

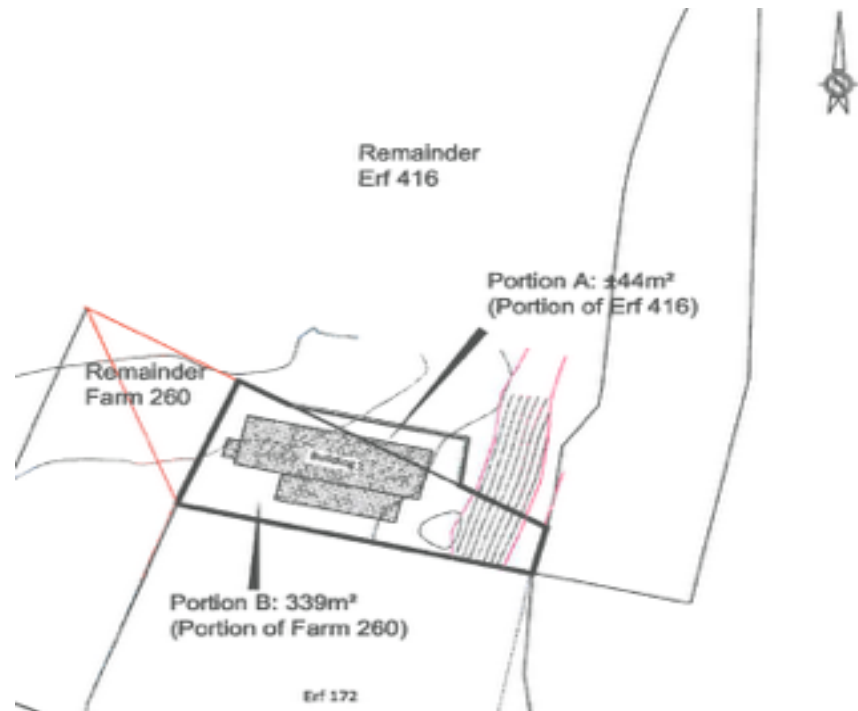


**REZONING, SUBDIVISION AND CONSOLIDATION OF PROPERTY, AND THE ACQUISITION AND LEASE OF PROPERTY IN RESPECT OF THE VISHUIS HERITAGE CENTRE IN KASSIESBAAI, ARNISTON (W416 - MTRP) (WARD 5)**

**INTRODUCTION**

1. Kassiesbaai is a historic fishing village in Arniston within the jurisdiction of the Cape Agulhas Municipality ('CAM'). It is recognised as a Grade I heritage resource under the National Heritage Resources Act 25 of 1999 ('the Heritage Act'), that is a heritage resource with qualities so exceptional that it is of 'special national significance'. Despite this status, many visitors to Arniston do not enter Kassiesbaai and the Village benefits relatively little from tourism. Many residents of the Village are unemployed and poor. In order to promote tourism inside Kassiesbaai and to train its residents in tourism-related skills, the community developed the idea, now known as the Vishuis Project, of building an information and heritage centre at the entrance to Kassiesbaai. The Vishuis Project has been approved by among others the South African Heritage Resources Agency ('SAHRA'). SAHRA is responsible for administering Grade I heritage resource under the Heritage Act.
2. The heritage centre has been designed to incorporate architectural elements from the Kassiesbaai Heritage Area with more modern architectural elements to complement the character of the Heritage area in which it will be located, without trying to duplicate it.
3. The most suitable position identified for the heritage centre is just north of the Arniston Harbour, along the sea shore and on the right hand side as one enters Kassiesbaai. This location results in the visitors centre straddling the land upon which Kassiesbaai is situated (erf 416) and a relatively small triangle of land ( $\pm 339\text{m}^2$ ) between Kassiesbaai, the harbour and the Indian Ocean.
4. The triangle of land, upon which the heritage centre would be partially situated, currently forms part of the Remainder of Farm 260 Arniston Downs Bredasdorp RD, which is owned by CAM.
5. Erf 416 is owned by the Waenhuisekranz Fisherman's Union ('the Union').
6. In order to enable the heritage centre to be established, in summary, it is proposed that the following would need to happen:
  - 6.1. First, the boundaries would need to be altered to create a separate erf for the heritage centre. This would involve:
    - 6.1.1. The subdivision of the portion of erf 416 to form portion A with a proposed temporary erf number **erf 768**, Arniston ( $\pm 44\text{m}^2$ ).
    - 6.1.2. The subdivision of the triangle of land referred to above from the remainder of Farm 260 Arniston Downs Bredasdorp RD to form portion B with a proposed temporary erf number **erf 767**, Arniston ( $\pm 339\text{m}^2$ ). This is referred to below as 'Portion B'.
    - 6.1.3. After subdivision, the consolidation of portions A and B to form a new erf of  $\pm 383\text{m}^2$  (with proposed erf number **erf 769** Arniston). This consolidated portion is referred to below as 'the Property'.

These properties, and the position of the heritage centre are depicted in the following diagram.



- 6.2. The proposed new Property would be registered in CAM's name. It is proposed that the Union would donate Portion A to CAM to enable this. The Union has indicated it is agreeable to doing so.
- 7.
- 7.1. Second, together with the above-mentioned subdivisions and consolidation, the Property would be rezoned to Special Zone to permit the construction and operation of the heritage centre.
- 7.2. Third, it is proposed that CAM would enter into a lease agreement in terms of which it would lease the heritage centre to the Union at a nominal rental for a period of 20 years, with an option to extend the tenancy for a further period of 20 years. The proposed rental agreement limits purposes for which the heritage centre may be used.
8. The purpose of this report is to describe the decisions which the Council of CAM ('the Council') is called upon to make. Before discussing each of the decisions in turn, the background to this matter is set out in more detail.

## **BACKGROUND**

9. In support of the worthy objectives of the Vishuis Project, CAM previously considered took certain decisions concerning the heritage centre. Those previous decisions included a decision to donate to the Union Portion B which is now proposed to be Erf 767 (it was previously referred to as erf 758). CAM also made a zoning determination and granted building plan approval in respect of the heritage centre. Thereafter construction of the heritage centre commenced with funding raised for that purpose by the Waenhuiskrans Arniston Community Development Trust ('the Trust').
10. In June 2013 certain residents of Arniston questioned the legal validity of those decisions.
11. As a result, CAM investigated the decision to donate Portion B to the Union and the related decisions and identified a number of administrative irregularities. Construction on the heritage centre was suspended. CAM then brought an application before the Western Cape High Court to have the previous decisions set aside because of the irregularities which it had identified. At CAM's request, on 1 October 2013 the Court set aside the decisions, and remitted the matter to CAM for consideration. The heritage centre is currently partially constructed.
12. CAM considered the Vishuis Project afresh and revisited the legal requirements relating to the matter. As indicated, CAM is now considering a transaction in terms of which

CAM's property will be leased to the Union for a nominal amount rather than donated. This means that CAM will retain ownership of Portion B.

13. The remainder of this report deals with each of the decisions that will be required to be taken to give effect to the Vishuis Project.

#### (1) SUBDIVISIONS AND CONSOLIDATION

14. As set out above, the partially constructed heritage centre straddles the boundary between the remainder of Farm 260 Arniston Downs Bredasdorp RD and Erf 416 (the land on which Kassiesbaai is situated).
15. The current proposal envisages the subdivision of both Erf 416 and the Remainder of Farm 260 Arniston Downs Bredasdorp RD to form the remainder of those properties and Portion A and Portion B. After subdivision, Portion A and Portion B will be consolidated to form the Property.
16. The application for the subdivisions and consolidation is attached as Annexure on page 42.
17. The applications should be read with the motivation report from Town & Country Land Surveyors and Town Planners, Annexure page 44].
18. The applications for subdivision and consolidation are governed by among other provisions, s 25 of the Land Use Planning Ordinance 15 of 1985 (Cape) ('LUPO').
19. The proposed subdivision and consolidation of the properties have been advertised in terms of s 24(2) of LUPO. A copy of the advertisements is attached as Annexure on page 68.
20. The land owner has obtained the requisite permit in terms of s 27(18) of the National Heritage Resources Act 25 of 1999 allowing Erf 416 to be subdivided. A copy of the permit is attached as Annexure on page 69.
21. Council is required to make its decisions regarding the subdivision of each property and the consolidation of the subdivided portions after considering the above mentioned motivation, together with the remaining matters addressed in this report.

#### (2) REZONING

24. The applicable zoning scheme is the Cape Agulhas Municipality Integrated Zoning Scheme ('the Zoning Scheme'), which came into effect on 30 June 2014.
25. The current zoning of Erf 416, Arniston is Special Zone and the portion of Farm 260, Arniston Downs Bedasdorp RD involved is Undetermined.
26. CAM is applying in terms of s 17 of LUPO for the rezoning of the consolidated portion to Special Zone. This will make provision for the construction of the heritage centre and the use of the property for that purpose.
27. Under s 300(1) of the Zoning Scheme, CAM must select one of the following methods of development management for a Special Zone: (a) Special Zone Annexure method; (b) Special Zone Site Development Plan method; or (c) a combination of (a) and (b).
28. Method (b) is proposed.
29. The development rules which would apply to the consolidated portion are set out in the proposed Special Zone Site Development Plan for the Property contemplated in s 300(1)(b) of the Zoning Scheme, which is attached as Annexure on page 75. It makes provision for the site to be used for:
- A museum displaying the history and living heritage of the site;
  - A facility for community meetings, community functions and any other community matters;
  - An information centre for tourists;
  - A facility where light snacks and drinks could be offered to the public; and
  - A training and educational facility,
30. Council would need to approve the draft Special Zone Site Development Plan.
31. Among the other issues which Council must consider when deciding this rezoning application are the motivation for the rezoning (referred in para 16 above), the remaining matters addressed in this report, and the input provided during the public consultation process.
32. The entire property is subject to a servitude requiring that it be 'open to the use of the public'. In this regard, the following is relevant: The anticipated development objectives

of the project are that it will be a visitors' and information centre available for the use of the public. In addition, pedestrians will be able to walk around the centre. Accordingly, it is submitted that the property will remain open to the use of the public.

### (3) LEASE

33. As mentioned, it is proposed that CAM lease the Property to the Union. A copy of the proposed lease agreement is attached as Annexure on page 76.
34. The proposed lease agreement provides for, among other things, the following.
- 34.1. The lease will be for a period of 20 years with an option, subject to certain conditions, for the Union to extend for a further period of 20 years. The right to extend may not be exercised more than once (clauses 3.1 and 25);
- 34.2. The monthly rental is R1 excluding VAT (clause 7.1);
- 34.3. The Union shall effect all improvements to the Property. The Union acknowledges that all improvements effected to the Property will become the property of CAM. CAM shall not be liable to compensate the Union. (clause 8);
- 34.4. The Union acknowledges that the Property must be used in compliance with the servitude which provides that the entire Property is "open for the use of the public" (clause 12.1).
- 34.5. Unless CAM gives written permission, the Union may use the Property and allow it to be used only for the purposes of (clause 12.2):
- 34.5.1. a visitor's centre for purposes of providing general and specific information about services and products offered in the Kassiesbaai fishing community;
- 34.5.2. a heritage centre providing information on the archaeological, ecological and human history of the Kassiesbaai environment and history;
- 34.5.3. providing of training facilities to members of the Kassiesbaai fishing community in order to assist these members to become economically active; and
- 34.5.4. serving of refreshments and light meals.
- 34.6. The Union shall maintain the interior of the Building (clause 14.1).
- 34.7. CAM shall maintain, at its cost, the exterior of the Building (clause 14.4);
- 34.8. The Union shall maintain, at its cost, the roof of the Building and ensure that the roof remains at all times in good condition. In the event that the roof requires replacement, CAM, at its cost, shall replace the roof (clause 14.5);
- 34.9. The Union shall not allow the property to be used in any manner contrary to any provisions of law (including but not limited to the provisions of any applicable town planning or zoning scheme or of any licence relating to or affecting the occupation of the Property or the conducting of any business therein) (clause 12.3);
35. The decision about whether to enter into the proposed lease is governed by among other provisions, the Municipal Asset Transfer Regulations (GN R878 in GG 31346 of 22 August 2008) ('the MATR'). The following provisions are relevant:
- 35.1. A municipality may grant a right to use, control or manage a capital asset only after the municipal council has approved in principle that the right may be granted (MATR 34(1)(b)). 'Capital asset' is defined to include land.
- 35.2. The municipal council must, when considering in terms of MATR 34(1)(b) approval for any proposed granting of a right to use, control or manage a capital asset, take into account (MATR 36) -
- (a) whether the capital asset may be required for the municipality's own use during the period for which the right is to be granted;
- (b) the extent to which any compensation to be received for the right together with the estimated value of any improvements or enhancements to the capital asset that the private sector party to whom the right is granted will be required to make, will result in a significant economic or financial benefit to the municipality;
- (c) the risks and rewards associated with the use, control or management of the capital asset in relation to the municipality's interests;

- (d) any comments or representations on the proposed granting of the right received from the local community and other interested persons;
  - (e) any written views and recommendations on the proposed granting of the right by the National Treasury and the Provincial Treasury;
  - (f) the interests of any affected organ of state, the municipality's own strategic, legal and economic interests and the interests of the local community; and
  - (g) compliance with the legislative regime applicable to the proposed granting of the right.
- 35.3. An approval in principle in terms of MATR 34(1)(b) that a right to use, control or manage a capital asset may be granted, may be given subject to any conditions, including conditions specifying (MATR 40) -
- (a) the type of right that may be granted, the period for which it is to be granted and the way in which it is to be granted;
  - (b) the minimum compensation to be paid for the right; and
  - (c) a framework within which direct negotiations for the granting of the right must be conducted, if granting of the right is subject to direct negotiations.
- 35.4. If approval in principle has been given in terms of MATR 34(1)(b) that a right to use, control or manage a capital asset may be granted, the municipality may grant the right only in accordance with the disposal management system of the municipality (MATR 41(1)).
- 35.5. Before granting the right to use, control or manage a capital asset, the municipality must be satisfied that the private sector party to whom the right is to be granted can demonstrate the ability to adequately maintain and safeguard the asset (MATR 41(4)).
- 35.6. A written agreement concluded between the municipality and the private sector party to whom the right to use, control or manage a capital asset is granted must be signed on behalf of the municipality and the private sector party and set out the terms and conditions on which the right is granted, including, the prescribed minimum terms and conditions (MATR 45(1) and (2)).
- 35.7. An agreement granting a right to use, control or manage a capital asset to a private sector party or organ of state must be made available in its entirety to the council of the municipality and may not be withheld from public scrutiny (MATR 46).
36. In light of the above provisions, the Council must take into consideration the following facts and considerations.

**Whether the property may be required for CAM's own use during the period of the lease (MATR 36(a))**

37. Before the commencement of construction of the heritage centre, CAM did not utilise Portion B. Nor was it utilised by anyone else. CAM does not foresee that CAM will require the property for its own use during the period of the lease.

**Compensation to be received and the estimated value of the improvements to the property (MATR 36(b))**

38. As indicated, the rental to be received for the Property (which will include Portion B), namely R1 per month, is nominal.
39. This needs to be seen in the context of the value of the Portion B.
- 39.1. On 20 February 2012 CAM obtained a valuation of Portion B from De Kock Lloyd Property Valuations who placed a value of R520,000 on Portion B.
- 39.2. The residents who questioned the validity of the decision to donate Portion B obtained a report from Philip Eloff Professional Valuer dated 25 April 2013 (Annexure on page 87), which valued Portion B at R1,500,000.
- 39.3. CAM then requested Douglas Property Valuations CC to comment on the report from De Kock Lloyd Property Valuations and Philip Eloff report, and to provide an independent valuation of Portion B (referred to as erf 758). The report of Douglas Property Valuations CC. It found among other things that:
- 39.3.1. The De Kock Lloyd report failed to link the determined value to the statutory constraints on Portion B, and the derived value did not constitute a "market value".
- 39.3.2. The valuation in the Philip Eloff report is premised on single residential property sales (as the highest and best use). However residential use is not permissible on Portion B. The valuation report employs a comparable sales analysis utilising single residential properties which do not have the same zoning or statutory impediments as Portion B the not have the same zoning or statutory impediments. Accordingly, the premise on which the Philip Eloff report is based is incorrect and leads to an incorrect conclusion as to value.
- 39.3.3. Considering all the statutory impediments applicable to Portion B, an "open market value" of such property cannot be realized.
- 39.3.4. The value attached to the property is one of socio-economic upliftment, community benefit and public interest.
- 39.3.5. In the circumstances, Portion B has a value of R1.
40. For the reasons, set out more fully in the report of Douglas Property Valuations CC, it is submitted that Portion B has a value of R1.
41. Also of importance in considering the economic benefit to CAM is the following.
- 41.1. The Union will at its cost effect improvements to the Property. The Union has estimated the cost of the building works at R1,600,000. In terms of the proposed lease agreement, the Union acknowledges that all improvements effected to the Property will become the property of CAM and CAM is not liable to compensate the Union (clause 8).
- 41.2. The Union will be donating to CAM a portion of its property, Portion A.
- 41.3. The Vishuis Project has as one of its aims the promotion of tourism and economic development of Arniston. If these aims are realised, it will benefit CAM, through increased rates and decreased liabilities for the provision of social services.

42. In the circumstances, Council is advised that the proposed lease will result in both an economic and a financial benefit to CAM. These benefits are likely to be significant. At worst however, should the economic aims of the project not be realised, the economic and financial consequences to CAM would be neutral.

**Risks and rewards associated with the use, control or management of the Property in relation to CAM's interests (MATR 36(c))**

43. A potential risk to CAM's interests would arise from a public liability claim by any member of the public who suffers damages on the Property. This risk can be mitigated by way of public liability insurance. Such insurance is contemplated in clause 18.1.3 of the proposed lease agreement.
44. CAM will have the financial obligations associated with the following maintenance and replacement obligations in terms of the lease:
- 44.1. maintenance of the exterior of the Building (apart from the roof) at CAM's cost (clause 14.4); and
- 44.2. replacement of the roof of the Building, at CAM's cost, if the need arises (clause 14.5).
45. The proposed lease of the Property to the Union does not pose any other foreseeable risk to CAM's interests. This is especially so given the fact that Portion B has no market value, and CAM is not using Portion B and does not intend to do so.
46. The potential rewards to CAM's interests arise from the socio-economic objectives of the project. In particular, it is expected that the project will:
- 46.1. help to provide additional income for residents of Kassiesbaai which would enable them to pay their municipal rates, to maintain the historic fisherman's residences so to prevent the decay of the historic houses, and to preserve the historic character of Kassiesbaai;
- 46.2. promote economic growth in Arniston and Kassiesbaai by promoting tourism to the benefit of both Kassiesbaai and Arniston; and
- 46.3. enable CAM to fulfil its Constitutional and statutory duties to protect heritage resources and the built environment within its jurisdiction and to foster and promote sustainable development.

**Any comments or representations on the proposed granting of the right from the local community and other interested persons (MATR 36(d))**

47. Refer below from paragraph 58.

**Any written views and recommendations by the National Treasury and the Provincial Treasury (MATR 36(e))**

48. Refer below from paragraph 61.

**Interests of any affected organ of state, CAM's own strategic, legal and economic interests and the interests of the local community (MATR 36(f))**

49. The other organs of state which are affected by this proposal are the heritage authorities: SAHRA and Heritage Western Cape ("HWC"). They have both given approval for the project.
50. The project advances CAM's strategic interests of promoting sustainable economic development, tourism, and social upliftment and alleviating poverty. CAM's legal interests are accommodated in the terms of the lease agreement. CAM's economic interests are addressed above.

51. The project will affect the interests of the local community in the following ways. The primary and directly objects of the project are to benefit the community of Kassiesbaai in the ways described above. All residents and ratepayers of CAM will benefit from the completion of the heritage centre which will be visually attractive and will enhance the character of the whole of Arniston.

All residents and ratepayers will also benefit from any increase in tourism to the town and enhanced social and economic integration between residents of Kassiesbaai and other residents of Arniston. Visitors to Arniston will benefit from information about and access to Kassiesbaai which the heritage centre intends to provide.

**Compliance with the applicable legislative regime (MATR 36(g))**

52. All applicable legislation has been or will be complied with.

**Conditions (MATR 40)**

53. Conditions suitable to the project are provided for in the lease and have been discussed above.

**Compliance with CAM's disposal management system (MATR 41(1))**

54. If Council grants in principle approval for the lease to be concluded, CAM must comply with its Land Disposal Policy dated 23 February 2012. Part 10.1.8 permits the letting of CAM's land by private treaty in certain special circumstances. The following circumstances are relevant (any one of which would permit the proposal):

- municipal land for community projects;
- municipal land for educational purposes other than private schools;
- previously disadvantaged areas identified by the Municipality, where the local economy is stagnant and remedial steps will require special treatment; and
- 'non-viable parcels of land' may be let to adjoining owners. Under the Policy, the determination of non-viability rests with the Council and its decision will be final. It is recommended that a determination of non-viability be made in respect of Portion B given that its small size and the restrictions on its permissible use preclude any commercial, business or residential use.

**Whether the Union can demonstrate the ability to adequately maintain and safeguard the asset (MATR 41(4))**

55. In terms of the proposed lease, the Union's maintenance obligations are in respect of the interior of the Building (clause 14.1) and the roof of the Building (clause 14.5). CAM is satisfied that the Union is able to adequately carry out those maintenance obligations and to safeguard the Building. If the Union fails to meet these duties, CAM has remedies in terms of the lease.

**Whether the proposed lease agreement includes the prescribed minimum terms and conditions (MATR 45(1) and (2))**

56. The proposed written lease which is proposed to be signed on behalf of CAM and the Union sets out the terms and conditions on which the right is granted. They include the minimum terms prescribed by the MATR which are relevant.

**The entire lease agreement must be made available to the Council and to the public (MATR 46)**

57. The entire draft lease agreement will be circulated for public comment and will be made available to the Council.



**OTHER DECISIONS**

58. CAM has previously approved the Trust's building plan application in respect of the heritage centre. That prior approval was set aside under the Court Order. It is expected that a new application for building plan approval will be made if and when the authorisations contemplated in this report have been granted.

**OBJECTIONS, COMMENTS AND REPRESENTATIONS**

59. A process of public participation in relation to the decisions contemplated in this report is required by the definition of 'advertise' in LUPO; ss 29, 30 and 33 of the Zoning Scheme, s 4(1)(b) PAJA read with regulation 18 the Regulations on Fair Administrative Procedures; and ss 21 and 21A of the Local Government: Municipal Systems Act 32 of 2000 ('the Systems Act').
60. This process has been carried out.

**VIEWS AND RECOMMENDATIONS BY THE NATIONAL TREASURY AND THE PROVINCIAL TREASURY**

61. Annexure L. sets out the written views and recommendations on the proposed granting of the right by the National Treasury and the relevant provincial treasury.