

ANNEXURE 2

WARA's CASE IN THE CAPE HIGH COURT AGAINST VERREWEIDE (EDMS) BPK AND THE CAPE AGULHAS MUNICIPALITY (CAM)

WARA instituted proceedings against Verreweide and CAM relating to erf 599, the erf immediately opposite the campsite at the entrance to the town. In terms of an interim order granted on 22 April 2008 the court ordered that all construction work on the property is to cease pending the finalisation of an application to review the decision of the Municipality to transfer the property to Verreweide and to review the Municipality's approval of the building plans for the building presently under construction. The review application is to be heard during May 2009 and pending the finalisation thereof the construction has been suspended.

Certain general questions concerning the court proceedings have been addressed to the members of the committee and short answers to those questions are set out herein.

1. How did the matter end up in court?

WARA had for some considerable time requested information from CAM regarding the sale and transfer of the property to Verreweide. CAM refused to make the information or documentation available to WARA until a court application was threatened to provide the documentation and information. This was received during late November 2007. It was apparent from the information and documentation received that CAM had appeared to act irregularly and wrongfully when selling and transferring the property to Verreweide. At the annual general meeting of WARA held in December 2007 the committee was authorised to proceed with litigation to set aside these irregular proceedings and also to proceed with litigation to stop the developer of the property (Verreweide) from proceeding to build without approved plans and in breach of the zoning conditions.

2. What is a review application?

An application for review is brought when parties believe that a body such as CAM acted irregularly or wrongfully. In this regard WARA was advised that the sale and transfer of the property to Verreweide was unlawful and further that the approval of the building plans for erf 599 was unlawful.

3. When were the proceedings instituted?

Vereweide (controlled by Robert Haarbuerger) commenced the excavation and development of erf 599 without approved building plans. CAM ordered Verreweide to cease construction, this order was ignored. CAM refused to institute proceedings for an interdict to stop Verreweide building. WARA was therefore compelled to act to stop the building without approved plans and also to stop the developer building contrary to the zoning conditions. During February 2008 an application was launched for an urgent interdict to prevent Verreweide from building further. Shortly after the proceedings were instituted, Robert Haarbuerger, on his Advocate's advice, ceased building operations. A week later building operations recommenced as during the week the then Municipal Manager, Mr Keith Jordaan, approved Verreweide's building plans, on appeal.

Vereweide continued building until ordered by judgement of the High Court on 22 April 2008 to cease all building operations pending the finalisation of the review of the sale and transfer of the property to Vereweide and the review of the approval on appeal of Vereweide's building plans by Keith Jordaan.

4. What is the history of erf 599? How did it become the centre of a court case?

Erf 599 came into existence when a section of erf 214 was cut off and zoned for business. This was done with the objective of moving there the Arniston Centre, with Bob's Shop and the Waenhuis Restaurant. Town planners and consultants advised that erf 599 would be a better business location for the town's needs than where the Arniston Centre was situated at the time. Mr Bob Harman and the Municipality could not, however, agree on a price for erf 599. The Arniston Centre was consequently not moved to erf 599.

In 2003 there were three suggestions for development on erf 599 in reaction to an advertisement placed in the local newspaper by the Municipality. One of these suggestions was presented by two residents of Kassiesbaai. Another was a suggestion by a consortium that wished to give the people of the fishing community an interest in the development and ownership of the businesses in the development. The tender was allocated by CAM to a third suggestion, made by the Arniston Bay Consortium of Mr Christo Swanepoel and Ms Ethel Botha. Mr Swanepoel and Ms Botha later agreed with CAM that the land should be sold to Verreweide (Pty) Ltd rather than to the Arniston Bay Consortium.

Verreweide was eventually unable to adhere to the conditions for the sale of erf 599. One of the conditions was that the development had to be completed before the transfer of land could be obtained. Verreweide did not have the money to complete the development and through a process of arbitration they entered into a new conditions with the CAM. With this new agreement, it was no longer necessary for Verreweide to adhere to the original conditions. Verreweide could now obtain the transfer of land even before the development had been completed. The new agreement was not advertised by CAM. Enquiries about the agreement were also not answered before the land was transferred to Verreweide on 25 January 2007 for R426 000.

Immediately after the transfer, Verreweide put the erf up for sale for R5,5 million. Robert Haarburger (and his associates) eventually bought all the shares in Verreweide for R3.98 million and thus became the owners of erf 599.

5. What were the objections to the sale of erf 599?

More than thirty organisations and individuals lodged complaints against CAM's decision to sell erf 599 to Arniston Bay Consortium.

These complaints included that the price was not market-related and that, in addition, CAM had not accepted the best price. There was also the argument that the decision was tantamount to a subsidy for the new business at the expense of Bob Harman's business, and that those employed at Harman's shop would lose their jobs.

The committee also raised objections at the time. It said that CAM was wrong not to use an independent appraiser to value the property *before* the sale and not to ensure that the people to whom the tender was allocated had sufficient money to complete the development. CAM should have either accepted a better price or ensured greater empowerment for the fishing community. It also warned later, that CAM had not established whether the partners in Arniston Bay Consortium (Verreweide) had sufficient funds to complete the development. Furthermore, it said that the advertisement for the sale of the erf had been misleading; had it been clear that CAM would accept a chiefly residential complex, the price would have been higher. It is now clear that most of the committee's objections and suggestions were justified. However, CAM did not respond to them.

6. Robert Haarburger says in a newspaper article that the legal action "is denying Kassiesbaaiers opportunities" and that the "vendetta" of the WARA's committee members against him is "hidden behind the legal action". Is this true?

This is not true. The objections mentioned above were raised long before Robert Haarburger was involved. Robert Haarburger's conduct further complicated things since he had started construction without approved building plans and had more or less doubled the floor-space of the development and was building contrary to the zoning conditions.

When erf 599 was zoned for business, it was a public process. Limitations for future development were placed on the land. When such limitations are changed, there is a legal process that should be followed. Such a process is important in any country: it helps to preserve a town's character, while preventing so-called "sweetheart deals". When a developer changes these rules independently, especially on land that used to be public property, it can damage a town's character and give the developer an unfair financial benefit. In the case of erf 599, for example, the argument would be that the limitations on development could also limit the possible price of the property. By doubling the developed area on a stand, the developer can potentially double the value of the stand. Apartments and a hotel were not initially considered as a use for erf 599. By changing the conditions so that the erf could be used for apartments and a hotel instead of retail, the value of the property was increased even more. Before Robert Haarburger bought the shares in Verreweide, it was estimated that a development within the limitations on the stand could be worth R16 million. With a much larger development and the changes in the functions of the buildings, that value could even be doubled. It is believed that these are factors that should be taken into account when the wisdom of CAM's process for the sale of the property is assessed.

WARA is not against development in Waenhuiskrans. We will also not limit the permanent residents' employment opportunities. Had CAM ascertained beforehand, like it was suggested, that the people to whom the tender for erf 599 was awarded had enough money to do the development, the development would have long since been completed. And if CAM had looked into an actual empowerment suggestion, like it was suggested, every family in the fishing community would now have been able to share in the growth of the property's appreciation in value.

Verreweide's initial suggestion did not include empowerment. They did later promise to make use of local labour during construction, and that people from the local community would get an opportunity in the development to conduct their businesses. Training would also be provided to enable these people to start their own businesses. Robert Haarburger would be fully supported if he keeps these promises. Yet it is wrong of him to be angry when a committee member pointed out that local labour was not being used for the construction, and to accuse WARA, when construction is later suspended due to his wrongful conduct, of denying local people opportunities. WARA is sincerely committed to helping the local community wherever possible and to protect their rights.

The promises of jobs and other benefits for local people are now part of the public documents and can be obtained from WARA.

7. Who are the parties in this court case?

WARA is the Applicant, (the Western Cape Heritage Council have also joined as a Second Applicant, but their request for an interdict to suspend the building operations was refused), The Respondents are Verreweide, CAM and the Deeds Office (a nominal Defendant who takes no part in the proceedings).

In matters such as these Municipalities who are Defendants generally don't really become involved in the litigation other than explaining to the court why the decision was

made and supplying the necessary documentation in support thereof. Municipalities then usually abide in the decision of the court (it will accept whatever the court finds). CAM however, in this matter has taken an unprecedented active role in opposing the application at the expense of Ratepayers. (It was reported in the Cape Agulhas Tribune of 28 November 2008 that CAM's legal costs from March to November 2008 amounted to R360 000 excl VAT and that could increase by a further R180 000. There is uncertainty if the previous Municipal Manager, Keith Jordaan, was authorized to appoint the legal advisor and the new Municipal Manager has been instructed by the Council to investigate the appointment of the legal representative. It was reported, in a separate article, that the Council has noted that a file containing relevant documentation concerning erf 599 has vanished from the CAM offices without a trace)

8. What happens should the court determine that the sale of erf 599 was illegal?

Should the court determine that the sale of erf 599 was invalid for some or other reason, for example that CAM had not, as is required, followed a transparent process when they entered into a new contract with Verreweide in 2006, the sale will be set aside and, CAM will need to re sell the erf. Good judgment and legal requirements dictate that an independent appraisal of the property should be obtained before the sale. Such an appraisal will obviously be considerably higher than R426 000. This will entail that CAM will receive more for the property and these extra funds can be used to improve the lives of the inhabitants of Waenhuiskrans, or particularly the fishing community.

9. Will CAM and/or the community lose money if the sale of erf 599 is set aside by the Court?

CAM and the community will not lose. They will win, because the land will probably be sold at a much higher price.

Should CAM have acted wrongfully, the developer will not have a damages claim against CAM. What will transpire is that the sale will merely be set aside and accordingly CAM will not be out of pocket in this regard.

10. What happens if WARA wins the court case?

If the case is decided in favour of WARA then the aims and objections of WARA have been upheld. In this regard justice will be done, the community's interests will have been protected, and the character of the town will have been protected and respect for the law would have been enforced. Should WARA be successful then the court will in all probability order CAM and Verreweide to pay WARA's legal costs incurred in this matter. This will mean that all those who have made funds available for the litigation will receive back a pro-rata share of the funds made available, alternatively the money could be allocated to a special fund.

11. What happens if WARA loses the court case?

Naturally, although WARA will be disappointed, the members of WARA will stand with their heads held high as they would have striven to maintain the aims and objectives of WARA and also, to the best of their ability, enforce that the laws of the country be upheld and obeyed. Although costs usually follow the result, WARA are advised that it is unlikely that WARA will be obliged to pay all the Respondents' costs as at the time of institution of the proceedings Verreweide did not have approved plans and WARA was entitled to come to court. A Judge has already found that Verreweide has in certain respects acted unlawfully.

Robert Haarburger recruited 116 new members for WARA and paid their membership fees. He then immediately demanded a special meeting to appoint a new committee to end the litigation against Verreweide. WARA verified the details of all the applications and

admitted 86 new members. The committee welcomes the new members, even though Robert Haarbuerger and his associates will expect them to vote to put an end to the litigation. The committee believes that the Association should represent everybody and that debate is important. Of the new members, 46 are employed by Robert Haarbuerger. Most of the rest are family members of Robert Haarbuerger's employees.

Robert Haarbuerger has once again insisted that multiple proxies be introduced. Proxies of that type were discontinued because many people held the view they had in the past been abused (by Robert Haarbuerger) and because they do not encourage debate in that people who wish to vote for a certain issue should be there to be persuaded one way or the other.

The executive committee of the WARA unanimously decided that a special meeting would not be necessary and that the issues raised by Robert Haarbuerger could be raised at the annual general meeting.

12. What will happen if Robert Haarbuerger and his associates take over WARA and stop the case against themselves?

WARA will then be liable for all costs – our own as well as those of CAM and Verreweide. This means that by getting control of WARA, they are not only stopping the litigation against them but effectively getting their legal costs paid. The members (including probably mostly the new members) may be held liable for legal costs. The benefit which can be obtained for the community by setting aside the sale to Verreweide will be lost. A building will be build which is in contravention of the then existing zoning conditions. The uniqueness and character of the town will be compromised.

13. What is the legal advice at this stage?

WARA has already won the first part of the case. The advice is that WARA has a strong case and that the litigation should continue.

The reason why Robert Haarbuerger is trying to gain control of WARA so as to stop the litigation is that he knows that he has a weak case.

14. Is there a possibility of settling out of court?

The committee has on numerous occasions indicated both through its legal representatives and others that it would be prepared to negotiate a settlement of the matter. During August 2008 certain members of the committee had a meeting with Mr Reynold Stevens, the new municipal manager, with a view to a negotiated settlement. It was confirmed in correspondence that the committee is open to a negotiated settlement. CAM undertook also to speak to Robert Haarbuerger about a negotiated settlement. Neither CAM nor Robert Haarbuerger has approached the committee to consider settlement negotiations. The current indication is that Robert Haarbuerger and his associates do not wish to settle this matter. Robert Haarbuerger believes that by controlling WARA he can end the litigation and proceed with the unlawful building operations.

It is your committee's belief that a court should be allowed to consider this matter if a negotiated settlement can not be reached.

15. Is it important that as many members as possible attend the annual general meeting on 30 December 2008?

It is very important that as many members as possible attend the meeting. This promotes debate – something which is particularly important this year, also for the sake of the process of constitutional democracy.