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## NOTICE OF APPEAL

APPEAL IN TERMS OF SECTION 35 (READ WITH REGULATION 11) OF THE ENVIRONMENT  
CONSERVATION ACT, 1989 (ACT NO 73 OF 1989)

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### 1. GENERAL AND INTRODUCTION

- 1.1 M&T Development (Pty) Ltd / JR 209 Investments (Pty) Ltd (hereinafter referred to as the "**Appellant**") is the owner of Portion 107 of the Farm Doornkloof 391-JR (hereinafter referred to as the "**Property**"), situated in the area of jurisdiction of the Kungwini Local Municipality.
- 1.2 The **Appellant** applied to the Kungwini Local Municipality for the establishment of a township on the property. A copy of the township establishment application is annexed hereto as **Annexure A**.
- 1.3 At the time when the **Application** was launched, the property was zoned as agricultural. The **Appellant** applied for the township establishment to enable it to conduct the activities as per the proposed zoning and as fully dealt with in the **Scoping Report**. The aforesaid constituted a listed activity in terms of the provisions of the Environment Conservation Act ("ECA") and the **Appellant** was therefore duly bound to apply for authorisation in terms of the **Act**.
- 1.4 The **Appellant** appointed Bokamoso Landscape Architects and Environmental Consultants Close Corporation (the "**Consultant**") as environmental consultants. On 17 February 2007 the **Consultant** submitted a **Plan of Study for Scoping** to the **Respondent**.
- 1.5 For the purpose of compiling this appeal all relevant information was taken into account, including the following:
- 1.5.1 The **Decision** for the Proposed Township Development, the upgrading of a road, and the upgrading of services on portion 107 of the Farm Doornkloof 391-J.R. ("the proposed activity") issued by the **Respondent**, dated 20 November 2007 and attached as Annexure **B**;
- 1.5.2 The Plan of Study (Pos) for Scoping compiled by Bokamoso Landscape Architects and Environmental Consultants, dated 17 February 2006;

- 1.5.3 **Respondent's** approval of PoS for Scoping dated 05 June 2006 (*4 months after the Plan of Study for Scoping was submitted – the guideline timeframe for the evaluation of a Plan of Study for Scoping is 14 days*);
- 1.5.4 The Environmental **Scoping Report** for the proposed activity compiled by Bokamoso Landscape Architects and Environmental Consultants, dated June 2007;
- 1.5.5 **Respondent's** Draft Policy Document on Development Guidelines for Ridges, dated 19 April 2001; and
- 1.5.6 The various studies undertaken by and inputs supplied by Galago Ventures including the "Melodius Lark Bird Study", the "Occurrence of specific habitats of rare and endangered mammals" and the "beetle study to determine the occurrence of the critically endangered *Ichneustoma stobbiae* and its habitat on the **Property**";
- 1.5.7 The recommendations regarding the required buffer zones (as supplied by the specialist) around the beetle species and the red listed fern species *Chellanthes deltoidea* subsp.nov.gauteng were also taken into consideration; and
- 1.5.8 The other specialist inputs included as part of the **Scoping Report**.
- 1.6 The **Appellant**, at considerable cost (which in total amounted to more than R 500 000.00) instructed the specialist consultants to compile specialist reports as requested in the approval of Plan of Study for Scoping.
- 1.7 The **Appellant** hereby notes an appeal against the relevant **Decision**. The **Appellant** requests that the negative **Decision** be revoked by the **MEC** and substituted with a positive authorisation in terms of the **Act**, subject to such conditions as may be deemed appropriate.
- 1.8 The **Appellant's** right to pursue a review by the High Court in respect of any reviewable irregularities associated with the process and the **Decision** of the Department are reserved. The specific grounds of appeal and further comments relevant to the **Decision** are dealt with below.

**DEFINITIONS:**

For purpose of this appeal, unless indicated otherwise, the following words shall have the following meanings as indicated opposite thereto:

<b>“Act”</b>	The Environment Conservation Act, 1989 (Act no: 73 of 1989)
<b>“Appellant”</b>	M&T Development (Pty) Ltd / JR 209 Investments (Pty) Ltd, represented by Bokamoso Landscape Architects and Environmental Consultants
<b>“Application”</b>	An application in terms of Regulation 4 read with Regulation 6 of the Regulations in terms of which the Appellant applied for authorisation to undertake the following activities: <ul style="list-style-type: none"><li>- A change of land-use of the property as envisaged in Item 2(c) of Schedule 1 of the Regulations;</li><li>- The construction and upgrading of roads; and</li><li>- The upgrading of external services.</li></ul>
<b>“Decision”</b>	The decision of the Respondent dated 20 November 2007 with regard to the application, a copy of which is attached hereto as Annexure B
<b>“DFA”</b>	The Development Facilitation Act, 1995
<b>“Scoping Report”</b>	The complete <b>Environmental Scoping Report/ Mini EA</b> filed by the Appellant
<b>“NEMA”</b>	The National Environmental Management Act, Act 107 of 1998
<b>“Property”</b>	Portion 107 of the Farm Doornkloof 391-JR – also known as Doornvallei Proper
<b>“Regulations”</b>	The <b>regulations</b> promulgated under Government Notice R1182, dated 5 September 1997 as amended in terms of Section 21 of the Environment Conservation Act, 1989 (Act number 72 of 1989)

**“Respondent”** The Head of Department: Gauteng Department of Agriculture, Conservation and Environment functioning under delegated powers in terms of Regulations 9 and 10 of the Regulations and/or the Gauteng Department of Agriculture, Conservation and Environment (GDACE).

### 3. SUMMARY OF GROUNDS OF APPEAL:

**The Appellant relies on the following main grounds of appeal. The Appellant submits that:**

- 3.1 The **Respondent** did not objectively apply its mind to the **Application**. In addition it is argued that the **Decision** of the **Respondent** was materially influenced by an incorrect application of the relevant guidelines as well as the misinterpretation of information without applying his mind adequately.
- 3.2 The **Respondent**, in its’ **Decision** for the proposed activity (GDACE EIA Ref 002/04-05/2218), cites a number of reasons (points 2.1 and 2.2 of the **Decision**) for the **Decision** to refuse environmental authorisation of the proposed development to the **Appellant**. The reasons that are provided in the **Decision** are in certain cases based on incorrect facts and/or are without substance or application.
- 3.3 It is furthermore submitted that the **Respondent** did not adequately consider and/or failed to consider relevant issues such as the mitigation measures as proposed within the various specialist studies as submitted. Arguments for this claim are presented below.
- 3.4 In Figure 10 on Page 44 of the **Scoping Report** the **Appellant** has incorporated the findings from the various specialists into a sensitivity plan (Figure 10) which responds to the recommendations as set out. All sensitivities have been taken into account and the development has been formed by the buffers and corridors provided and tested with the specialists during special layout meetings in order to maintain the biodiversity on the **Property**.
- 3.5 The **Respondent’s** erred in rigidly applying the department’s **Draft** ridges policy without due consideration of contextual specificities in this instance.

- 3.6 The **Respondent** erred in applying formal “policy” status to Draft documents<sup>1</sup> which have not undergone any/ sufficient public participation process and moreover rigidly applied such draft guideline principles without consideration of the merits and characteristics of the **Application** and the **Property**;
- 3.7 The **Respondent** erred in only applying policies/ plans in a biased fashion in order to prevent any form of development. The **Respondent** failed to properly consider and apply the contents of other relevant guidelines and legislation such as the Gauteng Spatial Development Framework Phase 3 (GSDF 3), the City of Tshwane Spatial Development Framework (CTSDF), the principles of the Development Facilitation Act, 1995 (Act 67 of 1995) (DFA), the principles of **NEMA** and the **DFA** that promotes sustainable development and the July 2002, 2004/2005 IDP and the 2005/2006 Kungwini IDP which earmarks the area for “**rural and urban residential densification**”.
- 3.8 In the **Decision** it was stated that the contents of the IDP of the Kungwini Local Municipality also formed one of the key factors that informed the **Decision**. The **Respondent** did not specify the exact IDP that was taken into consideration and according to all above mentioned IDP’s the **Property** is earmarked for residential development densification. Suggest that this be moved to a more relevant part of Section7 below.)
- 3.9 The **Respondent** erred in the **Decision** in the classification of the critically endangered *Ichnestoma stobbiai* species as a red listed species. According to the beetle specialist that was appointed to conduct the beetle survey, the *Ichnestoma stobbiai* is a beetle species of “**high conservation importance that will most probably be red listed in the near future**” – Refer to Page 11 of the *Invertebrate Report compiled by Galago Ventures in December 2006 – page 11 is included as Annexure C of this Appeal*.
- 3.10 The **Respondent** only took the conclusions and recommendations of the initial surveys done by Galago Ventures into consideration. The **Respondent** ignored the recommendations in the additional correspondence supplied by Galago Ventures (after the layout that took the environmental sensitivities into consideration was finalised) regarding the near threatened and vulnerable bird species, the proposed buffer zone for the red data flora species and the buffer zone for the critically endangered beetle species. In this follow-up

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<sup>1</sup> The **Draft Red Data Species Policy** and the **Draft Ridges Policy**

correspondence Galago Ventures indicated that it would be possible to develop the **Property**.

- 3.11 The **Respondent** preferred subjective opinions of officials to the professional inputs of experts.
- 3.12 The **Respondent** indicated in the Plan of Study for Scoping and in the **Decision** that a river runs across the **Property**. **There is no river or drainage line on the Property**. This supports the ground that the **Respondent** has failed to apply its mind regarding the merits of the **Property**.
- 3.13 The **Respondent** indicated that the **Property** contains the metapopulation requirements for *Trachyandra erythrorrhiza*, a Near Threatened plant species endemic to South Africa. According to officials of the **Respondent**, this plant species is not a red data species anymore. This species is now an orange listed species. This plant species prefers clayish soils and is usually associated with clayish soils, wetlands and drainage lines and as already mentioned, no rivers or drainage lines occur on the **Property**. According to Me. Petra Lemmer of Galago Ventures (the flora specialist that visited the **Property**), **Property is not regarded as a suitable habitat for the *Trachyandra erythrorrhiza***.
- 3.14 The **Respondent** erred in that it subjectively, selectively and out of context used experts from the **Application** and applicable legislation to substantiate a negative record of decision;
- 3.15 The **Respondent's** decision not to authorise the **Application** is without merit and reasons for such **Decision** are artificial, and based on generalised and inapplicable principles, which from a practical point of view cannot serve as an impediment against approval of the **Application**
- 3.16 The **Decision** of the **Respondent** was procedurally unfair in that the **Appellant** *inter alia* was not provided with a reasonable opportunity to make representations before the **Respondent** made the **Decision** (and / or, that a mandatory and material procedure prescribed by the relevant empowering legislation was not complied with) as the **Respondent** did not want to meet with the **Respondent** to discuss the project during a pre-application consultation<sup>2</sup>, the Respondent only supplied comments regarding the Plan of

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<sup>2</sup> Due to the fact that the environmental issues associated with the study area were regarded as sensitive, the **Appellant** made various attempts to discuss the application with the **Respondent** prior to the application. The **Respondent** simply refused to meet with the **Appellant** that was merely trying to approach the **Respondent** with assistance regarding the proposed project. *Refer to Annexure D for proof of the efforts made by the Respondent and refer to the Scoping report for more detail regarding the meeting.* The

Study for Scoping four months after it was submitted and the Respondent did not provide comments on the Scoping report to the EIA consultant and did not request further information with regard to outstanding issues which would assist the **Respondent** in reaching their final decision. The Appellant' right of *audi alteram partem* was denied.

- 3.17 The **Respondent's** decision to refuse to authorise the application constitutes inconsistent decision making.
- 3.18 The comments received by the **Respondent** dated 6 June 2006 (4 months after the Plan of Study for Scoping has been submitted) which approve the Plan for Study of Scoping indicates that the **Respondent** does not support the proposed development based on the reasons as stated in section 7 below together with our responses. We submit that this demonstrates that the application was prejudged and that the decision maker demonstrated bias in this regard.
- 3.19 Our comments follow each reason as mentioned:
- 3.19.1 According to the **Respondent's** Geographical Information System, the **Property** is dolomitic and a part of the **Property** is located on a class 3 ridge. The dolomitic land has a low geotechnical development capacity. The dolomitic formations are of high importance in terms of ground water carrying capacity as they supplement Pretoria's drinking water supply and the envisaged impact by the proposed development is discouraged.
- o The **Respondent** failed to apply their minds with regards to the recommendations and findings of the geotechnical report that was submitted as part of the **Scoping Report**. This report indicates that in the 121 percussion boreholes that were drilled, no water was evident. The deepest borehole was drilled to a depth of 60m which leads us to believe that the ground water is found at depths below this. According to the Geotechnical engineer, dewatering and ground water pollution risks are therefore regarded as low. The Geotechnical report indicates "According to Hobbs, the **Property** is situated in the Fountains Compartment (east) and the dolomitic groundwater level is generally very deep." It is clear that the above findings were not taken into account.
- 3.19.2 The Gauteng Agricultural Potential Atlas (GAPA 2002) indicates that the **Property** has a moderate agricultural value.

Taking into account the red data species on **Property**, the above activity would not be conducive to the preservation of the encountered species as

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Respondent eventually agreed to meet with the Appellant, but the Respondent clearly indicated at the meeting that they were not very keen to meet with the Respondent and they were not very helpful in that regard.

listed above. The proposed layout provides a far more effective land use and still enables the protection of the species on the **Property**.

- 3.19.3 The **Respondent's** C-Plan version 2 indicates that a large part of the **Property** is irreplaceable due to the presence of Red Data flora and fauna species that are critically endangered, endangered or vulnerable in terms of the (IUCN) World Conservation Union's red Listing System and considered to be facing high risk or extinction in the wild.

As stated above, the red data fauna species (*Ichneustoma stobbai*) as well as the *Chelanthes deltoidea* recorded on the **Property** and buffers were instituted to allow their continuance and instituted on the proposed layout plan. In the **Scoping Report** dated June 2007, the proposed layout plan (Figure 9 of the **Scoping Report**) indicates that the buffer zones around the red data species (*Chelanthes deltoidea* as well as the *Ichneustoma stobbai*) have been accommodated.

Comments (Annexure H(ii) in the **Scoping Report**) dated the 2<sup>nd</sup> of May 2007 entitled "Comments upon the site plans dated April 2007") highlight the sustainable development option whereby a corridor of at least 100m be provided for the Red data beetle species on the **Property** which allows connectivity to Smuts Koppie along with conservation of parts of the higher lying natural grassland for future bird biodiversity. This link **has been indicated** on the plan in Annexure F of the **Scoping Report** which indicates the finalized layout plan of the township that has been overlain by the sensitivity map in accordance with Ms. Lemmer's comments.

- 3.19.4 The principles of the National Environmental Management Act, Act No. 107 of 1998 (**NEMA**) in particular Principles 2(4)(a)(viii) states that; negative impacts on the environment and on people's environmental rights be anticipated and prevented, and where they cannot be prevented are minimised and remedied. Cumulative impacts on the environment from this development are significant and it is best that it be prevented.

Without considering any additional information and prior to the **Scoping Report** having been submitted, the **Respondent** indicated that they were opposed to the development and failed to apply their mind in terms of the provision made for the minimisation of environmental impacts.

- 3.19.5 Principle 4(a)(i) states that the disturbance of ecosystems and loss of biological diversity are avoided, or, where they cannot be altogether avoided, are minimised and remedied.

Provision has been made for the minimisation of impacts as well as the conservation of biodiversity features in the **Scoping Report** and various specialist studies as submitted.



- 3.19.6 Principle 4(a)(iii) states that a risk-averse and cautious approach is applied, which takes into account the limits of current knowledge about the consequences of decisions and actions.

Provision has been made for the minimisation of impacts as well as the conservation of biodiversity features in the **Scoping Report** and various specialist studies as submitted.

- 3.19.7 Sensitive, vulnerable, highly dynamic or stressed ecosystems, such as coastal shores, estuaries, wetlands, and similar systems require specific attention in management and planning procedures, especially where they are subject to significant human resource usage and development pressure.

Provision has been made for the minimisation of impacts as well as the conservation of biodiversity features in the **Scoping Report** and various specialist studies as submitted.

- 3.19.8 The Ridges Policy

At the outset it has to be mentioned that this document according to the introduction is only "a draft". It has not been discussed with any interested and affected parties, it has not been adopted and it has not been approved by the institution.

The "Gauteng Draft Ridges Policy document" therefore has **no** legal status, cannot be enforced and does not bind either the **Respondent**, the **Appellant** or the Kungwini Local Municipality at all.

Furthermore, the **Property** falls on a section of the ridge that is almost completely transformed. The sensitive section is currently isolated from the untransformed sections of the ridge and if no development takes place, the long term sustainability of the sensitive grassland cannot be guaranteed.

If the development takes place in accordance with the final layout plan, the disturbed south-western section of the **Property** will be rehabilitated and a 100m linkage will be supplied to ensure the linkage of the isolated grassland with the untransformed sections of the ridge.

- 3.19.9 C Plan Version 2

According to the C-Plan Version 2 the **Property** is regarded as an irreplaceable site, because it has a high bio-diversity, it is a habitat for red data species and there is a high possibility that red data species occur on the **Property**.

All the red data and habitat surveys have been completed and some red data species and habitats and sensitive eco-systems were identified on the **Property**. All these features have been taken into consideration and were accommodated (with the assistance of the fauna and flora specialists) in the final layout.

#### 3.19.10 Kungwini Local Municipality Integrated Development Plan

The July 2002, 2004/2005 IDP and the 2005/2006 Kungwini IDP earmark the area for "**rural and urban residential densification**". The proposed development is therefore regarded as in line with all the above mentioned IDP's.

3.19.11 Furthermore it is stated in the comments received by the Department dated 6 June 2006 which approve the Plan for Study of Scoping that C Plan Version 2 indicates that presence of the following:

- o The Juliana's Golden Mole (*Neamblysomus julianae*) as well as a wetland on site

A specialist report was conducted entitled "The occurrence of specified habitats of rare and endangered mammals.." by I.L. Rautenbach Ph.D., (Prof. Nat. Sci.) of the Galago team where it was confirmed that the above species does not occur. With regards to the wetland on the **Property**, a qualified engineer certified the layout plan and indicated that the proposed township was not affected by either the 1:50 or 1:100 year floodline.

3.20 The **Respondent's** denial of the **Application** does not promote sustainable development; because it only takes the ecological environment into consideration. The economical, social and institutional environments are ignored completely.

#### 4. REASONS FOR DECISION

The **Respondent** submitted as required in terms of Regulation 10 of the **Regulations**, the following basic reasons for its **decision**: These reasons are:

4.1 According to the Gauteng Biodiversity Conservation Plan (C-Plan 2), a large portion of the **Property** is irreplaceable. Sites designated as irreplaceable in terms of C-Plan 2 analysis are highly sensitive areas that must be protected from transforming land uses. The site under proposed activity contributes towards the conservation of the following biodiversity features:

4.1.1 Carltonville Dolomite grassland, a vegetation type that is severely transformed & poorly conserved in Gauteng;

4.1.2 Suitable habitat for *Hubenaria barbertoni*, a Red List plant species endemic to South Africa & currently considered vulnerable

4.1.3 *Chellanthes deltoidea* subsp.nov.gauteng form has been confirmed on site. This is a newly discovered intraspecific taxon listed as vulnerable & known only from Gauteng and Limpopo

4.1.4 Metapopulation requirements for *Trachyandra erythrorrhiza*, a Near Threatened plant species endemic to South Africa;

4.1.5 Suitable habitat for Melodius Lark (*Mirafra cheniana*), currently considered Near Threatened in South Africa. Predominant threats to this bird species include habitat loss, fragmentation & degradation;

4.1.6 *Inchnestoma stobbiai* (Stobbia's Fruit chafer) has been confirmed on site, a Red List beetle that qualifies for the endangered category and is near endemic to Gauteng. Support for this can be found in Annexure II to the Scoping Report wherein the Specialist has reported that:

"Portion 107 of the farm 391-JR is deemed the most important to leave undeveloped for the conservation of this *Inchnestoma stobbiai* population, especially the higher section of the site". - Appendix A of Annexure H: Invertebrate report for Portions 107 & 129 of the Farm Doornkloof 391-JR.

“Taking into consideration the invertebrate report attached as Appendix B, which states that a red data beetle species also occurs on site, then it is recommended that the entire site be conserved and not developed”. Section 10 to Annexure H (i) Flora & Fauna habitat survey report in the Scoping Report:

“Based on the observed adult activity & habitat type present most (80-90%) of the site has suitable habitat for *Inchneustoma stobbiai* - Appendix A of Annexure H: Invertebrate report for portions 107 and 129 of the Farm Doornkloof 391-JR.

4.2 In addition, the proposed development activities will affect a river, a Class 3 ridge and dolomite, which are associated with ecological processes such as cave ecosystem dynamics, groundwater dynamics, hydrological processes, nutrient cycling, evolutionary processes, pollination & wildlife dispersal. It is the Department’s view that the proposed development will detrimentally affect the natural functioning of these ecological processes, which are essential for the maintenance and generation of biodiversity. Rivers, ridges & dolomite are regarded as ecologically sensitive for the following reasons:

a) Ridges

- Ridges form biodiversity hotspots. As they provide resources for survival, reproduction & movement, they are ideal refuges for wildlife in an urbanized landscape;
- In a landscape affected by climate change, chances of species survival will be higher on ridges;
- Ridges provide vital habitat for many threatened, rare & endemic species of fauna & flora;
- Ridges, and the interface between the lower slopes & the flat ground adjoining a ridge, provide important habitat required for the completion of the life cycles of many invertebrates, many of which provide essential ecosystem services (e.g. pollination);
- Ridges form naturally existing corridors that can functionally interconnect isolated natural area & therefore play an important role in wildlife dispersal;
- Other ecological associated with ridges, which are important for the maintenance & generation of biodiversity, include evolutionary processes, hydrological processes & pollination.

b) Dolomite

- Internationally karst is recognized as a highly valuable, non-renewable resource that can be especially vulnerable to disturbance & therefore required sensitive management. Karst or dolomite areas contain some of South Africa's largest aquifers, which have particularly high storage capacities & high transmissivity values, but are also more vulnerable to contamination/groundwater pollution than any other types of aquifers.

The numerous caves found in dolomite areas are also extremely sensitive environments which are of important ecological, scientific, heritage, educational, cultural & recreational value. These caves frequently contain spectacular crystal & limestone formations that have developed over thousand of years & are also important repositories of paleontological & archaeological relics. Many are tourist attractions while others are of cultural & historical significance. These caves also provide essential refuges to a wide range of animals including rare & threatened bats, & they support a unique & poorly studied group of animals known as troglodytes or cave dwellers (i.e. various specialized worms, salamanders, snails, crayfish, isopods, amphipods, spiders, crickets, beetles & fish that have adapted to life in a dark, nutrient poor environment.

c) Rivers

River ecosystems (perennial & non-perennial) contribute to the conservation of biodiversity & provide ecosystem services such as clean water. Rivers provide a habitat to many species, both inside of the water body & the river channel as well as within the riparian zone & larger floodplains. Rivers & streams are linear ecosystems & are therefore extremely sensitive to any disturbance that may occur within the entire catchment of the river or stream. As rivers are affected along their entire lengths, stringent measures are required to prevent degradation at a point of impact as well as downstream. Therefore these features must be protected from transforming land uses such as the proposed development.

- 4.3 Based on the above, the **Respondent** concluded that the activity will lead to substantial detrimental impact on the environment, alternatively, that potential detrimental impacts resulting from this activity cannot be mitigated

to acceptable levels and that the principles contained in section 2 of NEMA will not be given effect to if the activity were to proceed.

## 5. **BACKGROUND TO THE APPLICATION**

- 5.1 The **Application** constitutes an application for a mixed use development on the subject property;
- 5.2 Densification and compaction, and more specifically residential densification, as a development principle is repeatedly enshrined as a priority in the **DFA**, **NEMA** the Municipal Structures Act, 2000, The National Land Planning Bill, The Gauteng Spatial development Framework and numerous other applicable local guideline plans, action plans and spatial development frameworks applicable to the subject property within the jurisdictional area of Kungwini;
- 5.3 It is therefore clear that the proposed development of the **Appellant** is in line with national legislation, provincial legislation and guidelines, and consistent with the integrated development plans of Kungwini, which earmarked the subject property for residential development.
- 5.4 The Kungwini IDP documents listed in this appeal have statutory status, have been approved by the MEC and were duly promulgated in terms of the Municipal Systems Act 2000. These documents stemmed from extensive public participation processes, which *inter alia* involved the **Respondent** and/or its officials and/or representatives.
- 5.5 In view of the foregoing, it is notable that the **Respondent**, who actively participated in the formulation and finalisation of the Kungwini **IDP** process and according to the **IDP**, never queried the principles contained therein, elected to unilaterally draft guideline documents inconsistent with such **IDP**.
- 5.6 It is submitted that the aforementioned failure of the **Respondent** to consider applicable developmental obligations, cooperative governance obligations, transparency requirements and its ignorance of the principles of trust and consistency prescribed in the **DFA** and **NEMA** places the decision in question and subject to appeal and review.
- 5.7 The Plan of Study for Scoping was only approved 4 months after it was submitted to the **Respondent**<sup>3</sup>. Such delays in the process are irreconcilable

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<sup>3</sup> According to the **Respondent's** guideline document, the evaluation of a Plan of Study for scoping should only take 2 weeks

with the principle of expedited decision making enshrined in the **DFA** and the right to prompt administrative justice as provided for in the Promotion of Administrative Justice Act.

## 6. **THE APPLICATION**

- 6.1 The **Application** submitted to the **Respondent** consisted *inter alia* of the following:
- 6.1.1 An **Application**;
- 6.1.2 Pre-application consultation with **Respondent** to discuss the **Property** sensitivities (as indicated on the sensitivity map that was prepared for this purpose), **Respondent's** preliminary viewpoint regarding the developability of the **Property** and risks associated with the **Application**;
- 6.1.3 Submission of an **Application** for authorisation to **Respondent**;
- 6.1.4 Submission of a Plan of Study (PoS) for Scoping to **Respondent**;
- 6.1.5 Receipt of approval of the Pos for Scoping from **Respondent**;
- 6.1.6 Undertaking of a comprehensive public participation process, including the placement of a newspaper advertisement, the erection of site adverts, the holding of a public meeting and making the draft **Scoping Report** available for public comment;
- 6.1.7 The conduction of specialist surveys to investigate issues identified in more detail. The following specialist reports were included as part of the **Scoping Report**:
- A Geotechnical survey (including a geo-hydrological and soils input);
  - Fauna and flora surveys and inputs;
  - A Civil Services input/ report;
  - A storm water management input; and
  - A traffic impact assessment
- 6.1.8 Finalisation of the **Scoping Report** and public participation processes and submission of the **Scoping Report** to **Respondent**;
- 6.1.9 Evaluation of the **Scoping Report** by the **Respondent**;
- 6.1.10 Receipt of a RoD from **Respondent** refusing authorisation of the proposed activity;
- 6.1.11 Informing interested and affected parties of the decision as taken by the **Respondent** within the specified timeframe;
- 6.1.12 Informing interested and affected parties of the intention to submit an appeal within the specified timeframe; and finally;
- 6.1.13 the submission of an appeal, within the 30 day appeal period, to the MEC for **Respondent** in respect of the negative **Decision** received.

It is clear from the a foregoing reports and costs incurred by the **appellant** to comply with the provisions of the **Act**, that the **Appellant** acknowledges the important role of environmental considerations in development planning and has complied with the provisions of the applicable legislation.

7. **RESPONSES TO THE STATED REASONS IN THE ROD FOR THE REFUSAL OF THE APPLICATION WHICH RESPONSES PROVIDE SUBSTANTIATION FOR THE GROUNDS OF APPEAL**

7.1 **Reason 1:**

**“2.1 According to the Gauteng Biodiversity Conservation Plan (C-Plan 2), a large portion of the proposed development site is irreplaceable. Sites designated as irreplaceable in terms of C-Plan 2 analysis are highly sensitive areas that must be protected from transforming land uses. The site under proposed activity contributes towards the conservation of the following biodiversity features:**

**7.1.1 Carltonville Dolomite grassland, a vegetation type that is severely transformed & poorly conserved in Gauteng;”**

The sensitivity map (Figure 2) on Page 12 of the **Scoping Report** and the Vegetation Map (Figure 5) on Page 37 of the **Scoping Report** indicate the portions of the sensitive grassland that must be conserved. The vegetation specialists specifically indicated that the grassland in the north-western section of the **Property** (Area F, G, B, and H) is regarded as sensitive and they recommended that it be excluded from the development. When looking at the final layout plan (**Figure 2 below** and inserted on Page 20 and as Figure 3 of the **Scoping Report**), most of the sensitive grassland section has been excluded from development.

The geological constraints and the ecological issues on the **Property** were the main form giving elements for the finalised layout. The final layout was also tested against an environmental sensitivity map that was compiled by layering all the constraints and sensitivities that were identified in the specialist studies. The recommendations supplied by the specialists regarding the required buffers were also taken into consideration when the layout was finalised. The approach was to conserve the most sensitive areas (including the sensitive grassland area)

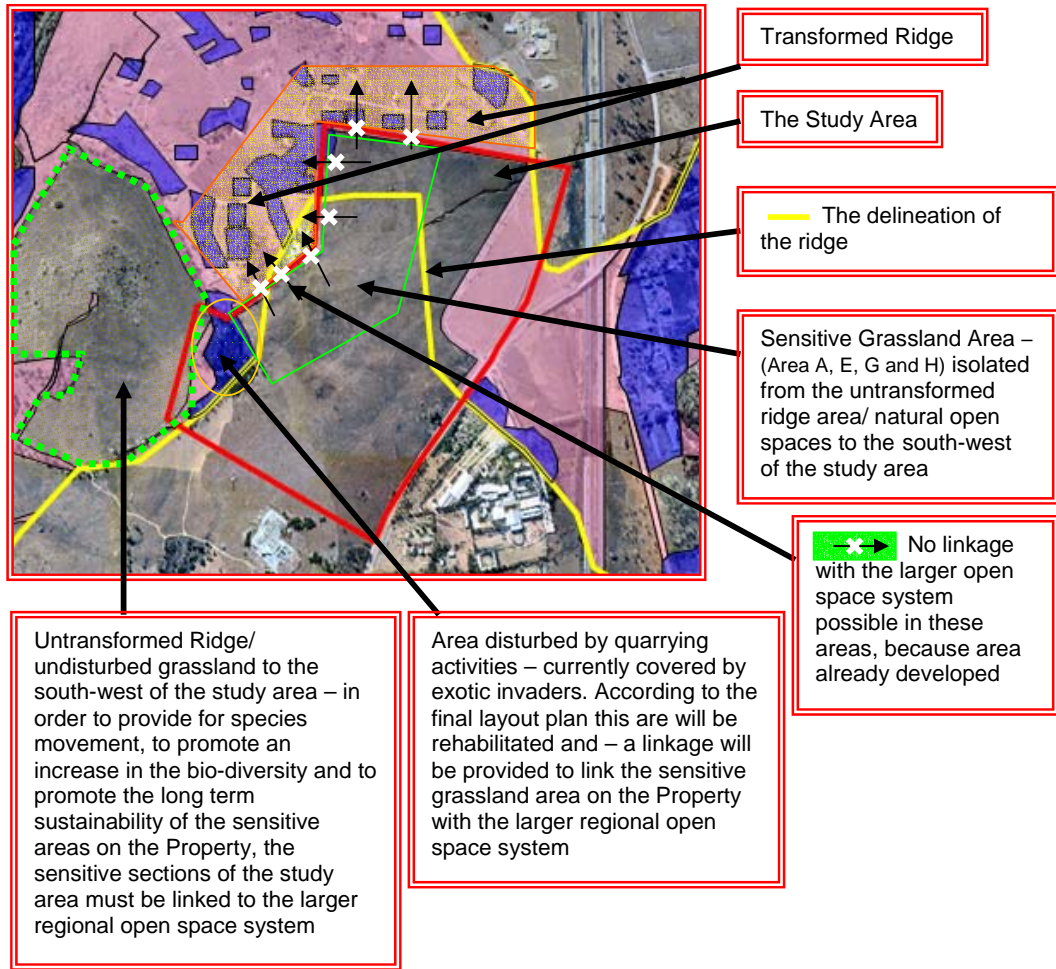


and to compromise (where necessary) on some of the required buffers and sensitive areas.

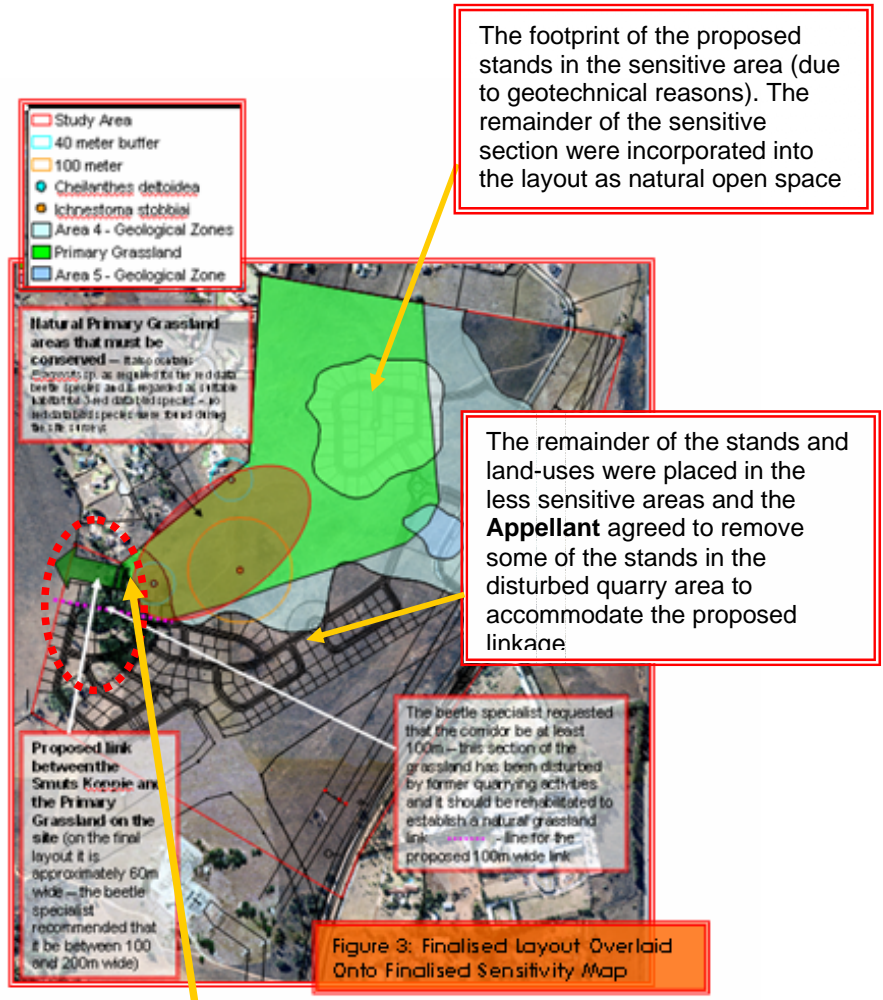
Unfortunately the sensitive section of the grassland is almost surrounded by development and according to the GDACE Draft Ridges Policy; the developed area that surrounds the grassland area is regarded as a transformed ridge (*Refer to Figure 1 below*). It will therefore not be possible to establish an open space link towards the developed areas, because the natural areas in the developed areas have already been transformed.

The sensitive grassland section is also separated from the larger regional open space system/ untransformed ridge system by the section of the grassland (in the south-western section of the **Property**) that has been disturbed by former quarrying activities (*Also Refer to Figure 1 and 2 below*). This disturbed section is covered with exotic invaders and the vegetation specialists recommended that this disturbed section be rehabilitated and incorporated as a link that will connect the sensitive grassland section with the larger regional open space system/ the untransformed ridge. The **Appellant** agreed to donate and rehabilitate the disturbed quarry area as an open space linkage and included a corridor of 100m in between the sensitive grassland and the larger open space system, to the west of the **Property**. It is submitted that this undertaking could have been incorporated as a condition in a positive RoD, along with other necessary conditions to ensure the preservation of sensitive areas and buffer zones as part of the development, rather than the issue of a negative RoD which may in fact lead to the further degradation of the sensitive areas.

Figure 1 and 2 below illustrate the open space linkage that was proposed, the locality of the sensitive grassland to be conserved and the footprint of the proposed stands in the sensitive area.



**Figure 1: The Proposed Linkage with the Larger Regional Open Space System**



Note that the sensitive grassland section is almost surrounded by development and in order to ensure the long term sustainability of the sensitive area, it was proposed that the disturbed section be rehabilitated and included as a linkage (a corridor of at least 100m) that will connect the sensitive grassland with the other untransformed sections of the ridge/ natural open spaces.

**Figure 2: The Proposed Development Footprint and the Impact of the Footprint on the Sensitive Areas**

**Conclusion:**

The sensitive Carltonville Dolomite Grassland has been taken into consideration during the layout planning phase and in order to promote the long term sustainability of this sensitive grassland section (currently isolated from the larger open space system by the disturbed grassland in the south-western corner of the **Property** and through developments to the north of the grassland) a linkage was provided through the disturbed section. The **Appellant** agreed to remove all the exotic invaders from the disturbed grassland section/ quarry and to rehabilitate it to act as a natural

linkage between the sensitive grassland on the **property** and the larger regional open space system associated with the untransformed section of the ridge.

#### **7.1.2 Suitable habitat for *Hubenaria barbertoni*, a Red List plant species endemic to South Africa & currently considered vulnerable;**

According to the specialists *Habenaria barbetoni* was not found on site. Furthermore, more than 50% of the **Property** will remain open space/ habitat for the species when the development takes place and the disturbed western section of the **Property** will be rehabilitated to act as a linkage between the sensitive grassland and the larger regional open space system. The linkage will play an important role in terms of species movement and distribution (i.e. through pollinators).

#### **Conclusion:**

Although no *Hubenaria barbertoni* was found on the **Property**, large portions of the potential habitat will be conserved. In addition, the final layout provides a linkage with the larger open space system.

#### **7.1.3 *Chelanthes deltoidea* subsp.nov.gauteng form has been confirmed on site.**

**This is a newly discovered intraspecific taxon listed as vulnerable & known only from Gauteng and Limpopo;**

First of all it is important to note that the *Chelanthes deltoidea* species that was confirmed on the **Property cannot yet be classified** as a newly discovered intraspecific taxon, because the National Botanical Institute (NBI) must still describe the species. At this stage it is only suspected that the species is an intraspecific taxon and this can only be confirmed after the NBI has described it.

It is also important to note that the species actually occurs in the Northern Cape (Namakwaland). Galago Ventures identified the first species in Gauteng and according to Galago Ventures, only one species was found in Limpopo Province and the specialist **is still waiting for the confirmation of the species**. The statement "*This is a newly discovered intraspecific taxon listed as vulnerable and known only from Gauteng and Limpopo*" that was used in the **Decision**, is therefore incorrect and misleading. In our view this incorrect statement by the **Respondent** is a demonstration that the department had already decided from

the offset that no development will take place on the **Property** and that they did not properly consider the actual facts in taking the decision. We submit that the application was prejudged and that the decision is based on facts that have been artificially manipulated (or misunderstood) but which may have convinced the HoD, MEC and the public that the **Property** is not suitable for development. The fact that the application was prejudged is also apparent from the comments made in the approval of the Plan of Study that the Department "does not support the proposed development."

The **Appellant** on the other hand never disguised the fact that the *Chelanthus deltoidea* was found on the **Property**. In fact, the **Appellant** paid the vegetation specialists to search other sites in the area for the species and the **Appellant** paid the vegetation specialists to supply information regarding the required buffer around the species. The specialists' inputs regarding the required buffers were included as part of the **Scoping Report**, but have been blatantly ignored by the **Respondent** and have not been included in the RoD. The buffers that were applied around the species are based on scientific facts and not based on artificial facts or arbitrary references which we submit have been used in this **Decision** by the **Respondent** to oppose the development.

After the red data flora (*Chelanthus deltoidea*) was recorded on the **Property**, appropriate buffers (based on scientific facts) were instituted to provide for their continuance and were instituted on the proposed layout plan. In the **SCOPING REPORT** dated June 2007, the proposed final layout plan (*Figure 9 Of the Scoping Report*) indicates that the buffer zones around the red data species (*Chelanthus deltoidea* as well as the *Ichneustoma stobbiai* discussed below) had been accommodated.

The comments received by the **Respondent** dated 6 June 2006 which approve the Plan for Study of Scoping indicates under point 5(f) that should red data species be confirmed on site, that an appropriate buffer zone to maintain the requirements of the species must be motivated by a qualified specialist. The buffer zone as applied was based on the report as written by Ms Petro Lemmer (attached as appendix H(v) in the scoping report and included as **Annexure C** of this appeal) where she indicated that a 40m buffer would suffice for the red data plant species.

|  
**Conclusion:**

The **Appellant** acknowledged the fact that the *Chellanthes deltoidea species* occurs on the **Property** from the start and applied appropriate buffers (based on scientific facts) around the species in the final layout.

On the other hand, it is submitted that the **Respondent** ignored certain relevant information supplied in **Scoping Report** which was supplied to assist the **Respondent** with informed decision making. In our view the Respondent failed to take all relevant facts into account and that the **Respondent** would do anything (including the creation of artificial facts) to prevent sustainable development that is based on scientific facts.

#### **7.1.4 Metapopulation requirements for *Trachyandra erythrorrhiza*, a Near Threatened plant species endemic to South Africa**

According to the specialists *Trachyandra erythrorrhiza* was not found on the **Property** and will most probably never be found on the **Property**, because it is not regarded as a suitable habitat for the species. It is surmised that the **Respondent** regards the **Property** as a suitable habitat for the species, because the **Respondent** is of the opinion that a river flows through the **Property**. This specific species is usually associated with drainage lines, marshy areas and clayish soils, **none** of which occur on the **Property**.

Furthermore, it is important to note that vegetation specialists recently discovered more than 400 of the species in the Rietvlei Dam Nature Reserve and more than 1000 of the species were discovered on the Farm Grootfontein (to the east of the Rietvlei Dam Nature Reserve and the **Property**) a few years ago. Officials of the **Respondent** recently confirmed that the species **is not a Red Listed Species anymore**, but an **Orange Listed Species**.

#### ***Conclusion:***

According to the specialists *Trachyandra erythrorrhiza* was not found on **Property** and will most probably never be found on the **Property**, because it is not regarded as a suitable habitat for the species.

We submit that this reason for refusal to authorise is another example of the use of artificial facts in opposition to the application of the **Appellant** to prevent development on the **Property** in its entirety. In fact, we question whether the

**Respondent** visited the correct **Property** and/or issued a **Decision** for this specific **Property**.

**7.1.5 Suitable habitat for Melodius Lark (*Mirafra cheniana*), currently considered Near Threatened in South Africa. Predominant threats to this bird species include habitat loss, fragmentation & degradation;**

When Galago Ventures conducted the initial vegetation and fauna survey, they could not confirm the occurrence of the *Mirafra cheniana* on the **Property**, because they did not regard it as the most suitable season for such a survey. They recommended that another survey be conducted at the correct time of the year and the **Appellant** agreed to this proposal, because the **Appellant** wanted to take all possible environmental issues into consideration from the start to promote sustainable development and holistic and integrated planning.

The recommendation from Galago Ventures on page 2 of their report after undertaking another survey at the correct time of the year, entitled "Melodius Lark Bird Study" indicates that parts of the higher lying natural grassland on the **Property** be kept undisturbed to ensure future bird biodiversity on the **Property**. This is in fact the case, with this area being connected to the area containing the red data species (*Chelanthes deltoidea* and *Ichneustoma stobbiai*). The final layout has been tested with the Galago Ventures Team and they were satisfied with the open space areas supplied for the Melodius Lark. This was confirmed in the Scoping Report.

**Conclusion:**

Although no Melodius Larks were identified during the various surveys conducted on the **Property**, the grassland of the **Property** was regarded as a suitable habitat for the species. In order to accommodate the Melodius Lark, the **Appellant** agreed to keep a large portion of the higher lying natural grassland undisturbed to ensure future bird biodiversity on the **Property**. Galago Ventures was satisfied with this proposal and they recommended that a link be provided with the larger untransformed ridge to the south-west of the **Property**. The **Respondent** agreed to provide a 100m linkage in the disturbed south-western corner of the **Property**. The **Respondent** also agreed to rehabilitate the linkage area that has been disturbed by formed quarrying activities.

**7.1.6 *Ichneustoma stobbiai* (Stobbia's Fruit chafer) has been confirmed on site, a**

**Red List beetle that qualifies for the endangered category and is near endemic to Gauteng. Support for this can be found in Annexure II to the Scoping Report wherein the Specialist has reported that:**

We submit that the **Respondent** erred in the **Decision** in the classification of the critically endangered *Ichneustoma stobbiai* species as a red listed species. According to the beetle specialist that was appointed to conduct the beetle survey, the *Ichneustoma stobbiai* is a beetle species of ***“high conservation importance that will most probably be red listed in the near future”*** – Refer to ***Page 11 of the Invertebrate Report compiled by Galago Ventures in December 2006 (also annexed to the Scoping Report) – page 11 is included as Annexure B.***

When the layout for the proposed development was finalised, the **Appellant** took the proposed buffer zone, as supplied by the beetle specialist (in the second report done by the specialists – also annexed to the **Scoping Report**) into consideration, even though the beetle was not yet a red listed species. This proves once again that the **Appellant** was willing to compromise on the layout to accommodate a species not even on the red data list.

According to the available information and the latest feedback supplied by the Beetle specialist (Mr. James Harrison), the beetle occurs on lists of the IUCN, but is not yet a red listed species. We expect that the department would have informed the beetle specialist Mr. James Harrison if the species has been red listed, because he has a good working relationship with the relevant officials at GDACE and he communicates with the department on a regular basis.

#### **Background regarding the beetle species:**

Mr Perro Stobbia, a well respected entomologist who actually identified the Fruit Chafer Beetle (and after whom it was named), was contacted some time ago to supply the **Appellant** with more information regarding the specific beetle species. According to Mr. Stobbia the specific habitat requirements for this beetle are relatively small (approximately 300m x 300m).

The beetle also appears to prefer mountain grassland and is not associated with any specific grass species. The female of the species is unable to fly and, therefore, extremely localised. The defining criteria for habitat selection appears to be northern slopes, of which there are none on the **Property**.

It is therefore considered highly unlikely that the proposed development **Property** provides suitable habitat for this species even though the beetle species (*Ichneustoma stobbiai*) was recorded on the **Property** and buffers were instituted to allow their continuance and instituted on the proposed layout plan.



In the **Scoping Report** dated June 2007, the proposed layout plan (Figure 9 of the **Scoping Report**) indicates that the buffer zones around the red data species (*Chelanthus deltoidea* as well as the *Ichnestoma stobbia*) have been accommodated.

Invertebrates such as the Fruit Chafer Beetle are extremely habitat specific and the fact that the species was recorded on the **Property** does not necessarily mean that the **Property** provides ideally suitable habitat for this beetle. So little is known about these species, those reporting rates often do not accurately reflect population sizes or occurrences. As a result it is the opinion of the specialists that many such species are included on endangered lists without their actual conservation status warranting it.

Comments (Annexure H(ii) in the Scoping report) dated the 2<sup>nd</sup> of May 2007 entitled "Comments upon the site plans dated April 2007.." highlight the sustainable development option whereby a corridor of at least 100m be provided for the Red data beetle species on the **Property** which allows connectivity to Smuts Koppie along with conservation of parts of the higher lying natural grassland for future bird biodiversity. This link **has been indicated** on the plan in Annexure F of the **Scoping Report** which indicates the finalized layout plan of the township that has been overlain by the sensitivity map in accordance with Ms. Lemmer's comments.

Initial comments by Ms. Petro Lemmer (Page 26 of 33 of the report in Annexure H(i) of the **Scoping Report**) indicated that the entire **Property** be conserved and remain undeveloped based on the invertebrate report attached to Ms. Lemmer's initial report.

The invertebrate report by Mr. James Harrison gives further comment and indicates that if the **Property** is to be developed, corridors are to be created for purposes of interconnectivity (page 6 of 8 of the Appendix A of Annexure H(iv) of the **Scoping Report**) and that the northern section of the **Property** be excluded from the development as it is closer to Smuts Koppie and has a less modified habitat. The recommendations from Mr. Harrison were taken into account when compiling the layout plan. The reasonable conclusion that the applicant drew from this was that development can occur on the **Property** provided that the recommendations by Mr. James Harrison be implemented.

Ms Lemmer then further indicated on page 13 of 15 of Annexure H(iv) of the **Scoping Report** that "A plan of corridors and buffer zones is needed for the area" under point 7 of the document that "... development should be accompanied by the planting of herbaceous species". Mr. Harrison further indicates in his report under the conclusions (page 6 of 8) that sections of the **Property** featuring *Eragrotis spp.* should remain undeveloped. This conclusion has been taken into account in the final layout of the township. The aforementioned comments tie up with that of Ms Lemmer.

**Conclusion:**

According to the information supplied to the **Appellant**, the *Inchneustoma stobbiai* is **not red listed yet**. Although the beetle species is not a red listed species/ was not a red listed species when the **Scoping Report** was compiled, the **Appellant** took<sup>4</sup> the risk-averse and cautious approach by allowing for the required buffer zones for the beetle species in the final layout.

This shows once again that the **Respondent** based its decision on incorrect assumptions and facts. Selective extracts from the specialist reports were referred to in the RoD without looking at the broader context within the specialist study. Only the information in the specialist reports that emphasize the **Respondent's** non-support of the development were referred to in the decision.

An example is the quotes used from the Annexures to the **Scoping Report** in Item 2.1 of the **Decision** namely:

"Portion 107 of the farm 391-JR is deemed the most important to leave undeveloped for the conservation of this *Inchneustoma stobbiai* population, especially the higher section of the **Property**". - Appendix A of Annexure H: Invertebrate report for Portions 107 & 129 of the Farm Doornkloof 391-JR.

"Taking into consideration the invertebrate report attached as Appendix B, which states that a red data beetle species also occurs on site, then it is recommended that the entire site be conserved and not developed". Section 10 to Annexure H (i) Flora & Fauna habitat survey report in the Scoping Report:

"Based on the observed adult activity & habitat type present most (80-90%) of the site has suitable habitat for *Inchneustoma stobbiai* - Appendix A of Annexure H: Invertebrate report for portions 107 and 129 of the Farm Doornkloof 391-JR.

No mention was made in Item 2.1 of the fact that the beetle specialist quoted in his report that the beetle species was **not yet on the red data list** and no mention was made of the inputs supplied by the beetle specialist (at a later stage) regarding the buffer requirements for the beetle species. If the beetle specialist did not regard the **Property** as developable, he surely would not have supplied the inputs regarding the required buffers.

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3.11.6 <sup>4</sup> Principle 4(a)(iii) of NEMA states that a risk-averse and cautious approach is applied, which takes into account the limits of current knowledge about the consequences of decisions and actions.

It must be noted that the comments in the initial reports were done **before** any layout proposal was presented to the specialists for inputs and recommendations and before the sensitivity maps for the **Property** were compiled and it is submitted that the **Respondent** misused the initial comments of the specialists to unjustifiably oppose the development.

## 7.2 Reason 2:

“.....It is the Department’s view that the proposed development will detrimentally affect the natural functioning of these ecological processes, which are essential for the maintenance and generation of biodiversity. Rivers, ridges & dolomite are regarded as ecologically sensitive for the following reasons:

### 7.2.1 Ridges

- **Ridges form biodiversity hotspots. As they provide resources for survival, reproduction & movement, they are ideal refuges for wildlife in an urbanized landscape;**
- **In a landscape affected by climate change, chances of species survival will be higher on ridges;**
- **Ridges provide vital habitat for many threatened, rare & endemic species of fauna & flora;**
- **Ridges, and the interface between the lower slopes & the flat ground adjoining a ridge, provide important habitat required for the completion of the life cycles of many invertebrates, many of which provide essential ecosystem services (e.g. pollination);**
- **Ridges form naturally existing corridors that can functionally interconnect isolated natural area & therefore play an important role in wildlife dispersal;**
- **Other ecological associated with ridges, which are important for the maintenance & generation of biodiversity, include evolutionary processes, hydrological processes & pollination.**

In the RoD the **Respondent** indicated that the Ridge has been classified as a Class 3 Ridge.

According to the **Respondent** the ridge is regarded as a “no-go” area for development and no or only low impact development may be considered with a footprint cover of less than 5%.

Class 3 ridges are divided into low impact development areas (Class 3A) and high impact development area (Class 3B). GDACE's Ridges Policy states that all Class 3 ridges will be considered as Class 3A ridges, until such a time as the local authority conducts and submits for approval a Strategic Environmental Assessment (SEA) designating the ridge as a Class 3B ridge. Class 2 and Class 3A ridges specify low impact development that can cover only 5% of the property (i.e. the ridge footprint) with a 200 m buffer zone of low impact development around the ridge. Class 3B ridges specify high impact development in those areas that are already disturbed, except in cases where the open space is larger than 4 hectares. This is however the case with an open space component of 30.4 hectares for the development.

The majority of the remainder of **Property** is made up of small areas of slightly steeper slopes, expected to be as result of small landscape features such as clumps of vegetation, boulders, earth mounds etc. As such features cannot be regarded as ridges, it is argued that the ridge must be assumed to be confined to the northern most portion of the site, which has been excluded from the development.

Aforementioned conclusions are solely based on the existence and contents of the Gauteng **Draft** Ridges Policy.

At the outset it has to be mentioned that this document according to the introduction is only "a draft". To our knowledge it has not been through a formal public consultation process and it has not been finally adopted and approved by the institution. It is therefore at best a broad guideline and can not be considered to be a legal requirement which needs to be complied with in all circumstances, which is how GDACE has applied it to this development.

It is noted that Regulations 75 and 76 of the April 2006, EIA Guidelines provide as follows:

**75.** Guidelines issued in terms of regulation **73** or **74** **are not binding** but must be taken into account when preparing, submitting, processing or considering any application in terms of these Regulations.

**76.** Before issuing any guidelines in terms of regulation **73** or **74**, the Minister or MEC **must publish the draft guidelines in the relevant Gazette for public comment.** (Our own emphasis).

In addition the draft policy has not been incorporated in any statutory document, approved Spatial Development Framework or **IDP**. A public participation process is a statutory requirement and prerequisite for any valid planning document or policy (see the **DFA**, and the Resource Document on the DFA 1999 and Juta's New Land Law Budlander, Latsky and Roux page 2A to20).

The "Gauteng Draft Ridges Policy document" therefore does not have a binding status and does not bind either the **Respondent**, the **Appellant** or the Kungwini Local Municipality.

This "policy" document moreover by virtue of the **DFA** requirements is flawed by lack of transparency and public participation and *per se* cannot even qualify as planning document or planning tool at all.

The authors of this document in confirmation of the a foregoing clearly state that it is a draft "attempt" to address "sensitive ridge environments" (Refer to the introduction of the document).

It is also submitted that the draft policy has been rigidly applied by the **Respondent** and the generalised characteristics regarding ridges contained in the document are in an unqualified fashion applied to the subject property without investigation or consideration of the applicability thereof.

L.A. Rose Innes in the Book Judicial Review of Administrative Tribunals in South Africa, page 96, states with regard to the rigid application of policies the following:

*" It is sometimes stated to be a ground for review that a Tribunal failed to exercise its discretion or did not apply its mind fairly and properly to a question in that it arbitrarily applied a policy or to rigidly applied a policy. An Administrative Board of Tribunal if it wishes to apply a general policy in the making of its decisions and if the application of the policy is otherwise lawful and there is nothing unreasonable in such policy, nor anything contrary to common law, may do so, but it must not allow a policy to develop into hard and fast rules which preclude the person exercising the discretion from bringing his mind to bear in a real sense on the particular circumstances of each and every individual case coming up for decision".*

The learned Author moreover in this regard states: *An administrative authority should not adopt the attitude that it will apply a policy unless good reason is demonstrated to it by an applicant and that exception should be made, it should in the first place decide whether the case is a proper one for the application of the policy.*" (Page 97).

This principle has been confirmed by our courts. See for instance Roux vs Minister van Wet en Orde en Andere 1989 (3) SA 46 and Moreletta Sentrum (Edms) Bpk vs die Drankraad 1978 (3) SA 405 and Pietermaritzburg City Council vs Local Road Transportation Board 1959 (2) SA (N).

From a proper interpretation of this “draft” policy it is furthermore clear that the authors, in general terms, have identified certain characteristics which pertain to ridges in general and not to the specifics of this property.

Additional investigations and discussions with experts however have proved that the ridge can even be classified as a Class 4 ridge. More than 65% of the ridge has already been transformed by human activities. Nowhere in the ridges policy does the **Respondent** actually define what constitutes “transformation”. Based on indicated land cover classes, it must be assumed that all land classes other than natural constitute a transformation (i.e. exotic/ alien vegetation, agriculture, urban and mine quarries).

The figures below illustrate the **Respondent’s** classification of the ridge and follow-up classification of the ridge as done by the **Appellant**.



Figure 3: The Total Area Of The Ridge (1121,27 Ha)

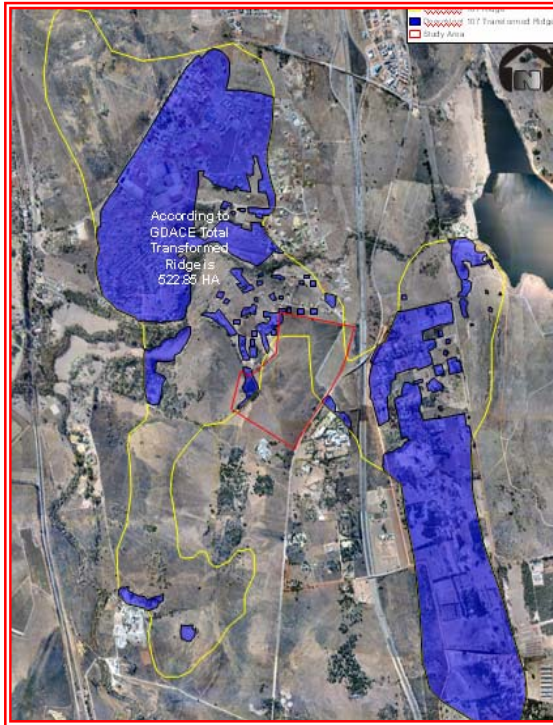


Figure 4: According to GDACE The Transformed Ridge Is 552,85 Ha In Extent – Less Than 65% (Class 3 Ridge)

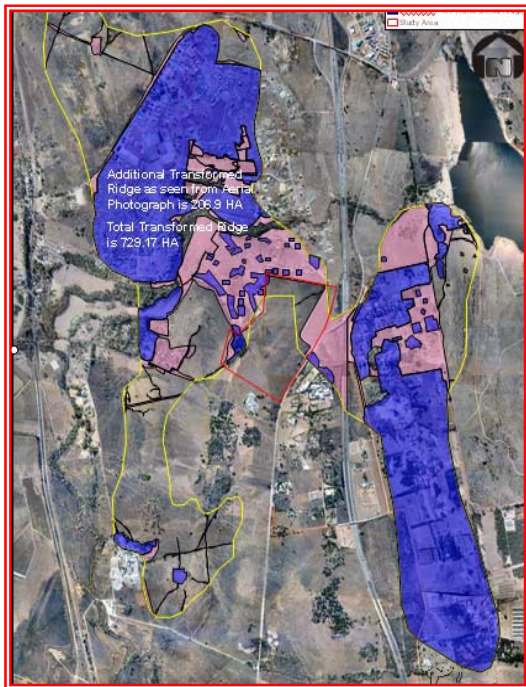


Figure 5: According to the Appellant The Transformed Ridge Is 729,17 Ha In Extent (more than 65%) – Class 4

From **Figure 5** (inserted above) it is also clear that more than 50% of the ridge that occurs on the **property** is transformed ridge. As already mentioned in this appeal, the only possible linkage of the untransformed section of the ridge in the northern corner of the **Property** is through the disturbed quarry area in the south-western corner of the **Property** and such a linkage has been provided in the final layout plan. The untransformed ridge on the **Property** (the sensitive grassland also falls within the ridge area) is actually an isolated patch that is almost surrounded by urban development and edge effects (*Refer to Figure 1 of this Appeal*).

***Conclusion:***

Based on the above information, it can be surmised that in terms of the Draft Ridge's Policy no viable development greater than 4 ha in extent can take place on ridges within Gauteng, regardless of the ridge's biodiversity, ecological sensitivity or present state of transformation.

In terms of the policy, such development would have to take place at a density of 0.2 units/ha in order to comply with the policy, making it potentially only available to the wealthiest few. This is clearly not viable for developers (in this case the **Appellant**) or the average person. It is also blatantly in opposition to the various government and local authority densification programmes, as well as the **Respondent's** own stated concern regarding 'high income low density developments'. It must also be noted that this site lies within the urban edge and therefore will not, according to GDACE's own policy in this regard, contribute to the so called "urban sprawl" ,

Furthermore, the **Property** falls on a section of the ridge that is almost completely transformed. The sensitive section is currently isolated from the untransformed sections of the ridge and if no development takes place, the long term sustainability of the sensitive grassland cannot be guaranteed.

If the development takes place, the disturbed south-western section of the **Property** will be rehabilitated and a 100m linkage will be supplied to ensure the linkage of the isolated grassland with the untransformed sections of the ridge.

Provision has thus been made for the minimisation of impacts as well as the conservation of biodiversity features in the scoping report and various specialist studies as submitted and is in line with Principle 4(a)(i) of NEMA<sup>5</sup>.

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<sup>5</sup> Principle 4(a)(i) states that the disturbance of ecosystems and loss of biological diversity are avoided, or, where they cannot be altogether avoided, are minimised and remedied.



### 7.2.2 Dolomite

In its' Decision, the Respondent raises concern that the karst is a highly valuable non-renewable resource and requires extensive management. A concern was also raised with regard to caves as well as possible ground water pollution possibilities that are associated with this type of environment that is extremely sensitive.

It must be noted that of the 121 percussion boreholes that were drilled, no water was evident. The deepest borehole was drilled to a depth of 60m which leads us to believe that the ground water is found at depths below this. According to the Geotechnical engineer, dewatering and ground water pollution risks are therefore regarded as low. The Geotechnical report indicates "According to Hobbs, the **Property** is situated in the Fountains Compartment (east) and the dolomitic groundwater level is generally very deep."

With regards to the applicability of caves on the **Property**, Galago Ventures inspected the **Property** and on page 3 in their report entitled "Occurrence of specified habitats of rare and endangered mammals", it was indicates that **no caves** were present on the **Property**.

From a cultural historical point of view, J van Schalkwyk indicates that they found no obvious features, sites or artefacts of cultural significance that would be impacted on by the proposed development. They therefore recommend, from a heritage point of view, that the proposed development can continue and request that if archaeological sites or graves are exposed during the construction phase, it should be brought to the attention of the Environmental Conservation Officer.

#### ***Conclusion:***

No caves or cave ecosystems are present on the **Property** and the dolomitic conditions of the **Property** have been taken into consideration throughout the planning process by all the specialists, including the storm water engineer.

According to the Geotechnical engineer, dewatering and ground water pollution risks are regarded as low.

### 7.2.3 Rivers

River ecosystems (perennial & non-perennial) contribute to the conservation of biodiversity & provide ecosystem services such as clean water. Rivers provide a habitat to many species, both inside of the water body & the river channel as well as within the riparian zone & larger floodplains. Rivers & streams are linear ecosystems & are therefore extremely sensitive to any disturbance that may occur within the entire catchment of the river or stream. As rivers are affected along their entire lengths, stringent measures are required to prevent degradation at a point of impact as well as downstream. Therefore these features must be protected from transforming land uses such as the proposed development.

The **Property** is in no way affected by a river or the 1:100 or 1:50 year floodline as certified by a qualified engineer.

It is possible that the contours may have been misinterpreted and that the depression at the western most point of the **Property** was seen to be a river. Please note that this is not the case.

### *Conclusion*

The **Respondent** erred by indicating that there is a river on the **Property**. There is no river or drainage line on the **Property**. This again raises the question whether the **Respondent** has properly applied its mind regarding the site specific attributes of the **Property** and the merits of the development.

## 8. Final Conclusion

The following submissions are made by the Appellant in conclusion:

It is clear to the **Appellant** that the **Respondent** was opposed to the development even before the application was submitted and that the application was prejudged. It is for this reason that the Respondent also failed to properly consider all relevant facts in making the decision. It is further submitted that the refusal to consult with the **Appellant** regarding the site sensitivities at the early stages of the application is proof thereof.

It is argued that this failure to properly consult with the applicant and to provide it with an opportunity to respond to GDACE's concerns is a breach of the applicant's right to *audi alteram partem* i.e. the right to be heard **before** a decision is taken.

The reasons provided by the **Respondent** for its decision, are unsubstantiated, arbitrary and are inconsistent with basic planning, environmental management and development principles contained in the legislation relied upon by the **Respondent**.

The **Respondent's** reasons reflect ignorance of the site specific characteristics and circumstances of the subject property and the surrounding area. This again demonstrates that the Respondent failed to properly consider all relevant facts in making the decision

The **Respondent** erred in that it subjectively, selectively and out of context extracted expert inputs from the **Application** without reference to other relevant information and applicable legislation to attempt to substantiate a negative record of decision.

The negative attitude of the **Respondent** from the outset of the process, the misrepresentation of data and the selective usage of inputs from experts and legislation to substantiate a negative **Decision** raises concerns regarding the objectivity of the **Respondent** and presents a real probability of bias in the decision making process.

It is the **Appellant's** opinion that it is being victimised and discriminated against<sup>6</sup>. Some of the experts that conducted specialist studies for the **Appellant** confirmed this view after a meeting with the conservation department of the **Respondent**. The Appellant is also aware of its right to compensation in terms of section 34 of the ECA and of its common law rights. However, the Appellant is desirous of first attempting to resolve the matter with the **Respondent** in an amicable manner. The Appellant would therefore welcome a further discussion with the Respondent after he has had an opportunity to review the contents of this appeal.

As already illustrated above, it is the Appellant's submission that no rationale for the decision and no consistency exists and the Honourable MEC is respectfully requested on an urgent basis to intervene and reverse such decision subject to such reasonable conditions as the MEC may deem necessary.

If some of the arguments incorporated in this Appeal are unclear or if the Honourable MEC/ the **Respondent** require more detailed information to make an informed decision, the **Appellant** is more than willing to meet with the **Respondent** to discuss the relevant issues or to supply the **Respondent** with the additional information required.

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