

***STONEHAVEN ESTATE
ENVIRONMENTAL AGREEMENT
City of Cape Town and the
Stonehaven Estate Home Owners Association***

**ENVIRONMENTAL AGREEMENT
in respect of the house construction works**

made and entered into between

the CITY OF CAPE TOWN

herein represented by

JOHN CHRISTOPHER SULLIVAN

in his capacity as
**EXECUTIVE DIRECTOR: URBAN AND ENVIRONMENTAL SERVICES (SOUTH
PENINSULA ADMINISTRATION),**
duly authorised hereto
(hereinafter referred to as "the COUNCIL")

AND

STONEHAVEN ESTATE HOMEOWNERS' HOA

herein represented by

.....

(in his capacity as, duly authorised
hereto)
(hereinafter referred to as "the HOA")

1 DEFINITIONS

- 1.1 Throughout this Agreement the following terms shall have the indicated defined meanings in each case:
- 1.1.1 **“HOA” or HOA** means the Stonehaven Homeowners HOA;
 - 1.1.2 **“Builder”** means:
 - 1.1.2.1 the main contractor as engaged by the Owner from time to time for the execution of the works including all sub-contractors appointed by the main contractor of his own volition for the execution of parts of the works;
 - 1.1.2.2 any other contractor from time to time engaged by the Owner directly in connection with any part of the works which is not a nominated sub-contractor to the main contractor;
 - 1.1.3 **“common property”** bears the meaning ascribed to it under paragraph 1.1.6 of the Constitution of the HOA.
 - 1.1.4 **“Construction EMP”** means Appendix 1 of this document, which controls the works in connection with the House Construction in such a way as to ensure that such works does not result in undue or reasonably avoidable adverse impacts on the environment or environmental damage;
 - 1.1.5 **“Council”** means the City of Cape Town, its successors in title or assigns;
 - 1.1.6 **“days”** means the days of the week excluding Sundays and legal public holidays;
 - 1.1.7 **“Environmental Control Officer”** (ECO) means a suitably environmentally qualified official of the Council designated to oversee the protection of the environment which could potentially be affected by the development;
 - 1.1.8 **“Environmental Damage”** means any damage caused by the works to the environment, except as foreseen in the Construction EMP and in respect of which no remedial action is required;
 - 1.1.9 **“Environmental Site Officer”** (ESO) means a qualified independent environmental manager to be appointed by the owner prior to commencement of the works on an erf, to oversee the implementation of the Construction EMP and this agreement until the completion of the works on the site;
 - 1.1.10 **“Erf”** means one of the residential erven that forms part of the Property;
 - 1.1.11 **“House Construction”** means all activities, including building works relating to the construction of a new house on an erf, and includes

for any and all works relating to the renovation, addition, alteration and/or amending of an existing house on an erf;

1.1.12 “**Operational Environmental Management Plan**” (OEMP) means the environmental management plan setting out measures for the ongoing environmental protection of the Property, as amended or varied with the approval of Council from time to time, and which the HOA is obliged to enforce and Owners are obliged to comply with.

1.1.13 “**Owner**” means the registered owner of an erf;

1.1.14 “**party or parties**” means severally and collectively the Council and the HOA;

1.1.15 “**Property**” means Unregistered portions 42,43 and 45 (previously part of portion 1 of Farm no. 953, Cape Division, portion 5 of Farm no. 959, Cape Division and Erf 15461, Fish Hoek which have been consolidated), remainder of portion 22 of Farm 959, Cape Division, Portion 14 of Farm 959, Cape Division and Erf 17222, Fish Hoek and collectively known as Stonehaven Estate;

1.1.16 “**this Agreement**” means this agreement and the annexures and amendments thereto and “the agreement” shall have the corresponding meaning;

1.1.17 “**Works**” means all activities, including building operations carried out on an erf in connection with or incidental to, house construction;

1.2 Unless patently consistent with the context, and expression defined in this paragraph 1, which denotes:

1.2.1 any gender, includes the other gender;

1.2.2 a natural person, includes an artificial person and *vice versa*; and

1.2.3 the singular, includes the plural and *vice versa*.

1.3 The headings to the several paragraphs of this agreement are to be ignored in the interpretation hereof; the same having been included only for the ease of reference.

1.4 If any provision of this paragraph 1 and/or any provision of the PREAMBLE is a substantive provision conferring rights or imposing obligations to any party, then notwithstanding that such provision is contained in this paragraph 1 and/or PREAMBLE, as the case may be, effect shall be given thereto as if such provision were a substantive provision in the body of this Agreement.

1 PREAMBLE

Whereas:

- 1.5 The Council, when approving the subdivision of the Property, imposed a condition (condition 2) that the developer shall produce an Environmental Management Plan (EMP) and an environmental contract shall be entered into with Council for the construction and installation of the infrastructure (civil and electrical) services. Such plan and contract shall at the same time address the issue of construction of the dwellings and responsibilities and obligations arising from this. The responsibility shall in time fall upon the HOA once its members have the majority ownership of the estate.
- 1.6 The contract between the developer and Council provided that a separate agreement would be entered into between the Council and the HOA.
- 1.7 The Council and HOA wish to record the agreement reached to address the issue of construction of the dwellings and the responsibilities which fall upon the HOA during the construction of the dwellings.

2 SCOPE AND OBJECTIVES

- 1.8 This agreement outlines procedures to ensure that as far as reasonably practical the execution of the works, in relation to house Construction, do not result in undue or reasonably avoidable adverse impacts on the environment.
- 1.9 In the context of this agreement the “environment” refers to and includes but is not limited to the existing and final:
 - 1.9.1 biophysical environment on the erf, the property and surrounding properties;
 - 1.9.2 roads and road verges; and
 - 1.9.3 wetland areas, natural runoff and watercourse on the site.
- 1.10 The rights which accrue to the Council in terms of this agreement are supplementary and additional to any rights and obligation which the Council has in terms of any applicable environmental legislation and this agreement is in no way intended to detract from the Council’s right to enforce applicable legislation if and when it deems it appropriate.

3 CONSTRUCTION EMP

- 1.11 The Construction EMP forms Appendix 1 to this Agreement.
- 1.12 The Construction EMP and any subsequent amendments or variations thereof will be submitted to the Council for their approval, whereupon it shall be deemed to be incorporated into and constitute an integral part of this Agreement.

2 STONEHAVEN HOMEOWNERS HOA

- 2.1 The HOA shall monitor and enforce compliance with the Construction EMP by the Owner, Builder and contractors during the works and shall itself comply with the provisions of the Construction EMP when carrying out any construction work on the common property.
- 2.2 The HOA shall ensure that any environmental damage caused by the works or by non-compliance with the EMP is made good and/or restored within a reasonable period after such environmental damage or non-compliance has come to its attention.
- 2.3 In order to carry out its obligations set out in paragraphs 5.1 and 5.2 above, the HOA undertakes to enter into an agreement with each owner prior to commencement of the Works on an erf.
- 2.4 The Agreement referred to in paragraph 5.3 above shall contain, at minimum, the following material terms.
 - 2.4.1 The HOA shall ensure that prior to commencement of the works on an erf, an ESO is appointed by the Owner to ensure compliance by the owner and his builder with the Construction EMP for the duration of the works.
 - 2.4.2 The HOA shall ensure that the ESO is aware of and agrees to comply with the role and responsibilities of the ESO as set out in Appendix 1.
 - 2.4.3 The HOA shall require each Owner to include in the contract documentation relating to the House Construction for the Builder the provisions of the Construction EMP and shall further require that the provisions of the Construction EMP are incorporated in a legally binding agreement between the Owner and the Builder.
 - 2.4.4 The HOA shall bind itself to enforce compliance with the Construction EMP by the Owner and Builder.
- 2.5 The HOA shall, on request of the Council, promptly deliver to the Council copies of all agreements in terms of paragraph 5.4 above.

3 ENVIRONMENTAL CONTROL OFFICER (ECO)

- 3.1 The Council shall appoint a suitably environmentally qualified official to fulfil the role of ECO, for the purposes of this agreement.
- 3.2 The ECO will be responsible for overseeing the implementation of the Construction EMP by the ESO and the HOA, and for monitoring the protection of the environment on property in general, as well as on the individual erven, for the duration of the Works.
- 3.3 The ECO will also be responsible to approve the terms and conditions of appointment of the ESO.

4 BREACH

In the event that the HOA fails to enter into the agreement referred to in paragraph 5.3 above, with each Owner and environmental damage occurs, or in the event that the HOA fails to enforce compliance with the Construction EMP and environmental damage occurs, Council shall be entitled to require the HOA to remedy or make good at its cost any environmental damage caused to the property within 24 hours after receipt of a notice or within such longer period as may in the circumstances reasonably be necessary to remedy such breach and in the event that the HOA does not remedy such breach, Council shall be entitled to carry out the remedial work itself and to claim the costs from the HOA or at its discretion, approach the High Court for an interdict and/or monetary damages and/or further or alternative relief (but not cancellation) by way of a determination by experts as set out in paragraph 9 of this agreement.

5 FORCE MAJEURE

- 3.4 The HOA shall not be liable for failure to perform their obligations in terms of this Agreement in the event and to the extent that such failure is caused by a condition of *force majeure*.
- 3.5 The condition of *force majeure* shall arise from circumstances beyond the reasonable control of the HOA which prevents them from meeting their obligations in terms of this Agreement including, but not limited to, the following:
- 3.5.1 riot or civil commotion;
 - 3.5.2 labour dispute, strikes, lock-outs;
 - 3.5.3 earthquake, flood, fire, lightening, storm of gale force 7 (seven), or stronger, on the Beaufort Scale as measured by the South African Weather Bureau at the Cape Town International Airport or other natural physical disasters; and
 - 3.5.4 negligent or malicious damage by persons known or unknown, for whose acts the HOA is not in law liable.
- 3.6 The HOA shall give notice immediately to the Council and to the ESO of the occurrence of an event of *force majeure* which causes or is likely to cause any failure to perform any of their obligations of this Agreement.

6 DETERMINATION OF DISPUTES

- 3.7 In the event of there being any dispute, difference of opinion, want of agreement or deadlock (herein, collectively referred to as "a dispute") between the parties in regard to or arising out of or by way of:
- 3.7.1 the interpretation of this Agreement; or
 - 3.7.2 any alleged or purported variation, cancellation or termination of this Agreement; or
 - 3.7.3 any want of agreement on the implementation or otherwise, or the method of implementation, of any recommendation made, or any advice given by the ESO to the HOA or Council, or contained in the House Construction EMP; or
 - 3.7.4 any, or any alleged, breach, non-performance or repudiation on the part of any party of this Agreement or of any of its obligations arising in terms of or out of this Agreement; or
 - 3.7.5 any concomitant claim on the part of any other party in respect of an interdict and/or an order for specific performance and/or for monetary damages and/or for further or alternative relief (but not cancellation);

any party shall be entitled, by written notice to the remaining parties, to require that such dispute be referred for determination by experts ("the experts") pursuant to this paragraph;

- 3.7.6 there shall be three experts,
- 3.7.7 within seven (7) days after the receipt of the notice in terms of paragraphs 9.1.1 to 9.1.6 above calling for determination by the experts, the Council and the HOA shall each, by written notice delivered to the other, nominate one expert;
- 3.7.8 in the event of either the Council or the HOA failing to nominate an expert in terms of paragraph 9.1.7 timeously, an expert shall, on the written application of the other of them, be nominated on behalf of the defaulting party by the Chairman for the time being of the Southern African Institute of Ecologists and Environmental Scientists (SAIE&ES) in his absolute and unchallengeable discretion, which nominee shall be deemed to be the expert duly nominated by such defaulting party;
- 3.7.9 the two experts nominated or deemed to have been nominated by the Council and the HOA in terms of paragraph 9.1.7 and 9.1.8 above shall within two days after their nomination agree upon and nominate a suitably qualified person as the third expert, failing which the third expert shall be nominated, on the application of either the Council or the HOA, *mutatis mutandis* in accordance with the provisions of paragraph 9.1.8 above; and
- 3.7.10 the third expert nominated in terms of paragraph 9.1.9 above shall be the chairman of the experts in the conduct of their proceedings.

- 3.8 The experts selected in terms of paragraphs 9.1.7 to 9.1.10 above shall in all respects act as experts and not as arbitrators.
- 3.9 The experts may as far as they consider just and equitable in the circumstances dispense with any legal formalities or procedures and shall not be bound to observe or carry out the strict rules of evidence or the proof of documents; provided that the experts shall, at least, afford each of the parties and/or their legal or other representatives an opportunity to submit their representations to them, preferably in the presence of the other parties, and, similarly, to reply to or comment on the representations so submitted by the other parties.
- 3.10 Any hearing by the experts shall be held in Plumstead.
- 3.11 The parties shall use their best endeavours to procure that the decision of the experts shall be given within twenty-one days or as soon thereafter as is possible after determination by experts had been called for in terms of paragraphs 9.1.1 to 9.1.6 above.
- 3.12 The experts shall be empowered to make a costs order in respect of the arbitration proceedings including the party liable to pay costs and/or the scale of tariff according to which such costs are to be taxed and/or the costs of two counsel and/or the qualifying costs of the witnesses.
- 3.13 The concurring decision of two out of three experts:
- 3.13.1 shall be final and binding on all parties affected thereby as if it were the decision of an arbitrator duly delivered in terms of the Arbitration Act, 1965;
 - 3.13.2 shall be carried into effect by the parties affected hereby; and
 - 3.13.3 may be made an order of any competent court at the instance of any party.
- 3.14 In the event of a matter to be resolved urgently, the HOA and Council are to reach an agreement regarding the dispute with 48 hours, failing which the matter shall be referred for determination by expert in terms of paragraphs 9.1.7 to 9.7 above.
- 3.15 This paragraph 9:
- 3.15.1 constitutes an irrevocable consent by the parties to any proceedings in terms hereof and no party shall be entitled to withdraw therefrom or to claim in any such proceedings that it is not bound by this paragraph;
 - 3.15.2 is severable from the rest of this Agreement and shall remain in effect even if this Agreement is terminated for any reason;
 - 3.15.3 shall not preclude any party from seeking urgent interim relief from any competent Court pending the determination of a dispute by experts as herein provided; and
 - 3.15.4 shall *ipso facto* be deemed to be incorporated into and to form part of any further or other written agreement hereafter entered into between

the Council and the HOA to regulate any issues relating to environmental protection or control in the context of the execution of the works.

7 WHOLE AGREEMENT

This Agreement records the whole of the Agreement entered into by and between the parties; there being no collateral or extraneous terms and, save as expressly herein set out, no warranties or representations, express or implied, which have been given or made by or on behalf of any party to induce or which had the effect of inducing the transactions the subject of this Agreement.

8 NON-VARIATION

No purported amendment or variation of, or addition to, or cancellation by consent or notation of, this Agreement shall be of any force or effect unless and until it has been reduced to writing and duly signed on behalf of all the parties hereto.

9 INDULGENCE

No indulgence which any party ("the grantor") may grant or permit to any other party ("the grantee") shall constitute a waiver of any of the rights of the grantor, who shall not thereby be precluded from exercising any rights against the grantee which may have arisen in the past or which arise in the future and who shall not be obliged to give to the grantee any notice of the withdrawal or discontinuation of such indulgence prior to so exercising its rights against the grantee.

10 WARRANTY OF AUTHORITY

Each of the signatories of this Agreement on behalf of a corporate party by his signature hereto warrants and represents in his personal capacity, that he is duly authorised so to execute this Agreement and to bind such corporate party hereto.

1 DURATION OF THIS AGREEMENT

The duration of this Agreement shall be for the period until the works in respect of all the residential erven on the Property have been completed, provided that in the event of the Builder, or any other Builder, thereafter returning to an erf to carry out any form of house construction work, this Agreement shall be reinstated and shall be of full force and effect for the period of carrying out of such house construction operations.

2 COST

- 3.16 Each party to this agreement shall bear its own costs in connection with the fees and disbursements of any legal advisor, including but not limited to an attorney, charged in respect of any advice and/or assistance commissioned by such party from such legal advisor concerning this agreement and any aspect thereof.
- 3.17 The stamp duty, if any, on this agreement shall be borne and paid by the HOA on demand.

11 ENVIRONMENTAL LEGISLATION

This agreement shall not in any way absolve the parties hereto from liability or responsibility in terms of the Environment Conservation Act No 73 of 1989, or any other applicable environmental legislation.

SIGNED AT ON THIS THE DAY OF20.....

AS WITNESSES:

for and on behalf of:
CITY OF CAPE TOWN

1.

2.

.....
duly authorised hereto

SIGNED AT ON THIS THE DAY OF20.....

AS WITNESSES:

for and on behalf of
**STONEHAVEN HOMEOWNERS
HOA**

1.

2.

.....
duly authorised hereto

APPENDIX 1

Construction Environmental Management Plan for Houses

