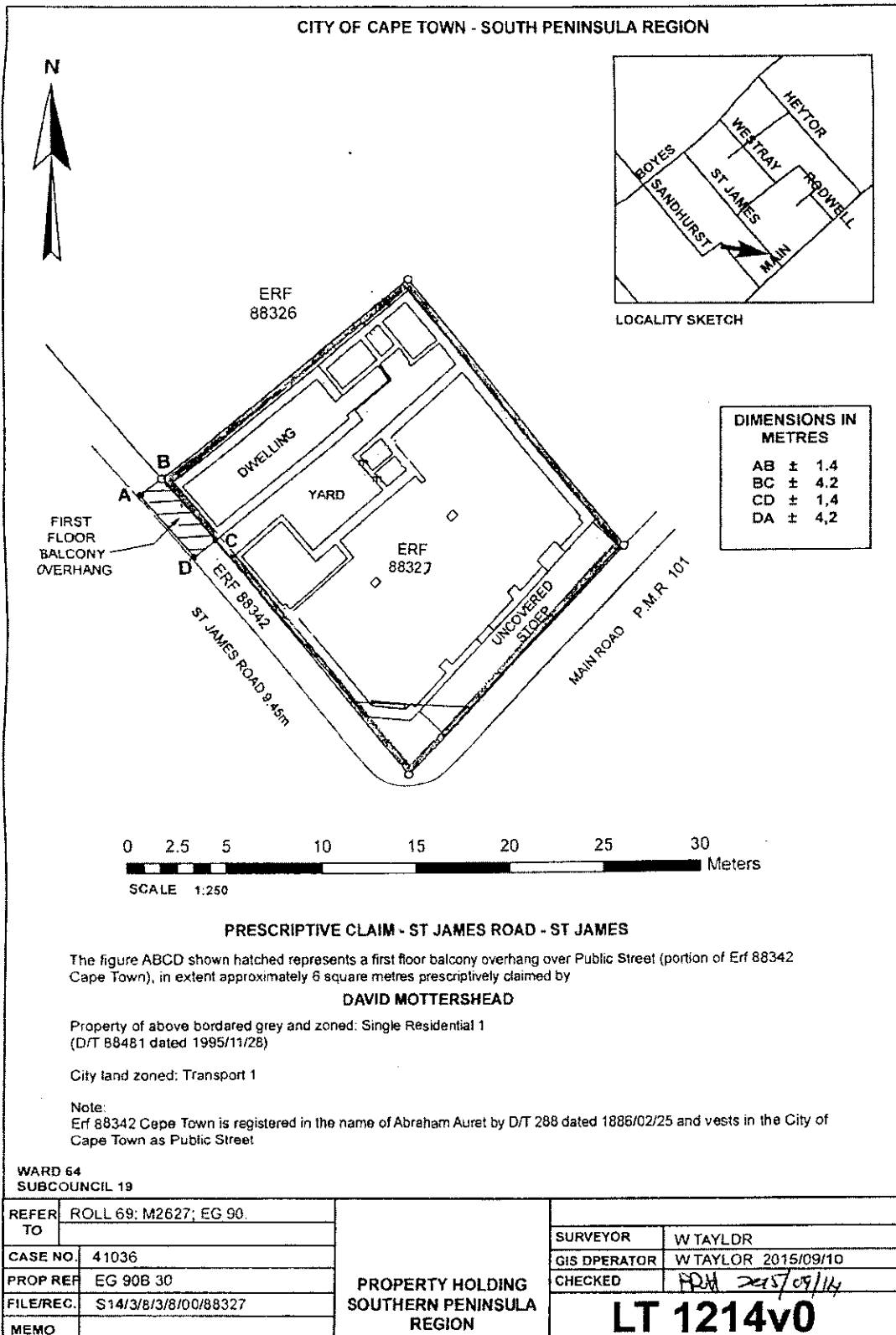
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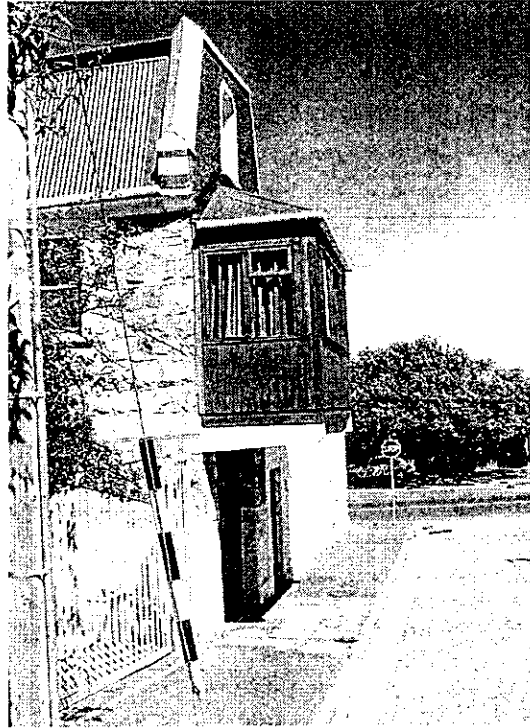
**ACQUISITIVE PRESCRIPTIVE CLAIM OVER A PORTION OF ERF 88342
CAPE TOWN, SITUATED AT ST JAMES ROAD: DAVID MOTTERSHEAD**

RESOLVED that for reasons set out in the report,

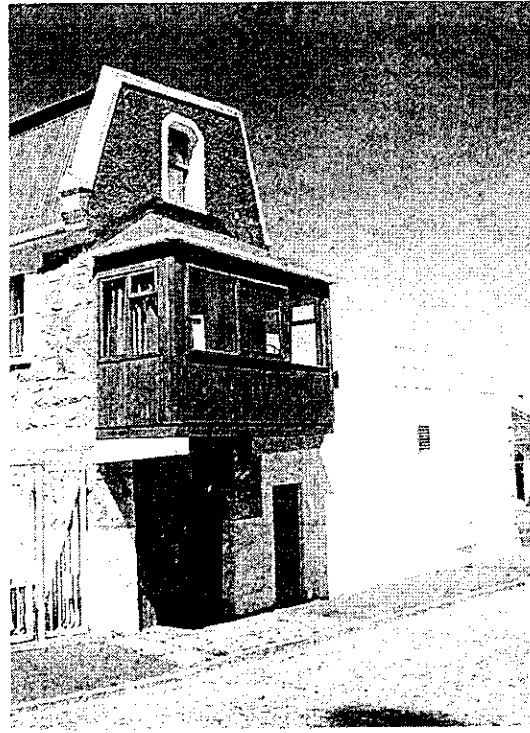
- a) Based on the evidence submitted by the claimant, Council, in terms of the provisions of Section 7 of the By-law relating to the management and administration of the City of Cape Town's Immovable Property, as published in the Provincial Gazette no 5988, dated 28 February 2003, read with Section 1 of the prescription (Local Authorities) Ordinance No 16 of 1964, admit the acquisitive prescriptive claim over a portion of public street, being a portion of ERF 88342 Cape Town, situated at ST James Road, in extent approximately 6 m² and as depicted on Plan No LT 1214vo attached and marked annexure A, by David Mottershead.
- b) Council approve the closure of the portion of the subject property, being a public Street, in terms of section 6 of the By-law relating to the Management and Administration of the City of Cape Town's Immovable Property.
- c) Council approve that the subject property be transferred to David Mottershead.
- d) All costs in connection with this transaction will be borne by the applicant.
- e) Any and all other statutory requirements must be complied with.

Action: Gerda du Plessis





2014/11/19.

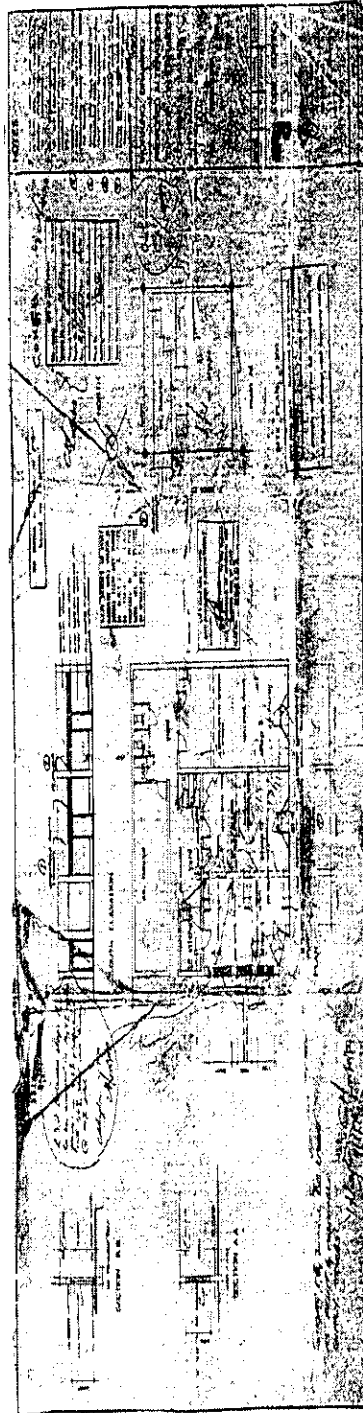


2014/11/19.



ATTRIDGE SURVEY
1915





BUILDING PLAN
NO 226/03
DATED 10 July 1978



**CITY OF CAPE TOWN
ISIXEKO SASEKAPA
STAD KAAPSTAD**

Civic Centre
12 Hertzog Boulevard
Cape Town
8001

Iziko lalunlu
12 Hertzog Boulevard
Cape Town
8001

Burgersentrum
Hertzogboulevard 12
Kaapstad
8001

L. Maralack

L. Maralack
Umnxeba:

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COMPLIANCE & AUXILIARY SERVICES – LEGAL SERVICES – CORPORATE ADVISORY SERVICES

MEMORANDUM OF ADVICE

TO: THE PROPERTY MANAGEMENT DEPARTMENT

ATTENTION: MRS WENDY TAYLOR

MR. WILSON BAARTMAN

DATE: 9 July 2015

RE: LEGAL OPINION RELATING TO THE PRESCRIPTIVE CLAIM SUBMITTED IN RESPECT OF ERF 88342 CAPE TOWN, SITUATED AT NO 56 ST JAMES ROAD

1. INTRODUCTION

A prescriptive claim has been submitted by Duncan Bates, Professional Land Surveyor, acting on behalf of the registered owner of Erf 88327 Cape Town, in respect of Erf 88342 Cape Town, situated at Main Road, St James. The claim relates to an encroachment that consists of a first floor overhanging structure (balcony) over the public footway in St. James Road, St James. The applicant is claiming ownership of the overhanging structure over the public footway.

As a result of the above, the City's Property Management Department now seeks a legal opinion on whether the claim submitted meets the legal requirements of section 125 of the Municipal Ordinance 20 of 1974 read together with the Prescription (Local Authorities) Ordinance 16 of 1964.

2. BACKGROUND

The claimant's property is situated at No 56 St James Road. The property contains a triple storey dwelling. According to Duncan Bates, the balcony of the first floor level of the dwelling was constructed prior to 1915 as it is shown on the Altridge's Survey Plan dated 1915. The City's Survey sheet dated 1950 also shows the overhanging structure. Duncan Bates further submitted that the encroachment was formally approved under the cover of Building Plan No 272421 dated 3 October 1974.

In terms of the City's records, Building Plan No 226403 dated 10 July 1978, also shows the encroachment as an "Encroachment over footway" and "balcony projection". No evidence was submitted by the City that the owner or his predecessors acknowledged the City's right as owner in respect of the encroachment over Public Street (public footway).

3. DISCUSSION

Prescription is an original mode of acquiring ownership which is regulated by the Prescription Act 18 of 1943 (hereinafter called the 1943 Act) and the Prescription Act 68 of 1969 (hereinafter called the 1969 Act). The aforementioned Acts do not codify the law of prescription.

Section 2(1) of the 1943 Act defines acquisitive prescription as

"acquisition of ownership by the possession of another person's movable or immovable property... continuously for 30 years nec vi, nec clam, nec precario (without force, openly and without the owner's consent".)

Section 1 of the 1969 Act states that a person shall become prescription became the owner of a thing which he has possessed openly and if he were the owner thereof for an uninterrupted period of thirty years or for a period which, together with any periods for which such thing was so possessed by his predecessors in-title, constitutes an uninterrupted period of thirty years.

Section 18 of the 1969 Act however states that the provisions of this Act shall not affect the provisions of any law prohibiting the acquisition of land or any right in land by prescription. My emphases.

The State Land Disposal Act 48 of 1961 is such legislation that prohibits the acquisition of land or right in land by prescription. Section 3 of the Act Stated that:

"Notwithstanding any rule of law to the contrary State land shall, after the expiration of a period of 10 years from date of commencement of this Act, not be capable of being acquired by any person by prescription."

The aforementioned legislation commenced on 28 June 1961. Taking into account section 3, no State land may be acquired via prescription from 28 June 1971, being ten years from the date of the commencement of the Act.

Prescription claims of Municipal land are governed by the Prescription (Local Authorities) Ordinance 16 of 1964 and the Municipal By-law relating to the Administration of the City of Cape Town's Immovable Property (LA 12783), which was published on 28 February 2003. Writer hereof note that Property Management referred to section 125 of the Municipal Ordinance 20 of 1974. Writer hereof however advises that most sections including section 125 of the aforementioned Municipal Ordinance was repealed by the Western Cape Local Government Laws: Rationalisation Act 4 of 2010.

Section 1 of the Prescription (Local Authorities) Ordinance 16 of 1964 states that:

Notwithstanding any rule of law to the contrary any land-

(a) Vested in or under the control of the any institution or body mentioned in paragraph (f) of subsection (1) of the Republic of South Africa Constitution No 32 of 1961 ; or

(b) Held in trust for any such institution or body, whether or not already established
And any rights in respect of such land shall, after the expiration of a period of ten years from the date of promulgation of this ordinance, not be capable of being acquired by any person by prescription.

The aforementioned Ordinance was promulgated on the 7th day of August 1964. It therefore follows that since 1974 no acquisition of municipal land or rights therein has been permitted by prescription.

The aforementioned provision must be read with Section 7 of the By-law relating to the Management and Administration of the City of Cape Town's Immovable Property which states that:

"The Council may, if written proof to its satisfaction is submitted that any person has, prior to the expiration of the period of ten years contemplated by Section 1 of the prescription (Local Authorities) Ordinances, 1964 (Ordinance 16 of 1964), by prescription acquired the ownership of immovable property owned by the municipality or any right in or over such property, admit or concede any claim to that effect by such person.

Where there is any conflict of laws, the provisions of the National Legislation, in this instance, the State Land Disposal Act, will prevail. No conflict however exists between section 3 of the aforementioned Act and section 1 of the 1964 Ordinance. It therefore follows that in order to acquire prescriptive rights in or over municipal land: the claimant or his predecessors-in-title must have exercised possession of the property for an uninterrupted period of 30 years prior to either 28th June 1971 or 7th day of August 1974.

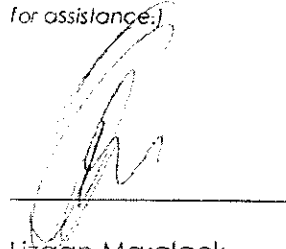
An investigation relating to the subject claim by the Property Management Department (PM) revealed that the encroachment, which consists of first floor overhanging structure over the public footway, existed prior to 1915 as it was shown on the Attridge Survey of 1915. The department further confirmed that the building Plan No 226403 dated 10 July 1978 also shows the encroaching structure which plan was approved by the City. This is an indication that the owner openly exercised possession over the encroachment without the municipality's consent. No proof was submitted by Property Management that owner or his predecessors-in-title was informed that they are illegally encroaching over Council owned land or that the owner acknowledged the City's rights relating to the overhanging structure over the public footway.

It therefore follows that the owner and his predecessors-in -file of exercised possession and control of the aforementioned encroachment, openly and without the consent of the Municipality for an uninterrupted period in excess of thirty years, being before 1915. This period falls well within the 10 year period prescribed by the States Land Disposal Act and the Ordinance 16 of 1964.

4. CONCLUSION

Having regard to the evidence submitted by the Property Management Department, Legal Services confirms that the claim submitted by the claimant is complies with the provisions of both the 1943 and 1969 Prescription Acts as well as the provision of the State Disposal Act 48 of 1961 and the Prescription (Local Authorities) Ordinance 16 of 1964 read with the Municipal By-law relating to the Management and Administration of the City of Cape Town's Immovable Property. Council can therefore admit or concede to the claim submitted.

(Please note that the content of this opinion is based upon the totality of the information made available by the instructing line Department to Legal Services along with its request for assistance.)



Lizaan Marafack

Legal Advisor: Property, Planning and Environmental Law Unit