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## FORENSIC SERVICES

### FORENSIC REPORT

#### FORENSIC INVESTIGATION INTO ALLEGED IRREGULARITIES RELATING TO THE DISPOSAL OF ERF 165639, COMMONLY REFERRED TO AS SITE B, TO GROWTHPOINT PROPERTIES LIMITED

DATE: 27 February 2019

CASE NO: FSD 064/18-19

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## INVESTIGATION TEAM

NAME	DESCRIPTION
██████████	Chief Forensic Services
██████████	Manager Forensic Services
██████████	Principal Forensic Officer
██████████	Senior Forensic Officer (lead investigator)
██████████	Forensic Officer
██████████	Assistant Forensic Officer

## ROLEPLAYERS

NAME	DESCRIPTION
Anderson	Mr William Anderson, Manager: Immoveable Property Planning, Immoveable Property Management, Assets and Facilities Management
Aucor	Tradeport 62 (Pty) Limited trading as Aucor South
CBC	Compagnie Generale de Batiment et de Construction
Chambers	Ms Sally Chambers, Senior Professional Officer, Property Management
City	The City of Cape Town
Coessa	Reality Dynamix 10 (Pty) Ltd trading as Coessa Development Consortium
De Lille	Ms Patricia de Lille, Erstwhile Executive Mayor
Devland	Devland Construction (Pty) Ltd
Diamond	Mr Stuart Diamond, Councilor, Executive and Councilor Support
Dibowits	Mr Martin Dibowits, Auctioneer previously employed at Aucor Auctioneers

<b>FS</b>	Forensic Services, Probity, Office of the City Manager
<b>Gelderbloem</b>	Ms Ruby Gelderbloem, Director: Property Management
<b>Growthpoint</b>	Growthpoint Properties Limited
<b>Herron</b>	Mr Brett Herron, erstwhile Councilor of the City of Cape Town
<b>Human</b>	Mr Andre Human, Manager: Property Disposals and Acquisitions, Property Management
<b>IPAC</b>	Immovable Property Adjudication Committee
<b>Jacoby</b>	Mr Kevin Jacoby, Chief Financial Officer
<b>[REDACTED]</b>	<b>[REDACTED]</b>
<b>Leslie</b>	Ms Juliet Leslie, Principal Planning Professional, Integrated Urban Management Portfolio
<b>Lewis</b>	Ms Tania Lewis, Head: Property Disposals, Property Management
<b>Marais</b>	Mr David Marais, Transport and Urban Development Management Investment Specialist

<b>Mbandazayo</b>	Mr Lungelo Mbandazayo, City Manager
<b>Ndaba</b>	Ms Lindiwe Ndaba, Portfolio Manager Probity
<b>Neilson</b>	Mr Ian Neilson, Deputy Executive Mayor
<b>Pelser</b>	Frank Pelser, Advocate of the High Court of South Africa
<b>Pendlebury</b>	Mr Paul Pendlebury, Head: Valuations, Property Management
<b>Rode</b>	Rode and Association, Property Consultants, Valuers and Town Planners
<b>SCM</b>	Supply Chain Management
<b>Scott</b>	Ms Karen Scott, Professional Valuer, Rode and Association, Property Consultants, Valuers and Town Planners
<b>September</b>	Mr Gregory September, Section Head: Land Use, District B
<b>Slamang</b>	Mr Siraj Slamang, Senior Professional Officer, Valuations, Property Management
<b>Swart</b>	Ms Charlain Swart, Legal Advisor, Legal Services

<b>Vink</b>	Mr Basil Vink, Chief Audit Executive
<b>Whitehead</b>	Ms Mellissa Whitehead, Executive Director: Transport and Urban Development Authority

## EXHIBITS

DESCRIPTION	EXHIBIT
Copy of request received from the City Manager	Exhibit 1
Copy of document titled "REZONING OF ICS-POWER STATION SITE"	Exhibit 2
Copy of memorandum titled "SUBDIVISIONAL APPROVAL VARIOUS ERVEN CAPE TOWN, COEN STEYTLER & HANS STRYDOM AVENUES, LONG STREET & TABLE BAY BOULEVARD: ICS DEVELOPMENT; LAND OWNER: C.C.C."	Exhibit 3
Copy of amendment application to the subdivisinal area	Exhibit 4
Copy of memorandum titled "AMENDMENT TO SUBDIVISIONAL APPROVAL VARIOUS ERVEN CAPE TOWN, COEN STEYTLER & HANS STRYDOM AVENUES, LONG STREET AND TABLE BAY BOULEVARD: ICS DEVELOPMENT; LAND OWNER: C.C.C."	Exhibit 5
Copy of letter addressed to the Town Clerk dated 22 May 1996	Exhibit 6
Copy of Substitution scheme and memorandum dated 5 June 1996	Exhibit 7
Copy of page 37 of the Substitution Scheme	Exhibit 8
Copy of Deed of Transfer in respect of Site AB (erf 158112)	Exhibit 9
Copy of memorandum titled "ICS POWER STATION SITE: REVERSION TO PREVIOUS SUBDIVISION AND REZONING CONDITIONS ERF 158112 CAPE TOWN" dated 29 January 2001	Exhibit 10
Copy of SG Diagram 4951/2001 and SG Diagram 4949/2001	Exhibit 11
Copy of valuation report dated 4 July 2016	Exhibit 12



Copy of report to Council with reference SCMB 32/01/10	Exhibit 13
Copy of Council minutes dated 26 January 2011	Exhibit 14
Copy of Aucor's mandate	Exhibit 15
Copy of auction pack compiled by Aucor	Exhibit 16
Report compiled by Dibowits	Exhibit 17
Copy of report submitted to IPAC dated 23 September 2016	Exhibit 18
Copy of minutes in respect of IPAC	Exhibit 19
Copy of Rules of auction and sale conditions	Exhibit 20
Copy of summary provided by Planning and Building Development Management	Exhibit 21
Copy of e-mail received from Province	Exhibit 22
Copy of Rode report	Exhibit 23
Copy of Adv Pelser opinion dated 10 October 2018	Exhibit 24
Copy of the Valuation Guidelines	Exhibit 25
Copy of e-mail received from Gelderbloem	Exhibit 26
Copy of Adv Pelser opinion dated 8 October 2018	Exhibit 27

Copy of Adv. Pelsler opinion dated 14 November 2018

**Exhibit 28**

1. **Mandate**

101 This investigation was mandated by the City Manager on 25 October 2018, in accordance with the System of Delegations of the City of Cape Town, Section 12(2) of the City Manager's delegated authority which states, *inter alia*, that he is empowered:

*"To authorise forensic and ethics investigations in relation to any alleged fraud, corruption or other criminal activity, maladministration and/or negligence on the part of any employee, any municipal entity, agent, contractor, supplier or service provider to the City of Cape Town"*

2. **Background**

201 We received a memorandum<sup>1</sup> dated 4 October 2018, from the City Manager, Mr Lungelo Mbandazayo (Mbandazayo) addressed to the [REDACTED] and the Portfolio Manager Probity, Ms Lindiwe Ndaba (Ndaba) with subject line "REQUEST FOR FORENSIC REVIEW: GROWTHPOINT - DUE CARE AND PROCESS AND ALIENATION OF PROPERTY".

202 From a perusal of the aforementioned memorandum, Mbandazayo makes reference to a meeting which took place on 4 October 2018 and the potential need for collaboration with the Chief Audit Executive, Mr Bazil Vink (Vink) and [REDACTED].

203 In the memorandum, Mbandazayo writes the following:

"...The scope of work should amongst other things, but not limited thereto, encompass the following for each engagement-

a. Growth Point

- i. Determine gaps in the existing prices related to property disposal: sales (potential business improvements), including -
  - Market Price Testing;
  - Development rights and restrictions – zoning, subdivisions, cognisance of legislative requirements; and

<sup>1</sup> Exhibit 1: Copy of request received from the City Manager

- Commercial property requirements (alignment with City strategies).
- ii. Case analysis in terms of
  - Was due process followed
    - What option, if any were available for Erf 165639 at the time;
    - Who understood these options;
    - How were these options communicated; and
    - From whom to whom.
  - Was due care exercised
    - Was a business case prepared;
    - What was the official city of Cape Town position in terms of total permissible floor area (bulk)
      - How was this determined and by whom
      - And which time
    - How was this communicated – from whom to whom and at which time.
- b. Alienation of Property  
 Taking into consideration all past and present reviews on Property Management define the areas yet to be addressed by the summary of the file and the file content that will be made available to your office.  
 Note: The summary of the file may give further context..." (sic)

204 Mbandazayo subsequently authorised the above to be investigated.

205 It should, however, be noted that item a(i) falls within the Internal Audit ambit and therefore, same was referred to the Chief Audit Executive, Vink. For the purposes of this report, FS will deal with item a(ii) as detailed above. This is in line with the City Manager's instruction that FS collaborate with the Chief Audit Executive.

206 Furthermore, item b, Alienation of Property will be reported on under FSD 065/18-19, which is envisaged to be completed during Quarter four (4).

### 3. Objectives

301 The objective of this investigation was to determine whether due process and due care was exercised during the disposal of erf 165639, commonly referred to as Site B to Growthpoint.

#### 4. Scope and Limitations

- 401 The scope of this investigation was for the period August 1994 to December 2018.
- 402 This report is based on the facts established from the documentation reviewed and information obtained during the course of the investigation and from the persons interviewed. Should we receive any additional information after the date of issuing of this report, our findings and recommendations may change.
- 403 Although our report may contain references to relevant laws and legislation, we do not provide legal opinion on the compliance with such laws and our findings in this report are not to be construed as providing legal advice.
- 404 This report was prepared solely for the purpose of reporting our findings to the persons listed on the distribution list detailed above. It was prepared for use in legal proceedings and may contain confidential information that relates to City staff members, third parties and commercial activities of the City. Therefore, no part may be quoted, referred to, or disclosed in whole or in part, by any party without the consent of the City Manager.
- 405 Where we have conducted searches on public databases and since we do not control same, we can provide no undertaking as to the accuracy or correctness of the information obtained during such searches.
- 406 It should be noted that item a(i) falls within the Internal Audit ambit and therefore same was referred to the Chief Audit Executive. Vink Forensic Services will therefore focus on whether due process was followed and whether due care was exercised (as per item a(ii)) in respect of the sale of Erf 165639, commonly referred to as Site B.
- 407 Furthermore, item b, Alienation of Property will be reported on under FSD 065/18-19.

408 It should be noted that FS did not interview Mr. Andre Human (Human), Manager: Property Disposals and Acquisitions, Property Management as we were informed by Gelderbloem that same would not be advised due to him receiving medical treatment. We have, however, interviewed Human's subordinate and supervisor in order to ensure the completeness of the investigation.

## 5. Investigation Procedures Performed

501 Conducted interviews with:

- Ms Sally Chambers, Senior Professional Officer, Property Management;
- Mr Martin Dibowits, Auctioneer previously employed at Aucor Auctioneers;
- Ms Ruby Gelderbloem, Director: Property Management;
- Ms Juliet Leslie, Principal Planning Professional, Integrated Urban Management Portfolio;
- Ms Tania Lewis, Head: Property Disposals, Property Management;
- Mr Paul Pendlebury, Head: Valuations, Property Management;
- Mr Gregory September, Section Head: Land Use, District B;
- Mr Siradj Slamang, Senior Professional Officer, Valuations, Property Management; and
- Ms Charlain Swart, Legal Advisor, Legal Services.

502 Documentation/information obtained and reviewed, but not limited to the following:

- ICS Power Station Site: Substitution scheme dated 25 August 1994;

- City of Cape Town Municipal Planning By-law 2015;
- Critique conducted by Rode and Associates, Property Consultants, Valuers and Town planners relating to erf 165639;
- Valuation report dated 4 July 2016, compiled by Sirraaj Slamang;
- Memorandum dated 29 January 2001, titled: ICS POWER STATION SITE: REVERSION TO PREVIOUS SUBDIVISION AND REZONING CONDITIONS ERF 158112 CAPE TOWN;
- Amendment to subdivisional approval various erven Cape Town, Coen Steytler & Hans Strijom avenues, Long Street and Table Bay Boulevard: ICS DEVELOPMENT: Land owner: C.C.C dated 27 March 1996;
- Application for amendment to subdivisional area conditions in terms of section 42 (3) of Ordinance 15 of 1985: Erf 155342, 155343 and 155344 at Cape Town dated 5 January 1996;
- Land Use Planning Ordinance No. 15 of 1985;
- Aucor auctioneer documentation including Rules of auction and sale conditions;
- CityMap Viewer in respect of erf 165639;
- Title deed relating to erf 165639 and erf 165637;
- SG Diagram No. 4951/2001 and No. 4949/2001, approved by the Surveyor General 11 September 2001;
- Rezoning of ICS Power Station site dated 25 August 1994;
- Legal Opinion in respect of erf 165639 drafted by Advocate Frank Pelsler.

## 6. Investigation Findings

601 We contacted Property Management in order to request the property files relating to Site A with erf number 165637, Site B with erf number 165639 as well as consolidated Site AB with erf number 158112.

602 From a perusal of the aforementioned files it was confirmed that Site B was disposed of by way of public auction on 7 September 2016, by Tradepost 62 (Pty) Limited trading as Aucor South (Aucor).

603 During the public auction, thirty (30) bids were received, the highest bid received was in an amount of R 86 500 000.00 from Growthpoint Properties Limited (Growthpoint).

604 Transfer of Site B to Growthpoint took place on 6 March 2017.

### Historical data relevant to Erf 165639, commonly referred to as Site B:

605 From a perusal of the documentation obtained, it was noted that the words 'Block', 'Portion', 'Parcel' and 'Site' were utilized interchangeably to describe the various erven. For the purposes of this report we will utilise the wording 'Site' except in instances where we have quoted.

606 Prior to August 1994, the ICS Power Station site, located on the Foreshore, Cape Town was decommissioned, resulting in the site being rezoned to a Subdivisional Area.

607 During the course of the investigation we found a document<sup>2</sup> titled "REZONING OF ICS-POWER STATION SITE" dated 25 August 1994, which sets out the rezoning of the land from a General Commercial Use Zone to a Subdivisional area. This document appears to set out the subdivisional area.

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<sup>2</sup> Exhibit 2: Copy of document titled "REZONING OF ICS-POWER STATION SITE"



which comprised of eight (8) Sites, namely, A, B, C, D, E1, E2, F, G as well as the Servitude Area.

608 A Subdivisional Area is an unusual type of zoning provided for under the Land Use Planning Ordinance, No 15 of 1985 (Land Ordinance). The zoning is a legal mechanism which permits both subdivision and the allocation of zoning to occur simultaneously in accordance with the intended use. It is particularly useful in facilitating the development of large tracts of land for multiple purposes by way of a single rezoning application.

609 Attached to the aforementioned document was Annexure B: ICS Power Station Site Redevelopment: Proposed Development Rights, which was stamped 22 February 1994 (refer to Exhibit 2). This document sets out the provisions, conditions and restrictions imposed on Sites A, B, C, D, E1, E2, F, G, and the Servitude Area. The total Permissible floor area for the aforementioned Sites amounted to 151 000m<sup>2</sup>. The provisions, conditions and restrictions imposed on the aforementioned Sites are detailed below in Table A:

**Table A: ICS Power Station Site Redevelopment – provisions, conditions and restrictions**

#	Description	Permissible Floor Area	Height restrictions
1	Site A	23000m <sup>2</sup>	60m
2	Site B	17500m <sup>2</sup>	55m
3	Site C	16500m <sup>2</sup>	50m
4	Site D	15500m <sup>2</sup>	40m
5	Site E1	12500m <sup>2</sup>	50m
6	Site E2	6000m <sup>2</sup>	35m
7	Site F	35000m <sup>2</sup>	50m
8	Site G	25000m <sup>2</sup>	50m

610 From a memorandum<sup>3</sup> drafted by the City Planners Department with subject line "SUBDIVISIONAL APPROVAL VARIOUS ERVEN CAPE TOWN, COEN STEYTLER & HANS STRYDOM AVENUES, LONG STREET & TABLE BAY BOULEVARD: ICS DEVELOPMENT: LAND OWNER: C.C.C." it indicated that in

<sup>3</sup> Exhibit 3: Copy of memorandum titled "SUBDIVISIONAL APPROVAL VARIOUS ERVEN CAPE TOWN, COEN STEYTLER & HANS STRYDOM AVENUES, LONG STREET & TABLE BAY BOULEVARD: ICS DEVELOPMENT: LAND OWNER: C.C.C."

terms of section 25(1) of the Land Ordinance approval is granted for the subdivision of the aforementioned area as of 31 January 1995. The memorandum made reference to a Plan SE 14155/1 which was attached, however, the said plan was illegible. This memorandum further indicated that the validity of the approval is valid for five (5) years from the aforesaid date. It also set out the General Business Sub Zone for Sites A, B, C, D, E, G, H and K as a 'B6'.

- 611 In January 1996, an application<sup>4</sup> was made to amend the Subdivisional Area conditions in order to facilitate the development of property for hotel, office and retail purposes. This emanated from an offer received from Compagnie Generale de Batiment et de Construction (CBC) to purchase and consolidate Sites A (erf 155344), B (erf 155342) and the proposed Alpha Street (erf 155343). Alpha Street is later referred to as Site K. The proposed amendment was to increase the permissible floor area of the combined Site A and B from 41000m<sup>2</sup> to 69000m<sup>2</sup> (This amendment would have included Site K). Whilst it is noted that the erven numbers mentioned above are different, these are the original subdivisional area erven numbers given when the ICS Power Station site was initially subdivided. The erven numbers would have changed due to subsequent subdivisions and consolidations.
- 612 On 27 March 1996, the City Planner's Department issued another memorandum<sup>5</sup> with subject "AMENDMENT TO SUBDIVISIONAL APPROVAL VARIOUS ERVEN CAPE TOWN, COEN STEYTLER & HANS STRYDOM AVENUES, LONG STREET AND TABLE BAY BOULEVARD: ICS DEVELOPMENT: LAND OWNER: C.C.C." granting the elimination of Sites A, B and K, now combined to form a single Site AB. As a result, the combined permissible floor area of Sites A, B, C, D, E1, E2, F, G was increased from 151000m<sup>2</sup> to 179 500m<sup>2</sup>.

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<sup>4</sup> Exhibit 4: Copy of amendment application to the subdivisional area

<sup>5</sup> Exhibit 5: Copy of memorandum titled "AMENDMENT TO SUBDIVISIONAL APPROVAL VARIOUS ERVEN CAPE TOWN, COEN STEYTLER & HANS STRYDOM AVENUES, LONG STREET AND TABLE BAY BOULEVARD: ICS DEVELOPMENT: LAND OWNER: C.C.C."

613 On 22 May 1996, the Department of Housing, Local Government and Planning issued a letter<sup>6</sup> to the Town Clerk, advising them that the Premier, at the time, resolved that in terms of section 42 of the Land Ordinance, the application to amend the rezoning conditions of Sites A, B and K be approved. Again the erven numbers are reflected as follows: Site A - erf 155344, Site B - erf 155342 and Site K - erf 155343.

614 In another memorandum<sup>7</sup> dated 5 June 1996, addressed to the Director Survey and Land Information and Director Building Survey Town Planning Branch Development Control Section, the City Planner stated that on 16 April 1996, Site G was registered to Devland Construction (Pty) Ltd (Devland), thus the Substitution Scheme replaced the underlying zoning. This Substitution Scheme sets out the developmental rights and zoning provisions. The memorandum further makes mention that the provisions of Sites A and B were amended with approval from the Premier as stated in paragraph 613 *supra*. The developmental rights and zoning provisions for each Site is detailed below in Table B:

**Table B: Substitution Scheme – development rights and zoning provisions**

#	Description	Sub-Zoning	Permissible Floor Area	Height restrictions
1	Site A	B6	23000m <sup>2</sup>	60m
2	Site B1	B6	17500m <sup>2</sup>	55m
3	Site B2	-	500m <sup>2</sup>	10m
4	Site C1	B6	16500m <sup>2</sup>	50m
5	Site C2	B6	6000m <sup>2</sup>	35m
6	Site D	B6	15500m <sup>2</sup>	40m
7	Site E	B6	12500m <sup>2</sup>	50m
8	Site F	C6	35000m <sup>2</sup>	50m
9	Site G	C6	25000m <sup>2</sup>	50m

615 On page 37<sup>8</sup> of the Substitution Scheme under the heading "BLOCK B: DEVELOPMENT RIGHTS AND ZONING PROVISIONS" it reads: "The following provisions shall be applicable to Block B following the imposition thereon of a Substitution Scheme, and in the event of any such provision and a provision of the

<sup>6</sup> Exhibit 6: Copy of letter addressed to the Town Clerk dated 22 May 1996

<sup>7</sup> Exhibit 7: Copy of Substitution scheme and memorandum dated 5 June 1996

<sup>8</sup> Exhibit 8: Copy of page 37 of the Substitution Scheme



- 618 In a further memorandum<sup>10</sup> dated 29 January 2001, titled "ICS POWER STATION SITE: REVERSION TO PREVIOUS SUBDIVISION AND REZONING CONDITIONS ERF 158112 CAPE TOWN" it motivated that the aforementioned erf 158112 (Site AB) be re-subdivided into its original three (3) erven, namely Site A, Site B and that the extra portion, Site K, be returned to road reserve as the encroachment will no longer be required if the above 3 erven are recreated.
- 619 The aforementioned memorandum also advised that a statutory process be followed in order to reinstate the original conditions imposed on the Sites.
- 620 From a perusal of Surveyor General Diagrams<sup>11</sup>, SG No. 4951/2001 and SG No. 4949/2001 approved on 11 September 2001, it illustrates the re-subdivision of erf 158112 (Site AB) into its original form, more specifically erven 165639 (Site B) and 165637 (Site A). This is therefore indicative that Site AB (erf 158112) was re-subdivided into its original form. This was confirmed by Ms Tania Lewis (Lewis), Head: Property Disposals, Property Management during our consultation, who advised that her department obtained the Surveyor General diagrams from the Property files. It should be noted that this document did not form part of the bundle provide to Property Disposal by Planning and Building Development Management.
- 621 On 30 June 2005, Site A (erf 165637) was sold to Reality Dynamix 10 (Pty) Ltd trading as Coessa Development Consortium (Coessa). The Icon building was developed, which resulted in a bulk usage of approximately 23000m<sup>2</sup> as confirmed in Table A *supra*.

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<sup>10</sup> Exhibit 10: Copy of memorandum titled "ICS POWER STATION SITE: REVERSION TO PREVIOUS SUBDIVISION AND REZONING CONDITIONS ERF 158112 CAPE TOWN" dated 29 January 2001

<sup>11</sup> Exhibit 11: Copy of SG Diagram 4951/2001 and SG Diagram 4949/2001

*To determine whether due process and due care was exercised in respect of the disposal of erf 165639, commonly referred to as Site B to Growthpoint*

- 622 We met with Ms Sally Chambers (Chambers), Senior Professional Officer, Property Management in order to obtain information relating to the disposal of Site B (erf 165639). During our consultation Chambers informed us that the disposal of Site B was one of the 'projects' she was required to co-ordinate. Chambers indicated that Site B, formed part of the Strategic Asset list, which contained the 'high profile' properties earmarked for disposal. According, to Chambers the Director: Property Management, Ms Ruby Gelderbloem (Gelderbloem) would consult with the Strategic Asset Committee in order to determine the appropriate disposal options.
- 623 Chambers informed us that she recalls that Site B was previously out on tender on a number of occasions, however, the attempts were unsuccessful due to an unfavorable market and/or undesirable bids received. Chambers explained that it is for this reason that the Strategic Asset Committee elected to explore the public auction option.
- 624 From the documentation analysed, we can confirm that Site B was advertised for sale via the City's Supply Chain Management (SCM) tender process on numerous occasions. The below table depicts these instances.

**Table C: Tender processes relating to the disposal of Site B**

#	Date	Tender Number
1	During 2011	287P/2010/2011
2	During 2015	315P/2014/2015
3	During 2016	275P/2015/2016

- 625 Chambers also explained the process followed regarding the disposal of City property with specific reference to Site B. Chambers informed us that Site B was placed on the Annual Disposal Programme, which would have necessitated a technical investigation. A technical investigation facilitates inputs and/or comments from other departments as well as objections. Chambers stated that should no objections be received, the property is valued by the City's Internal Valuations department and a Disposal Plan is

also obtained. Chambers recalled that no objections were received regarding the disposal of Site B.

- 626 Chambers informed us that she liaised with Ms Juliet Leslie (Leslie), Principal Planning Professional, Planning and Building Development Management, Integrated Urban Management Portfolio in order to obtain all spatial data relating to Site B. Chambers advised that Leslie provided her with a bundle of documentation with a brief summary of the historical data pertinent to Site B. The documentation provided by Leslie to Property Disposal was discussed above in detail under the heading "*Historical data relevant to Erf 165639, commonly referred to as Site B*".
- 627 Chambers informed us that there were numerous discussions regarding the permissible floor area (also commonly referred to as bulk) applicable to Site B as a result of a historical consolidation (as discussed in paragraphs 610 through 614 *supra*). Chambers recalled that Leslie was unable to indicate the amount of potential bulk, however, she (Leslie) advised that the purchaser would be required to apply for access to any additional bulk.
- 628 Chambers indicated that Planning and Building Development Management was uncertain with regards to the permissible floor area and the potential accessible bulk of Site B, as they were of the opinion that a re-subdivision had not taken place and therefore the 69000m<sup>2</sup> approved in respect of Site AB was still in effect. Chambers advised that due to the uncertainty by Planning and Building Development Management, Property Management relied on the initial subdivisional rights of Site B, being 17500m<sup>2</sup> as contained in the Substitution Scheme dated 5 June 1996.
- 629 Chambers indicated that she enquired from Planning and Building Development Management whether Site AB was re-subdivided into its original forms, i.e. Sites A, B and K. Chambers stated that Planning and Building Development Management could not recall that a re-subdivision had taken place. Chambers again emphasised that the documentation

provided by Planning and Building Development Management was left up to Property Disposal's interpretation and no certainty regarding the permissible floor area and accessible bulk was thus provided. It is therefore reasonable to assume that Planning and Building Development Management was not aware of the re-subdivision which had taken place during September 2001 as detailed in paragraph 620 *supra*.

630 Chambers stated that advertising Site B with a permissible floor area of 17500m<sup>2</sup> was the safe route to follow at the time due to the uncertainty of Planning and Building Development Management regarding the permissible floor area accompanied with the fact that Property Disposal are not experts in the planning field.

631 Chambers indicated further that the valuation of the property was performed by the City's internal Valuations department. Chambers recalled that Mr Siraj Slamang (Slamang), Senior Professional Officer, Valuations, Property Management performed the valuation of Site B.

632 We obtained a copy of the valuation report<sup>12</sup> prepared by Slamang, dated 4 July 2016. From a perusal of the valuation report, it is noted on page 2 under the heading "*Salient information*" that the maximum permissible bulk was listed as 17500m<sup>2</sup> due to limitations by the existing Foreshore Precinct plan. The report also indicated that after consultation with the City's Planning and Building Development Management it would appear that the purchaser would be able to access additional bulk, however, this would necessitate a full investigation, including a transport impact assessment before the potential accessible bulk is determined.

633 Furthermore, according to the valuation report, the estimated market value of Site B was R80 000 000.00, with a reserve set at R72 000 000.00.

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<sup>12</sup> Exhibit 12: Copy of valuation report dated 4 July 2016



- 634 Chambers further advised that once all information was gathered regarding the site earmarked for disposal, a report was drafted to Council indicating the intention to sell and the conditions attached thereto.
- 635 We obtained a copy of the report<sup>13</sup> drafted to Council, dated 17 January 2011, with reference number SCMB 32/01/10, which sought to obtain authorisation to dispose of, or granting of rights to use, control or manage by public competition City-owned vacant land being erf 165639 Cape Town Foreshore known as Site "B" of the former ICS Power Station site.
- 636 According to the Council minutes<sup>14</sup> dated 26 January 2011, authorisation was granted to dispose of Site B, subject to the conditions imposed by the Director: Property Management. It was noted that the disposal was to be actioned by Mr William Anderson (Anderson), Manager: Immovable Property Planning, Immovable Property Management, Assets and Facilities Management and Gelderbloem.
- 637 Chambers indicated that once the above process was completed, the property was released to the market for public auction.
- 638 Chambers stated that the Auctioneering company in this particular instance, Aucor was procured by Lewis. The Auctioneer, Mr Martin Dibowits (Dibowits) was briefed and the marketing plan, market value, commission and rights were discussed. Chambers indicated that all the relevant documentation relating to Site B was handed to the Auctioneer, who would sign a mandate and compile an auction pack.
- 639 We noted that Aucor was provided with a mandate<sup>15</sup> on 29 July 2016, relating to the sale of Site B. The mandate informed the auctioneer of, *inter alia*, the property's reserve price of R72 000 000,00 as well as the agreed Auctioneer's commission.

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<sup>13</sup> Exhibit 13: Copy of report to Council with reference SCMB 32/01/10

<sup>14</sup> Exhibit 14: Copy of Council minutes dated 26 January 2011

<sup>15</sup> Exhibit 15: Copy of Aucor's mandate

- 640 We obtained a copy of the auction pack<sup>16</sup> compiled by Aucor, which contained information relating to Site B. According to the auction pack, the public auction would be held on 7 September 2016. It was noted from the auction pack that it contained property information, property description, development rights, development conditions, property locality, property locality and site diagram, property images and rules of auction and sales conditions. It is important to note that on page 3 of the auction pack, the permissible floor area was listed as 17500m<sup>2</sup>, with a height restriction of 55m.
- 641 Chambers stated that she would have expected the Auctioneer to verify the information provided in relation to the disposal of Site B. It was however, noted that this verification was not a requirement as per the Auctioneers mandate.
- 642 Chambers informed us that once the Auction was concluded, the Auctioneer provided Property Management with a report detailing the auction proceedings.
- 643 We obtained a copy of the Auctioneer's report<sup>17</sup> dated 15 September 2016, which indicated that thirty (30) bids were received of which four (4) bidders submitted bids over the reserve price of R72 000 000.00. The highest bid received was R86 500 000.00 from Growthpoint.
- 644 Chambers advised that a report was submitted to the Immovable Property Adjudication Committee (IPAC) once the auction was concluded requesting authority to sell Site B to the highest recommended bidder, in this instance Growthpoint.

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<sup>16</sup> Exhibit 16: Copy of auction pack compiled by Aucor

<sup>17</sup> Exhibit 17: Report compiled by Dibowitz

- 645 We obtained a copy of the report<sup>18</sup> submitted to IPAC dated 23 September 2016, which informed them of the auction and the bids received. The report recommended that the offer received from Growthpoint be accepted. It was noted from the IPAC minutes<sup>19</sup> dated 29 September 2016, that IPAC accepted the offer received from Growthpoint.
- 646 According to Chambers the sale agreement would have been signed by Mr Andre Human (Human), Manager: Property Disposals and Acquisitions, Property Management as he has the delegated authority. FS noted that there was a document<sup>20</sup> titled "Rules of auction and sale conditions" dated 24 November 2016, which was signed by the City as well as Growthpoint. Chambers confirmed that this document was the sale agreement of Site B.
- 647 We therefore met with Leslie in order to define Planning and Building Development Management's role in the disposal of Site B. Leslie informed us that she received a request from Chambers to provide Property Management with all relevant documentation in respect of Site B, as same was earmarked for disposal.
- 648 Leslie informed us that she provided Chambers with the following documentation:
- Rezoning of the ICS Power Station Site (refer to Exhibit 2);
  - Substitution Scheme (refer to Exhibit 7);
  - Subdivisional Rights amendments/rezoning's and approvals (refer to Exhibits, 3, 4, 5, 6);
  - Memorandum dated 29 January 2001, relating to the possible reversion of Site AB into its original form (refer to Exhibit 10); and
  - Summary notes<sup>21</sup> (for internal use only).

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<sup>18</sup> Exhibit 18: Copy of report submitted to IPAC dated 23 September 2016

<sup>19</sup> Exhibit 19: Copy of minutes in respect of IPAC.

<sup>20</sup> Exhibit 20: Copy of Rules of auction and sale conditions

<sup>21</sup> Exhibit 21: Copy of summary provided by Planning and Building Development Management

- 649 We noted from the memorandum dated 29 January 2001, that a statutory process should have been undertaken in order to revert Site AB (erf 158112) into its original form i.e. Sites A, B and K. We therefore enquired from Leslie whether this process was followed. Leslie informed us that to her knowledge there are no records to indicate that the reversion had taken place. Leslie provided us with a copy of an e-mail<sup>22</sup> received from Province, wherein they confirmed that they have no record to suggest that the reversion had taken place. This also, confirmed the version provided by Chambers at para 629 *supra*, that Planning and Building Development Management had no recollection of a re-subdivision. It is therefore apparent that, Leslie was unaware of the re-subdivision which had taken place in September 2001. (see paragraph 620).
- 650 As a result, Leslie indicated that her department was of the opinion that the permissible floor area across Sites A and B had remained at 69000m<sup>2</sup> as the amendment to increase the consolidated erven's (Site AB) permissible floor area had not lapsed. Leslie confirmed that the documentation can be confusing, however, particular attention should be placed on the 'small print' as it contained the amendments relevant to Sites A and B. Leslie referred us to the covering memorandum attached to the Substitution Scheme dated 5 June 1996 (refer to Exhibit 7), which made reference to the increase of Site AB's permissible floor area as approved by the Premier.
- 651 Leslie also informed us that she cannot recall being required by Property Management to definitively quantify the permissible floor area of Site B. Leslie indicated that all relevant documentation was made available to Property Management for their perusal and interpretation.
- 652 FS conducted a second interview with Leslie, advising her of the re-subdivision which had taken place in September 2001, illustrating the re-subdivision of Site AB into its original form, Site A, B and K. Leslie advised that

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<sup>22</sup> Exhibit 22: Copy of e-mail received from Province

she was unsure whether this re-subdivision would have affected the permissible floor area of Site AB, as same was an amendment of a condition and not a re-subdivision. Leslie indicated further that Planning and Building Development Management was of the view that amendments to conditions do not lapse unlike zonings and subdivisions. It is therefore for this reason that she (Leslie) was of the opinion that the permissible floor area of 69000m<sup>2</sup> was still in effect. Leslie, however, indicated that their department was advised to await the outcome of a legal opinion which should be adhered to.

- 653 We also met with Mr Gregory September (September), Section Head: Land Use, District B to whom Leslie reports, to obtain his opinion regarding the permissible floor area of Site B. September confirmed the version provided to us by Leslie and stated further that Leslie is a senior official with vast technical expertise in the planning and building environment.
- 654 During our consultation with September he informed us that as the City is an organ of State they are exempted from the requirements provided for in the Land Ordinance and therefore the re-subdivision in respect of Site AB into its original form would not have followed the prescribed statutory process. However, September could not recall any re-subdivision of Site AB into its original form, Site A, B and K. Therefore, September was also unaware of the re-subdivision which took place in September 2001.
- 655 September also explained that as Growthpoint had purchased the property with 17500m<sup>2</sup> of permissible floor area, they would be allowed to submit an application to access additional potential bulk. However, this application would be subjected to the City's application process, scrutiny and investigation.
- 656 During a second consultation with September, we presented him with a diagram which illustrated the re-subdivision of Site AB into its original form, Site A, B and K. September advised that there appears to be confusion

regarding understanding the difference between an amendment to a condition imposed on an erf versus a sub-divisional application. September indicated that although the diagram illustrates a re-subdivision of Site AB into its original form, it would not automatically facilitate the adjustment of the previous erf (Site AB's) permissible floor area of 69000m<sup>2</sup>. September advised that in order to amend a condition, the City would be required to submit an application to Province as the competent authority. According to September this process was not followed and therefore, Planning and Building Development Management was of the opinion that the 69000m<sup>2</sup> was still in existence.

- 657 September stated that previously their department was of the view that although Site AB was re-subdivided, the permissible floor area of 69000m<sup>2</sup> remained in existence as the condition imposed was never amended. However, since receiving a legal opinion (which will be discussed later in detail) their department has aligned their view with same, due to the fact that as Site AB is no longer in existence the amended condition (the permissible bulk of 69000m<sup>2</sup>) consequentially cannot survive.
- 658 We interviewed Lewis in order to establish how Site B was earmarked for disposal. According to Lewis numerous attempts were made to dispose of Site B, by way of tender, however, this method proved unsuccessful. It was therefore decided to dispose of Site B by way of public auction. Lewis stated that in terms of the Municipal Asset Transfer Regulations (MATR), Council has the final decision regarding the disposal of land.
- 659 Lewis advised that her department (Property Disposal) consulted a panel of Auctioneers and subsequently appointed an Auctioneer via the City's SCM process. Once the Auctioneer was appointed a mandate was signed and the marketing and advertising components were discussed. Lewis indicated further that the disposal would also include administrative duties such as recommendations to IPAC, appeal notifications, signing of the sale agreement and a pre-disposal investigation.

- 660 We enquired from Lewis what her opinion was regarding the permissible floor area of Site B. Lewis indicated that the summary provided by Planning and Building Development Management was unclear which necessitated consultations with Planning and Building Development Management as well as the Valuations department. Lewis indicated that her department (Property Disposal) relied on the information provided by Planning and Building Development Management. She informed us that Leslie advised her that the Substitution Scheme takes precedent over any other amendments and/or limitations imposed on the Sites which falls within the former ICS Power Station Site.
- 661 Lewis indicated that the Property Disposal department was not confident in the data they had obtained from Planning and Building Development Management as there was uncertainty regarding the permissible floor area and potential accessible bulk for Site B. Lewis informed us further that Planning and Building Development Management provided Property Disposal with incomplete data as pertinent documentation and information relating to the re-subdivision of Site AB was found by Property Disposal whilst perusing the Property files in respect of Site B.
- 662 Lewis stated that the Property Disposal department considered the information from a cautionary perspective and therefore listed Site B with a permissible floor area of 17500m<sup>2</sup>. Lewis advised FS that, Rode and Association, Property Consultants, Valuers and Town Planners (Rode) were appointed to critique the valuation report compiled by Slamang.
- 663 We obtained a copy of the Rode Report<sup>23</sup> dated 6 November 2018, compiled by Karen Scott (Scott), Professional Valuer, from Gelderbloem. From a perusal of the report it was noted that Rode concluded that in terms of the valuation of Site B, the critical variables applied appear to be reasonable, given the lack of recent market information.

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<sup>23</sup> Exhibit 23: Copy of Rode report

664 Lewis also informed us that Advocate Frank Pelsler (Adv Pelsler), Advocate of the High Court of South Africa provided Property Management with a legal opinion regarding the rights of Sites A, B and consolidated Site AB.

665 We obtained a copy of a Memorandum<sup>24</sup> dated 10 October 2018, which contained legal advice from Adv Pelsler. From this Memorandum, the opinion of Adv Pelsler can be summarized as follows:

- The consolidation of Site A and Site B to form Site AB implies a rezoning, which occurred in 1996. In terms of section 16(2) of the Land Ordinance a rezoning lapses after two (2) years if the land is not used as permitted by the rezoning. Site AB was never used for the purpose intended and therefore the amended bulk lapsed;
- As Growthpoint contends for an entitlement to the balance of the maximum permissible floor area approved for Site AB. As Growthpoint is not the owner of Site AB, neither Growthpoint nor Site B is entitled to the allocation made in respect of Site AB. It should be noted that Site AB is a different and larger land unit; and
- The re-subdivision of Site AB into its original form will stand until it is set aside by judicial review. In law Site AB is no longer in existence, therefore, the allocated bulk cannot survive.

666 Lewis referred us to a Surveyor General Diagram, SG No. 4951/2001, approved on 11 September 2001, which illustrated the re-subdivision of erf 158112 (Site AB) into its original form, more specifically erf 165639 (Site B). From a perusal of the diagram it was noted that there was a stamp which indicated that there was an exemption from the provisions contained in the Land Ordinance. This therefore confirmed the version explained by September in para 653 *supra*. This diagram is also indicative that Site AB was in fact re-subdivided into its original form. It should be noted that this document was found by Property Disposal and did not form part of the

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<sup>24</sup> Exhibit 24: Copy of Adv Pelsler opinion dated 10 October 2018



bundle of documentation provided to Property Disposal by Planning and Building Development Management.

- 667 We also met with Slamang who performed the valuation of Site B to determine the process followed. Slamang informed us that Site B was previously leased via a long term lease for parking purposes. However, he was advised that same would be disposed of and would therefore require valuation. Slamang explained that he received a brief from the Property Disposal department setting out the mandate and requirements.
- 668 According to Slamang, he understood that the Property Disposal department circulated the intention to sell Site B to the relevant internal departments for input regarding limitations, restrictions and zonings. This information would then be consolidated and provided to Valuations.
- 669 Slamang indicated that from the documentation obtained it was noted that the permissible floor area for Site B was listed as 17500m<sup>2</sup>. Slamang indicated further that the Auctioneers documentation and the previous attempted sales of Site B, also reflected a permissible floor area of 17500m<sup>2</sup>.
- 670 Slamang stated that when performing the valuation of Site B, consideration was given to the possibility of accessing additional bulk. This additional bulk was calculated by utilizing the zoning of the site, which was a GB7 zoning with a Floor Area Ratio (FAR) of 12.0. The FAR was obtained from the Municipal Planning By-law approved by Council on 25 March 2015. Slamang explained that the additional bulk is calculated by multiplying the square meterage of the property (3932m<sup>2</sup>) by the FAR (12.0), therefore resulting in potential bulk of 47184m<sup>2</sup> for Site B. It should be noted that the 47184m<sup>2</sup> includes the initial bulk of 17500m<sup>2</sup>.
- 671 During the course of our consultation with Slamang, we noted that he was unaware that Site B, previously formed part of consolidated site, Site AB.

- 672 Slamang stated that he liaised with Leslie in order to clarify the potential accessible bulk in respect of Site B. According to Slamang he was advised by Leslie that in theory there is additional bulk available, however, due to the shape and limitations on the erven, there is uncertainty as to whether the total bulk is accessible. Slamang indicated that the valuation was therefore performed on the basis that there may be additional bulk available, however, the exact amount is undeterminable without performing an investigation and a traffic impact assessment.
- 673 Slamang explained that it is therefore for this reason that the Valuation report dated 4 July 2016, indicated that with a permissible floor area of 17500m<sup>2</sup> the property would be valued at R60 000 000.00. However, when consideration was given to accessing additional bulk, (according to the report an additional 30%) the property valuation would be R85 000 000.00. Thus, Slamang concluded in the valuation report that the best estimated market value of Site B was R80 000 000.00 with a reserve price of R72 000 000.00.
- 674 We consulted with Mr Paul Pendlebury (Pendlebury), Head: Valuations, Property Management, who explained the process followed in respect of a property valuation. According to Pendlebury, Valuations received a formalized brief from the line department, in this instance Property Disposal. He recalled that Site B was valued on numerous occasions as it was always earmarked for disposal. He also stated, that due to an unfavourable market the City also considered leasing the property for extended periods.
- 675 Pendlebury indicated that Valuations experienced difficulty with obtaining information from Planning and Building Development Management. He also stated that the Planning and Building Development Management did not definitively quantify the permissible floor area and potential bulk available for Site B.

- 676 We obtained a copy of the Valuation Guidelines<sup>25</sup> from Pendlebury which provides a guideline to assist Valuers with valuing properties for acquisition, disposal and leasing purposes. On page 26 of the aforementioned document it sets out the approach to valuation, definition of market value, highest and best use, method of valuation, general neighborhood, market information and sales data and market information.
- 677 According to the guideline the most appropriate method to value development properties is by using the market data approach of direct comparison. With this method, recent transactions of properties in the neighborhood are traced and investigated. Only those properties with similar value adding attributes are then compared to the subject property.
- 678 We also consulted with Dibowits who was responsible for the auctioning of Site B. Dibowits informed us that he was mandated by the City's Property Disposal department to commence with the auction of Site B. According to Dibowits he conducted an investigation on Site B and determined that the property was tendered for sale on numerous occasions and that the allocated bulk remained the same on all occasions at 17500m<sup>2</sup>.
- 679 Dibowits was of the opinion that the permissible floor area of 17500m<sup>2</sup> was correct and fair based on his investigation, understanding and the documentation available.
- 680 We met with Gelderbloem who is responsible for leasing, acquisitions and disposals in respect of City owned property. Gelderbloem advised that she formed part of the Strategic Asset Committee, which also included the erstwhile Executive Mayor, Ms Patricia de Lille (de Lille), Deputy Executive Mayor, Mr Ian Neilson (Neilson), the Chief Financial Officer, Mr Kevin Jacoby (Jacoby), erstwhile Councillor Brett Herron (Herron), Councillor Stuart Diamond (Diamond), Councillor, Executive and Councillor Support, Executive Director: Transport and Urban Development Authority, Ms Melissa

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<sup>25</sup> Exhibit 25: Copy of the Valuation Guidelines

Whitehead (Whitehead), Human, and Mr David Marjais (Marais), Transport and Urban Development Management Investment Specialist. Gelderbloem advised that the Strategic Asset Committee was responsible for providing direction in terms of strategic assets and the disposal thereof.

- 681 Gelderbloem informed us that Site B was earmarked for disposal and that she cannot recall any other options being explored. According to Gelderbloem, Site B was previously marketed on numerous occasions (via tender), however, the market was unfavourable and the bids received were undesirable. Gelderbloem also advised that the market was not keen to engage as the tender process was cumbersome. It is for this reason that the public auction option was utilized.
- 682 Gelderbloem advised that a disposal programme was created in terms of the City's budgeting in order to generate income for revenue. This is achieved through the alienation of identified properties. Gelderbloem explained that Site B was identified as one of these properties and would have remained on the disposal programme until alienation was achieved.
- 683 Gelderbloem further advised that there was an internal debate at a political level, whether the City should sell property "packaged" or "non-packaged". "Packaged" means going through a full statutory process, by preparing and obtaining all the development rights i.e. zoning, subdivision, registered servitudes etc. prior to disposal. Whilst, "non-packaged" is the disposal of property with no development rights.
- 684 According to Gelderbloem the disposal of properties was driven by the erstwhile Executive Mayor, de Lille who advised that properties identified for disposal should not be packaged as the development industry 'knows best',
- 685 Gelderbloem stated that she was advised by Valuations and Property Disposal that if the rights of Site B were increased by way of an application it would allow Property Management to advertise with more rights thus

resulting in more revenue. Gelderbloem informed us that she advised Neilson and Jacoby of the above, however, they argued that obtaining additional rights would be time consuming and therefore advised her to continue with the sale of Site B 'as is' i.e. with its current rights, restrictions and limitations. Gelderbloem provided FS with a copy of an e-mail<sup>26</sup>, wherein the above is confirmed.

- 686 Gelderbloem stated further that she recalled Neilson requesting a clause be inserted into the sale agreement stating that any additional rights acquired by the purchaser of Site B must be paid for. However, we noted that the "Rules of Auction and sale conditions" contained no clause to this effect.
- 687 We informed Gelderbloem that it was noted that no clause was inserted into the "Rules of Auction and sale conditions" regarding the additional rights and the payment thereof. Gelderbloem advised that the additional accessible rights were taken into account during the valuation phase and therefore same was incorporated into the estimated market valuation of Site B (i.e. the additional accessible bulk of 30%). Thus, the request by Neilson to insert a clause was no longer required.
- 688 Gelderbloem also corroborated the versions provided to us by Chambers, Lewis, Slamang and Pendlebury that Planning and Building Development Management provided no certainty in respect of the permissible floor area and the potential accessible bulk of Site B. Gelderbloem stated that this is problematic for Property Management as they rely on the data provided by Planning and Building Development Management. Gelderbloem stated further that the input departments do not take responsibility and/or accountability for the information they provide to Property Management.
- 689 It is interesting to note, that during the discussion with Gelderbloem, she informed us that when the sale of Site B played out in the media, she requested the documentation from Planning and Building Development

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<sup>26</sup> Exhibit 26: Copy of e-mail received from Gelderbloem

Management and Property Disposal. She was advised by the aforementioned departments that she would be required to calculate the permissible floor area for Site B, which is indicative that there was little certainty regarding the permissible floor area of Site B.

690 We met with Ms Charlain Swart (Swart), Legal Advisor, Legal Services who informed us that Legal Services received a request from Property Management to advise on, *inter alia*, whether the maximum permissible bulk on Site B was indeed 17500m<sup>2</sup> at the time of sale. Furthermore, Swart informed us that an independent legal opinion was obtained from Adv Pelser in respect of the aforementioned request.

691 Swart stated that on 8 October 2018, Adv Pelser provided an opinion, this opinion was circulated to Property Management, as well as Planning and Building Development Management. According to Swart Planning and Building Development Management disputed the legal opinion. Therefore, additional information was provided to Adv Pelser for further consideration.

692 We requested Swart to elaborate on the aspects disputed by Planning and Building Development Management. Swart informed us that Planning and Building Development Management disputed whether the re-subdivision of Site AB into its original form had in fact taken place. Swart indicated that although Planning and Building Development Management submitted additional documentation, this did not change the opinion provided by Adv Pelser.

693 We obtained a copy of the legal opinion<sup>27</sup> drafted by Adv Pelser dated 8 October 2018. The legal opinion dealt with the following aspects:

- Whether the amended bulk of 69000m<sup>2</sup> continued to be available after Site AB was subdivided;

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<sup>27</sup> Exhibit 27: Copy of Adv Pelser opinion dated 8 October 2018

- If available, would the owner of Site B automatically be entitled to the remainder of the bulk not used by Site A, or how should it be distributed;
- Could the City limit the permissible bulk on Site B at the time of sale;
- Could the City lay claim to the additional bulk; and
- Are specifications "included in a public sector bid document... binding on the successful bidder irrespective of the specifications being included in the contract".

694 Adv Pelser subsequently concluded as follows:

- "(1) The amended bulk of 69000m<sup>2</sup> did not continue to be available, least of all after Block AB was subdivided.*
- (2) Even if the amended bulk had been available, then the owner of Site B has no automatic entitlement to the remainder of the bulk not used by Site A; at best for the owner of Site B it might have qualified for an apportionment of the balance of the bulk.*
- (3) The City is contractually entitled to limit the permissible bulk in respect of land it sells, but any such contractual limitation operates only between the City and the purchaser (failing any conversion, and registration, of the limitation into a real right); and the contractual limitation cannot fetter the City's exercise of its statutory powers, which are to be exercised in the public interest.*
- (4) The City cannot lay claim to the balance of the additional bulk, because (i) none exists; (ii) the City is not the owner of the property; and (iii) the City is not authorized by statute to do so.*
- (5) The specifications of a public bid document are not per se incorporated by operation of law in the contract concluded with the successful bidder. The non-incorporation of material bid specifications may, however, render the resulting contract unlawful and void. Therefore, the incorporation of the maximum permissible floor space recorded in the auction brochure into the contract of sale is required for the latter's validity."*

695 However, on 14 November 2018, Adv Pelser submitted another Memorandum<sup>28</sup> confirming the findings of his initial opinion (8 October 2018), which was also communicated to the Nelson.

696 We were advised by September, Pendlebury and Gelderbloem that Growthpoint has made an application to access additional bulk as well as

<sup>28</sup> Exhibit 28: Copy of Adv Pelser opinion dated 14 November 2018

subterranean rights. These applications, at the time of drafting, this report were being considered by the relevant departments.

697 The memorandum received from the City Manager contained specific questions relating to the disposal of erf 165639, commonly referred to as Site B to Growthpoint. For ease of reference, FS will deal with each question separately.

Whether due process was followed in respect of what option, if any were available for Erf 165639 at the time

698 During the course of the investigation it was noted that the Strategic Asset Committee identified Site B for disposal, which resulted in same being placed on the City's Disposal Programme. Furthermore, numerous attempts were made to dispose of Site B, however, they were unsuccessful. Therefore, the public auction option was explored.

699 According to Gelderbloem there was an internal debate whether Site B should be sold "packaged" or "non-packaged", Gelderbloem advised that the erstwhile Executive Mayor, de Lille was of the opinion that properties should not be packaged as the development market 'knows best'.

6100 Gelderbloem stated that she was advised by Valuations and Property Disposal that if the rights of Site B were increased it would generate more revenue. This option was therefore proposed to Neilson and Jacoby, where after Neilson advised Gelderbloem that the application process would be time consuming and therefore advised Gelderbloem to continue with the sale of Site B with its current rights, restrictions and limitations. Neilson subsequently requested that a clause be inserted into the sale agreement stating that any additional rights acquired by the purchaser must be paid for. However, FS can confirm that a clause to this effect was not inserted into the sale agreement. However, Gelderbloem advised that the additional accessible rights were taken into account during the valuation



phase and therefore same was incorporated into the estimated market valuation of Site B (i.e. the additional accessible bulk of 30%). Thus, the request by Neilson to insert a clause was no longer required.

- 6101 According to Gelderbloem Site B was always earmarked for disposal and she could not recall any other options being explored regarding development.

Whether due process was followed in respect of who understood these options and how were they communicated

- 6102 The Strategic Asset Committee was responsible for providing direction in terms of strategic assets and the disposal thereof. They identified Site B for disposal and therefore requested authorisation from Council as required by the MATR. This, thus placed Site B on the City's Disposal Programme.

- 6103 As Site B was earmarked for disposal, Council granted authority to dispose of same by way of public auction to be actioned by Anderson and Gelderbloem. Gelderbloem therefore instructed Human and Lewis to commence the disposal process.

Whether due care was exercised i.e. was a business case prepared

- 6104 During the course of the investigation Gelderbloem stated that to her knowledge the concept of a 'business case' is used to describe the process followed by Property Management in respect of the disposal of property. This will include, previous unsuccessful sales, exploring the available sale options, selling a property 'packaged' vs 'non-packaged'.

- 6105 It was noted that Property Disposal requested the spatial planning information from Planning and Building Development Management. However, Planning and Building Development Management was uncertain

with regards to the permissible floor area and the potential accessible bulk in relation to Site B. Property Disposal therefore followed a cautionary route and relied on the rights and restrictions imposed by way of the Substitution Scheme and the re-subdivision which took place in September 2001.

- 6106 It would appear that Planning and Building Development Management were unaware that Site AB was re-subdivided into its original forms, Site A, B and K in September 2001. However, once the above information was brought to the attention of Leslie and September, they indicated that they were unsure whether the aforementioned re-subdivision would have affected the permissible floor area of 69000m<sup>2</sup> as same was an amendment of a condition and not a re-subdivision. Leslie informed us that Planning and Building Development Management was of the view that amendments to conditions do not lapse unlike zonings and subdivisions. It is therefore for this reason that Planning and Building Development Management was of the opinion that the permissible floor area of 69000m<sup>2</sup> was still in effect, notwithstanding the sale and development of Site A.

What was the official City of Cape Town's position in terms of the total permissible floor area (bulk), how was this determined, by whom and at which time

- 6107 Planning and Building Development Management were uncertain with regards to Site B's permissible floor area and potential accessible bulk. They provided Property Disposal with a bundle of documentation for perusal and interpretation, prior to auction. Gelderbloem informed us that this is problematic as Property Management relied on the documentation provided by Planning and Building Development Management.
- 6108 It would appear that Planning and Building Development Management were unaware of the re-subdivision of Site AB into its original forms. However, once this was brought to their attention they were unsure whether the aforementioned re-subdivision would have affected the permissible floor

area of 69000m<sup>2</sup> as same was an amendment of a condition and not a re-subdivision. However, from a legal opinion obtained, it is apparent that the amended bulk of 69000m<sup>2</sup> ceased to exist once Site AB was re-subdivided into its original form, Site A, B and K. Furthermore, the amended bulk would have anyway ceased to exist as Site AB was never utilized for its intended purpose (to develop a hotel, office and retail space), which necessitated a rezoning and consolidation.

6109 Property Disposal therefore followed a cautionary approach and listed Site B with a permissible floor area of 17500m<sup>2</sup> based on the Substitution Scheme as well as the re-subdivision which took place in September 2001.

6110 The Valuations department performed their valuation on the basis that as Site B had a permissible floor area of 17500m<sup>2</sup>, the property would be valued at R60 000 000.00. However, when consideration was given to accessing additional bulk, (according to the report an additional 30%) the property valuation would be R85 000 000.00. Thus, Valuations concluded in the valuation report that the best estimated market value of Site B was R80 000 000.00 with a reserve price of R72 000 000.00.

6111 From the above, it was noted that Site B, had a complex history of rights, limitations, restrictions, amendments and transfers which took place during the years 1994 to 2001. As a result of the complex history, Property Disposal relied on the information provided to them by Planning and Building Development Management regarding Site B. However, Planning and Building Development Management did not provide Property Disposal with a definitive quantification of the permissible floor area and the potential accessible bulk in respect of Site B. It is, therefore, for this reason that Property Disposal followed a cautionary approach and utilized the rights allocated and detailed in the Substitution Scheme, i.e. 17500m<sup>2</sup>.

6112 Thus, the estimated market valuation of the property was calculated on this basis, taking into consideration that the purchaser may apply to the City to

access additional bulk of approximately 30%. Therefore, the estimated valuation of Site B was R 80 000 000.00. The valuation of the property was also subjected to scrutiny by Rode, who confirmed and agreed with the estimated market valuation.

6113 Furthermore, we accord with the view of Adv Pelsier, where he stated that the amended bulk of 69000m<sup>2</sup> was not only allocated to Site B, but across Sites A, B and K. Thus, Site B (Growthpoint) is not entitled to lay claim to the remainder amended bulk allocated across Site AB, as Site AB was re-subdivided into its original form in September 2001.

6114 It is, however, noted that Growthpoint may submit an application to the City for consideration to access additional bulk in respect of Site B. This application will be subjected to the City's application process, scrutiny and investigation.

## **7. Control Issues**

701 During the course of the investigation it was noted that Planning and Building Development Management failed to maintain adequate records which resulted in incomplete documentation.

702 As the custodian department, Planning and Building Development Management also failed to definitively quantify the permissible floor area and the potential accessible bulk in respect of Site B. It was noted that a bundle of documentation was provided to Property Disposal for their perusal and interpretation. This therefore, places the Property Disposal department at risk as they are not planning experts and thus they rely on the data provided by Planning and Building Development Management.

703 During the course of the investigation it was noted that there was a lack of integrated planning and coordination between the departments within

Property Management who are responsible for the disposal of City owned land.

## 8. Summary of Findings

801 We established that Site B, had a complex history of rights, limitations, restrictions, amendments and transfers which took place during the years 1994 to 2001, which is summarized below for ease of reference:

#	Date	Details
1	25 August 1994	Rezoning of ICS-Power Station Site with Annexure B; ICS Power Station Site redevelopment; Proposed Development Rights
2	31 January 1995	Subdivisional approval of the ICS Power Station Site
3	January 1996	Amendment to the subdivisional area to consolidate Sites, A, B and K as well as the increase in the permissible floor area
4	27 March 1996	City's City Planners department approved the consolidation and the elimination of the individual sites
5	22 May 1996	Premier at the time, resolved the amendment to consolidate Sites A, B, and K as well as the increase in the permissible floor area
6	5 June 1996	Site G of the previous subdivisional area was developed by Devland, therefore resulting in the Substitution Scheme.
7	15 April 1997	Consolidated Site AB was transferred to CBC for the development of hotel, office and retail space
8	13 November 2000	Site AB was re-transferred to the City as CBC failed to develop the land
9	29 January 2001	Memorandum requiring that a statutory process be followed to revert the consolidated Site AB into its former state.
10	11 September 2001	Surveyor General Diagrams, SG No 4951/2001 and SG No 4949/2001 indicating the re-subdivision of Site AB into its original form

802 We established that the Strategic Asset Committee identified Site B as a strategic asset for disposal, which resulted in some being placed on the City's Disposal Programme. A pre-disposal investigation was conducted before going to Council for disposal authorisation.

- 803 We established that Council authorised the disposal of Site B, which resulted in Gelderbloem referring same to Property Disposal for disposal.
- 804 It was established that Property Disposal requested the documentation relating to Site B from Planning and Building Development Management. Planning and Building Development Management provided Property Management with a bundle of documentation which was left up to Property Disposal's interpretation. We established from Chambers, Lewis and Gelderbloem that Planning and Building Development Management did not provide Property Disposal with a definitive quantification of the permissible floor area and the potential accessible bulk in respect of Site B, it is therefore for this reason that Property Disposal followed a cautionary approach and utilized the rights allocated and detailed in the Substitution Scheme, i.e. 17500m<sup>2</sup>.
- 805 We established from Valuations that the estimated market valuation of the property was calculated utilising the 17500m<sup>2</sup> permissible floor area, taking into consideration that the purchaser may apply to the City to access additional bulk of approximately 30%. Valuations therefore concluded that the estimated valuation of Site B was R 80 000 000.00, with a reserve of R72 000 000.00. The valuation of the property was also subjected to scrutiny by Rode, who confirmed and agreed with the estimated market valuation.
- 806 Furthermore, we accord with the view of Adv Pelser, where he stated that the amended bulk of 69000m<sup>2</sup> was not only allocated to Site B, but across Sites A, B and K. Thus, Site B (Growthpoint) is not entitled to lay claim to the remainder amended bulk allocated across Site AB, as Site AB was re-subdivided into its original form in September 2001.
- 807 It is, however, also noted that Growthpoint may submit an application to the City for consideration regarding accessing additional bulk in respect of Site B. This application will, however, be subjected to the City's application process, scrutiny and investigation.

**9. Recommendations**

- 901 It is recommended that Planning and Building Development Management considers developing a Standard Operating Procedure (SOP) that defines and establishes departmental responsibility and internal controls in respect of record management.
- 902 It is also recommended that Planning and Building Development Management as the custodians and experts of spatial planning data certifies that the information provided to and/or requested by internal departments is complete and accurate in order to prevent the misinterpretation of rights, limitations, amendments and restrictions.
- 903 It is also recommended that the departments within Property Management is reminded of Directive 2 of 2018, which sets out the importance of transversal functions aimed at ensuring effective cross-directorate communication and decision making.

  
  
