



smith · ndlovu · summers

ENVIRONMENTAL LAW SPECIALISTS

ARCUS GIBB (PTY) LTD
Attention: Mr. Dirk Prinsloo
P.O. Box 19844
Tecoma
EAST LONDON
5214

Our ref: NDS/ct/D21-01
Your ref: D Prinsloo

25 April 2008

Per e-mail: dprinsloo@gibb.co.za

COPY TO: Department of Economic Affairs, Environment and Tourism

Attention: Mr. Gerry Pienaar
Per e-mail: gerry.pienaar@deaet.ecape.gov.za

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Dear Mr. Prinsloo

RE: APPLICATION FOR EXEMPTION AND BASIC ASSESSMENT REPORT FOR THE PROPOSED NEW BEACH HOTEL AND APARTMENT RESORT AT THE KEI MOUTH: COMMENTS ON BEHALF OF STEPHEN DUGMORE

We refer to the above and confirm that we act for Mr. Stephen Dugmore (“client”). Our client’s family has a residence in the Kei Mouth area and has a direct interest in the applications that are the subject of these comments, as will be discussed in more detail below.

The site of the proposed development incorporates four erven, namely 160, 161, 162 and 163 Kei Mouth (hereinafter referred to collectively as “the property”).

This letter contains comments on the Basic Assessment Report (“BAR”), undated. In what follows, we have produced a response *ad seriatim* various statements and/or findings contained in the BAR which we (i) disagree with; and/or (ii) regard as flawed in fact and/or in law; and/or (iii) view otherwise as incomplete or misleading.

Where comments have not been made with any specific reference to a particular paragraph, no inference is to be drawn therefrom as to any purported endorsement by us, of that particular comment, and our right to comment more fully on behalf of our clients and in due course, is reserved.

attorneys

Partners: N.D. Smith BA (Hons) LLB ADL LLM (Marine & Environmental Law) • S.I.F. Ndlovu BA (Law) LLB LLM (Marine & Environmental Law)
R.W. Summers BSocSci LLB LLM (Environmental Law)

Professional Assistants: M.V. Hofmeyr LLB • H.S. Muller LLB • C. Hayman LLB LLM (Mercantile Law) • C.L. Tacon BSc (Hons) LLB

Cape Town: 5th Floor Poyntons Building, 24 Burg Street, Cape Town 8001, South Africa • P.O. Box 619, Cape Town 8000, South Africa
Tel: 27 (0)21 424 5826/56/58 • Fax: 27 (0)21 424 5825 • email: nicks@law.co.za • Cell: 082 375 0905

Durban: Suite 2, 281 Florida Road, Morningside, Durban 4001, South Africa
Tel: 27 (0)31 313 3361 • Fax: 27 (0)86 6168 210

As a point of departure, and in the context of commentary on the BAR, we would like to emphasise certain relevant principles contained in the National Environmental Management Act, 107 of 1998 (“NEMA”), as set out in Section 2 of NEMA:

“(1) The principles set out in this section apply throughout the Republic to the actions of all organs of state that may significantly affect the environment and –

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- (e) guide the interpretation, administration and implementation of this Act, and any other law concerned with the protection or management of the environment.
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- (4) (a) Sustainable development requires the consideration of all relevant factors including the following:
- (i) The social, economic and environmental impacts of activities, including disadvantages and benefits, must be considered, assessed and evaluated, and decisions must be appropriate in the light of such consideration and assessment.
- (r) 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.” (Emphasis supplied).

In the recent judgment of the Supreme Court of Appeal in the matter of *MEC for Agriculture, Conservation, Environment and Land Affairs v Sasol Oil (Pty) Ltd and Bright Sun Development*¹, Acting Justice of Appeal Cachalia states as follows regarding the evolution of South Africa’s legislative regime for environmental impact assessment (or “EIA”):

*“[15] The first steps that were taken to protect the environment after the advent of the Constitution were the promulgation of regulations under s 21(1) of the ECA that listed the activities that are potentially detrimental to the environment and set out the rules regarding the compilation of environmental impact assessments relating to such activities. This was followed by the enactment of NEMA, which gives effect to s 24 of the Constitution. Of particular importance is NEMA’s injunction that the interpretation of any law concerned with the protection and management of the environment must be guided by its principles. At the heart of these is the principle of ‘sustainable development’, which requires organs of state to evaluate the ‘social, economic and environmental impacts of activities’”*². (Emphasis supplied).

The abovementioned judgment clearly emphasises the importance of the principles in NEMA as a backdrop to decision-making by organs of state where those decisions may significantly affect the environment.

The substantive requirements for the content of a basic assessment report under NEMA are set out in Regulation 23 of the NEMA EIA regulations³, as follows:

“23 Content of basic assessment reports

- (1) The EAP managing an application to which this Part applies must prepare a basic assessment report in format published by, or obtainable from, the competent authority.
- (2) A basic assessment report must contain all the information that is necessary for the competent authority to consider the application and to reach a decision contemplated in regulation 26, and must include -
- (a) details of –
- (i) the EAP who prepared the report; and
- (ii) the expertise of the EAP to carry out basic assessment procedures;
- (b) a description of the proposed activity;
- (c) a description of the property on which the activity is to be undertaken and the location of the activity on the property, or if it is –
- (i) a linear activity, a description of the route of the activity; or

¹ 2005 (SA) 368/04 (SCA).

² Paragraph 15 on page 9 of the judgment.

³ As promulgated in GN R385 of 21 April 2006.

- (ii) an ocean-based activity, the coordinates within which the activity is to be undertaken;
 - (d) a description of the environment that may be affected by the proposed activity and the manner in which the geographical, physical, biological, social, economic and cultural aspects of the environment may be affected by the proposed activity;
 - (e) an identification of all legislation and guidelines that have been considered in the preparation of the basic assessment report;
 - (f) details of the public participation process conducted in terms of regulation 22(a), in connection with the application, including –
 - (i) the steps that were taken to notify potentially interested and affected parties of the proposed application;
 - (ii) proof that notice boards, advertisements and notices notifying potentially interested and affected parties of the proposed application have been displayed, placed or given;
 - (iii) a list of all persons, organisations or organs of state that were registered in terms of regulation 57 as interested and affected parties in relation to the application; and
 - (iv) a summary of the issues raised by interested and affected parties, the date of receipt of and the response of the EAP to those issues;
 - (g) a description of the need and desirability of the proposed activity and any identified alternatives to the proposed activity that are feasible and reasonable, including the advantages and disadvantages that the proposed activity or alternatives will have on the environment and on the community that may be affected by the activity;
 - (h) a description and assessment of the significance of any environmental impacts, including cumulative impacts, that may occur as a result of the undertaking of the activity or identified alternatives or as a result of any construction, erection, or decommissioning associated with the undertaking of the activity;
 - (i) any environmental management and mitigation measures proposed by the EAP;
 - (j) any inputs made by specialists to the extent that may be necessary
 - (k) any specific information required by the competent authority.
- (3) In addition, a basic assessment report must take into account –
- (a) any relevant guidelines; and
 - (b) any practices that have been developed by the competent authority in respect of the kind of activity which is the subject of the application.” (Emphasis supplied.)

In the comments which follow, we have referred to the paragraphs in the BAR, in the sequence in which they appear.

AD “SECTION A: APPLICATION FOR EXEMPTION”

Ad paragraph 1

1. The regulations require that an application for exemption be in writing accompanied by reasons for such application and any supporting documentation. The motivation contained within the BAR does not provide substantive reasons for the failure to explore alternative layouts. Reference is merely made to the financial viability of an alternative basement parking layout but no supporting documents to support such claim are made available.
2. It is our opinion that the alternatives have not been thoroughly considered and insufficient detail is provided as an explanation as to why they have not been explored as required. The Department of Environmental Affairs and Tourism (“DEAT”) published a series of guidelines (“DEAT Guidelines”) dated June 2006 in support of the NEMA EIA Regulations, in terms of which the “no-go option” must be fully assessed regardless of exemption applications, this requirement has not been met.

AD “SECTION B: ACTIVITY INFORMATION”

Ad paragraph 1

1. The description fails to disclose that the proposed development will be situated on a primary dune, and construction of a basement and four storey building, comprising 12 hotel rooms and 34 apartments (which include 89 bedrooms) requires excavating into the dune.

2. There is no mention of the applications for consent use and departure from the zoning regulations. A report regarding the progress thereof is requested.
3. The National Heritage Resources Act (“NHRA”), 25 of 1999 requires that the South African Heritage Resources Agency (“SAHRA”) is notified at the very earliest stages of a development when the character of a site will be altered where there are more than three erven and a permit is required to demolish or alter a building 60 years or older.
4. It is our view that SAHRA should have been notified of the proposed development prior to the demolition of the former hotel. Such notification would have allowed SAHRA to make an informed decision regarding a possible heritage impact assessment (“HIA”). Such HIA is now inconsequential as the former hotel has already been demolished, thus altering the nature of the site irreversibly.
5. Although the BAR has listed certain items from the listed activities⁴, it is arguable that certain activities may have been omitted from the list, namely;
 - “3 prevention of the free movement of sand, including erosion and accretion, by means of planting vegetation, placing synthetic material on dunes and exposed sand surfaces within a distance of 100 metres inland of the high-water mark of the sea; and
 - 5 removal or damaging of indigenous vegetation of more than 10 square metres within a distance of 100 metres inland of the high-water mark of the sea.”
6. In respect of item 3 of the listed activities, the landowner admits to having planted buffalo grass in order to stabilise the dune and curb erosion.⁵ This activity requires a basic assessment to be carried out and environmental authorisation to be granted prior to any construction related activities commencing. Should these activities have been carried out without the requisite consent the landowner is guilty of an offence. We request any documentation pertaining to the above activities and the relevant environmental authorisation be made available to the IAPs.
7. It is our opinion that the description of the activity does not meet the requirements as stipulated in regulation 23(2)(b) of the NEMA regulations, as it is inaccurate and misleading. Certain details have not been disclosed in the description, however, have arisen in other contexts within the BAR.

Ad paragraph 2

1. Guideline 5 of the DEAT Guidelines relates to the “Assessment of Alternatives and Impacts”. These Guidelines state unequivocally that the “no-go option” should remain the default option, even when it may not be a “real” or “implementable” alternative. The “no-go option” must always be included to provide the baseline for assessment of the impacts of other alternatives and to illustrate the implications of not authorizing the activity.
2. The assessment of alternatives should, as a minimum, include the following:
 - (i) The consideration of the no-go alternative as a baseline scenario (even in cases where the no-go alternative is not a realistic alternative);
 - (ii) A comparison of the selected alternatives; and
 - (iii) The providing of reasons for the elimination of an alternative.
3. There is no mention within the BAR of the environmental benefits which the “no-go option” will have on the area (i.e. on the natural environment and sense of place of the area). Furthermore, the “no-go option” is incorrectly described as vacant land in the BAR, although, the original documentation for the zoning application, dated March 2006, refers to the “existing hotel” which was previously on the site and has subsequently been

⁴ Government Notice No 386

⁵ Refer to Section E, Ad paragraph 2.

demolished and the “no-go option” is thus technically not “implementable” as the site has already been altered.

4. However, for the purposes of this report we have assumed that the “no go option” entails leaving the land in its current form with no further development and it is our opinion that this has not been thoroughly considered and assessed, the reasons for which will be expanded upon below.
5. In accordance with the DEAT Guidelines the interested and affected parties (“IAPs”) must be afforded an opportunity to provide inputs into the formulation of alternatives. This was not done and there has been no real comparison of the advantages each alternative possesses in accordance with the DEAT guidelines, as no substantive details have been provided nor evidence upon which their reasoning is based.
6. Information regarding any restrictions contained in the title deeds relating to the discrete land units that collectively comprise the property, has been omitted in the BAR. We request that the title deeds be made available as attachments, together with whatever conveyancer’s certificates may be required to elucidate restrictive title deed conditions contained in these title deeds.

Ad paragraph 4

1. The position of the activity on the site does not take into consideration the fact that the property consists of four erven.
2. However, the plans submitted to the Great Kei Municipality show the consolidation of erven, although the Administrative Manager is unaware of any application for consolidation having been submitted.⁶ If the applicants have submitted an application for consolidation of the erven we request a copy be made available to the IAPs.

Ad paragraph 5

1. It is not clear from the BAR how the physical size of the activity has been arrived at, as the figure of 4 800 square metres does not correspond to the ground floor level footprint of 1 702.1 square metres in the Building Plan (Floor levels) Proposal (Appendix D).
2. The proposed site comprises four erven, however, these have not been individually accounted for in the BAR.

Ad paragraph 6

1. Although the site is currently accessible from an existing road on the western boundary, vehicular access will be relocated to the eastern boundary from an existing road.
2. The BAR fails to describe the type of access road that will be planned for the eastern boundary, which will presumably include access to both the basement and ground level parking bays.

Ad paragraph 7(a)

1. The proposed development is located on a primary dune, thus the use of construction waste as fill may require specialist geotechnical input as to the stability of the dune.
2. It is stated elsewhere in the BAR that the Great Kei Municipal services and infrastructure are currently under stress. It is uncertain from the BAR whether the 100 cubic metres of

⁶ Minutes of a Meeting between Stephen Dugmore and Messrs Andile Sihlahla of the Great Kei Municipality and Dennis Dicks held on 7 January 2008.

solid waste produced will be able to be disposed of at the Kei Mouth Solid waste site. There is no evidence put forward to suggest that the landfill site will have the requisite capacity to deal with the solid waste generated by the activity.

3. Despite this, no alternatives for solid waste disposal have been identified, nor is there a detailed waste management plan identifying measures for the optimal reuse or recycling of materials thereby reducing the amount of solid waste that would be disposed of at the landfill site and thus minimising further stresses on the municipality.
4. It is our view that the EAP has therefore not dealt with the issue of solid waste disposal in a satisfactory manner.

Ad paragraph 7(b)

Please note that the engineering report (Appendix D1) was not available on the website.

1. As stated in the BAR the municipal services and infrastructure are currently under stress and the additional 102 rooms, conference facilities and restaurant will further add to the burden placed on these services.
2. The EAP and consulting engineers have failed to identify any optimisation measures for the reduction and recycling of waste water.

Ad paragraph 8

1. South Africa is a water scarce country and the availability of water is a critical factor to consider. It has been indicated that the proposed activity will rely upon the Great Kei Municipality for its potable water.
2. As stated previously the municipal services and infrastructure are already stressed, the proposed development with its 102 rooms will place an extraordinary burden on the services and there is no evidence to support the assertion that the municipality will be able to cope with the increased demand. Furthermore, the EAP has failed to identify any alternate sources for water.

Ad paragraph 9

1. Insufficient detail is provided in respect of the design measures incorporated into the proposed activity for energy efficiency.
2. No alternate energy sources have been explored, such as solar heating. The construction and operation of the proposed development will require an enormous amount of electricity and thus sustainable means should be investigated so as to reduce the demand placed upon the existing services and infrastructure.
3. Due to the electricity problems currently experienced throughout South Africa, Eskom has advised that there will be a delay of four to six months in processing applications for electricity certificates for buildings requiring more than 100kVA, it is therefore advisable that more energy efficient sources and alternatives are investigated and incorporated into developments to reduce the future demand (ie solar panels and timers on geysers etc.).

Ad paragraph 10

1. Uncertain whether the site plan is to the correct scale.

2. The site plan is in respect of the former hotel and not the proposed hotel and apartments therefore the exact position of each element of the proposed activity is unclear.
3. The position of services is not indicated on the site plan. (The former hotel has been demolished, however, there is no indication of where those services were positioned on the site).
4. There is no indication of any trees or shrubs above 1.8 metres, however, the photographs indicate that there are various palm trees which are taller than 1.8 metres.
5. The walls been included on the site plan, however these are in respect of the former hotel. No reference is made to the materials used or the height thereof. (Check key on site plan)
6. There is no reference to any servitudes registered against the property. Information regarding any restrictions contained in the title deeds relating to the discrete land units that collectively comprise the property, has been omitted in the BAR. We request that the title deeds be made available as attachments, together with whatever conveyancer's certificates may be required to elucidate restrictive title deed conditions contained in these title deeds.
7. Although the BAR makes reference to indigenous Milkwood trees, a protected species on the adjacent property, these have not been indicated on the site plan. Nor have the dunes, slopes, rivers, flood levels or high water mark been indicated.
8. The position from which the photographs were taken has also not been indicated on the site plan.

Ad paragraph 11

1. The information provided in respect of the photographs and adjacent area is inadequate and lacks sufficient detail.

Ad paragraph 12

1. The facility illustrations available are wholly inadequate as no elevations or sections are provided, furthermore, the 3D images are not to scale.
2. Due to the lack of detail in the illustrations provided one is unable to accurately assess the impacts of excavation into a primary dune and construction of four storeys on top thereof. The sense of place is an important factor in this assessment and one is unable to assess the visual and aesthetic impacts of the proposed development without detailed illustrations providing the accurate scale and dimensions.
3. The location of the site on a primary dune raises fears for the stability of the dune and proposed construction, however, no structural engineering drawings or reports have been made available, which are essential to accurately determine the impacts of the proposed development on the area and its surrounds.

Ad paragraph 13

1. The BAR states that the proposed development will not contribute to service infrastructure, however, elsewhere⁷ in the BAR it states that the development must not compromise the capacity of the municipality. This is an apparent contradiction as the additional hotel, apartments, conference and restaurant facilities will compromise the municipal services and infrastructure, which are already under enormous strain.

⁷ Environmental Impact Statement.

2. The DEAT Guidelines state that the “identification, description, evaluation and comparison of alternatives are important for ensuring the objectivity of the assessment process. In cases where there is no objective and thorough assessment of alternatives, the EIA process usually confirms a chosen activity and the value of the assessments as an input to decision-making may be compromised.”
3. It is further highlighted in the DEAT Guidelines that without a proper description of the need and desirability for a proposed activity, it is difficult for a competent authority to make an informed decision. The BAR in question does not provide a proper description of the need and desirability for the proposed development.
4. The socio-economic impacts of the proposed development are inflated as they do not take into account the number of jobs lost due to the demolition of the former fully functional hotel. The same reasoning applies to the assertion that the hotel component will provide permanent job opportunities.
5. With regard to the permanency of the job opportunities that will be created, it is argued that the primary economic activity upon which the area relies is tourism, which is seasonal and not throughout the year, therefore the availability of work will not be constant. Furthermore, the long term impacts of climate change upon the local economy need to be taken into consideration.
6. The statement that a hotel only financial model is not sustainable is not substantively supported. Any reports thereon should be made available to the IAPs. (A hotel should generate more job opportunities than sectional title apartments which would presumably have a lower occupancy rate.)
7. There is a reference to the lack of support from the local inhabitants of the former hotel, however, the BAR fails to show that the local inhabitants have been consulted and will utilise the facilities and are in support of the proposed development.
8. The socio-economic impacts have not been sufficiently detailed and it is recommended that a socio-economic impact study be conducted in order to assess the real socio-economic effects of the development.
9. Our client submits that there is no need for the proposed development, specifically with regard to the construction of 34 luxury sectional title units in the area and that, accordingly, the proposed development is undesirable. Further reasons for the undesirability of the proposed development will be expanded upon below.

Ad paragraph 14

1. In terms of regulation 23(3) of the NEMA Regulations the BAR is required to take into account any relevant guidelines. It is our opinion that this regulation has not been complied with as the EAP has failed to take into consideration the series of guidelines (“DEAT Guidelines”) published by the Department of Environmental Affairs and Tourism (“DEAT”) in support of the NEMA EIA Regulations. Guideline 5, dated June 2006, relates to the “Assessment of Alternatives and Impacts”.
2. Other legislation, policies and guidelines which have been excluded from the list include the following:
 - a. Land Use Planning Ordinance
 - b. Municipal Systems Act
 - c. Development Facilitation Act
 - d. Great Kei Spatial Development Framework
 - e. Great Kei Integrated Development Plan

f. National Environmental Management: Integrated Coastal Management Bill

AD “SECTION C: SITE / AREA DESCRIPTION”Ad paragraph 1

1. The adjacent dune may be steeper than the gradient indicated. (Request records of measurements undertaken).

Ad paragraph 2

1. The BAR should include “seafront” within the location description.

Ad paragraph 3

1. The site is located on a primary dune and thus has complex geotechnical conditions, the geological stability of the site should thus include “any other unstable soil or geological feature.”
2. Specialist geotechnical advice should be required in regard to the excavation of a basement into the dune and construction of four storeys on top thereof.

Ad paragraph 4

1. The groundcover is incorrectly identified as bare soil. The photographs and statements included in the BAR indicate that the site is vegetated and thus the appropriate type of groundcover is in fact “natural veld with scattered aliens” and “gardens.”
2. The site is part of a coastal dune system with significant indigenous vegetation in the immediate surroundings, namely the Red Milkwood species which is protected in terms of the National Forest Act, (Act 84 of 1998). Section 15(a) of the National Forest Act states that no person may cut, disturb, damage or remove any protected tree except under a licence granted by the Minister.
3. As such vegetation is at risk during the construction phase, specialist studies ought to be carried out to assess the actual impacts on the Milkwoods and identify further threatened or endangered species prior to the commencement of any activities on site.

Ad paragraph 5

1. The features listed indicate that the surrounding area is a tranquil residential area with a high conservation value due to the presence of a “river, stream or wetland”, “nature conservation area”, “natural area” and an “archaeological site”.
2. In comparison, the proposed development will be a high density residential building with retail facilities and thus not in keeping with its setting and affecting the aesthetic appeal of the area.
3. The development of such high-density style residential developments within the area creates good reason for anticipating that the rezoning and proposed development on the property, could set a precedent and in the future lead to further such applications for the rezoning and subsequent development of adjacent properties.

Ad paragraph 6

1. As previously stated the former hotel was demolished without giving notice to SAHRA and thus a HIA can not be carried out. Proof of the notification sent to SAHRA of the proposed development is requested and any reply thereto by SAHRA.

AD "SECTION D: PUBLIC PARTICIPATION"Ad paragraph 1

1. Item 23(2)(f)(ii) of the NEMA regulations requires proof of the notices and advertisements to be included in the BAR. Although the documentation labelled Appendix G refers to an advertisement that was placed in the Daily Despatch on 22 February 2008, there is no proof of such advertisement within the BAR.
2. It is uncertain when the landowners were informed of the proposed development and whether landowners who reside elsewhere in South Africa were timeously notified, as the Background Information Document was only issued on 22 February 2008 and the public meeting was held less than 14 days later on 6 March 2008.
3. Furthermore, it has come to our attention that an estate agent was advertising and selling the units as having the requisite planning and environmental approval and construction during the December vacation period and construction was due to commence in April 2008. The developer's motives are thus cause for concern, as the landowners were not informed during this time, when the majority of landowners who reside elsewhere in South Africa would have been in the area on vacation.

Ad paragraph 2

1. The photographs of the notice boards are inconclusive proof as the detail of the notice is illegible and therefore one is unable to ascertain whether it complies with the requirements set out in the Basic Assessment form.

Ad paragraph 3

1. As previously stated the newspaper advertisement has not been included in the BAR and thus the public participation requirements within the NEMA regulations have not been met.

Ad paragraph 4

1. The failure to initiate the public participation proceedings during the peak holiday season whilst the majority of landowners would be present is of concern and undermines the public participation process.
2. Although a public meeting was held, it is argued that the short notice given did not afford landowners who reside elsewhere an opportunity to attend and voice their concerns.

Ad paragraph 5

1. Appendix E of the report includes a comments and responses report, however, such report is based upon the comments received from IAPs that were raised prior to the availability of the BAR.
2. It is the intention of the EAP to submit the BAR to the Department of Economic Development and Environmental Affairs on 28 April 2008, only four days after the closing date for written submissions, thus it is of concern that the IAPs will not receive

the relevant responses required in terms of Item 23 (2)(f)(iv) of the NEMA regulations before the BAR is submitted.

Ad paragraph 6

1. Appendix G makes reference to e-mails sent to the relevant municipal authorities regarding their intention to submit an application for environmental authorisation.
2. It is uncertain whether such communications were made 30 days prior to the intended submission date of 28 April 2008 and copies of these documents are requested to be made available for the IAPs.

Ad paragraph 7

1. According to Regulation 23(2)(f)(iii) of the NEMA Regulations, a list of all persons identified as interested and affected persons must be included in the application, however, this has not been included in the BAR.
2. We respectfully draw your attention to Regulation 58 (5) of GN R385 and wish to record that in the event that the Basic Assessment Report contains substantive new information, which has not previously been made available to IAPs, we reserve the right to comment on such new information. We await a copy of the supplemented report for further perusal and response.

AD "SECTION E: IMPACT ASSESSMENT"

Ad paragraph 1

Issues relating to National Heritage Resources Act ("NHRA"), 1999

1. The response of the EAP is lacking in sufficient details, particularly with regard to the relevant sections of the NHRA. In terms of section 38 (c) of the NHRA, where the character of a site is to be altered by a development which comprises more than three erven SAHRA are to be notified at the earliest possible stage. This would require the landowner to notify SAHRA prior to the demolition of the former hotel, in the early planning stages of the proposed development.
2. Furthermore, it is argued by the IAPs that certain sections of the former hotel were built prior to the 1960's and hence may have been illegally demolished as there is no evidence of a demolition permit having been applied for.

Dune destabilization and excavation

1. The EAPs response to this issue fails to consider the impact of excavating into a primary dune and there is no geotechnical input as regards the stability of such dune.
2. The EAP refers to the past development history of the site, however, the former hotel was only two storeys without a basement and according to the BAR constituted various corrugated iron structures which would have had little, if any, impact on the stability of the dune, in comparison to the proposed four storey building with basement.
3. Reference is also made to relevant engineering designs which will be applied, however, such designs should already have been investigated and incorporated into the BAR.

Visual impact and sense of place

1. The architectural impressions provided to the IAPs are insufficiently detailed. One is unable to assess the actual visual impacts of the proposed development without the dimensional heights of the building, which are lacking.
2. The response to the IAPs comments does not deal substantively with the issue of sense of place. The former hotel was in the same style as early Kei Mouth buildings, with a pitched roof, detached buildings and numerous open spaces. It was nestled into the surrounds and was not highly visible from the beach or neighbouring properties. It was thus appropriate within the context.
3. In comparison, the proposed development will rise four storeys and have blank side walls. The single structure will loom over the adjacent properties and be highly visible from the beach and the surrounding residential area. It is thus not suited to the tranquil residential setting in which the site is located and will be considered an eyesore on the landscape.

Capacity of municipal services

1. The BAR concedes that the municipal infrastructure and services are under stress at present, but goes on to imply that the proposed development will alleviate the situation by making more funds available by way of increased rates and taxes. This approach fails to take into account the additional burden that the proposed development with its 102 rooms, conference facilities and restaurant will in fact place upon the municipal infrastructure and services.
2. The Great Kei Municipality will be required to upgrade their services immediately in order to accommodate the proposed development's service requirements and thus will have to make a substantial financial outlay, and thus the funds necessary must be immediately available. The rates and taxes payable in respect of the proposed development will only be due in the future and thus will not be available to assist the municipality in meeting the financial obligations of the requisite upgrade, it will merely assist in reducing the deficit.

Building in an environmentally sensitive area

1. The EAP fails to identify and address the concerns raised in respect of the excavation into a primary dune and the construction of a four storey building thereon.
2. The dune is also incorrectly identified as unvegetated, however, proof of the vegetation is evident in the photographs supplied and references elsewhere in the BAR to indigenous trees.
3. It is our opinion that the site is located within an environmentally sensitive area and specialist input and further assessment is therefore required in order to determine the impacts of the proposed development on the environment.

Town planning issues

1. The response to the issue of zoning raised by the IAPs is misleading and fails to disclose all the relevant information.
2. The site has been incorrectly identified as Residential V zoning. The property constitutes four erven, of which only three are zoned Residential V, whilst the other is zoned Business II.

3. Despite the different zonings, all four erven require applications for consent use and departures from the zoning regulations in order to be utilised for flats / apartments and to alter the building setback lines.
4. The applications are required to be advertised in terms of the relevant legislation, and the EAP has failed to provide conclusive proof of such advertisements. Due process has thus not been followed and the applications are therefore fatally flawed.
5. In respect of the building setback lines, an application is required for the departure from the zoning regulations. It appears from the layout plan provided that such building lines have been applied to the property as if it were one consolidated erf and not comprising four separate erven. We request a copy of the documents pertaining to an application for consolidation of the erven, should there be no such application it is our view that the building lines on the proposed layout are incorrect.

Public access

1. The response to the IAPs comments highlights what appears to be one of the motivating factors behind the new proposed development that is public access to the facilities. This is a contradiction, as the majority of facilities will not be available to the public as they are private sectional title units.

Ad paragraph 2

1. The BAR states that there is no intact indigenous vegetation on the site and that there will thus be wind erosion. These statements are contrary to the latter part of the statement which acknowledges that there are indigenous trees on the site. It is apparent from the photographs provided that the dune is, in fact, covered by vegetation and therefore not subject to erosion. Furthermore, the landowner has admitted to planting buffalo grass on the site, thus the land can therefore not be considered bare and subject to erosion.
2. In respect of the “no-go option” the statements that the vacant land may be utilised for illegal dumping; subject to soil erosion and the invasion of alien species are unfounded. The site is currently surrounded by vacant land which is not used for dumping purposes, thus there is no basis for the assertion that the site will be utilised for dumping purposes in the future.
3. With respect to the issue of soil erosion, any erosion that may occur is as a direct result of the landowner’s activities in demolishing the former hotel and thus they are directly responsible for the rehabilitation of the land in terms of section 28 of NEMA, the duty of care provision. Irrespective of the environmental authorisation decision, the landowner is obligated to remedy the damage caused by their activities, this would include stabilising the dune and the planting of indigenous vegetation.
4. The landowner’s mitigation measures are considered inadequate, in light of the duty of care placed upon them by virtue of NEMA. Despite previous statements that there are protected indigenous species on the adjacent land and given the surrounding areas environmental significance, the landowner has failed to include the planting of indigenous vegetation in their attempts to stabilise the dune. Furthermore, no attempts have been made to accurately identify and record the indigenous vegetation and species on site and the adjacent area prior to the commencement of construction activities.
5. The BAR fails to identify mitigatory measures for the “no-go option” despite having identified several impacts.

Ad paragraph 3

1. As stated previously, the BAR fails to address the issues and impacts arising from the excavation into a primary dune for the construction of a basement and four storey building. This may have serious consequences for the stability of the dune and thus indirectly upon the entire dune system.
2. The assessment identifies the activities associated largely with carrying out the actual construction, namely noise generation; soil erosion; solid waste disposal; employment opportunities; water quality; air quality; clearing indigenous vegetation and the resultant loss of biodiversity.
3. It is clear from the list of potential impacts that the negative environmental impacts are far greater than the positive socio-economic benefits of the proposed development and are far more significant and longer lasting.
4. Although there is a need for socio-economic development and growth, this needs to be in accordance with the NEMA principles and therefore must be sustainable and not purely to the detriment of the environment.
5. In assessing the “no-go option” the BAR has identified the following cumulative impacts; deterioration in water quality and air quality, as well as habitat loss for the surrounding environment. It is unclear how leaving the land as it is may give rise to these impacts and no substantive explanation is provided.
6. With regard to the mitigation measures, it is our view that these are inadequate and inappropriate. Painting a roof green does not address the problem that the visual impacts of the building cannot be properly assessed due to the lack of height dimensions in the plans. Furthermore, a green roof will not detract from the blank side walls.
7. No substantive evidence has been made available in respect of solid waste disposal and there is no confirmation that the landfill site will have the requisite capacity to handle the waste generated by the proposed development. The BAR does not propose any waste management plan for the proposed development and has failed to identify any alternate sources for waste disposal.
8. The planting of indigenous vegetation on the dune is not a mitigatory measure but rather a peremptory measure in terms of the duty of care provision in NEMA, section 28.
9. The BAR fails to include any mitigatory measures for the “no-go option” despite listing several impacts.

Ad paragraph 4

1. The positive employment benefits are neither sufficiently detailed nor substantiated. The socio-economic benefits of the proposed development are dependent upon the longevity and financial viability of the proposed development, and no evidence of any studies therein have been included.
2. The cumulative impacts fail to include the effects of negative water quality on the surrounding environment and its vegetation and biodiversity, for example the effect upon the Red Milkwood trees, a protected species.
3. The statement that vacant land will result in the establishment of an informal settlement is untenable. According to the land use plans the site is currently surrounded by various tracts of vacant land, however, there is no mention of any illegal settlements on these

pieces of land. There is thus no reasonable explanation for listing such activities as potential impacts when there is no likelihood of this occurring.

4. Once again, the cumulative impacts of the “*no-go option*” are unrelated to the proposed activity.
5. The submissions made in respect of the visual impact of the residential units, is, in our view, not expanded upon in sufficient detail in the BAR. It is submitted that the impact of these units will have a seriously negative visual impact on the adjacent landowners, and the mitigation measures as proposed in the BAR do not address the issue adequately, in that insufficient details are provided as to how the architectural guidelines will minimise negative aesthetic impacts.
6. The assertion that the proposed development will be visually more pleasing than the former hotel is unfounded. The former hotel was in keeping with its surroundings and the sense of place with its low roof line, detached buildings and outdoor areas. The proposed development will alter the aesthetic appeal of the area.
7. The statement regarding the noise generated by outdoor parties implies that such events will not occur at the proposed development. This is contrary to earlier statements concerning the need and desirability of the proposed development, whereby members of the public will have access to the facilities.
8. In regard to parking it is our submission that there are insufficient parking bays in terms of the zoning regulations, as the calculations have been based upon the ratios required for the hotel and not for flats or apartments, which require a greater percentage.
9. The suggestion that the proposed development will result in rates and taxes which will profit the municipality is ill conceived as the Municipality will be required to pay for the upgrade to the systems and thus any increase in the municipal budget will be required to offset the deficit caused by the costs of the upgrade.

Ad paragraph 6

1. The BAR fails to address the identification of impacts in substantive detail. It is essential when evaluating an application for environmental authorisation that all relevant information is before the competent authority.
2. In the present situation the landowner seeks to gain the environmental authorisation before putting forth plans as to how the environmental impacts will be addressed, what methods will be used and how the development will be monitored long term. This is not in accordance with the legislative requirements and substantive details are required prior to submitting this BAR in order to allow for informed decision-making.
3. The DEAT guidelines emphasise that the “*no-go option*” must be thoroughly assessed, however, it is apparent from the BAR that there has been no such evaluation in respect of the management of impacts and mitigation thereof should no activities take place on the site. This is contrary to the guidelines and the NEMA regulations.

Ad paragraph 7

1. Several of the issues raised by the EAP have been dealt with elsewhere in this commentary and our responses contained in this paragraph deal with those issues which have not previously been canvassed in the BAR.
2. The EAP is of the opinion that the information contained within the BAR is sufficient to make a decision subject to the recommended conditions, which includes a reference to

audits but fails to include the crucial details as to whether such audits are internal or external and who should be responsible for conducting such audits.

3. Furthermore, the EAP requests an indemnity clause in respect of climate change, which given the property's close proximity to the sea and a river mouth may be significant, but fails to raise the effects thereof in the BAR and supporting documentation.
4. Despite the complexity and sensitivity of the site and its surrounding area, the EAP did not acquire specialist input, which is provided for in terms of regulation 23 (2)(j) of the NEMA Regulations. However, it has come to our attention that the EAP does not have the requisite authority to conduct such environmental assessment single-handedly in terms of the Natural Scientific Professions Act, as they are not a registered scientific practitioner.
5. It is therefore our opinion that the EAP does not have the requisite knowledge and experience to conduct the basic assessment and specialist input is required prior to any environmental authorisation being considered.

CONCLUSIONS

1. Throughout South Africa it has become apparent that developments on dune systems are increasing and can have devastating effects upon the ecosystem and thus such areas must be considered as sensitive and a proper environmental assessment ought to be carried out.
2. It is our view that this development is not within the carrying capacity of the area. Authorising the proposed development will undermine the sense of place of the area as it would transform the property from low density residential into a more densely populated residential area.
3. For the reasons set out above (and based on the somewhat limited information put up to date), it is clear in our submission that the proposed development will be both objectionable and undesirable. Accordingly, the proposed development cannot be said to be beneficial.
4. It is clear from the chain of events and documentation within the Great Kei Municipality file that planning and applications have been deliberated over since 2006, however, at not stage was the public informed. The units were already being sold as having the requisite planning and environmental approval despite no environmental assessment or public consultation having taken place.
5. Such behaviour is at odds with the principles of NEMA and is contrary to the legislation. The basic assessment and public participation process have been hastily carried out in order to submit the application, obtain environmental authorisation and commence construction as soon as possible.
6. Furthermore, it is our submission that the BAR fails to meet the requirements of regulation 23(2) in that not all the necessary information is contained therein and thus the application must fail. The BAR also lacks substantive details in regard to the impacts and mitigation measures which have not been thoroughly assessed, particularly with respect to the *"no-go option."*
7. The BAR and the associated processes, including the public participation process, are thus fatally flawed and therefore environmental authorisation should not be granted based upon the BAR as it stands.

8. We remind you that the applicant requires approvals for the proposed development under a range of legislative provisions additional to those imposed by NEMA and LUPO. Those applications must be advertised and the approvals obtained, regardless of the time it takes to do so, before the applicant can lawfully undertake the proposed development. If such applications have been submitted to the relevant authorities, a report as to the status thereof is required. Please respond to this issue by return.
9. A particular concern which needs to be considered, is the sustainability of further housing in the area and the capacity of existing infrastructure to meet increased demand, particularly if regard is given to such issues as water supply, sewage and storm water drainage, and waste disposal (as mentioned above).
10. Accordingly, if approved, the proposed development will have a noticeable (adverse) effect on our clients' (and other neighbouring landowners') constitutionally enshrined right to:
 - An environment that is not harmful to their health or well-being, and
 - their right to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures, including reasonable and lawful administrative action that (*inter alia*) secures ecologically sustainable development and use of natural resources, while promoting justifiable economic and social development.⁸
11. We look forward to hearing from you regarding the outcome of this matter in the near future. We anticipate (in the event that your client persists with the application in terms of NEMA) receiving a substantially supplemented basic assessment report (which includes substantive and appropriately detailed responses to all the issues raised herein), for our clients' further perusal and response.

Yours faithfully,
SMITH NDLOVU & SUMMERS
Per:

NICHOLAS SMITH

⁸ Section 24 of the Constitution, Act 108 of 1996.