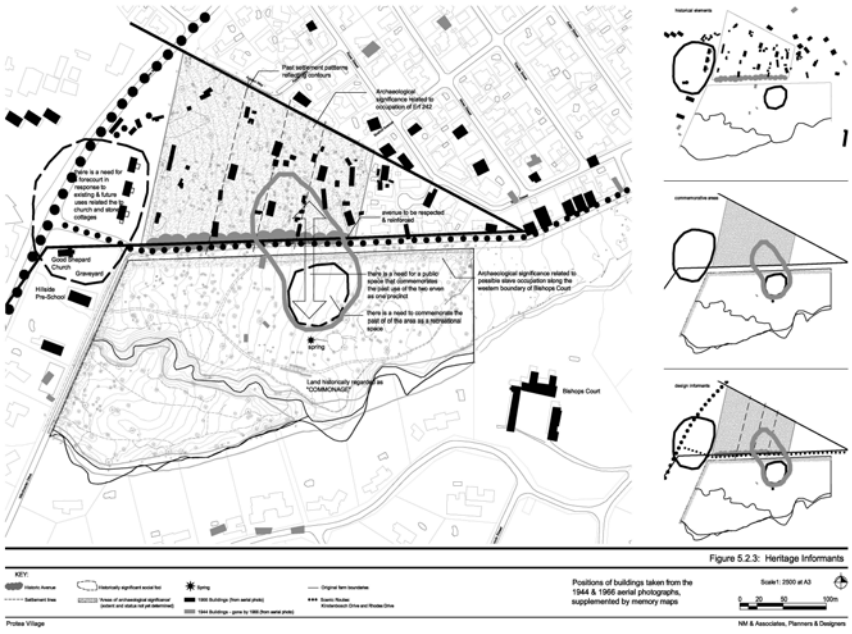
Protea Village Restitution Claim

Comment on Environmental & Technical Study

as prepared by Common Ground dated Nov 03 [final draft]



Prepared and submitted by the

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BY HAND

8th December 2003

THE CITY OF CAPE TOWN

Attention: The Hon Dr W Mgoki
CITY MANAGER
Civic Centre
12 Hertzog Boulevard
CAPE TOWN
8000

Dear Sir

Comment on Environmental & Technical Study as prepared by Common Ground o.b.o the City of Cape Town dated Nov 03 [final draft]

EXECUTIVE SUMMARY

The forced removal of the people of Protea Village during the late 50's and early 60's left an indelible scar on the history of the area as well as in the memory of those most affected at the time. Some 40 years later we have a new dispensation which incorporates significant freedoms of expression and rights as contained in the Constitution. We also have a number of statutes which seek to restore rights that were lost through a process of engagement, reconciliation, resolution of disputes and financial compensation. With these rights and freedom comes the requirement to act in a responsible and informed manner.

Unlike other development proposals that the Fernwood Residents Association (FRA) has commented on, the process involving the Protea Village Community is not about dealing with a rapacious developer whose primary intention is often to develop beyond the limit, but rather about ensuring that the land claims process (of which we are an interested and affected party) results in the equitable restitution of rights that were dispossessed within the framework of the law. This process involves, inter alia; a study of the facts, application of the relevant statutes and ordinance's, engagement with the claimant community and neighbouring communities, debate and resolution of areas of conflict.

FRA submits the following key points as integral to this submission:

- Common Ground has in its report (CG Rep) arrived at numerous conclusions and recommendations which have not involved the surrounding residents who consider themselves interested and affected parties (IAP's). These parties are asserting their rights under the provisions of the Provision of Administration of Justice Act and National Environmental Management Act to be involved and to have their views, representations and concerns noted. FRA is working closely with the group of affected residents who will be submitting their own response to the CG Report.
- FRA questions, for reasons set out in this report, whether the City of Cape Town has the authority in law to make Erf 212 available for restitution.

- FRA also draws attention to the incorrect zoning as contained in the Common Ground Report with reference to Erf 242. The Erf remains zoned "Educational" as per the interim interdict signed by all parties on the 18th March 1983 (case 2223/83) and as per the final Order of the High Court dated October 1984.
- As far as aspects of the environmental study are concerned, FRA draws attention to the likely existence of among other species, the Cape Rain Frog (*Breviceps gibbosus*) which, although classified as Near Threatened in 2001, has since been re-assessed and will be classified Vulnerable.
- The concept of using detention ponds to accumulate storm-water run off is problematic.
- As no study has been conducted of the impact of winter rainfall on both erf 242 and erf 212, the conclusions drawn in the report may not be fully substantiated. FRA supports the recommendation that further testing be done on the site, particularly CBR and Consolidometer analysis
- No estimate is made of the cost of providing bulk services or the source of funding. This is clearly a significant element of the development proposal and should be set out in full.
- FRA fully supports the recommendations made i.r.o the need to conduct a phase 1 archaeological survey of the site (particularly Erf 242) in order to properly ascertain and give definition to development implications of the site.
- FRA endorses the recommendation that "the correspondence dated 8 October, addressed to the City of Cape Town, from DEA&DP be reviewed in terms of the requirements of section 24 (1) of the National Environmental Management Act with a view to proceeding with an Environmental Impact Assessment given the ecological and historical sensitivities associated with the properties concerned.
- FRA submits that section 38 of the National Heritage Resources Act also needs careful consideration in terms of its applicability given the findings of the draft heritage assessment which rate erf 242 as being of significant historical value.
- It appears, based on the data presented that the impact of the development proposal with regard to the loss of trees is far greater on the environment that the Common Ground report would lead the reader to believe.
- FRA has some difficulty with the recommendation that all invasive tree species such as the Poplars and Gum trees be removed. As with the Fernwood Parliamentary Sportsground, these species act as a significant absorbent of rainfall, particularly throughout the winter months. The removal of all aliens simultaneously would, in our opinion, materially change the geo-technical characteristics of the site.
- FRA also submits that the true layout as proposed in the report is hidden and thus is not available for comment and review. It stands to reason that the removal of trees is based on a plan. That plan is not included in the report which, in FRA's opinion is a material error of omission. FRA submits that a rigid layout, such as the 86 five hundred square meter plots, as proposed, fails to address the requirements of sec 24 (7) of NEMA and is contradictory to both the historical facts surrounding the number and format of dwellings on site as well as the fact that this is a community claim
- FRA notes the predominance among the claimant community of single person households which are female of which a large percentage is over the age of 65. Given the desire in the background document prepared for the claimant community for some form of community centre, FRA is puzzled that no provision is made for ensuring the wellbeing of the elderly citizens within the claimant community. Simply re-locating these folk back to the area without providing the necessary frail care / medical support structure appears to be a limitation in the planning recommendation
- Section 35(3) of the Restitution of Land Rights Act contains some important provisions in relation to the formulation of an order of restoration. Sec 35(2c) provides as follows: "if the claimant is a community, determine the manner in which the rights are to be held or the compensation is to be paid or held" FRA notes that the Common Ground Report does not elaborate on this point. Section 2(1)(a) of the Communal Property Associations Act specifically envisages a restitution order which is conditional on the formation of a communal property association in terms of the Communal Property Associations Act. Section 9 (1) of the Act prescribes detailed, practical rules corresponding with each principle which seek to ensure their implementation in the management of the Common Property Association (CPA). In terms of section 8(2)(c), the constitution of the CPA must comply with these principles before it qualifies for

registration. Section 9(2) requires that the constitution be interpreted in accordance with those principles. Not only do these principles provide a framework for the proper governance of the community, but they are also aimed at ensuring that there is equitable access to the asset which is the subject matter of the restitution order. FRA submits that the Protea Village claimant community is bound by these key statutory provisions and that they (the provisions) are integral to the framework within which development guidelines are formulated and assessed by, inter alia, The City of Cape Town and the Land Claims Commission. Failure to address this key issue results in a lack of clarity as to how the claim by the Protea Village claimant community is addressed from the structural (legal) perspective of ownership in the context of the development guidelines recommended by Common Ground. FRA requests Common Ground to rectify this omission in its report. In this context FRA would also like to point out the apparent inconsistency between the requirements the Communal Property Associations Act and the expression of the claim in its current form which "confirms that that 86 claimants wished to return to the site to live on individual plots" (p50 of the Common Ground Report)

- FRA has examined, by way of reference to precedents established in the Land Claims Court, the meaning and interpretation of the terms "feasibility of restitution" and the "sustainability and affordability" thereof. In the case of the Kranspoort Community, Dodson J set out a clear framework in order to assess the feasibility of restoration. FRA submits that this framework should be applied in the Common Ground Report in order to arrive at a property structured outcome on which the City of Cape Town, and indeed the Land Claims Commission can base their decision(s).
- FRA submits, in all humility and with the utmost respect, that resettlement in its present conceived format is an option that is not sustainable for over half of the claimant community and is likely to result in a range of problems enunciated upon by the learned Judge as set out in the Kranspoort case. FRA concerns are amplified in section 6 which comment on some of the processes followed to date and the expectations that have been created (which may prove difficult to meet or impossible to implement). In order to address the issue from a planning perspective FRA has, in discussion with PROVAC, explored alternatives that would meet the requirements and spirit of the land claims process. Further engagement in this regard is welcomed by both the Fernwood Residents Association and Bishops Court Residents Association.

FRA believes that the responsible application of a well established legal framework, the implementation of sound planning principles and the assistance of both FRA and BCRA in the process, working together with all interested and affected parties will result in an equitable outcome that does justice to both the spirit and requirements of the Restitution of Land Claims Act. Moral regeneration, the right to be re-connected to the land with a sustainable framework is fully supported by both FRA and BCRA.

We invite all parties to work together to ensure that this vision is realised.

Yours sincerely

Protea Village Task Team
Tony Bell, Prof Jonny Myers, Nuku van Coller

Working in conjunction with the Bishops Court Residents Association - *chaired by*
Dr J Schrire

Preamble

The forced removal of the people of Protea Village during the late 50's and early 60's left an indelible scar on the history of the area as well as in the memory of those most affected at the time. Some 40 years later we have a new dispensation which incorporates significant freedoms of expression and rights as contained in the Constitution. We also have a number of statutes which seek to restore rights that were lost through a process of engagement, reconciliation, resolution of disputes and financial compensation. With these rights and freedom comes the requirement to act in a responsible and informed manner.

Unlike other development proposals that the Fernwood Residents Association (FRA) has commented on, the process involving the Protea Village Community is not about dealing with a rapacious developer whose primary intention is often to develop beyond the limit, but rather about ensuring that the land claims process (of which we are an interested and affected party) results in the equitable restitution of rights that were dispossessed within the framework of the law. This process involves, *inter alia*; a study of the facts, application of the relevant statutes and ordinance's, engagement with the claimant community and neighbouring communities, debate and resolution of areas of conflict.

The comments that follow primarily address the report prepared by Common Ground but also seeks to amplify certain of the abovementioned issues that have not been dealt with through the required public participation process. FRA has, in preparing these comments;

- attended a briefing by Common Ground in October 2003
- reviewed a range of documents
- attended the information sharing workshop held on the 18th November 2003 hosted by Common Ground
- held two meetings with the Protea Village Action Committee (PROVAC)
- held two meetings with residents of the Fernwood and Bishops Court (residents)

1. The FRA's rights to comment and/or object to the application

In broad terms Fernwood Residents Association (FRA) represents the interests of the residents of Fernwood on the basis of a Constitution registered with the City of Cape Town. FRA asserts it right to be recognised as an interested and affected party under the applicable provisions of the Land Use Planning Ordinance, The National Environmental Management Act, and the Environment Conservation Act, The Promotion of Administrative Justice Act, The Heritage Resources Act, and the Constitution. At present the registered member base of the Association comprises 67% of homeowners in Fernwood. As such, the FRA has submitted these comments on behalf of its members in order to avoid burdening unnecessarily the record in this matter.

2. Lack of proper public participation (7-10) [1]

Residents within Fernwood and Bishops Court have expressed the opinion that the process, as followed to date, does not constitute a full public participation process are required *inter alia* by the provisions of the Promotion of Administrative Justice Act 3 of 2000 and the National Environmental Management Act. Following the distribution of the background information document earlier this year and the notice that appeared in the Tattler, Argus and Southern Mail on the 5th June 2003, the only involvement of residents in Fernwood or Bishops Court was at the informal information sharing workshop held on the 18th November. The claim made therefore that the document under consideration has included numerous meetings (p9) with residents is misleading as only one meeting has been held. In its media release dated June 03, Common Ground state that; "*the restitution process requires that the City,*

[1] Refers to the page numbers as contained in the report prepared by Common Ground entitles "Environmental & Technical Feasibility Study" Nov 03

working with the claimant community as well as local residents and other interest groups, puts together broad guidelines for the development of the area."

As indicated, the two meetings held with representatives of FRA and Bishops Court Residents Association (BCRA) which were largely feedback sessions. The lack of any input from surrounding residents does not support the inclusive process referred to by Common Ground in its statement. Many residents have expressed the view that the report presented at the workshop on the 18th November which was only distributed on the 5th November 2003 is largely a *fait accompli* with little or no opportunity for input other than by way of comment.

The consequence of this lack of proper public participation is that any decision taken by the City of Cape Town that materially prejudices the rights of residents may well be challenged by such residents under the provisions of the Promotion of Administrative Justice Act.

3. Planning & procedural considerations (p41 – 46)

Title deed conditions – errors of omission

3.1 Whilst the Common Ground report correctly states that **Erf 212** is municipal owned, **it fails to deal** with the primary conditions attached to the right of ownership. The title deed conditions, as listed in the Common Ground report (p44), omit any reference to the key title deed restriction which stipulates that the land vests in the Municipality of Cape Town under the provisions of section 24 (1) of Ordinance 33 of 1934.

Sec 24(1) of Ordinance 33 of 1934 provides that; "*The ownership of all public places in an approved township or subdivided estate shall, upon notification in the Provincial Gazette* ***vest in the Administrator in trust*** *for any such local authority……"*

Section 24(2) goes on to provide that; "*if the general plan of an approved township or subdivided estate is lawfully altered in consequence of the closing of a public place and the creation of a new public, the ownership of the land constituting the closed public place shall revest in the person on whose land the township was laid out…"*

FRA's understanding is that Erf 212 is held in trust for the right, use and enjoyment of all residents whose dwellings form part of Bishops Court Extension number 2 as reflected on General Plan 1013^{LD} dated 1952. FRA questions whether the City of Cape Town has the right in law to alienate this land for any purpose. FRA has sought Senior Counsel opinion on the matter and requests that the City of Cape Town to do likewise.

In this regard, FRA refers the reader and the City of Cape Town to a report[2] prepared by The City Engineer of the City of Cape Town dated 22 June 1982, *ad para* 23.1 which reads as follows: "*I (the City Engineer) consider the statement by the objectors (to the then proposed development of Erf 212) that the registration of the property as a Public Place should be an indication of its unassailability for any development not required for or incidental to the purpose for which the land was reserved*. *Erf 212* is *a vital component of the BishopsCourt environment and has, according to the residents of the area, become the neighbourhood common – a function it was deemed to fulfil as an endowment Erf in the original subdivision of BishopsCourt Estate.*" (text in brackets added by the writer for ease of reference).

[2] Report number 67/1982 prepared by the City Engineer, dated 22 June 1982.

3.2 Common Ground, in preparing the report, is unlikely to be aware of an important High Court ruling that impacts on the zoning of Erf 242. Common Ground notes that (p42); "how Erf 242 achieved a grouped residential dwelling use zone is questionable.' A copy of the settlement agreement reached between the parties to the High Court Application is attached as Annexure 1 to this submission. In essence you will observe that the settlement between the parties provides for the respondents (primarily the Administrator of the Cape) to be interdicted from:

- Rezoning Erf 242 from educational purposes to group housing
- Authorizing departures from the provisions of the town planning scheme so as to enable the sale of any portion of Erf 242 or allowing any portion to be sub-divided or from taking any further decisions relating to the furtherance of the proposed development of Erf 242 or using the said Erf other than for educational purposes

An interim interdict was granted on the 18th March 1983. Thereafter Notice of Motion was filed by the applicant (Mr John Turest Swartz) against the first respondent (Newlands Heights (Pty) Ltd), the second respondent (The Administrator of the Cape Province), the third respondent (The Municipality of Cape Town) and the fourth respondent (The Cape Educational Trustees). Case reference 2223/83. The matter was laid before the High Court in October 1984 which ruled in favour of the applicant. According to the applicant, Mr John Turest Swartz, the court has yet to rule on the matter of costs. The judgment thus still needs to be delivered by the honourable court on the matter of costs, notwithstanding the ruling given in respect of the application. FRA submits that the conditions referred to in the report dated 21 May 1982, as set out on page 42 of the Common Ground report, are of no force and effect as they are superseded by the settlement agreement. In addition, as set out above, the ruling of the High Court effectively sets aside the notice that appeared in the Government Gazette dated 26 November 1982 (number 4242) that sought to rezone Erf 242 from Educational to Group Housing. FRA trusts that this information assists in setting the record straight and thanks Mr Swartz for his assistance in this matter.

3.3 FRA respectfully requests that Common Ground amend section 5.3 of its report *ad pages 41 – 46* to reflect the full set of circumstances and facts *vs*. Erf 242 and Erf 212 as set out above.

4. The developable footprint – consideration of key factors (p23 – 30)

Notwithstanding FRA's stated position viz erf 212 and erf 242, comments are required on aspects raised by Common Ground in its report covering a range of issues. These are more fully set out below:

Environmental constraints (p23 – 26)

4.1. It appears that the Common Ground report focuses primarily on the limitations imposed by the 100 year flood-line on any proposed development of the site. The report does not include any reference to the various birds, amphibians and other species that may enjoy protection. FRA draws attention to the likely existence of among other species, the Cape Rain Frog (*Breviceps gibbosus*) which, although classified as Near Threatened in 2001, has since been re-assessed and will be classified Vulnerable in the "Atlas and Red Data Book of the Frogs of South Africa, Lesotho and Swaziland" (to be published later this year). *Breviceps Gibbosus* has been found to exist in the Fernwood Parliamentary Sportsground and, according to opinion presented to FRA, is likely to exist in the SE corner of Erf 212.

4.2. FRA would also like to point out that as no assessment has been done of the flow of water throughout the wet season, little conclusion can be drawn as to the developability of the portion of Erf 212 indicated as developable on figure 5.1.1. FRA submits that the large portion of land, located in the northern precinct of Erf 212 (i.e. adjacent to Kirstenbosch drive), is extremely wet during winter months as the seep from the NW sector of the Erf creates a marsh like bog across most of the Erf. FRA submits that this aspect needs to be covered more fully in order for the study to reflect a complete picture and in order to arrive at a correct assessment. Refer point 4.7 below.

Infrastructure & services (p27 – 30)

4.3. FRA requests clarity on the use of "**developer**" under para 5.2.1.1 of the Common Ground report. Reference is made to the conduct of a traffic impact assessment which has cost implications for the "developer". The only context in which this reference can be made is that some external party would be contracted, subject to the provisions of the section 42D agreement, to provide construction services to the Protea Village Community. Why a traffic impact assessment would be at the developer's expense is not clear as this cost will, in terms of prevailing legislation, have to be born by the claimant community. Kindly clarify this point.

4.4. The Common Ground report indicates that *"an external sewer link will be required to provide a sewer connection to the eastern boundary of Erf 242. This sewer extension will also serve that portion of Erf 212 which lies to the north of the Willow stream."* As the report does not indicate any connection other than a possible costly sewer extension under the Protea Stream, it appears from the diagrams presented that the planned sewer points are higher on Erf 242 than any of the planned erven.

4.5. The comment made regarding the adequate provisioning for **storm-water systems** appears to merit elaboration. FRA is of the opinion that the proposed use of detention ponds is not desirable as a means of controlling excess storm-water flow. The fact that downstream storm-water reticulation presents a capacity constraint needs to be more fully investigated.

4.6. As only limited information is provided as to the **costs** of; bulk sewerage, water main extension, roads, electricity, and storm-water reticulation no decision can be made as to the affordability or viability of the proposals / recommendations being made to the City of Cape Town by Common Ground. FRA submits that these costs need to be fully assessed prior to the submission of the final report. The reader is referred to the lengthy discussion under section 5.7 below which deals with the issue of "*affordability*" and "*sustainability*"

4.7. The geotechnical study clearly points to the "dampness" of both the old cricket pitch [zone 3] and the portion extending across the lower lying eastern portions [zone 4]. FRA supports the recommendation that further testing be done on the site, particularly CBR and Consolidometer analysis.

Heritage informants (p31)

4.8. FRA fully supports the recommendations made i.r.o the need to conduct a phase 1 archaeological survey of the site (particularly Erf 242) in order to properly ascertain and give definition to development implications of the site.

4.9. The conclusion arrived at in the Draft Heritage report bears repeating. *"It is concluded that the Protea Village Site has heritage significance in terms of the following intrinsic value of surviving material fabric in the form*

of standing structures. The site has high heritage significance in terms of associational symbolic value as a place of displacement and now a place of healing and reconciliation. The site has high contextual significance both in terms of the role it plays as part of the metropolitan open space system, primarily associated with the Liesbeeck River corridor, the sylvan quality of the present woodland setting, the landmark qualities of the social nexus relating to the church, graveyard and stone cottages along Rhodes Drive and the views into the site. The site has substantial significance in terms of public memory associated with forced removals…"

4.10. The last point is well document in a short summation[3] of the history of the people of Protea Village as prepared by Jenny Wilson who has been involved with the community for many years and has been key to assisting the community in their claim.

4.10.1. Protea Village was established on the farm of Protea when the slaves were released in 1834 and were allowed to establish a settlement on the farm as long as they still worked for the landlord. When Bishop Gray, the first Anglican Archbishop of Cape Town, bought the farm Protea, he changed the name to Bishopscourt although Protea Village retained its name. Bishop Gray made a particular effort to convert those living in Protea Village and therefore established a small chapel for them called Good Shepherd. The first Eucharist was said on Whitsun, 1864. The present building of the Church was built in 1886 by the residents of Protea Village, using stones from the nearby Liesbeeck River, with extensions added in 1904 and 1990. Protea Village grew into a vibrant community, especially during the establishment of Kirstenbosch Botanical Gardens in 1913 where many of the men worked as gardeners and labourers. The women worked mainly as domestic workers and flower sellers in the surrounding affluent areas. The community flourished, having its own character and community spirit with strong family, community and spiritual values. Everyone knew each other. They were like one big happy family living peaceably among the trees, river and beauty of the mountain. The village had its own church, school, playing fields, spring to supply the drinking water and a shop run by the Hussein family [the only Muslims in the area] who supplied all their needs including credit (which had to be paid off at 2/6 per week). They all worshipped at Good Shepherd, a chapelry of St Saviours, Claremont. Death knell struck the Community during the apartheid years by the proclamation of the Group Areas Act of 1950 which meant about 100 families were forcibly removed because of the colour of their skin, scattering them all over the Cape Flats which had been declared a Non-White Area. By the end of 1968 all the families were moved out, school closed, church closed for regular worship and most of the houses bulldozed flat, leaving the church and 3 stone cottages which can still be seen today. This was an incredible blow to the tight knit community, causing unimaginable hurts; many elderly people died soon after the move. The memories are still vivid with many people to this day. Thank God the Church was not bulldozed, and so the Protea community was able to return to the church for a service once a month to which a few loyal faithful's like the Nomdo family travelled many miles to attend. They never joined another church in their new neighbourhood. However, on Advent Sunday, 1978, the church reopened for regular Sunday worship; and there was great rejoicing. People from the surrounding now very affluent areas (mostly white) and those who had been dispossessed and scattered (mainly working class coloured) started worshipping together, building a new congregation which through the years has grown together in love, understanding and acceptance. In 1986 the Church of the Good Shepherd celebrated its centenary bringing many of the original

[3] Protea Village History. A Brief History of Protea Village, Cape Town, South Africa by Jenny Wilson, March 2000.

congregation to the celebration Eucharist and tea. But since the New South Africa and the Reunions of the Protea Village people, which started in 1995, more and more of the original congregation are feeling comfortable to return to their beloved Protea for regular worship. The whole process of submitting the Lands' Claim in 1995 has been an extremely healing process, giving many the opportunities to examine and deal with their hurts. This is an ongoing process. We await prayerfully for the outcome of the Lands Claim with great expectations that those of the Protea community who wish to return will be able to do so, even if not to their original homes perhaps to an Old Age Complex to be built as a memorial to the community of Protea Village.

Legal framework & constraints (p31)

4.11. Common Ground set out the myriad of statutory and regulatory provisions that impact on a claim of this nature. The Common Ground report goes on to state on page 45 that; "*it would appear that written authorisation from DEA&DP prior to the undertaking of the proposed development is not required because the proposed development does not constitute a listed activity*". As DEA&DP is the authorising agency in terms of the EIA regulations and NEMA, FRA submits that the conclusion drawn by Common Ground is based on a narrow set of criteria and appears to completely ignore the two stage test as required in sec 24 of NEMA. FRA respectfully requests that the requirements of sec 24 of NEMA be explicitly addressed and that the applicability of the section be motivation in the report.

4.12. Section 38 (1) of the National Heritage Resources Act provides specifically that; '*subject to the provisions of subsections (7), (8) and (9) any person who intends to undertake a development categorised as – any development or other activity which will change the character of a site; (i) exceeding 5000 m^2 in extent must at the very earliest stages of initiating such a development, notify the responsible heritage resources authority and furnish it with details regarding the location, nature and extent of the proposed development.*

(2) The responsible heritage resources authority must, within 14 days of receipt of a notification in terms of subsection (1)-
(a) if there is reason to believe that heritage resources will be affected by such development, notify the person who intends to undertake the development to submit an impact assessment report. Such report must be compiled at the cost of the person proposing the development, by a person or persons approved by the responsible heritage resources authority with relevant qualifications and experience and professional standing in heritage resources management; or
(b) notify the person concerned that this section does not apply.

This point is covered in the Common Ground report in the last paragraph on page 31. FRA concurs.

4.13 Section Section 35(3) of the Restitution of Land Rights Act contains some important provisions in relation to the formulation of an order of restoration. The relevant paragraphs provide as follows:

"(2) The Court may in addition to the orders contemplated in subsection (1)-

(a) determine conditions which must be fulfilled before a right in land can be restored or granted to a claimant;

(b) if a claimant is required to make any payment before the right in question is restored or granted, determine the amount to be paid and the manner of payment, including the time for payment;

(c) if the claimant is a community, determine the manner in which the rights are to be held or the compensation is to be paid or held

FRA notes that the Common Ground Report does not elaborate on this point. Section 2(1)(a) of the Communal Property Associations Act specifically envisages a restitution order which is conditional on the formation of a communal property association in terms of the Communal Property Associations Act. Section 9 (1) of the Act prescribes detailed, practical rules corresponding with each principle which seek to ensure their implementation in the management of the Common Property Association (CPA). In terms of section 8(2)(c), the constitution of the CPA must comply with these principles before it qualifies for registration. Section 9(2) requires that the constitution be interpreted in accordance with those principles. Not only do these principles provide a framework for the proper governance of the community, but they are also aimed at ensuring that there is equitable access to the asset which is the subject matter of the restitution order.

FRA submits that the Protea Village claimant community is bound by these key statutory provisions and that they (the provisions) are integral to the framework within which development guidelines are formulated and assessed by, inter alia, The City of Cape Town and the Land Claims Commission. Failure to address this key issue results in a lack of clarity as to how the claim by the Protea Village claimant community is addressed from the structural (legal) perspective of ownership in the context of the development guidelines recommended by Common Ground. FRA requests Common Ground to rectify this omission in its report. In this context FRA would also like to point out the apparent inconsistency between the requirements the Communal Property Associations Act and the expression of the claim in its current form which "confirms that that 86 claimants wished to return to the site to live on individual plots" (p50 of the Common Ground Report). The requirements of the Communal Property Associations Act are more fully dealt with under section 5.7 below.

Design informants from a heritage perspective (p32)

4.13. FRA understands and is fully aware of and is sensitive to the historic factors surrounding the social and living patterns of the people of Protea Village some 40 years ago. At the time the spring was the main supply of water and the cricket field that main area of recreation. These factors are critically important informants of the proposed plan to re-unite the people of Protea Village with the land they once occupied. As any resettlement would require the provision of bulk services, which were absent 40 years ago, FRA wonders whether the historical structural elements are being viewed by Common Ground in the appropriate context. The mention of keeping the Oak Avenue at all costs even if it requires drastic pruning and the replanting of some Oak trees seems to miss the point. The objective must surely not be to force an urban landscape on an environment but rather restore the rights lost and integrate these appropriately.

4.14. FRA is deeply moved by the historical record of village life as it once existed. Life must have been very rural in nature with no fences or boundaries existing between the cottages. Fields were clearly cultivated over most of Erf 242 as evidenced by the "rooms" that presently exist on the site and as referred to in the Common Ground report. The location of the cottages appears to have loosely followed the contours of Erf 242 with clusters occurring here and there. The pattern was loose thus allowing for a sense of openness and freedom within a residential environment. No grid pattern is evident.

4.15. FRA fully supports the recommendation that the three stone cottages serve as a memorial and that they be linked to Erf 242.

Strategy for assessment of the value of trees on site:

4.16. It is clear from the historic account of the evolution of both erven that many trees predate the community by almost 60 years. In particular the Oak trees edging the roadway of Kirstenbosch Drive date back to the turn of the century. Judging by the size of some other trees on Erf 242, in particular, FRA surmises that these majestic specimens must have been established at the same time.

4.17. Given this background FRA is a little stunned by the lack of critical information in the report. It appears that an attempt is being made to mask the true impact of the proposed development on the landscape so richly described. The only information presented is as per annexure vi which shows a tree count, the trees to be kept, those that may be kept and trees scheduled for removal. Why is this the only source of information provided on this critical issue? No tabulation or narrative accompanies the diagrams.

4.18. FRA has accordingly tabulated the information presented in the two diagrams in order assess the likely impact of the proposed development. Should these numbers not reflect the correct position FRA is happy to be corrected through the provision of accurate information by Common Ground

	Total number of trees	Trees to be kept (category A)	Trees that may be kept	Destroyed
Erf 242	171	46 (26%)	8 (5%)	117 (68%)
Erf 212	118	43 (36%)	13 (11%)	62 (53%)
	289	89 (31%)	21 (7%)	179 (62%)

4.19. It appears, based on the data presented in the two diagrams that the impact of the proposed development is far greater on the environment that the Common Ground report would lead the reader to believe.

4.20. FRA has some difficulty with the recommendation that all invasive tree species such as the Poplars and Gum trees be removed (p35). As with the Fernwood Parliamentary Sportsground, these species act as a significant absorbent of rainfall, particularly throughout the winter months. The removal of all aliens simultaneously would, in our opinion, materially change the geo-technical characteristics of the site. It was common in the past to plant poplars (e.g *Populus x canescens*) to soak up water, further indicating that the underlying area is marshy.

4.21. FRA would also like to point out that these trees, whilst alien form an integral and vital part of the character of both sites. Simply removing trees on such a large scale as indicated in the table above would significantly impact on the sense of place of both erven. This would be *contra bona mores.*

4.22. FRA also submits that the true layout as proposed in the report is hidden and thus is not available for comment and review. It stands to reason that the removal of trees is based on a plan. That plan is not included in the report which, in FRA's opinion is a **material error of omission**. FRA submits that a rigid layout, such as the 86 five hundred square meter plots, as proposed fails to address the requirements of sec 24 (7) of NEMA and is contradictory to both the historical facts surrounding the number and format of dwellings on site as well as the fact that this is a community claim.

5. Socio economic informants (p47 – 48)

5.1. The information contained in the socio economic segment of the report is instructive from a number of perspectives.

5.1.1. The first is that the community would require some form of financial assistance in order to resettle in the area. Notwithstanding the lack of a business plan it seems clear that sustainability of settlement poses a significant limitation on the claimant community.

5.1.2. In terms of the Land Claims Act, the community will probably be classified as a "***deemed community"*** as their settlement patterns over the last 40 years have resulted in claimants being spread over a wide area.

5.2. In order understand the overall picture, FRA has constructed the table below to tabulate and extrapolate the sample data.

	Community as a whole	% of 86 claimant families	Sample
Primary place of work	Ottery		Ottery
Number of claimant families	86		55
- comprising family units	54	62%	34
- comprising single person households	32	38%	21
Number of people within family structures	260		157
Number of single persons > 50 yrs old	32	37%	18
Average monthly income			R 3959
- % earning less than R 1500 per month	42		31%
Cost of living index	??		100

5.3. The observation made that; "*the resettlement of Protea Village would not impede the claimants access to their place of employment (primarily Ottery) since the site is accessible to the southern suburbs Main Road and the M3 both of which provide easy access to public transport*" is somewhat misleading. The writer has clearly never had reason to use public transport from the Fernwood Area. Any busses and taxi's are very infrequent as very few people use this form of transport in the area. The low level of car ownership among the claimant community places a further burden on the de-linking between the place of residence and work. FRA is, in general terms, not supportive of such sweeping generalisations that are not well thought through as the practical consequences can quite often result in problems being created.

5.4. FRA notes the predominance among the claimant community of single person households which are female of which a large percentage is over the age of 65. Given the desire in the background document prepared for the claimant community which indicated the desire for some form of community centre, FRA is puzzled that no provision is made for ensuring the wellbeing of the elderly citizens within the claimant community. Simply re-locating these folk back to the area without providing the necessary frail care / medical support structure appears to be a limitation in the planning recommendation.

5.5. Whilst much is made of the 10 year rates moratorium FRA would draw attention to factors not included in the report that would have a material impact on the monthly costs that would have to be borne by the claimant community:

- Insurance

- School (model c)
- Transportation
- Refuse removal
- Sewerage costs
- Security

5.6. In order to better understand and obtain guidance on these key issues FRA has turned to the Courts to establish how the concept of "feasibility" as defined sec 33(cA) of the Restitution of Land Rights Act[4] has been interpreted as well as the interpretation and meaning given to "restitution".

Feasibility & restitution

In the Kranspoort Community case[5] the court analysed the meaning of feasibility from a number of perspectives. As feasibility is oddly not defined in the Restitution the court had to turn to legislative history in order to arrive at a ruling. The full text of the relevant portion of Dodson's judgement is set out below:

"[88] In order to assess the impact of this argument it is necessary to establish the meaning of "feasibility" in paragraph (cA). The concept of feasibility is not defined in the Restitution Act. It does have a legislative history. Section 123(1) of the Interim Constitution[6] provided that restoration of a right in land could only be granted, in the case of State land, if the State certified that restoration of the land was feasible and in the case of private land, if the State certified that the acquisition of the right in land was feasible. Before the Restitution Act was amended to provide for the changes brought about by the promulgation of the final Constitution, this constitutional requirement of a certificate of feasibility was given effect to by section 15. It required that, before a land claim for restoration be referred to the Court, the Chief Land Claims Commissioner obtain a certificate of feasibility from the Minister of Land Affairs. Section 15(6) read -

> *"In considering whether restoration or acquisition by the State is feasible . . . the Minister shall, in addition to any other factor, take into account -*
> *(a) whether the zoning of the land in question has since the dispossession been altered and whether the land has been transformed to such an extent that it is not practicable to restore the right in question;*
> *(b) any relevant urban development plan;*
> *(c) any other matter which makes the restoration or acquisition of the right in question unfeasible; and*
> *(d) any physical or inherent defect in the land which may cause it to be hazardous for human habitation."*

[89] The final Constitution did not contain the same level of detail in the provision dealing with restitution (ie section 25(7)) as did the Interim Constitution. In particular, section 25(7) makes no reference to feasibility, but does make the right subject to the limitations contained in an Act of Parliament. The Restitution Act was amended in 1997 to take into account the constitutional changes. These included amendments to the provisions dealing with feasibility. Section 15 was deleted and paragraph (cA) was inserted in section 33, it now being the only provision referring to feasibility. In the Slamdien case, this Court held that the changes brought about by the final Constitition [sic] did not seek to change the basis for restitution fundamentally and

[4] Restitution of Land Rights Act, 22 of 1994
[5] Kranspoort Community, case LCC26/98, judgement delivered by the Hon Dodson J, page 52

were largely the result of a different drafting style. That approach must have informed the consequential amendments brought about by the Land Restitution and Reform Laws Amendment Act of 1997, including the repeal of section 15. Moreover, once the requirement for the Minister to issue a certificate of feasibility fell away, there was no longer a need to spell out in detail the nature of the discretion to be exercised in relation to feasibility.134 For these reasons, I am of the view that some guidance as to what was meant by the concept of feasibility can still be derived from the repealed section 15(6), even though that provision was not re-enacted elsewhere in the Restitution Act. Section 15 is discussed at some length by Roux in Juta's New Land Law.135 With reference to the factors in section 15(6), he comes to the conclusion that –

> *"[i]n essence, whenever land has been substantially transformed or developed, the Minister will have good reason to refuse a feasibility certificate".*

Also in relation to the now-repealed section 15, the author Murphy expressed the view that:

> ***"[f]easibility addresses the question of whether restoration . . . is practically achievable."***

[90] In so far as dictionary definitions are concerned, the New Shorter Oxford English Dictionary defines "feasibility" as "The quality or state of being feasible" and "feasible" as "Practical, possible; manageable, convenient, serviceable; . . .". It also defines a "feasibility report or study" as a study or report "on or into the practicability of a proposed plan."

A Concise Dictionary of Business defines "feasibility study" as -
"A study of the financial factors involved in producing a new product, setting up a new process, etc. The study will analyse the technical feasibility with detailed costings of set-up expenses, running expenses, and raw-material costs, together with expected income. The capital required and the interest charges will also be analysed to enable an opinion to be given as to the commercial viability of product, process, etc."

The dictionary definitions thus convey a spectrum of meaning ranging from, simply, "possible" to, when used in the context of a feasibility study, "commercially viable".

[91] It is also important to bear in mind the immediate context of the words in the sense that the enquiry relates to the feasibility of restoration. The feasibility of the community's plans for resettlement or community development after restoration are not expressly included in the formulation of paragraph (cA). The focus is on the process of actual restoration of the rights. At the same time, the various criteria referred to in the repealed section 15(6) do seem to imply some enquiry into the intended use of the claimant in so far as it called for reference to be made to changes in the zoning for the area and any relevant development plan. These are land use planning measures. Clearly the intention is that restoration would not be considered feasible where the claimant's intended use was out of kilter with more recent development of the land itself or in the surrounding area.

[92] The test which emerges from this analysis is that the Court should ask: is the restoration of the rights in land in question to the claimant possible and practical, regard being had to -

> *(i) the nature of the land and the surrounding environment at the time of the dispossession;*
> *(ii) the nature of the claimant's use at the time of the dispossession;*

---

[6] Constitution of the Republic of South Africa Act 200 of 1993. Sections 121 to 123, read with section 8(3)(b) of the Interim Constitution were the first provisions to confer a right to restitution arising out of racially based dispossessions of rights in land.

(iii) the changes which have taken place on the land itself and in the surrounding area since the dispossession;
(iv) any physical or inherent defects in the land;
(v) official land use planning measures relating to the area;
(vi) the general nature of the claimant's intended use of the land concerned.

However this does not mean that an enquiry into the social and economic viability of the claimant's intended use is required. To require this would give rise to problems. Courts are not well equipped to assess such social and economic viability. The effect of requiring such an enquiry may also be greatly to narrow the prospects of restoration awards being made generally and this would be contrary to the overall purpose of the legislation which has as one of its major focuses the actual restoration of rights in land."

5.7 The ruling of the Court is quite clear. In order to **assess the feasibility of restoration** the test / framework as set out by the court needs to be applied. FRA submits that this framework should be applied in the Common Ground Report in order to arrive at a property structured outcome on which the City of Cape Town, and indeed the Land Claims Commission can apply themselves.

Affordability & sustainability

5.8 FRA now turns its attention to the issue of affordability and sustainability by the claimant community. The Common Ground report (p49) makes the statement that PROVAC should "*give serious consideration to the more sustainable options allowing the community to benefit financially on an ongoing basis*". In order to, again understand the true meaning of the implication of affordability FRA refers to Dodson's judgement ad para [105].

[105] Section 35(2) contains some important provisions in relation to the formulation of an order of restoration. The relevant paragraphs provide as follows:

"(2) The Court may in addition to the orders contemplated in subsection (1)-
(a) determine conditions which must be fulfilled before a right in land can be restored or granted to a claimant;
(b) if a claimant is required to make any payment before the right in question is restored or granted, determine the amount to be paid and the manner of payment, including the time for payment;
(c) if the claimant is a community, determine the manner in which the rights are to be held or the compensation is to be paid or held;
(e) give any other directive as to how its orders are to be carried out, including the setting of time limits for the implementation of its orders;
(f) make an order in respect of compensatory land granted at the time of the dispossession of the land in question;"

Also important is section 35(3):
"(3) An order contemplated in subsection (2) (c) shall be subject to such conditions as the Court considers necessary to ensure that all the members of the dispossessed community shall have access to the land or the compensation in question, on a basis which is fair and non-discriminatory towards any person, including a tenant, and which ensures the accountability of the person who holds the land or compensation on behalf of the community to the members of such community."

*[107] Paragraphs (a), (c) and (e) of section 35(2) and section 35(3) give the Court further wide powers to devise appropriate conditions to ensure that the order will be implemented fairly and will **bring about a workable and practical result**. In considering how these provisions should be applied, I have had regard to some emerging literature regarding the aftermath of restoration orders and agreements. It appears from this literature that there is a trend of serious problems arising with the implementation of restoration orders and agreements. These problems have related to -*

(i) lack of co-ordination between the restitution process and the planning, budgeting and development programmes of provincial government;
(ii) shortage of land;
(iii) absence of proper planning before the resettlement of the land;
(iv) disputes over entitlement to membership of the community; and
(v) shortage of skills and resources needed to redevelop the land.

[108] Du Toit, in an insightful article on the restitution process describes the difficulties faced by the beneficiary of a restitution order as follows:

"This brings us to the most pressing and painful part of the problem - which is that the moment of return to the land cannot live up to the expectations and hopes generated by it. For of course what was lost can never be returned. Part of the problem is the fact that the land is not the only thing that was lost. What was destroyed through . . . removals was a whole way of being, a set of community relations, a system of authority and let [us] not forget, a broader system of economic relations and livelihoods of which the land was but a part, and which gave it its function and its value. The terrible truth of Restitution has thus been that the moment of return to the land is often a moment of disappointment and anti-climax. To settle on the spot from which one's forebears - or even a younger, more vigorous, more hopeful self - were once removed, is not necessarily to return to that more authentic, more dignified, more hopeful mode of existence. As we have seen in numerous cases, from Riemvasmaak and Elandskloof to Doornkop and Ratsegae, to return from exile to the promised land is to return to face the complex, dispiriting and painful problems in the new South Africa once again in new and often more intractable ways. For communities have grown, services are needed and the rural and national economies that made certain forms of existence possible may no longer be in place. If existence without piped water and electricity was acceptable in the past, it is no longer so - and these services have to be paid for, and paid for in a very different, increasingly globalised, economy. In all too many cases, we may be looking at a scenario where the land is returned to those who lost it - only to be lost again to the banks, or to those who are willing to pay good cash for it.

. . . .

This is not to suggest that the project of restoration or return is pointless and should be given up. The moment of the [realisation of the implications of returning] is of course potentially an immensely fruitful one. It can be the moment at which reality, however painful it is, is accepted, and at which a more modest, more grounded process of decision making can start on new terrain. But this is very difficult, not least because it must needs involve a final and full acceptance of the difficulties of the present. And negotiating this transition requires forms of practice - and forms of support - which have not thus far been made available to claimants or implementors."

[109] He goes on to say the following:

"Dealing with these difficulties will require a number of shifts in the conceptualisation and practice of restitution:

> ***In the first place, we need to move away from an approach that places an emphasis on negotiations to one that focuses more on a process of planning.*** *The most difficult and important question in restitution is not whether or not land claimants can get the outcome they prefer, but prior to that: whether they have made an informed choice in the first place. All too many claimants have chosen for land (or for money) - without being informed as to the exact implications, and often, it seems with very unrealistic hopes as to the kind of support and development aid they would get.*
>
> *Three things follow from this.*
>
> - *One, to be offered a choice by a harried government official at a once-off workshop, between a number of cut-and dried options ('restoration', 'alternative land', 'compensation') is not to be offered a choice at all. There needs to be much more scope for flexibility, and for claimants to design a range of tailor-made, integrated solutions . . .*
> - *Two, . . . [r]estitution planning should begin from the realisation that the implementation and development problems attendant on the resolution of a Land claim are not likely to be resolved by more resources magically being made available by other role players and arms of government. . . . Whatever solutions are to be found will have to be based on the resources that the Restitution process itself makes available. The key question will be how to use those resources most effectively.*
> - *Three, this takes time: it requires,* ***not so much an 'options workshop' as a participatory planning process.****. . . In my view, the argument that investment in the process of community-based planning is idealistic, expensive and unworkable is eloquently answered by the scenes now unfolding at Doornkop, Elandskloof and Riemvasmaak - projects that are likely to cost many times the money and time that was 'saved' through under-investing in planning."*

Dodson, in his ruling [ad para 116], provides that; In relation to the absence of proper planning, a condition will be incorporated in the Court's order in terms of section 35(2)(a) to require that there be proper planning before there can be restoration. If restoration must await a proper plan, it will act as a strong incentive for the planning process to proceed. The condition will require the presentation to and approval by the Court of a suitable plan for the commencement of the development and use of the farm. In scrutinising that plan, the Court will not act as a super-planner judging the merits of the plan which is presented.
Rather it will satisfy itself that -

(i) a reasonable degree of planning has taken place,
(ii) on the basis of a sufficiently participatory planning process and
(iii) there is a clear commitment to the implementation of the plan or plans formulated.

5.9 FRA submits, in all humility and with the utmost respect, that resettlement in its present conceived format is an option that is not sustainable for over half of the claimant community and is likely to result in a range of problems enunciated upon by the learned Judge [ad para 110 of the judgement]. FRA's concerns are amplified in section 6 below which section comments on some of the processes followed to date and the expectations that have been created (which may prove difficult to meet or impossible to implement). In order to address the issue from a planning perspective FRA has, in discussion with PROVAC, explored alternatives that would meet the requirements and spirit of the land claims process. Further engagement in this regard is welcomed by both the Fernwood Residents Association and Bishops Court Residents Association. This approach is endorsed (by inference) in the Common Ground report in the last paragraph on page 49 which points out that PROVAC

should "*give serious consideration to the more sustainable options allowing the community to benefit financially on an ongoing basis*".

6. Development vision (p49 – 51)

6.1. Following on from para 5.6 above, it is instructive to note that, as set out in the claim and as repeated on page 49 of the Common Ground report, only 22% of claimants (19 families) wished to return to the site. The vast majority (87%) favoured a development scenario which incorporated a memorial element and some form of facility that cared for the elderly.

6.2. Whilst FRA fully respects the right of the claimant community to envision the future, a few notable inconsistencies need to be pointed out in the Common Ground report, if only as a matter of record.

6.2.1. The statement (p 49) that *"the houses were described as beautiful single dwellings on separate erven that blended in with the natural environment*" is at odds with all historical accounts. Reference page 11 of the Heritage Report which states that; "in 1962, 59 families were living in 20 Stegman Cottages. The cottages were described as being semi-detached. All had fireplaces and were mostly painted white with dark green doors and windows. The 1966 survey shows a further 35 wood and iron detached houses with 10 iron and wood lean to's.

6.2.2. The focus group have indicated (p 50) that the community do not wish to return to a higher density environment which for many reminds them of the type of environment they were relocated into over 35 years ago. This statement contrasts markedly with the conclusion to the very next section which states that; "*a community claim is interpreted as a commitment to return to live in an environment in which certain aspects of everyday life are shared. The houses could be attached creating a stronger definition to the semi-public spaces and a presence over the site unlike the residential fabric typical of the surrounds in which individuals live in isolation from each other"*

6.3. FRA is a little perplexed as to how the visioning process described on page 50 of the Common Ground report results in the desired outcome of plots of 850 m^2 given that no cognisance seems to have been taken as to the practicality of this vision coupled with the very dramatic impact that such a proposal would have on the said environment. It seems quite odd that in a situation where less than 20% of the claimants wished to return and where the overwhelming need, as expressed by the claimants themselves is for financial sustainability, equity and moral regeneration, that the process resulted in this outcome. As no justification is presented in the Common Ground report, FRA an only surmise that the outcome was influenced by a belief that the potential exists to sell the land for financial gain. FRA is on record as saying that it will vigorously oppose this outcome as it serves none of the criteria inherent in the land claims process. In this context FRA has been approached by members within the claimant community who wish to sell "their plot" and has also been advised through a member of the City of Cape Town's Department of Land Claims that answers to key issues are needed urgently as "the developer is waiting"

6.4. Whilst it may appear to be insensitive, FRA would like to point out that desire expressed by the community to annex all of Erf 242 and 212 for development is inconsistent with historical patterns of occupation and may be creating unrealistic expectations that can not be met. Common Ground recognise this *ad para* 6.4 of their report which states that; *"it is important to recognise that while the developable footprint has been fixed at 5.8 hectares, the optimal footprint would therefore be one which allowed for smaller pockets of development and a smaller developable footprint on Erf 212"*

6.5. FRA submits that: *"the desire to re-establish a village within a forest containing small pockets of houses surrounded by parkland that could function as an extension of small private gardens"* (p51) is fundamentally at odds with the claim of 500 sq.m plots (p50)

6.6. FRA notes the terms of reference as contained in a letter by Mr P de Tolly to PROVAC dated 3 Oct 2003 in which the City of Cape Town stipulates the following conditions that still need to be met and procedures to be followed:

1. PROVAC need to establish affordability of housing
2. PROVAC need to prepare detailed design, including house designs (3 months)
3. PROVAC conduct Environmental Impact Assessment and Traffic Impact Assessment using Settlement Planning Grants (4 months)
4. PROVAC need to cost the designs
5. PROVAC need to prepare business plan to negotiate settlement
6. PROVAC need to negotiate the Section 42D agreement with the RLCC, including the amount of the Resettlement Grant per qualifying claimant
7. PROVAC need to fundraise any shortfall
8. PROVAC need to apply for rezoning and subdivision
9. City needs to approve rezoning and subdivision (at least 8 months)
10. PROVAC needs to finalise building plans and civil engineering designs
11. City needs to approve final building plan and civil engineering designs
12. PROVAC needs to negotiate with the City around financing the building of bulk services to the site (time depends on what needs to be done, and if there are funds to do it)
13. PROVAC to negotiate on site preparation (cutting some trees, levelling, excavating) (again, depends on budgets)
14. Contract manager to draw up tender document
15. Contract manager to call for tenders and award tender (1 month)
16. Contractor(s) to construct services and homes (6-12 months)
17. Claimants to occupy, and to report snags (defects) to be fixed by contractor for 1 year.

The usual time it takes for a housing development to be completed from the time that the land is secured is between two and four years. This varies depending on how long it takes to finalise the detailed design, whether there are objections and/or appeals to the rezoning, how quickly funds are found to develop the services to the site, and to develop the site itself, who develops the land (e.g. Council has procurement procedures to follow), whether one big contractor or several small contractors are used, etc.

You need to consider:

- Who should be the developer? Do you set up a Trust / Section 21 Company? How can you fundraise effectively and quickly? Who should be the Project Manager?
- What sort of title arrangements should you have to protect yourselves?
- How will homes be allocated?
- Who will build the services and homes? One big developer, or small contractors? What will be the claimants' involvement in the building phase? (The work has to be managed by a service provider approved by the RLCC)

7. Conclusions & Way Forward (p72 – 73)

7.1. FRA has pointed out a number of facts omitted from the Common Ground report which are material to any decision taken by the City of Cape Town and / or Land Claims Commission. As some of these factors relate to the primary right of development imposed by Title Deed resrictions, FRA submits that their veracity needs to be fully reviewed prior to completion of the final report by Common Ground to the City of Cape Town. FRA furthermore submits that the report be amended and amplified where necessary in order for the City of Cape Town and / or Land Claims Commission to be able to make informed decisions.

7.2. In particular FRA submits that the City of Cape Town obtain legal opinion on its rights viz Erf 212, and its *locus standi* viz Erf 242 given the terms of settlement as indicated

7.2.1. It is premature, in FRA's opinion, to consider application for rezoning under section 9 of LUPO in respect of Erf 212. Should an application for the removal of title deed conditions be considered, on either erven, FRA submits that these will have to comply with the three part test as defined sec 3 of The Removal of Restrictions Act, 47 of 1967 (as amended)

7.2.2. FRA requests that the implications of having to extend the Cape Town Zoning Scheme boundary as contemplated on p73 of the report be more fully set out.

7.2.3. FRA is unfamiliar with "schedule 8 conditions" as situated on page 73 of the Common Ground report and therefore reserves the right to comment.

7.3. The lack of any business plan or financial analysis places a significant constraint on the ability to assess alternatives. FRA believes that insufficient attention has been given to planning alternatives that would meet the wide range of needs expressed by the community. The statement of common intent to each be awarded a 500 m2 plot seems quite inconsistent with the broad range of needs as expressed by the claimant community for financial sustainability, equity and moral regeneration.

7.4. FRA submits, in all humility and with the utmost respect, that resettlement in its present conceived format is an option that is not sustainable for over half of the claimant community. FRA has, in discussion with PROVAC, explored alternatives that would meet the requirements and spirit of the land claims process. Further engagement in this regard is welcomed by both the Fernwood Residents Association and Bishops Court Residents Association.

7.5. FRA endorses the recommendation that "the correspondence dated 8 October, addressed to the City of Cape Town, from DEA&DP be reviewed in terms of the requirements of section 24 (1) of the National Environmental Management Act with a view to proceeding with an environmental impact assessment given the ecological and historical sensitivities associated with the properties concerned. This would result in a proper scoping process being conducted which would in turn remedy the objections raised by FRA to the public participation process conducted to date as more fully set out under section 2 above.

7.6. FRA can not agree with the recommendation that the design guidelines, as contained in the Common Ground report, be adopted (p73). FRA submits that too many factors remain unclear, omitted or have not been subjected to proper public participation in order for this decision to be taken at this stage. Much work and engagement by all interested and affected parties remains.

In conclusion, FRA would, notwithstanding representations made in this report, like to contribute to a process that ensures that the people of Protea Village are re-united with the land they once loved. The points raised are intended to contribute positively to the process of reconciliation and healing within a responsible framework that takes account of the framework provided by the law and the practical steps necessary to achieve restitution through the use and engagement of proper planning principles as enunciated by Dodson J. The current stance by certain members of the Protea Community seems overly focussed on securing the right to sell off "their plots" which development troubles FRA.

FRA believes that the responsible application of a well established legal framework, the implementation of sound planning principles and the assistance of both FRA and BCRA in the process, working together with all interested and affected parties will result in an equitable outcome that does justice to both the spirit and requirements of the Restitution of Land Claims Act. Moral regeneration, the right to be re-connected to the land with a sustainable framework is fully supported by both FRA and BCRA.

We invite all parties to work together to ensure that this vision is realised.

Yours sincerely

Protea Village Task Team
Tony Bell, Prof Jonny Myers, Nuku van Coller

Working in conjunction with the Bishops Court Residents Association
Chaired by
Dr J Schrire