

# **Decision of the Kwazulu-Natal Development Tribunal, Application No. 2003/151 (Hawaan Investments (Pty) Ltd (2003))**

DEVELOPMENT TRIBUNAL  
KWAZULU-NATAL

DEVELOPMENT APPLICATION NUMBER: 2003/151 submitted on behalf of Hawaan Investments (Pty) Ltd by Ndebele Kirby Planners cc and heard on the 29 September 2003 – 1 October 2003 & 29 – 30 October 2003.

Application for the establishment of a land development area in terms of Chapter V Section 31 (2) of the Development Facilitation Act No. 67 of 1995 on sub 417 of Lot 31 No. 1560 Reg. Div. FU. (To be redesignated Erf 1 Hawaan Forest Estate Reg. Div. FU. on registration. Referred to as Hawaan Forest Estate

TRIBUNAL JUDGEMENT

TRIBUNAL

Mr R A F Swart : Chairman

Mrs C Platt

Mr R Haswell

Mr J K Naidoo

APPEARANCES

For Applicant : Mr R Kirby

Mr R Evans

Ms P Naicker

Mr A M O'Neill

Dr M T Mentis

Mr B Breedlove

Mr G Nichols

Mr S Antoni

Mr A M Knox

Mr C P Kroeger

Mr G Nicolson

Mr N Cohen

Mr C Simmer

Ms S George

Mr D L B Clark

Mr H E Harvey

Designated Officer : Ms H Epstein

Deputy Registrar : Mr L Du Toit

Mr G K Suzor

Dept of Traditional & : Mr D Shabane

Local Government Ms S Hlela  
Affairs Ms P Pillay  
Ms J Appelgryn  
Dept of Agriculture & : Ms S Allan  
Environmental Affairs Mr I Felton  
Ms N Zungu  
Dept of Water Affairs &  
Forestry : Mr A Khan

#### OBJECTORS

eThekwini Municipality : Adv. A Stewart  
Dr M Sutcliffe  
Ms S Moonsammy  
Ms T Winstanley  
Dr D Roberts  
Mr R Boon  
Mr T O'Connor  
Mr T Markewicz  
Mr P A Singh  
Mr W Pfaff  
Mr I Duncan  
Ms C Kerr  
Ms J Subban  
Ms M Allopi  
Mr J Brickhill  
Ms J Redman  
Mr G Clark  
Ms K Gouden  
Ms S Pooran  
Mr B Govender  
Ms B Parker  
Mr C M Simmer  
WESSA : Ms A Armstrong  
Ms D Dold  
Mr G Cavens  
Mr B Page  
Ms S Sweet  
Mr G Cairns  
Mr A J M Carnegie  
Ms PE Carnegie  
Mr P Laws  
Mr W Duthie  
Ms C Kay  
Mr K J Kitchin  
Mr I Hunter

Objector : Mr W Menne  
Mr G Pullan  
Botanic Project : Mr D J Henry  
Mr R Lorimer  
INTERESTED & AFFECTED PARTIES  
Moreland : Mr N Brauteseth  
Mr T C Chetty  
Mr D T Jollands  
Mr R Wilkinson  
Ezemvelo KZN Wildlife : Mr A Blackmore  
Ms B McKelvey  
Media : Ms J Gowans

Mr T Carnie  
SECTION A

#### GENERAL COMMENTS

1. This application relates to a proposal for an upmarket housing development on land adjacent to, and including a portion of, the Hawaan Forest at Umhlanga Rocks.
2. The land is privately owned, has recently been transferred in the name of the applicant company, Hawaan Investments (Pty) Ltd, and is described as Sub 417 of Lot 31 No. 1560 Reg. Dev. Fu.
3. The development proposal for which permission of this Tribunal is sought, involves the construction of 201 residential units some of which will be freestanding units and others, part of two cluster sites. The applicant declares its intention “to create an upmarket, secure residential estate of quality unparalleled in the Municipality area, with the average price being in the vicinity of R2 Million per home.”
4. The applicant further states that the development will have “an Eco Theme” involving the planting of indigenous trees, shrubs and grasses, designed to enhance the integration of flora and fauna between the estate and the adjacent forest. In addition the applicant has set up a Trust, the prime purpose of which is to monitor and protect that portion of the Hawaan Forest which protrudes onto its land.
5. The total area of the land development site is 63,5357 hectares of which approximately 31,57 hectares is taken up by that portion of Hawaan Forest reserve which forms part of the applicant’s land. The total area of the forest is said to be 101hectares.
6. This application and its hearing over five days has evoked considerable public interest and a mixed reception from interested and affected parties no doubt because of the sensitivity of the Hawaan Forest area from an environmental and ecological point of view, and also because of the high degree of expertise enjoyed by the witnesses introduced by the parties to give evidence on their perception of the pros and cons of the proposals.
7. Paradoxically although there has been a tendency on the part of the

some of the parties to indulge in hyperbole and suggest that the development poses “disaster for the forest”, the one aspect on which there has been absolute unanimity on the part of the principal actors before the Tribunal has been their professed desire to preserve and improve the forest.

8. The preservation of Havaan Forest is clearly of prime importance to many and the fervour and sincerity with which they have stated their view before this Tribunal has been impressive. Wordsworth wrote of another forest at another time

“one impulse of a vernal wood  
may teach you more of man  
of moral evil and of good  
than all the sages can”

The impulse emanating from love of Havaan Forest at this hearing has certainly evoked emotional reactions bad and good and it is for the Tribunal to assess the value of these together with or against the opinions of the sages – the experts who have appeared before us.

9. There are in excess of 30 objectors to the application, most of them private individuals but the major role players ranged against the applicant are eThekweni Municipality, which approves “in principle” of the development but objects in strong terms to its extent and location and to certain other aspects, and the Wildlife and Environmental Society of South Africa (WESSA).

10. Twelve experts (or “sages”) who have given evidence have included Dr Mentis, Mr Breedlove, Mr Nichols, Mr Nicholson for the applicant all of them trained and recognized environmental and/or ecological scientists, while the Municipality has relied on Professors O’Connor and Lawes of similar qualifications together with members of its own Department of Environmental Management represented by Dr Debra Roberts and Mr Richard Boon and others. WESSA invited independent ecologist and environmental expert Mr Bruce Page.

The Department of Agriculture and Environmental Affairs was represented by Mrs Sarah Allan who handed in written evidence from Dr Aidie supporting the Record of Decision issued by her Department. Mr Blackmore represented Ezemvelo KZN Wildlife Society and gave qualified support to the application.

11. It needs to be recorded that by consent of the applicant and the Tribunal the Municipal Manager of eThekweni Municipality, Dr Michael Sutcliffe was introduced at the hearing in order to give evidence in support of the Affidavit which Dr Sutcliffe had lodged relating to the eThekweni Municipality position in respect of the application and to give an overview of the planning objectives of the eThekweni Municipality in relation to the broader area including and surrounding the Havaan Forest and related matters. This intervention took place during the course of the applicant’s

presentation of the development proposals.

12. It must also be recorded that the Department of Agriculture and Environmental Affairs has issued a Record of Decision giving support to the applicant's proposals subject to conditions and that the applicant has indicated acceptance of these conditions. It is also recorded that evidence has been given to the Tribunal that certain parties have lodged an appeal against to the Record of Decision in terms of the Environmental Conservation Act and this fact has been noted by the Tribunal.

The issue was referred to on the first day of the hearing when the Tribunal offered discussion on points in limine and the Tribunal ruled that notwithstanding the appeal against of the Record of Decision for the purpose of this hearing the Departments response in the form of its Record of Decision, conformed with the requirements of the Development Facilitation Act.

13. There is voluminous evidence from all of the expert witnesses who appeared and gave evidence either under Oath or Affirmation covering the very wide range of environmental and ecological aspects relevant to this application. In addition, as indicated earlier lengthy oral evidence was given and subjected to cross-examination by the Tribunal and interested and affected parties. It would be inappropriate and time consuming to endeavour to repeat in detail the evidence adduced during the hearing. It is emphasized that between the expert witnesses of the applicant and the objectors the Tribunal has had before it a barrage of environmental talent whose CV's reflect a wide range of academic expertise and excellence. It also needs to be noted that while there were elements of general agreement amongst them there was also a wide range of disagreement where one was not able to agree with the other on some of the more critical environmental issues.

14. In general terms the expert witnesses regaled the Tribunal with impressive and fascinating environmental and ecological argument and theory sometimes almost overwhelming in its scientific detail, which highlighted the conflicting evidence of what could or could not happen to a forest habitat threatened with neighbouring development by humans. The applicant's experts testified extensively to the merits of Functional Based Habitat Design concluding that it could only be to the benefit of the Hawaan habitat, while the objectors tended to be disdainful of the notion claiming that it had to yet be adequately and satisfactorily tested. In general terms they held the view that as required by NEMA sustainable development requires a risk averse and cautious approach and the conclusion was that the development in its existing form did not satisfy that requirement.

15. The eThekweni Municipality both in the form of the written Affidavit presented to the Tribunal on behalf of the Municipal Manager, Dr Sutcliffe and in the evidence which Dr Sutcliffe gave orally indicated that its approval in "principle" of the development related entirely to consideration of

property development South of what the Municipality referred to as the pepper tree hedge, which the Municipality's planners had now selected as the line beyond which no development referred to in this application could be approved by the Municipality.

16. It has been argued by the applicant and others that this line is a purely arbitrary line which had not been referred to in earlier negotiations between the applicant and the representatives of eThekweni Municipality but the Municipality has indicated its adamantness that this is the line beyond which it is not prepared at this stage to consent to any further development. As the hearing proceeded it became more and more evident that there was a good deal of unanimity amongst all the parties, when pressed to express an opinion, that development South of the pepper tree hedge line could find general approval subject to certain conditions. Amongst the matters that were raised as concern was the question of the placing of the development in relation to the forest edge and the applicant has indicated that it is prepared to accept in its planning a 20m buffer strip or set back or eco-tone area. The eThekweni Municipality has also indicated in its evidence that it would require a 20m buffer zone and expert environmentalist Professor Lawes has confirmed that in his opinion that would be sufficient in order to maintain the integrity of the forest area.

This attitude is also reflected in the objectors documentation referred to as MOSS 3 on page 37 where it stated that "south of the fallow cane land on the recently farmed area development should not be permitted closer than 20m from the forest edge. The 20m eco-tone/buffer area must be maintained as a sub climax state forest edge". Other witnesses including KZN wildlife indicated a similar position relating to the proposed buffer zone.

On the question of density it also became evident from the evidence that there was general agreement supported inter alia by Mr Markewicz on behalf of the eThekweni Municipality that a density of 6 – 10 units per hectare should be applied.

17. The parties also accepted that the applicant had shown commendable initiative in setting up a trust in order to preserve and monitor the forest under its ownership and it was noted that a Home Owners Association would in due course become the body charged with the responsibility of ensuring that proper maintenance of the forest area was provided.

18. It is clear from the evidence that during the course of the hearing the Tribunal was being asked to deal with what amounts to virtually two components of the development proposal namely development south of the pepper tree hedge line and development north of the line.

19. The second component namely that north of the line relates to development in respect of which the evidence itself is extremely obscure or in the terms of eThekweni witnesses "fuzzy":- On the one hand the applicant proposes to develop north of the pepper tree line to the line referred to as

the fig tree line in order to situate a cluster development in what appears to be a particularly sensitive area relating to the forest.

This has resulted in fierce opposition from the objectors. On the other hand the eThekweni Municipality in its opposition to any development north of the pepper tree hedge line has not been able to produce a clear picture as to what its final planning objectives will be with regard to the strengthening and preservation of the forest and its habitat. Indeed 12 expert witnesses gave varied opinions on the appropriate use of this area. The topography of the area north of the line is varied in terms of both slope and aspect, it is not a homogeneous one and it would seem that both the applicant and the objectors need to give far more detailed consideration as to what the future of this area should involve.

20. The Tribunal has been impressed by the evidence given by all experts and in particular by Mr Bruce Page and Mr Blackmore who dealt very directly and effectively with the requirements of development along the forest edge in order to preserve the forest and regenerate grasslands in particular along the forest edge for the benefit of the forest and its inhabitants.

Mr Page holds the view that the seral grassland (referred to as fallow land in the Environmental Impact Report) at the northern end of the development is in fact a critical component of the Coastal forest environment.

Mr Page asserts that the grassland adds significantly to the overall biodiversity of the area and that it is an essential habitat for species that occur in the forest. It is clear to the Tribunal that this aspect needs to be further examined by those involved in any long term planning for the area north of the pepper tree line.

21. By eThekweni's own admission, emphasized by its earlier appeal for a three month adjournment the City plan for the northern area has been recently and hastily conceived and identified. In addition – and this is significant - it was conceded by eThekweni's Counsel in questioning that the City will be prepared to look at alternative layouts for the area north of the hedge, provided the applicant is prepared to consider alternative layouts south of the hedge. The Northern area consists of a number of elevated hummocks and intervening drainage troughs. All are agreed that the forest should be allowed to re-generate itself over much of this now fallow land as possible and as Mr Page has indicated it is also vital to retain a grassland fringe. For this reason, the Tribunal is adamant that no cluster units should be built in this area. However, the Tribunal does not discount the possibility that a number of carefully placed houses commanding good views overlooking but removed from the forest could be built in this area. The Tribunal therefore envisages a few houses with a regenerating forest fringe with a specific EMP for these regenerating areas and these properties could be targeted by the applicant as an exclusive niche in the housing

market for nature lovers.

The Tribunal considers that this approach rather than the drawing of arbitrary lines or falling back enables both residential development and forest regeneration to co-exist in the area.

22. The Tribunal is conscious that regeneration will require resources and in particular financial resources and this can be forthcoming from residents of an exclusive type of residential development. The Tribunal believes it is worth pursuing.

23. The history of the changes of ownership in respect of the proposed development site and how the changes have taken place and whether they should have taken place has been the subject of much of the discussion before the Tribunal. This aspect is, however, only of historical interest. The de facto matter is that the land is now registered in the name of the applicant. It is privately owned land. No alternative uses of the land other than what is the subject of this application are before the Tribunal. The “look for alternative site” option, and the “no development at all” option are therefore not relevant to this hearing.

Similarly the question as to whether the developer was misled in the early interactions with the eThekweni Municipality representatives as to the “fig tree line” or the “pepper tree hedge line”, or not, while clearly still a matter of dispute between the two parties, cannot assist the Tribunal at this inquiry. The developer purchased the land unconditionally and accepted the risk that, that entails. The fact is the Municipality, has declared a position involving “the pepper tree hedge line” (whether arbitrarily or not) and that has influenced much of the discussion before the Tribunal.

24. In argument at the close of the hearing of evidence the principal parties raised or re-iterated a number of issues: -

a. The applicant claimed that the development complied fully with the principles enshrined in the DFA in that it provided for sustainable development and effective utilization of land. Mr Evans for the applicant also outlined various possible alternative land uses for the development site and stressed that the applicants’ proposals were by far the most acceptable because they provided jointly for sustainable development and protection of the forest. Mr Evans also averred that not one of the actions listed by the Municipality’s expert witnesses as inappropriate development actions were being breached by the applicant.

On the contrary, the creation of the Trust to help preserve the forest, the concession to broaden the so called “pinch point” from 275m to 400m was impressive evidence that the applicant is pro-active in its concern for the forest and its environment.

b. Advocate Stewart in his address in argument dealt, inter alia with,:-  
· The legal environment, the DFA principles, other environmental legislation. The Tribunal is fully cognisant of these matters and of its responsibilities in respect of environmental legislation.



· The constitutionality of the planning role of the eThekweni Municipality, the authority of the different spheres of government, the defining of executive and legislative authority, the effect of allocation of authority between the different spheres and Mr Stewart's interpretation of the interaction of the DFA with the KZN Town Planning Ordinance. Mr Stewart's arguments were interesting but, with respect, not new. All these matters have been the subject of a variety of opinions by Senior Counsel and others around the country for some years, but have yet to be tested fully in the superior court. Until they are there can be no certainty as to their efficacy in law.

It is not the function of this Tribunal to seek conflict with any municipality; it works closely with Municipalities throughout KZN in planning and development matters, and is frequently used by municipalities – including eThekweni – as a forum before which to seek approval of their own development plans.

It is worth noting however that the DFA was unusual and prioritized legislation in 1995 – one year after the New South Africa came into existence. It is questionable therefore, whether it could have been the intention of Parliament to allow planning schemes of a Local Authority – be it a Metro City or a platteland dorp – automatically and without good reason to preclude a Tribunal from considering the orderly fast tracking of development, which is the *raison d'être* of the Act.

· In the course of his argument Mr Stewart also referred to the Municipality's position in respect of Land Development Objectives (LDO's). It is common cause that for reasons placed before the Tribunal there are no LDO's in place in KwaZulu Natal. The Tribunal notes however Mr Stewart's assertion that "the city has in principle adopted LDO's for the area in question" and Mr Stewart uses this argument in support of his clients' insistence in opposing development north of the pepper tree hedge line. It needs to be recorded that none of the points regarding the constitutionality of the DFA process were raised by Mr Stewart as points in limine at the commencement of the proceedings.

· In summary, the Tribunal has not been influenced in its deliberations on the evidence before it in this application by these aspects of Mr Stewart's argument which relate to a view that the operation of the Tribunal should be necessarily restricted in the manner suggested. If and when it should become necessary to test the issue in a superior court the Tribunal is confident that all interested parties will no doubt welcome a definitive ruling.

c. In her argument, Ms Armstrong aligned herself with "much of what Mr Stewart has said", indicated that the development proposals would have a negative impact on the forest and significantly drew attention to the lack of ecological information before the Tribunal particularly in respect of the area north of the pepper tree hedge line. She also drew the Tribunal's attention to its responsibilities in respect of the environmental legislation commonly known as NEMA.

25. The Tribunal has given deep consideration to the voluminous documentary evidence before it and having listened attentively over five days to the impressive oral evidence has come to the following conclusions: -

a. That the proposed development should be considered in two separate components, namely Component 1 being development South of the pepper tree hedge and Component 2 being development North of the pepper tree hedge.

b. That Component 1 of the proposed development namely South of the pepper tree line is hereby approved subject to the conditions which will be more fully set forth in Part B of this judgment which will specifically provide that there be a buffer line of not less than 40m from the forest edge in order to encourage regeneration of grasslands to preserve the forest and its habitat and that a revised layout plan be produced for consideration which will conform with a density rate of between 6 – 10 units per hectare. The Tribunal believes it is for the applicant to decide whether such replanning of the first component area will involve cluster units or free standing units or both. The Tribunal will require an amended layout plan and Conditions of Establishment in respect of this component of the development to be submitted to it for approval by not later than the 4 December 2003 before any development can take place.

The Tribunal will invite comment from interested parties to such plan, such comment to be received by not later than 18 December 2003.

The Tribunal believes that the conditions referred to above comply fully with the spirit of those imposed by the environmental legislation known as NEMA and that in the setting of the buffer zone they go beyond what the eThekweni Municipality and other objectors have agreed to as a buffer that they are manifestly “risk averse” and, that they will go a long way towards meeting the need so effectively demonstrated by the witness Bruce Page and Mr Blackmore for a greater attention to be paid to the regeneration of grasslands adjacent to the forest. The Tribunal has also made it clear that the density proposals should not differ from those which have clearly been advanced by most of the major parties at the hearing.

c. The second Component namely north of the pepper tree hedge. The Tribunal will not grant approval for development north of the pepper tree hedge at this stage. The Tribunal will require the applicant to reconsider its development objectives preferably in consultation with the eThekweni Municipality regarding this portion of the development land. The Tribunal therefore makes an order in terms of Regulation 12(b) of the Development Facilitation Act, No 67 of 1995 that Component 2 become a different component of this application to be dealt with separately at a separate hearing of the Tribunal. The Tribunal will await the advice of the applicant in this connection and the separate hearing will be convened by the Tribunal.

d. In the meantime, as indicated above Component 1 of the application is

approved subject to the strict adherence to the terms and conditions hereinafter set forth.

## SECTION B

This application made in terms of the Development Facilitation Act (Act 67 of 1995) for the establishment of a land development area on proposed Erf 1 Hawaan Forest Estate Reg. Div. FU. (previously known as Sub 417 of Lot 31 No. 1560 Reg. Div. F.U.) is hereby approved, subject to the following:

### SPECIAL CONDITIONS

1. The application is approved for development south of the line known as the pepper tree hedge line.
2. The application will provide for a maximum density of between 6 – 10 units per hectare.
3. The development will provide for a buffer zone between the units to be constructed and the forest edge of not less than 40m.
4. The developer will submit an amended layout plan and set of Conditions of Establishment for approval by the Tribunal relating to the development south of the pepper tree hedge line. The Conditions of Establishment shall comply substantially in all major respects with those which follow attached to the Judgment, but will be adapted to provide for the layout plan restricted to the Component 1 development.
5. The conditions laid down in the Record of Decision of the Department of Agriculture and Environmental Affairs suitably adapted to the revised layout if necessary, shall be strictly adhered to and more particularly the preparation of Environmental Management Plan's in terms of sections 9.19 and 9.20 of the Record of Decision be undertaken in consultation with eThekweni Municipality, WESSA, and Ezemvelo KZN Wildlife.
6. There shall be no development at this stage north of the pepper tree hedge line and this aspect will be dealt with as a separate component application to be brought in terms of Regulation 12(b) of the Development Facilitation Act, No.67 of 1995.

### CONDITIONS OF ESTABLISHMENT

#### 1. Designation:

The name of the Township shall be Hawaan Forest Estate which name has been confirmed by the Surveyor-General.

#### 2. Layout:

The land Development shall be laid out substantially in accordance with Plan no. 2273/1 dated 18 March 2003 prepared by Ndebele Kirby Planners cc.

Future subdivision of Erven 106 and 115 shall be approved by the Local Authority in terms of Section 35 of the D.F.A. without the need for advertisement or public notification other than to the Hawaan Conservation Trust.

Approval of minor changes to any Component of the layout and/or housing types shall vest in the Local Authority. Any major divergence from the

layout plan shall be referred back to the Tribunal for approval in terms of Section 35

3. Lodging of the General Plan:

General Plan and subdivision Register: The applicant shall lodge General Plans with the Surveyor-General for approval as contemplated in section 23 of the Development Facilitation Act No. 67 of 1995.

4. Opening of the Township Register:

A print of the approved General Plans shall be lodged with the Registrar of Deeds, together with a copy of these conditions and the Title Deeds under which the land is held for the opening of a Township Register as contemplated by Section 37 of the Development Facilitation Act No. 67/1995.

5. Provision of Services:

(a) The land development applicant and the relevant local government body shall provide and install the services in the land development area, as provided for in terms of Section 40 of the Act and detailed in the report dated 7 March 2003 from Stemele Bosch and in accordance with the letters of confirmation that Bulk Services are available from the following bulk service providers:

EtheKwini Water

EtheKwini Waste Water

EtheKwini Electricity

EtheKwini North Operational Entity (Roads & Stormwater)

EtheKwini Solid Waste

(b) Onsite sewage disposal will be provided by the developer until such time as the eThekweni Municipality has the capacity to receive the sewage from the development at their sewage disposal plant.

6. Geotechnical Investigation:

A detailed geotechnical investigation shall be conducted prior to the development of each Component of the development.

7. KwaZulu-Natal Heritage Act of 1997:

Any archaeological mitigation as identified within the Archaeological Report and authorised and approved by Amafa, shall be carried out to the satisfaction of Amafa before construction commences.

8. Environmental Record of Decision:

The Record of Decision (EIA 3771) issued by the Department of Agriculture and Environmental Affairs together with the requisite Environmental Management Plan prepared by Guy Nicolson (dated ..... 2003) shall be adhered to.

9. Legislation to be suspended

The Following Laws on Physical Planning:

· Chapter III & sections 44, 45 & 47bis of Chapter IV Town Planning Ordinance No. 27 of 1949.

(suspended for a period of twelve months from the date of approval by the

Tribunal)

- Act 70/70 Subdivision of Agricultural Land Act
- Removal of Restrictions Act, 1967 (Act No. 84 of 1967):

Upon the date of approval of the land development application in the Provincial Gazette, the following conditions of title shall be removed:

Title Deed No. T266/1976:

Notarial Deed No. K216/94 dated 16/2/94 (Appendix A)

10. Application of Land Use Controls:

The Land Use Controls for Hawaan Forest Estate marked Annexure A, shall apply in the Land Development area:

These controls are intended to be included in the Umhlanga Rocks Town Planning Scheme No 1 in course of preparation and shall apply in addition to all other relevant controls in the Town Planning Scheme.

These controls are an interim measure and will be superseded when new controls in terms of the Land Use Management systems or any other equivalent system are instituted.

11. Hawaan Forest Conservation Trust:

The owner of Erf 2 shall manage and conserve the Hawaan Forest in terms of a Conservation Trust to be formed to the satisfaction of the Local Authority, the Department of Agriculture and Environmental Affairs, Ezemvelo KZN Wildlife and the Wildlife and Environment Society of South Africa.

The general public shall be granted access to the Forest under control of the Trust.

Such Conservation Trust is to exist in perpetuity.

12. Plan Approval:

i). Every erf shall have a Site Development Plan, Landscaping Plan and Building Plan prepared for it by the developer and approved by the Local Authority prior to any construction on the erf and development on the erf shall be in accordance with such Plans.

ii). Approval of any alterations by any Home Owner to the above mentioned plans shall be obtained from the Local Authority with the provision that no Building Plan may be submitted unless revised Site Development and Landscaping Plans have been reviewed and accepted, in writing, by the Home Owners' Association and provided that the Building Plan has been recommended, in writing, for approval by the Home Owners' Association.

#### D. CONDITIONS OF TITLE

1. Home Owners Association: (H.O.A.)

A Home Owners Association shall be formed, and all owners shall become members of the H.O.A. and ascribe to the rules and regulations of the H.O.A. and no erf/sectional title unit shall be transferred unless the transferee has become a member of the H.O.A.

The H.O.A. shall become members of the Hawaan Forest Conservation

Trust and ascribe to the rules and regulations of the Trust.

2. 5m Omnibus, Sewer and Drain and Conservation Servitudes:

All Erven (including Access Erven) except erven 2, 57, 95, 108 and 131 shall be subject to the following condition:

The Local Authority, relevant Service Provider or H.O.A. shall, without compensation, have the right to plant any vegetation and to erect, lay and maintain sewers, drains, water supply piping within such servitude and electricity mains above or underground and shall have reasonable access thereto for the purposes of maintenance, removal or extension and the owner of the land shall, without compensation, be obliged to allow the sewerage and drainage of any other land or street to be conveyed along such sewers and drains and shall not permit such drain to be damaged or allow any material from whatever source to impede the flow of water within it.

No buildings or other structures shall be erected within the aforesaid servitude area and no large-rooted trees shall be planted within the area of such servitude or within 1 (one) metre thereof nor shall the ground level therein be altered without the written consent of the local authority or H.O.A.

3. Trunk Sewer:

Erven 2, 56 and 57 and 108 shall be subject to a pipeline servitude 3 metres wide as depicted on S.G. 2382/1977 in favour of the eThekweni Water, as already created in Deed of Servitude No. K1206/1980S.

4. 3m Link Sewer Servitude:

Erf 2 shall be subject to the following servitudes to be registered on the General Plan substantially in accordance with the locations marked A, B, C, D.

The Local Authority, relevant Service Provider or H.O.A. shall, without compensation, have the right to erect, lay and maintain link sewers within such servitudes and shall have reasonable access thereto for the purposes of maintenance, removal or extension, provided that no undue damage to any indigenous vegetation shall occur in exercising this right.

No buildings or other structures shall be erected within the aforesaid servitude area and no large-rooted trees shall be planted within the area of such servitude or within 1 (one) metre thereof nor shall the ground level therein be altered without the written consent of the local authority or the Hawaan Conservation Trust.

5. Party-wall Servitude:

Party-wall servitudes as reflected on the general plan/s shall be registered over and in favour of the affected erven.

**C. REASONS FOR JUDGEMENT**

1. The development complies with the general principles outlined in Chapter 1 of the Development Facilitation Act in various respects and more particularly in that:-

- It will promote the integration of social, economic, institutional and physical aspects of land development.
- It will promote the availability of residential and employment opportunities.
- It will discourage the phenomenon of urban sprawl and contribute to development of a more compact city.
- It will contribute to the further development of schools and capacities of disadvantage persons involved in land development.
- It would encourage environmentally sustainable land development practices and process.

2. The development of component 1 as specified by the Tribunal will add a substantial economic asset to the rateable land base available to the Municipality while at the same time preserving a valuable natural environmental asset in the form of the Hawaan Forest.

3. The development will conform to the Municipality's broader plans of encouraging controlled land development, and the controls applied by this judgment together with the Trust to be created to monitor and preserve the forest will confirm the Municipality's commitment to protect its environmental assets.

4. The controls imposed by this judgment when added to the commendable and pro-active commitment to the environment by the developer in addition to the controls contained in the Record of Decision by the Department of Agriculture and Environmental Affairs comply more than adequately with the requirements outlined in the National Environmental Management Act (NEMA) and in particular the requirement referred to in Chapter 1, principle 4(a)(i) and (vii) of that Act which states, "sustainable development requires the consideration of all relevant factors including the following, that the disturbance of eco-systems and loss of biological diversity are avoided, or , where they cannot be altogether avoided, are minimized and remedied .....that a risk averse and cautious approach is applied, which takes into account the limits of current knowledge about the consequences of decisions and actions." The Tribunal in its judgment has gone beyond the requirements identified both by the applicant and most of the environmental scientists for the objectors in requiring a 40m eco-tone zone between the development and the forest. The objector's reservations – including those of the eThekweni Municipality – in respect of other aspects of the development can be accommodated in the compilation of the Environmental Management Plans to which the principal objectors must be party.

5. The development land is privately owned and with most of the constraints required by the judgment in place, the developer should now be able to proceed without undue delay with a development which can be economically viable albeit involving a revised layout plan which probably will combine cluster with free standing units. The revision of the layout plan must comply with the density ratio referred to in the judgment and could

result in the creation some 140 residential units.

6. While the judgment does not permit any development beyond the pepper tree hedge line at this stage it does not close the door on some development being considered as part of a separate component after the applicant and the objectors have had an opportunity of giving wider and broader consideration as to what precise steps are necessary to preserve the integrity of the forest on that portion of the applicants land.

7. For the moment the development plans as amended by the Tribunal will allow reasonable development for the applicant company while at the same time the integrity and the existence of the Hawaan Forest will in fact be more protected and preserved than it is at the present time.

8. Given the fact that the land is privately owned the judgment allows the developer to proceed with development while at the same time meeting the reasonable reservations of the objectors.

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MR R A F SWART  
CHAIRMAN  
KWAZULU-NATAL