



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case number: 4819/21

In the matter between:

NOORDHOEK ENVIRONMENTAL ACTION GROUP

Applicant

and

THE CITY OF CAPE TOWN

First Respondent

**MEC FOR LOCAL GOVERNMENT,
ENVIRONMENTAL AFFAIRS AND DEVELOPMENT
PLANNING: WESTERN CAPE**

Second Respondent

CHAND ENVIRONMENTAL CONSULTANCY CC

Third Respondent

INGRID EGGERT

Fourth Respondent

SADIA CHAND

Fifth Respondent

ZAAHIR TOEFY

Sixth Respondent

Heard: 8 NOVEMBER 2023

Delivered: 23 APRIL 2024 (Electronically)

JUDGMENT

INTRODUCTION

1. The challenge in this matter relates to certain decisions that were taken in respect of the building of a road known as, Houmoed Avenue Extension 1, which is a 1.2 kilometre section road in the vicinity of Sunningdale/ Noordhoek (also referred to as “**the proposed road**”). The proposed road is adjacent to a wetland in Noordhoek known as the Pick ‘n Pay reedbed or wetland. The applicant, Noordhoek Environmental Action Group, which is a non profit organisation with an environmental focus argues that the proposed road will disturb the wetland as well as three breeding ponds used by the endangered Western Leopard Toads (“**WLT**”) and will potentially cause their extinction.
2. As a result, the applicant seeks to review and set aside decisions taken by the sixth respondent (“**the Director**”) and the second respondent (“**the MEC**”) to grant environmental authorisation to the first respondent (“**the City**”) in terms of the National Environmental Management Act No 107 of 1998 (“**NEMA**”) and the Environmental Impact Assessment Regulations, 2014 (“**the EIA Regulations**”) for the construction of the proposed road.
3. Environmental authorisation was required for the proposed road because its construction and the establishment of the road reserve gives rise to listed activities in respect of: (a) the infilling of more than 10 m³ of material into a wetland; (b) the removal of an area of indigenous vegetation exceeding 300 m².
4. In its original notice of motion dated 17 March 2021, the applicant sought relief in terms of ten specific prayers. In its amended notice of motion (filed pursuant to Rule 53 (4))

certain further relief was sought, which the applicant subsequently indicated that it was withdrawing.

5. The following substantive relief is accordingly sought in this application:

- 5.1. An Order reviewing and setting aside the decision of the Director taken on 22 November 2019 granting the City's application for environmental authorisation for the proposed road.
- 5.2. An Order reviewing and setting aside the decision of the MEC taken on 18 September 2020, sitting as the appeal authority, refusing the appeal of the applicant against the environmental authorisation for the proposed road.
- 5.3. An Order declaring that the failure to commission specialist anuran or amphibian study into the impact of the proposed road on the WLT in particular constitutes a fatal flaw in the Basic Assessment Report (also referred to as the "**BAR**") submitted by Chand Environmental Consultants (also referred to as the "**Chand**") in the City's application for an environmental authorisation to construct the proposed road.
- 5.4. An Order declaring the submission of the aforesaid BAR by Chand, and not by a single natural person is in contravention of the intention of the NEMA, and in particular of the definition of an Environmental Assessment Practitioner ("**EAP**") in section 1 and, as such, constitutes a fatal flaw.
- 5.5. An Order declaring that the BAR was not conducted with the required objectivity by the appointed EAP.

- 5.6. An Order declaring that the lack of objectivity of those involved in the preparation of the BAR amounted to a fatal flaw in the process.
- 5.7. An Order declaring that in terms of a proper reading of the NEMA EIA Regulations, 2014, the traffic impacts associated with the proposed road required that a Traffic Impact Assessment be duly completed and submitted.
- 5.8. An Order declaring that the traffic study by the HH0 dated June 2016 is not a Traffic Impact Assessment as required by the NEMA EIA Regulations, 2014.
6. The applicant subsequently sought leave to amend its fourth prayer (as set out in paragraph 5.4) by deleting the words “*a single natural person*” and replacing it with “*an individual*”. I grant the amendment as sought.

THE BACKGROUND

The previous application process

7. The subject application process was preceded by an earlier basic assessment process which had been conducted during 2017 and 2018 but had been subsequently withdrawn (“**the previous BAR process**”). The previous BAR process was initiated in December 2016 and occurred pursuant to an earlier application for environmental authorisation (“**the previous application for environmental authorisation**”).
8. The previous BAR process culminated in the submission of a final BAR to the Department on 20 November 2018.

9. The previous application for environmental authorisation did not reach conclusion because, ultimately, the City decided to withdraw it.

The current application process

10. On 14 May 2019 the City submitted an application for environmental authorisation to the Directorate: Development Management in the Department of Environmental Affairs and Development Planning (“**the Department**”).
11. An EAP, Chand, was appointed to undertake the basic assessment.
12. A draft BAR was submitted to the Department on 22 May 2019 (“**the 2019 DBAR**”). It was the subject of a 30 day public participation process.
13. A final BAR was submitted to the Department on 14 August 2019.
14. Much of the information that was obtained during the previous BAR process formed part of the current application process.

THE LEGAL FRAMEWORK

15. In this section, I shall identify the relevant statutory and regulatory provisions which bear on the determination of this matter.

NEMA

16. Section 24(1) of NEMA provides (in relevant part) as follows:

“(1) In order to give effect to the general objectives of integrated environmental management laid down in this Chapter, the potential

consequences for or impacts on the environment of listed activities or specified activities must be considered, investigated, assessed and reported on to the competent authority or the Minister responsible for mineral resources, as the case may be, except in respect of those activities that may commence without having to obtain an environmental authorisation in terms of this Act.

(1A) Every applicant must comply with the requirements prescribed in terms of this Act in relation to-

- (a) steps to be taken before submitting an application, where applicable;*
- (b) any prescribed report;*
- (c) any procedure relating to public consultation and information gathering;*
- (d) any environmental management programme;*
- (e) the submission of an application for an environmental authorisation and any other relevant information; and*
- (f) the undertaking of any specialist report, where applicable.*

....

(4) Procedures for the investigation, assessment and communication of the potential consequences or impacts of activities on the environment-

- (a) must ensure, with respect to every application for an environmental authorisation-*
 - (i) coordination and cooperation between organs of state in the consideration of assessments where an activity falls under the jurisdiction of more than one organ of state;*
 - (ii) that the findings and recommendations flowing from an investigation, the general objectives of integrated environmental management laid down in this Act and the principles of environmental management set out in section 2 are taken into account in any decision made by an organ of state in relation to any proposed policy, programme, process, plan or project;*

- (iii) that a description of the environment likely to be significantly affected by the proposed activity is contained in such application;
 - (iv) investigation of the potential consequences for or impacts on the environment of the activity and assessment of the significance of those potential consequences or impacts; and
 - (v) public information and participation procedures which provide all interested and affected parties, including all organs of state in all spheres of government that may have jurisdiction over any aspect of the activity, with a reasonable opportunity to participate in those information and participation procedures; and
- (b) must include, with respect to every application for an environmental authorisation and where applicable-
- (i) *investigation of the potential consequences or impacts of the alternatives to the activity on the environment and assessment of the significance of those potential consequences or impacts, including the option of not implementing the activity;*
 - (ii) *investigation of mitigation measures to keep adverse consequences or impacts to a minimum;*
 - (iii) *investigation, assessment and evaluation of the impact of any proposed listed or specified activity on any national estate referred to in section 3 (2) of the National Heritage Resources Act, 1999 (Act 25 of 1999), excluding the national estate contemplated in section 3 (2) (i) (vi) and (vii) of that Act;*
 - (iv) *reporting on gaps in knowledge, the adequacy of predictive methods and underlying assumptions, and uncertainties encountered in compiling the required information;*
 - (v) *investigation and formulation of arrangements for the monitoring and management of consequences for or impacts on the environment, and the assessment of the effectiveness of such arrangements after their implementation;*

- (vi) *consideration of environmental attributes identified in the compilation of information and maps contemplated in subsection (3); and*
- (vii) *provision for the adherence to requirements that are prescribed in a specific environmental management Act relevant to the listed or specified activity in question.”*

(Emphasis added)

17. Section 24I of NEMA reads as follows:

“24I Appointment of external specialist to review assessment

The Minister or MEC may appoint an external specialist reviewer, and may recover costs from the applicant, in instances where-

- (a) *the technical knowledge required to review any aspect of an assessment is not readily available within the competent authority;*
- (b) *a high level of objectivity is required which is not apparent in the documents submitted, in order to ascertain whether the information contained in such documents is adequate for decision-making or whether it requires amendment.”*

18. Section 24O of NEMA reads as follows:

“24O Criteria to be taken into account by competent authorities when considering applications and consultation requirements

(1) If the Minister, the Minister responsible for mineral resources or an MEC considers an application for an environmental authorisation, the Minister, Minister responsible for mineral resources or MEC must-

- (a) *comply with this Act;*
- (b) *take into account all relevant factors, which may include-*
 - (i) *any pollution, environmental impacts or environmental degradation likely to be caused if the application is approved or refused;*
 - (ii) *measures that may be taken-*

- (aa) *to protect the environment from harm as a result of the activity which is the subject of the application; and*
 - (bb) *to prevent, control, abate or mitigate any pollution, substantially detrimental environmental impacts or environmental degradation;*
 - (iii) *the ability of the applicant to implement mitigation measures and to comply with any conditions subject to which the application may be granted;*
 - (iiiA) *the ability of the applicant to comply with the prescribed financial provision;*
 - (iv) *where appropriate, any feasible and reasonable alternatives to the activity which is the subject of the application and any feasible and reasonable modifications or changes to the activity that may minimise harm to the environment;*
 - (v) *any information and maps compiled in terms of section 24 (3), including any prescribed environmental management frameworks, to the extent that such information, maps and frameworks are relevant to the application;*
 - (vi) *information contained in the application form, reports, comments, representations and other documents submitted in terms of this Act to the Minister, Minister responsible for mineral resources, MEC or competent authority in connection with the application;*
 - (vii) *any comments received from organs of state that have jurisdiction over any aspect of the activity which is the subject of the application; and*
 - (viii) *any guidelines, departmental policies, and environmental management instruments that have been adopted in the prescribed manner by the Minister or MEC, with the concurrence of the Minister, and any other information in the possession of the competent authority that are relevant to the application; and*
- (c) *take into account the comments of any organ of state charged with the administration of any law which relates to the activity in question."*

EIA Regulations

19. The Environmental Impact Assessment Regulations, 2014 GN R982 of 2014 published in GG 38282 of 4 December 2014 (“**the EIA Regulations**”) requires that applicants for environmental authorisation must follow one of two procedures, a basic assessment or a full scoping and environmental impact assessment.

20. Regulation 12 of the EIA Regulations provides:

“12 Appointment of EAPs and specialists

- (1) A proponent or applicant must appoint an EAP at own cost to manage the application: Provided that an EAP need not be appointed for an application to amend an environmental authorisation where no environmental impact assessment or part thereof is required as part of such amendment application.*
- (2) In addition to the appointment of an EAP, a specialist may be appointed, at the cost of the proponent or applicant, if the level of assessment is of a nature requiring the appointment of a specialist.*
- (3) The proponent or applicant must-*
 - (a) take all reasonable steps to verify whether the EAP and specialist complies with regulation 13(1)(a) and (b); and*
 - (b) provide the EAP and specialist with access to all information at the disposal of the proponent or applicant regarding the application, whether or not such information is favourable to the application.”*

(Emphasis added)

21. Regulation 13 of the EIA Regulations sets out the general requirements for EAPs and specialists and requires that they must:

21.1. be independent;

- 21.2. have expertise in conducting environmental impact assessments or undertaking specialist work as required, including knowledge of the Act, the Regulations and any guidelines that have relevance to the proposed activity;
 - 21.3. ensure compliance with the Regulations;
 - 21.4. perform the work relating to the application in an objective manner, even if this results in views and findings that are not favourable to the application;
 - 21.5. take into account, to the extent possible, the matters referred to in regulation 18 when preparing the application and any report, plan or document relating to the application; and
 - 21.6. disclose to the proponent or applicant, registered interested and affected parties and the competent authority all material information in the possession of the EAP and, where applicable, the specialist, that reasonably has or may have the potential of influencing: (i) any decision to be taken with respect to the application by the competent authority in terms of the EIA Regulations; or (ii) the objectivity of any report, plan or document to be prepared by the EAP or specialist, in terms of the EIA Regulations for submission to the competent authority, unless access to that information is protected by law, in which case it must be indicated that such protected information exists and is only provided to the competent authority.
22. In terms of Regulation 13 (2), in the event where the EAP or specialist does not comply with subregulation (1)(a), the proponent or applicant must, prior to conducting public participation as contemplated in Chapter 6 of the Regulations, appoint another EAP or

specialist to externally review all work undertaken by the EAP or specialist, at the applicant's cost.

23. A specialist is defined as “*a person that is generally recognised within the scientific community as having the capability of undertaking, in conformance with generally recognised scientific principles, specialist studies or preparing specialist reports, including due diligence studies and socio-economic studies*”.¹
24. In terms of Regulation 18 of the EIA Regulations, when considering an application, the competent authority must have regard to section 24O and 24(4) of the Act, the need for and desirability of the undertaking of the proposed activity, the requirements of the Regulations, any protocol or minimum information requirements relevant to the application as identified and gazetted by the Minister in a government notice or any relevant guideline published in terms of section 24J of the Act.
25. According to Regulation 19(3) a BAR must contain the information set out in Appendix 1 to the Regulations or comply with a protocol or minimum information requirements relevant to the application as identified and gazetted by the Minister in a government notice.
26. Regulation 40 deals with the purpose of the public participation process. It provides:

“(1) *The public participation process to which the ... basic assessment report... was subjected to must give all potential or registered interested and affected parties, including the competent authority, a period of at least 30 days to submit comments on each of the basic assessment reports, ...*

¹ Regulation 1.

- (2) *The public participation process contemplated in this regulation must provide access to all information that reasonably has or may have the potential to influence any decision with regard to an application unless access to that information is protected by law and must include consultation with ... all potential, or, where relevant, registered interested and affected parties”.*

THE GROUNDS OF REVIEW

27. The grounds of review that were ultimately relied on and advanced at the hearing of the matter may be summarised as follows²:

27.1. First, that the failure to commission and complete an expert study on the WLT means that irrelevant considerations were taken into account and relevant considerations were not taken into account. As a result, the applicant argues that it is impossible for a decision-maker to make a rational decision involving polycentric factors which must be weighed up against each other. According to the applicant, the failure to have appointed an amphibian or anuran specialist to specifically assess the impact that the proposed road would have on the WLT falls foul of NEMA Regulation 12(2), particularly that the WLT is an endangered species. It is also argued in this regard that NEMA requires a risk averse and cautious approach.

27.2. Second, that there was an irrationality in appointing an expert after the fact. The basis for the alleged irrationality is that: (a) there are no current data on the WLT population which uses the Pick ‘n Pay reedbed in general or the three known breeding ponds in particular; (b) if an anuran expert is needed to monitor the state of the WLT after construction of the proposed road, it ought to have been

² Certain additional grounds were advanced in the affidavits but not persisted with in argument.

important enough for such an expert to monitor and establish the state of the WLT before construction; and (c) it makes no sense to recommend mitigation which is untested and untried and then to monitor the effectiveness of the mitigation.

27.3. Third, that cumulative impacts were not considered and that this omission will “*inevitably lead to gaps in knowledge which will lead to relevant facts not being taken into account and irrelevant facts being taken into account*”.

27.4. Fourth, that there was an inadequate public participation process in that: (a) the EAP failed to identify and consult with local knowledge and conduct focus groups at the right stage of the process coupled with repeated requests for information; (b) the second application process contained no new specialist studies; and (c) the members of the applicant did not have the resources to participate in the second application process.

27.5. Fifth, that the traffic study which was commissioned by the City for legitimate traffic and road planning purposes is not a NEMA compliant expert study and does not consider the environment or alternative routes for the proposed road.

27.6. Sixth, that the EAP was biased and motivated by a preconceived imperative that the proposed road had to be built. This, according to the applicant is “*the only plausible explanation for the egregious failures*” that it has identified.

27.7. Seventh, that the EAP was improperly appointed in that: (a) it was appointed by HHO Consulting Engineers and not the City as is required by Regulation 12(1); and (b) an entity as opposed to an individual was appointed.

- 27.8. Eighth, that the MEC did an about-turn in respect of the relevance of the previous EIA process to the current approval process.

REVIEW GROUND 1: THE FAILURE TO COMMISSION AND COMPLETE AN EXPERT STUDY ON THE WLT

The challenge

28. The applicant argues that the advice and active involvement of an anuran expert is necessary for the following reasons:

- 28.1. Respected amphibian experts called for an amphibian report.
- 28.2. An environmentalist called for a specialist amphibian report.
- 28.3. Members of the public, local inhabitants and interested and affected parties called for an amphibian report.
- 28.4. The EAP appreciated the need for an anuran specialist report.

The consideration that was given to the WLT in the approval process

29. It is common cause that an anuran specialist was not appointed as part of the process but that two specialists who considered the impact on the WLT were appointed.
30. In what follows, I shall set out the focus that was given to the WLT in the process.

The Faunal Impact Study

31. The observations made in respect of the WLT in the Faunal Impact Study include the following:

- 31.1. Impacts on the WLT potentially arise from three avenues: habitat loss; habitat degradation; and roadkill.
- 31.2. The proposed road is likely to experience heavy traffic at times and as roadkill is a major source of mortality of the WLT, it could significantly increase mortality of toads moving in and out of the wetlands. Specific mitigation in this regard is recommended which should be focused on minimising roadkill through preventing toads from accessing and crossing the road on the one hand and providing alternative access routes under the road on the other.
- 31.3. Habitat degradation would result largely from increased pollution risk due to run-off from the new road surface. The primary mitigation that has been recommended and included in the road design is to limit culverts to more than 50 m from the open water bodies and include swales to clean the water before it reaches the vlei.
- 31.4. The construction of the proposed road would result in some loss of habitat along the edge of the vlei. Habitat loss will result, in some measure, from the construction of the road along the edge of the vlei. Roadkill of young toads leaving the breeding ponds are of particular concern and specific measures to limit or prevent toadlets from climbing out onto the road should be implemented. It was noted that: (a) this may take the form of an overhanging curved design that prevents toads from scaling the road barrier; and (b) this could take several forms, the final design of which should be informed by input from a specialist.

31.5. Preventing toads from crossing the road is only one aspect of mitigation in this regard as this would also prevent them from accessing the adjacent urban areas such as Milkwood Park where toads are apparently resident outside of the breeding season. In order to provide access to the other side of the road, drive culverts under the road have been recommended. These should be associated with drift fences to direct toads from the open water bodies towards the culverts. While it is not clear whether or not the toads will use such culverts, current research indicates that such systems can be effective for some species. While the success of such features in other parts of the world is variable, this has not been well established in South Africa for the WLT. As such, follow-up monitoring of the culverts is recommended during and after the breeding season when firstly adults and then later young toads are moving about. Further details of the recommended mitigation actions to reduce the impact of the WLT are also dealt with.

32. The following findings and conclusions were reached:

32.1. Impacts associated with the loss of faunal habitat (including the WLT breeding ponds) were rated as medium without mitigation and low if mitigation measures are implemented.

32.2. WLT mortalities (which were subsumed in a general rating for all faunal mortalities) were rated as medium without mitigation and low if mitigation measures are implemented.

32.3. Mitigation measures were proposed for:

- 32.3.1. Design and construction phase impacts in relation to: (a) loss of faunal habitat due to transformation of currently intact habitat for road construction; (b) direct faunal impacts due to road construction.
 - 32.3.2. Operational phase impacts in respect of direct faunal impacts due to road operation.
 - 32.3.3. Cumulative impacts in respect of cumulative habitat loss and fragmentation due to the proposed road.
- 32.4. Amongst others, the following mitigation measures relating to the WLT were recommended:
- 32.4.1. The fate of the open water bodies and whether they should be augmented or moved, should be determined as part of the Wetland Rehabilitation Plan, with input from a faunal and amphibian specialist. They should be buffered from impact as much as possible.
 - 32.4.2. The edge of the road and walkway should have a step that is designed specifically to prevent toads from climbing the wall and accessing the road, and the pavement should have an overhang of at least 50 mm to prevent toads from getting onto the road.
 - 32.4.3. Any side roads that connect with the Phase 1 section of Houmoed Avenue from Milkwood Park should be constructed with gutters or cattle grids or some other feature to prevent toads from entering the

road, which feature must be designed in consultation with an amphibian specialist and must be aligned with the toad underpasses.

32.4.4. Toad underpasses must be constructed close to breeding ponds and should take the form of dry culverts; the edge of the road must be designed to direct the toads towards the culverts; and drift fences must be put in place to direct toads and other animals into the culverts. All these features must be designed in consultation with an amphibian specialist.

32.4.5. An amphibian specialist must evaluate the effectiveness of these measures.

32.5. According to the Conclusion and Recommendations:

“The Houmoed Avenue Extension would result in about 2 ha of habitat loss along the margin of the Pick and Pay Wetland System. The habitat loss is not considered highly significant as the affected reedbeds are homogenous and the loss would be a small proportion of the extensive ‘Pick and Pay’ reedbeds. There are however three small open water bodies along the edge of the wetland that would potentially be impacted to a greater or lesser degree by the road. Due to the presence of these water bodies, Option 1 is considered preferred to Option 2. The open water bodies are considered locally significant as open water is not available elsewhere in the affected wetland and are also known to be used by the Western Leopard Toad which is of specific concern. As the water bodies would be adjacent to the road, which would significantly reduce their utility for many fauna. Specific mitigation should be aimed to reduce the impact of the road on the open water bodies as much as possible. This would include planting indigenous trees and other vegetation along the road to screen the open water bodies from the road. In addition, the habitat loss resulting from the development should be partly offset by rehabilitation of the in-filled areas of wetland that currently exist along the Houmoed Road Extension route. This is in accordance with the freshwater study and is supported by the current study as well. The areas available for rehabilitation are estimated at 0.5 – 1 ha and would significantly reduce the overall impact of the development.

The major impacts associated with the construction phase of the development would be habitat loss resulting from the road footprint and disturbance resulting from construction activities. The loss of habitat is considered of moderate significance and cannot be effectively mitigated as the loss cannot be avoided if the road is constructed in the current proposed alignment. Disturbance is considered to be of moderate pre-mitigation significance which can be reduced to a low level through mitigation. Potential impacts on the Western Leopard Toads are highlighted as a specific concern associated with the development. Four avenues of mitigation are recommended to reduce the potential impacts on this species. This includes the following areas of mitigation:

- Run-off management to ensure that dirty run-off water does not enter the open water bodies. This is facilitated by placement of drainage culverts at least 50 m away from the open water bodies and use of swales to filter the water before it enters the vlei.*
- Habitat improvement and rehabilitation of in-filled sections of the wetland. This is an outcome of the freshwater study and is supported by the current study as well. This could provide for increased habitat for toads along the edge of the vlei in the area where the rehabilitation would take place.*
- Reducing road mortality through design features which prevent toads from climbing onto the road. The final design of the toad mitigation features should be developed with specific input from an amphibian specialist.*
- Enhancing connectivity through the creation of toad underpasses with associated drift fences. These should be monitored for at least 3 to 5 seasons to evaluate their success and improve their design where necessary.*

The final design of the above features should be achieved with collaboration and input from the freshwater specialist as well as an amphibian specialist to inform the design of the toad underpasses.....

During the operational phase, the presence of the road will result in a number of impacts related to disturbance of fauna along the road. These impacts include pollution due to run-off from the road surface, increased light pollution due to street lighting, increased levels of noise and litter input to the wetland as well as increased exposure and access of the wetland to people. These impacts would persist for the lifetime of the road and some of them would have cumulative impacts up that are likely to result in the long term degradation of the wetland if not mitigated. Important mitigation measures include limiting pedestrian access to the wetland, reducing light pollution from street lighting, measures to reduce litter inputs and any measures to improve the quality of the habitat along the road such as clearing

any woody aliens which become established and using indigenous species to re-vegetate the road verge.

The construction of the road will increase cumulative impacts on the larger Noordhoek Wetland System as well as connectivity in the wider Noordhoek-Sun Valley area. The contribution would however be low as the road is positioned along the existing urban fringe and as can best be seen as urban creep along the margin of the current urban boundary and not a novel impact into a currently intact and undisturbed ecosystem. Provided that the recommended mitigation measures are implemented, the impacts of the road can be reduced to an acceptable level. The mitigation measures suggested in this report are aimed at augmenting those outlined in the specialist freshwater study and as such those are supported by the current study as well.

Overall, the majority of impacts associated with the development of the Houmoed Avenue Road on fauna are likely to be low after the effective implementation of the recommended mitigation and there are no highly significant impacts on fauna likely to be associated with the development and which represent a fatal flaw. As such, there are no faunal ecological reasons to indicate that the project should not go ahead. However, due to the presence of the Western Leopard Toad in the area, it is critical that the proposed mitigation measures are effectively implemented and the moderate to low post mitigation impacts are contingent on the effective implementation of the required mitigation. Without the implementation of the suggested measures, there is a high potential for significant long term in impact on the Western Leopard Toad and the Environmental Authorisation should stipulate these measures as essential for the construction and operation of the road. To ensure that the suggested mitigation measures are effectively implemented, the design of the toad mitigation measures should be developed in collaboration between the project engineers and an amphibian specialist.

With the implementation of the required mitigation, the impacts of the Houmoed Road Extension on fauna are considered acceptable."

The Wetlands Report

33. The Terms of Reference of the Wetlands Report were to:

- 33.1. Identify and delineate the freshwater ecosystems present along the route for the proposed road extension.

- 33.2. Identify the potential impacts on freshwater ecosystems that could result from the construction of the proposed road and assess the significance of these impacts.
 - 33.3. Recommend mitigation measures to minimise the potential negative impact on freshwater ecosystems.
 - 33.4. Provide a summary of the findings in the form of a Freshwater Ecosystems Impact Assessment Report.
34. The Wetland Study recognised that the Pick ‘n Pay reedbed was of moderate-to-high conservation importance. However, it rated the specific impacts associated with the WLT as being of low significance:
- 34.1. The impact associated with disturbance to habitat was rated as low in a scenario without mitigation, and “very low” if mitigation measures are implemented.
 - 34.2. The impact described as “trampling of Western Leopard Toads and other fauna by vehicles” was rated as being of medium-to-high significance without mitigation, but of very low significance with mitigation.
35. The Wetland Study required the implementation of the following mitigation measures:
- 35.1. During construction:
 - 35.1.1. Wetlands and other natural areas outside the road reserve should be treated as “no go” areas.

- 35.1.2. Any work that needs to be undertaken in the wetlands or other natural areas outside of the road reserve should be closely monitored by the environmental control officer and should be carried out according to an approved method statement.
- 35.1.3. The wetland areas adjacent to the road reserve should be inspected at least weekly by the environmental control officer for signs of disturbance, sedimentation or pollution and immediate remedial action should be taken. If necessary, a freshwater ecologist should be consulted for advice on the most suitable remediation measures.
- 35.2. During the operational phase:
- 35.2.1. It was noted that it is not really possible to mitigate the increase in noise -related disturbance to fauna that would inevitably result from the establishment of a new road along the southern edge of the Pick ‘n Pay reedbed wetland system. In the case of the temporary bypass road however, some mitigation of this impact could be achieved by only operating the bypass road during the day. The disturbances related to night-time lighting could (and should) be mitigated to some degree by ensuring that no lighting is directed into the wetland area to the north of the road especially where there are open water areas. This would presumably only apply to the permanent road, as street lighting is unlikely to be installed for the temporary bypass road.

35.2.2. To reduce the vehicle -related mortality of the WLT on the proposed road, it is strongly recommended that permanent barriers (drift fences) should be erected along the edges of the road that lead frogs and other small ground-based fauna to underpasses below the road. These barriers and underpasses should be carefully designed and built, with substantial input and guidance from an amphibian specialist and a freshwater ecologist, together with input from engineers.

35.2.3. The erection of signage along the road warning motorists to beware of frogs crossing the road during and after rain was a further proposed mitigation measure.

35.3. Other proposed mitigation measures include:

35.3.1. A range of rehabilitation wetland measures were proposed. It was noted that the significance of the positive impact would also be enhanced if the proposed wetland rehabilitation interventions were to be seen by a wetland ecologist and guided by a detailed wetland rehabilitation plan prepared by landscape architect with good experience of working on wetland and rehabilitation projects.

35.3.2. A freshwater ecologist and a faunal specialist are to provide formal input into the final detailed design of the stormwater management measures for the proposed road.

- 35.3.3. To ensure that the mitigation and wetland rehabilitation measures were properly carried out, follow up monitoring of the road reserve and adjacent wetlands was to be undertaken by a freshwater ecologist. This should entail at least two site inspections each year and an annual report on the status of the potentially affected freshwater ecosystems for at least five years after the construction of the permanent road.
- 35.3.4. The City must ensure that the open water areas along the southern edge of the Pick ‘n Pay reedbed system, which are potential (and in some cases confirmed) breeding sites for the WLT, are not reduced in size (this was emphasised as critical).
- 35.3.5. It contemplated that frog survey would be carried out in advance of road construction to collect necessary data to inform the wetland rehabilitation plan:

“To ensure that the [WLT] and any other frog species that are present in the affected wetlands are adequately protected, it is strongly recommended that a frog survey in the road reserve and adjacent areas be completed by an amphibian specialist during late winter - early spring, to confirm what frog and tadpole species are actually present in and around the wetlands. This information, which is not required for the current (environmental assessment) stage of the project, should be used to inform the formulation of the finalized wetland rehabilitation plans as part of the landscape planning for the project.”

Cape Nature's comments

36. In terms of section 24O(1)(c) of NEMA, the competent authority must, in taking its decision, have regard to the comments of any organ of state charged with the administration of any law which relates to the activity in question.
37. Regulation 41(2)(b)(v) requires an applicant for environmental authorisation to give notice of the proposal to any organ of state having jurisdiction in respect of any aspect of the activity.
38. CapeNature was one of the commenting authorities in the assessment process.
39. Cape Nature provided two comments in the process, in letters dated 7 September 2017 (**“the first comment”**) and 6 June 2018 (**“the update comment”**), respectively.
40. CapeNature's updated comment concluded as follows:

“In conclusion, CapeNature does not object to the proposed project subject to the implementation of all mitigation measures and recommendations. As noted above, the potential impact of the Western Leopard Toad is still of concern, and therefore, a requirement should be that there is written approval from both the freshwater specialist and the faunal specialist of the final stormwater management plan in the final detailed road design, prior to commencement. The faunal specialist must also be provided an opportunity to provide inputs into the Wetland Rehabilitation Plan.”

The review by Dr Burger

41. The EAP appointed Dr Burger to provide an expert review of the Faunal Impact Study.
Dr Burger is a herpetologist.
42. The review by Dr Burger concluded as follows:

“In summary, the faunal impact report is deemed adequate and comprehensive in terms of identifying the relevant impacts and mitigation measures in the context of the proposed Houmoed Avenue extension project. These impacts can be partially (but not completely) mitigated, and the significance of the various impacts may range from LOW/MEDIUM to LOW after implementation of mitigation measures.

Although the overall impact can be mitigated to a large degree, it must be recognised that some of the impact will be unavoidable. In the end it comes down to weighing up priorities, i.e. that of the greater needs and desirability of urban expansion versus an objective to provide absolute protection for WLT in this particular area. If it was likely that the proposed road extension would result in the local extinction of the WLTs here, or if it would impair the WLT ecological viability to a significant degree, then the safeguarding up of WLTs would move up on the scale of priorities. It is however also plausible to achieve both goals, i.e. to develop the road extension and at the same time also maintain an adequate level of WLT ecological viability in the long term. With the various sensitivities and impacts and mitigation measures already been identified, it is a case of planning the finer details and specifications of the various toad-friendly features so that the overall efficiency of the proposed mitigation measures can be enhanced. This must be done in consultation with an amphibian specialist at the detailed design phase of the project.”

The Environmental Authorisation granted by the Director and the regard that was had to the WLT

43. The Director granted the Environmental Authorisation to the applicant to undertake the listed activities for which approval was sought on 22 November 2019.
44. The following aspects of the Environment Authorisation as granted warrant reference:
 - 44.1. Design interventions to allow for safe passage of the WLT and toadlets which have been aligned with the Faunal Impact Assessment Report include the following:
 - 44.1.1. Regular portal culvert crossings will be provided. These have a rectangular profile with smooth, flat floor, thus enabling safe passage of the toads beneath the road.

- 44.1.2. Upstream and downstream head walls will have flat invert slabs.
- 44.1.3. A continuous low brick wall will be constructed along the length of the road (northern edge). This wall will be situated behind the sidewalk. The purpose of the wall is to prevent toads that have climbed the full embankment from entering the roadway.
- 44.1.4. The low brick wall will gradually descend towards culvert openings, thus guiding toads to safe places to cross.
- 44.1.5. Along the right hand side edge, a vertical retaining structure such as a reinforced concrete wall will be constructed between the open channel and roadway. This structure will not be scalable by toads.
- 44.2. The relevant specific conditions that were imposed include the following:
 - 44.2.1. Condition 22 which required that the recommendations contained in the Wetlands Report (“**the Freshwater recommendations**”) must be implemented. It is referred to in Annexure 4. The recommendations included:
 - (a) A detailed Wetland Rehabilitation Plan should be drawn up for the proposed rehabilitation of non-permanent wetlands along the edges of the road.
 - (b) For the mitigation of potential operational phase impacts, it is of critical importance that a freshwater ecologist and fauna specialist provide formal input into the final detailed

design of the stormwater management measures for the proposed road.

- (c) Drift fences and underpasses should be installed for the frogs especially the WLT and other fauna, under the guidance of an amphibian specialist.
- (d) To ensure that the potentially negative impacts of the proposed development are minimised and that the recommended mitigation measures are successfully implemented during the operational phase, and to ensure that the proposed Wetland Rehabilitation measures are properly carried out, it is strongly recommended that follow-up monitoring of the road reserve and adjacent wetlands should be undertaken by a freshwater ecologist.

44.2.2. Condition 25 which required that the recommendations contained in the Faunal Impact Assessment Report (**“the Faunal Impact Assessment Recommendations”**), must be implemented. It is referred to in Annexure 7. The recommendations include the following areas of mitigation:

- (a) Runoff management to ensure that dirty run-off water does not enter the open water bodies. This is facilitated by placement of drainage culverts at least 50 m away from the open water bodies and use of swales to filter the water before it enters the vlei.

- (b) Habitat improvement and rehabilitation of infilled sections of the wetland which could provide for increased habitat for toads along the edge of the vlei in the area where the rehabilitation would take place.
- (c) Reducing road mortality through design features which prevent toads from climbing onto the road. The final design of the road mitigation features should be developed with specific input from an amphibian specialist.
- (d) Enhancing connectivity through the creation of toad underpasses with associated drift fences. This should be monitored for at least 3 to 5 seasons to evaluate their success and improve their design where necessary.
- (e) The final design of the above features should be achieved with collaboration and input from the freshwater specialist as well as an amphibian specialist to inform the design of the toad underpasses. Examples of potential design features were illustrated.

44.2.3. It was noted that during the operational phase, the presence of the road will result in a number of impacts related to disturbance of fauna along the road. These impacts were identified and important mitigation measures were imposed.

44.2.4. It was also noted that the construction of the road will increase cumulative impacts but that the contribution would be low given the positioning of the road. It was observed in this regard that provided the recommended mitigation measures are implemented, the impacts of the road can be reduced to an acceptable level.

44.2.5. The following concluding comment was made:

“Overall, the majority of impacts associated with the development of the Houmoed Avenue road on fauna are likely to be low after the effective implementation of the recommended mitigation and there are no highly significant impacts on fauna likely to be associated with the development and which represent a ~~red flag or~~ [reflected in the original] fatal flaw. As such, there are no formal ecological reasons to indicate that the project should not go ahead. However, due to the presence of the Western Leopard Toad in the area, it is critical that the proposed mitigation measures are effectively implemented and the moderate to low post mitigation impacts are contingent on the effective implementation of the required mitigation. Without the implementation of the suggested measures, there is a high potential for significant long term in impact on the Western Leopard Toad and the Environmental Authorisation should stipulate these measures as essential for the construction and operation of the road. To ensure that the suggested mitigation measures are effectively implemented, the design of the toad mitigation measures should be developed in collaboration between project engineers and an amphibian specialist.

With the implementation of the required mitigation, the impacts of the Houmoed Road extension on fauna are considered acceptable.”

44.2.6. Reasons for the decision appear from Annexure 10. Among the key factors affecting the decision to grant authorisation for the proposed development is, that the Competent Authority took account of the

Faunal Impact and the Wetlands Reports, which have been referred to already.

The appeal decision of the Minister of Local Government, Environmental Affairs and Development Planning and the regard that was had to the WLT

45. On 29 January 2020 an appeal was lodged against the Environmental Authorisation granted by the Director.
46. In support of the appeal, a report was provided by Dr Harding titled: “*Review of the Ecological Specialist Reports: Proposed Phase Extension of the Houmoed Avenue (Sunnydale Noordhoek)*.” Dr Harding reviewed the Wetlands Report and the Faunal Impact Report and raised certain concerns in respect thereof.
47. On 18 September 2020, the MEC determined the appeal in the matter.
48. The MEC dismissed the appeal and confirmed the decision of the Director.
49. The MEC provided, *inter alia*, the following reasons for his decision in respect of the Wetlands Report and the Faunal Impact Report:
 - 49.1. As to the Wetlands Report, the MEC recorded:
 - 49.1.1. The appellant called into question the expertise of the Freshwater Consultant (Mr Ollis) and the Faunal Consultant (Mr Todd) and submitted a review by Dr Harding. Dr Harding’s review raised concerns with the literature resources that were utilised or underutilised in preparing the specialist reports. Mr Ollis confirmed that key reports on the Noordhoek Wetlands cited by Dr Harding

were in fact consulted and cited. He concedes that some of the citations were omitted from the reference list. Mr Ollis confirms further that having read through the reports, his assessment and conclusions remain unchanged.

49.1.2. The exclusion of the 17 year old Ratcliffe Report was also raised by Dr Harding. Mr Ollis indicated that although he had not repeated all of the detailed information contained in that report, all relevant information had been taken into consideration and he had referred to Ratcliffe's findings where relevant. He points out that Ratcliffe reached very similar conclusions to his report as to the likely significance of the potential impacts on the wetlands that could result from the proposed road.

49.1.3. Dr Harding questioned the present ecological state rating assigned to the Pick 'n Pay Wetland as well as the ecological categories assigned by Mr Ollis for the Present Ecological State (PES). In this regard, Mr Ollis stands by his ratings while Dr Harding has challenged these.

49.1.4. The existing roads are already exerting a major impact on the wetland. The proposed road will add less than 1.7% to the total length of roads already present in the catchment of the wetland.

49.1.5. The Wetlands Report is clear that the Pick 'n Pay reedbed which forms an integral part of the greater Noordhoek Wetland System has been transformed through historical development and more recent

urban development of the Noordhoek Valley. As a result, the Wetland System was rated as largely modified relative to the perceived natural reference date of this freshwater ecosystem, with the present state of the hydrology, water quality and vegetation of the wetland considered to be especially impacted.

49.1.6. The wetland was still rated as being of moderate to high conservation importance with only the endangered WLT being noted as being of conservation concern.

49.1.7. It is anticipated that approximately 3% of the total extent of the Pick ‘n Pay reedbed and 0.5% of the Greater Noordhoek Wetland System will be lost as a result of the establishment of the proposed road, the impact of which is considered to be a negative impact of low to medium significance for the permanent wetland and of medium significance for the seasonal wetland.

49.1.8. Rehabilitation of wetland areas along the edges of the proposed road will be effected to compensate for the anticipated loss of wetland associated with the construction of the proposed road.

49.1.9. The report concluded that the proposed road would be acceptable in terms of impacts on freshwater ecosystems, if all the recommended mitigation measures are properly implemented and the proposed rehabilitation of non-permanent wetland habitat is properly carried out as an integral part of the proposed road.

49.1.10. The proposed road would not compromise the functioning of the wetland as a whole, despite the fact that there would be impacts.

49.1.11. With respect to the value of a wetland as calculated by Dr Harding, it would be dependent on many variables - he based his calculations on the Greater Noordhoek Wetland system as a whole whereas only a section along the 800 m long proposed road will be impacted. It was noted that the accuracy of global estimates, as given by Dr Harding and referred to by the appellant, have not been substantiated.

49.2. As to the Faunal Impact Assessment Report, the MEC recorded:

49.2.1. The Faunal Impact Assessment Report concluded that the proposed road will result in approximately 2 ha of habitat loss across the margins of the Pick 'n Pay reedbed but that the loss is not considered highly significant as the affected reedbeds are homogenous and the loss will be limited to a small portion of the extensive Pick 'n Pay reedbeds.

49.2.2. Two open water bodies were identified that would be impacted to a greater degree by the proposed road which are considered locally significant and are not available elsewhere in the wetland system.

49.2.3. The endangered WLT identified as being of specific concern with regard to the water bodies, as these are immediately adjacent to the proposed road. It is recommended that potential impacts on the

WLT be addressed through engineered mitigation measures, which include toad underpasses with associated drift fences. It is recommended that an amphibian specialist should inform the design of the toad underpasses.

49.2.4. It is also recommended that the toad underpasses be monitored for at least 3 to 5 seasons to evaluate their success and improve their design if necessary.

49.2.5. The majority of impacts associated with development of the proposed road on fauna are considered to be low after the implementation of mitigation measures. Further, there are no highly significant impacts on fauna likely to be associated with the proposed road which would prevent the project from going ahead as long as the mitigation measures recommended with respect to the WLT are effectively implemented.

49.2.6. The Harding review has raised particular concerns in respect of the impacts of the noise generated by vehicles using the road. As has been pointed out, this road will be approximately 800 m in length where there is at least 60 km of existing road in the catchment of the wetland.

49.2.7. As the Harding review points out, road effect impacts are not immediate, which is why it was recommended that the monitoring be undertaken for at least 3 to 5 seasons.

- 49.2.8. Mr Burger of Sungazer Faunal Surveys has been commissioned in his capacity as a herpetologist to review the Faunal Impact Assessment, specifically as it related to the findings and recommendations regarding the WLT. Mr Burger determined that the report was adequate and comprehensive in terms of identifying the relevant impacts and mitigation measures in respect of the proposed road. He concluded that the overall impact can be mitigated to a large degree but that some impact is unavoidable.
- 49.2.9. Mr Burger further expressed the view that since the proposed road is unlikely to result in the local extinction of the WLT or impair its ecological viability to a significant degree, it is plausible to develop the proposed road and also maintain an adequate level of the WLT ecological viability in the long term. He agreed that the planning of the finer details and specifications of the various toad friendly features must be done in consultation with an amphibian specialist at the detailed design phase of the project.
- 49.2.10. A separate herpetologist would thus not have come to a different conclusion and was therefore not required.
- 49.2.11. With respect to the appellant not having been granted access to Mr Burgers's comments and recommendations during the withdrawn EIA process, it is reiterated that these were two separate processes and as indicated by the City, it was not made available during the

first process as it was not included in documents placed before the CA for the consideration and therefore fell outside the EIA process.

49.2.12. It was also inferred that comments and inputs provided by ToadNuts had not been considered. As pointed out by the City, a one-on-one meeting between the parties to obtain input from ToadNuts was declined by the organisation.

49.3. As to need and desirability, the MEC recorded:

49.3.1. According to the Guideline, need and desirability will be determined by considering broader community's needs and interests as reflected in a credible IDP, SDF and EME for the area and as determined by the EIA.

49.3.2. According to the BAR, the City considers the proposed road to be a priority project given the urgency to resolve significant road congestion in the Valley. According to the City, current and future traffic volumes necessitate take the proposed link (bypass) road.

49.3.3. The proposed road is in line with the vision of the PSDF which promotes connectivity in the Cape by ensuring that urban communities are inclusive, integrated, connected and collaborate, with a priority to establish an access system within and between functional regions.

- 49.3.4. The road corridor does not fall within an area classified as Critical Biodiversity Area on terrestrial or aquatic grounds, though the wetland is considered aquatic Critical Ecological Support Area. The impacts can however be mitigated to an acceptable level.

The applicant has not established a reviewable irregularity

50. In my view this ground of challenge must fail for reasons set out hereunder.
51. It is clear from the documents referred to that the impact of the proposed road on the WLT was carefully considered and a range mitigation measures were proposed. More particularly:
- 51.1. First, the Wetlands Report and the Faunal Impact Study determined that the proposed road would impact on the WLT and proposed mitigation measures.
- 51.2. Second, the Faunal Impact Study was prepared by Mr. Simon Todd (a faunal specialist) and the Wetlands Report was prepared by Dr Dean Ollis (a wetland ecologist). Both authors are qualified as “specialists” as the term is defined in Regulation 1. In this regard:
- 51.2.1. Mr. Todd is: (a) an ecologist with more than 20 years’ relevant experience; (b) has conducted over 200 specialist faunal studies, four of which pertained to recent developments in the Noordhoek Valley; and (c) Mr. Todd had a background in conservation biology meaning that he was versed in the population dynamics which operate in respect of endangered species.

51.2.2. Mr Ollis: (a) has an M.Phil in Environmental Science, and a M.Sc. in Ecological Assessment; (b) he has 20 years of experience in environmental sciences, approximately 16 years of which were spent specialising in aquatic science; (c) he has provided specialist input in at least 18 major projects; and (d) has for several years been a member of the Freshwater Ecosystems Committee for National Biodiversity Assessment.

51.3. Third, while it is common cause that neither Mr Ollis nor Mr Todd are anuran specialists, Mr Burger (a herpetologist) was commissioned to review the Faunal Impact Assessment, specifically as it related to the findings and recommendations regarding the WLT. Mr Burger determined that the report was adequate and comprehensive in terms of identifying the relevant impacts and mitigation measures in respect of the proposed road. He concluded that the overall impact can be mitigated to a large degree but that some impact is unavoidable.

51.4. Fourth, neither the statutory nor the regulatory framework prescribe the particular specialists that must be appointed for specific authorisations. As stated, according to the Regulations a particular specialist must be appointed where “*the level of assessment is of a nature requiring the appointment of a specialist*”. Ms Chand, as an EAP was accordingly given a discretion as to which specialists to appoint in the assessment process. She exercised this discretion by appointing Mr Ollis and Mr Todd, both of whom considered the impact of the proposed road on the WLT. She also appointed Mr Burger who undertook the review as described.

- 51.5. Fifth, although a range of concerns were raised by Dr Harding in respect of the specialist studies, these were comprehensively addressed with by the MEC.
- 51.6. Sixth, the Commenting Authority (Cape Nature), in its second comment did not take issue with a further study, or report, by a more specialised scientist in order that the impact of the proposed road on the WLT may be understood or mitigated.
- 51.7. Seventh, the applicant has not placed any admissible evidence before the court from an appropriate specialist as to what a herpetologist's report might have revealed, which were not taken into account by the appointed specialists.
- 51.8. Eighth, the approval in respect of the proposed road accorded with the threshold of need and desirability.
52. The failure to commission and complete an expert study on the WLT by an anuran specialist does not, in my view, found a reviewable irregularity. It also does mean that irrelevant considerations were taken into account and that relevant considerations were not taken into account and nor does it mean that an irrational decision was taken. The detailed evidence that I have referred to shows that the impact of the proposed road on the WLT was carefully considered by the specialists who were appointed and that the decision-makers ultimately imposed a range of mitigation measures.
53. It appears that the applicant's real difficulty is that the decision-makers attached insufficient weight to the impact of the proposed road on the WLT. That, however, does not found a reviewable irregularity:

53.1. In **MEC for Environmental Affairs and Development Planning v Clairison's CC 2013 (6) SA 235 (SCA)** para 22 the SCA held:

"The law remains, as we see it, that when a functionary is entrusted with a discretion, the weight to be attached to particular factors, or how far a particular factor affects the eventual determination of the issue, is a matter for the functionary to decide, and as he acts in good faith (reasonably and rationally) a court of law cannot interfere."

53.2. In **South African National Roads Agency Ltd v Toll Collect Consortium 2013 (6) SA 356 (SCA)** para 20 C-D the SCA held (*albeit* in a procurement context):

"...the evaluation of many tenders is a complex process involving the consideration and weighing of a number of diverse factors. The assessment of the relative importance of these requires skill, expertise and the exercise of judgment on the part of the person or body undertaking the evaluation."

54. For all of these reasons, I am of the view that this ground of review cannot succeed.

REVIEW GROUND 2: THE IRRATIONALITY IN APPOINTING AN EXPERT AFTER THE FACT

The challenge

55. The applicant argues that it is irrational to appoint an expert after the fact for the following reasons:

55.1. There are no current data on the WLT population which uses the Pick 'Pay reedbed in general or the three known breeding ponds in particular. According to the applicant, there is therefore nothing against which the anuran expert will be able to measure whether the road is having an impact or not.

- 55.2. If it is important enough for an anuran expert to monitor the state of the WLT after construction of the road, it ought to be important enough for such an expert to monitor and establish the state of the WLT before construction.
- 55.3. It makes no sense to recommend a mitigation which is untested and untried and then to monitor the effectiveness of the mitigation. According to the applicant, if the road is catastrophically deadly to the WLT no expert will be able to bring back the WLT population and one of the issues which needed to be addressed by specialist was the cumulative effect of past developments and roads on the WLT in the area.

The law

56. As a point of departure, the legal principles dealing with irrationality as a ground of review are well established. In **Democratic Alliance v President of the Republic of South Africa and others** 2012 (12) BCLR 1297 (CC) the Constitutional Court summarised the approach as follows:

“[32] The reasoning in these cases shows that rationality review is really concerned with the evaluation of a relationship between means and ends: the relationship, connection or link (as it is variously referred to) between the means employed to achieve a particular purpose on the one hand and the purpose or end itself. The aim of the evaluation of the relationship is not to determine whether some means will achieve the purpose better than others but only whether the means employed are rationally related to the purpose for which the power was conferred. Once there is a rational relationship, an executive decision of the kind with which we are here concerned is constitutional.”

The applicant has not established a reviewable irregularity

57. I am in agreement with the opposing respondents that this ground of challenge must fail for the following reasons:

- 57.1. First, as a point of departure NEMA does not require complete and absolute knowledge of all potential consequences of a development proposal before environmental authorisation may be granted. This is supported by the fact that an applicant for environmental authorisation must indicate “*the possible mitigation measures that could be applied and level of residual risk*” and describe “*any assumptions, uncertainties, and gaps in knowledge which relate to the assessment and mitigation measures proposed.*”
- 57.2. Second, The WLT-related impacts were not at any stage assessed as a fatal flaw (even prior to mitigation). In these circumstances, it is not irrational to develop the most appropriate mitigation when a detailed design of the road is undertaken, and, thereafter over the course of five seasons (as prescribed by the conditions of approval), to assess the efficacy of the mitigations in practice, and revise and refine them if warranted.
- 57.3. Third, it would not have been practicable to ascertain the efficacy of the mitigation measures in advance of the activity. It is apparent from the evidence that the road effect impacts are not immediate, which is why it was recommended that the monitoring be undertaken for at least 3 to 5 seasons.
- 57.4. Fourth, none of the mitigation measures have been identified as being irrational. Notably, the applicant does not challenge the efficacy of the mitigation measures. Instead, it argues that these measures had “not been locally tested”. Reference is made to certain foreign studies. According to the applicant, these have not been tested on local roads and therefore hold up “no validity as effective mitigation measures.” In this regard, the applicant asserts; “we simply

do not know if these mitigation measures will work. In fact, the proposed mitigation will most probably result in a dramatic drop in numbers of WLT.”

58. There is, in my view, a rational connection between the mitigation measures and the purpose for which they were imposed, namely the preservation of the WLT’s natural habitat, and the protection of that species against the threat of road mortality.

59. I accordingly find that this ground of review must fail.

REVIEW GROUND 3: CUMULATIVE IMPACTS HAVE NOT BEEN CONSIDERED

The challenge

60. The applicant argues that the failure to take cumulative impacts into account will inevitably lead to gaps in knowledge which will lead to relevant facts not being taken into account and irrelevant facts being taken into account.

61. In support of this argument, the applicant relies on a statement made by the MEC in his answering affidavit which denies that the proposed road cannot be considered without considering the impact of the further extension and that each application must be assessed on its own merits. The applicant argues that this is a classic case of failing to take the cumulative impact into account.

62. As a point of departure, the EIA Regulations define “cumulative impacts” as follows:

“‘cumulative impact’, in relation to an activity, means the past, current and reasonably foreseeable future impact of an activity, considered together with the impact of activities associated with that activity, that in itself may not be significant, but may become significant when added to the existing and reasonably foreseeable impacts eventuating from similar or diverse activities;”

The applicant has not established a reviewable irregularity

63. I am of the view that the evidence shows that the cumulative impact in relation to the WLT was considered both in the assessment process and by the decision-makers as is apparent from the following:

63.1. In the portion of the Wetland Study, under the heading of “Cumulative Impacts”, it concludes that: *“the cumulative impact on freshwater ecosystems is thus considered, without any mitigation, to be a negative impact of medium significance for both route alternatives”*. When account is taken of the gains to be made by the rehabilitation recommended interventions, the report concludes that such impact would be reduced to a low-to-medium level. It states further that such impact would be reduced to a low level if *“the wetland rehabilitation interventions were to be overseen by a wetland ecologist and guided by a detailed wetland rehabilitation plan that was prepared by a landscape architect with good experience of working on wetland rehabilitation projects, with the input of a wetland ecologist”*.

63.2. The Faunal Impact Study under the heading, “Cumulative Impacts” notes:

63.2.1. Cumulative Impact 1 is described as “Cumulative habitat loss and fragmentation due to the Houmoed Avenue Extension”.

63.2.2. The nature of the impact is described as *“the road will contribute to a cumulative habitat loss and fragmentation in the Noordhoek-Sun Valley area, potentially impacting species abilities to disperse about the landscape or respond to environmental*

change". The impact was assessed as being of "medium" significance without mitigation, and "low" significance with mitigation.

63.2.3. The proposed mitigation measures are described in detail, including: ensuring that the development footprint is kept to a minimum; the removal of alien plant growth in the road verge, and edge of the wetland, limiting human access to the wetland, as well as the amount of litter entering the wetland.

63.2.4. It is noted that the impact will persist for the life of the road and it is not likely that it will be reversed.

63.2.5. The assessment of this impact concludes that *"although there will be some long term habitat loss, it is not likely that this would result in any loss of irreplaceable resources, provided that the suggested mitigation measures are applied"*.

63.3. In his reasons for the decision, the Director concluded that *"a number of potentially negative cumulative impacts were also identified that could result from the Phase 1 extension of Houmoed Avenue. With the implementation of all the recommended mitigation measures, it is anticipated that these cumulative impacts to freshwater ecosystems will be of low significance"*.

63.4. In his appeal decision, the MEC stated as follows under "Need and Desirability" heading, *"the [Director] has complied with the obligation set out in terms of the Need and Desirability guideline to consider both the environmental and*

planning context. The department, having considered all the relevant factors, concluded that all identified impacts and cumulative impacts had been found to be capable of adequate mitigation and to have adequate regard to the socio-economic and environmental benefits”.

64. This ground of review must accordingly fail.

REVIEW GROUND 4: INADEQUATE PUBLIC PARTICIPATION PROCESS

The challenge

65. The applicant raises three main objections to the public participation process:

65.1. The first application process was marred by repeated requests for information by the applicant which were ignored by the EAP.

65.2. The second application process contained no new specialist studies and carried over the deficiencies of the first process.

65.3. By the end of the first application process the members of the applicant were “bankrupted and exhausted by the first process and we simply did not have the resources to take on the second process.”

The applicant has not established a reviewable irregularity

66. I am of the view that there is no merit to this ground of challenge for the following reasons:

- 66.1. First, it is clear that there was extensive public participation in the first process with comments having been received from some 284 interested and affected parties. These are referred to in the FBAR.
- 66.2. Second, notwithstanding the applicant's assertion that it made repeated requests for information, it is clear from the affidavits filed on behalf of the applicant that the applicant and all other interested and affected parties, many of whom were members of the applicant, "spent a lot of time and invested a significant amount of money in contributing to the public participation process". In its supplementary affidavit, the applicant's complaint was that it was grossly unfair for all of this time and money to be disregarded and wasted because the City decided to withdraw the first process. The complaint was that the competent authority and the MEC relied on selected comments from the withdrawn application process, but not on all comments.
- 66.3. Third, as regards the second application process, it is clear from the affidavits that the applicant refused to engage with the EAP regarding the perceived shortcomings of the Wetland and Faunal Impact Studies. According to the evidence, the EAP addressed correspondence to the applicant advising that it was in the process of arranging with the project team, particularly the faunal specialist to meet with ToadNuts as soon as possible to discuss the impact of the proposed road on the WLT. In response, the applicant indicated that it would not attend this meeting because, it was asserted that it was nothing more than a tick box exercise.

66.4. Fourth, the applicants were given the opportunity for public participation by way of the following:

66.4.1. The applicant participated extensively in the context of the first BAR, both through their own representatives and offices bearers, and through the written representations of their agent, Mr van der Spuy.

66.4.2. On 6 December 2018 the applicant was granted an audience with the Department to ventilate its concerns with the process, which was followed up with a 32 page letter from Mr van der Spuy.

66.4.3. The applicant and its members were registered I&AP's in relation to both the first and second basic assessment processes.

66.4.4. As such, notice was sent to them in a letter dated 23 May 2019 on the availability of the BAR for review and comment.

66.5. Finally, the applicant has not identified any respects in which the public participation process failed to comply with NEMA and the EIA Regulations.

67. I accordingly find that this ground of review must fail.

REVIEW GROUND 5: THE TRAFFIC STUDY WHICH WAS COMMISSIONED BY THE CITY FOR LEGITIMATE TRAFFIC AND ROAD PLANNING PURPOSES IS NOT A NEMA COMPLIANT EXPERT STUDY AND DOES NOT CONSIDER THE ENVIRONMENT OR ALTERNATIVE ROUTES FOR THE PROPOSED ROAD

The challenge

68. In the applicant's heads of argument, this ground of review is reduced to a single paragraph. It is argued that it is common cause that the Traffic Study was commissioned by the City for legitimate traffic and road planning purposes, in terms of road and traffic legislation. According to the applicant, it is not NEMA compliant and does not consider the environment or alternative routes for the road.

The applicant has not established a reviewable irregularity

69. In my view, this ground of challenge falls to be dismissed for the following reasons:

69.1. First, the Transport Study did not serve the purpose of a traffic impact assessment under the EIA Regulations. Instead, the purpose of the Transport Study was to demonstrate the need for and desirability of the proposed road. It did so by identifying the pressure on the Kommetjie/Sun Valley Rd network and the need for additional capacity on the network. For that reason, it was not subject to the requirements of an impact assessment study under the EIA.

69.2. Second, the applicant does not make out a case for a Traffic Impact Study to have been provided. The basic assessment process for the proposed road did not warrant an assessment of traffic impacts because the project does not present any potential for an adverse impact on traffic. Instead, its purpose was to alleviate congestion, to improve traffic circulation both in the Noordhoek

Valley generally, and around Masiphumele, and to integrate Masiphumelele into the Noordhoek / Kommetjie Valley as a whole.

70. Accordingly, in my view, this ground of review must fail.

REVIEW GROUND 6: THE EAP WAS BIASED AND MOTIVATED BY A PRECONCEIVED IMPERATIVE THAT THE PROPOSED ROAD HAD TO BE BUILT

The challenge

71. The basis for this ground of review is framed as follows in the applicant's heads of argument:

"The unfortunate conclusion to which the applicant, NEAG, is driven is that the only plausible explanation for the egregious failures set out above is that the EAP was biased and was motivated by a preconceived imperative that both extensions of Houmoed Avenue H, A1 and HAE2 had to be built."

72. It follows, in my view, that the only basis for the allegation of bias is "the egregious failures" committed by the EAP in the process.

The law

73. In **Turnbull-Jackson v Hibiscus Coast Municipality and Others** 2014 (6) SA 592 (CC) at par 30, the Constitutional Court held that the question of whether an administrator was biased is a question of fact. On the other hand, a reasonable suspicion of bias is tested against the perception of a reasonable, objective and informed person.

74. In **S v Roberts** 1999 (4) SA 915 (SCA) (1999 (2) SACR 243; [1999] 4 All SA 285) in paras 32 – 34, the Constitutional Court held:

- 74.1. There must be a suspicion that the administrator might — not would — be biased.
- 74.2. The suspicion must be that of a reasonable person in the position of the person affected.
- 74.3. The suspicion must be based on reasonable grounds.
- 74.4. The suspicion must be one which the reasonable person would — not might — have.
75. Regulation 13(1)(f)(ii) of the EIA Regulations requires the EAP to be objective. Whether she is objective is a question of fact. An attack on her objectivity must be substantiated by facts, or an inference that may properly be drawn from proven facts, that demonstrate an absence of objectivity.
76. It is trite that the inference that is sought to be drawn must be consistent with all the proved facts; if it is not, then the inference cannot be drawn.³ The position was summarised as follows in *SA Post Office v Delacy and Another* (at par 35):
- “The process of inferential reasoning calls for an evaluation of all the evidence and not merely selected parts. The inference that is sought to be drawn must be “consistent with all the proved facts. If it is not, then the inference cannot be drawn” and it must be the “more natural or plausible, conclusion from among several conceivable ones” when measured against the probabilities.”*
77. ‘Plausible’ in this context means ‘acceptable, credible, suitable’.⁴ Where one or more inferences are possible, a court must satisfy itself that the inference sought to be drawn

³ *SA Post Office v Delacy and Another* 2009 (5) SA 255 (SCA) at para 35.

⁴ *Ocean Accident and Guarantee Corporation Ltd v Koch* 1963 (4) SA 147 (A) at 159B-D.

is the most plausible or probable, even if that conclusion may not be the only one.⁵ If there are no positive proven facts from which the inference can be made, the method of inference fails and what is left is mere speculation or conjecture.⁶

The applicant has not established a reviewable irregularity

78. I am in agreement with the opposing respondents that this ground of challenge must fail.
79. Notwithstanding the well-established threshold that has to be met, the applicant makes out no case for the inference it seeks to draw. This, in spite of the seriousness of the allegation.
80. There is however a more fundamental difficulty with this ground of challenge, namely, I have found that there is no merit to the applicant's other grounds of challenge.

REVIEW GROUND 7: IMPROPER APPOINTMENT OF THE EAP

The challenge

81. The applicant argues that:

- 81.1. Section 1 of NEMA defines "environmental assessment practitioner" when used in Chapter 5, means the individual responsible whereas Chand Environmental Consultancy CC was appointed.

⁵ *Govan v Skidmore* 1952 (1) 732 (N) at 734, approved in *Smit v Arthur* 1976 (3) SA 378 (A) at 386; *Cooper and Another v Merchant Trade Finance Ltd* (474/97) [1999] ZASCA 97 (1 December 1999) para 7.

⁶ *S v Essack & another* 1974 (1) SA 1 (A) at 16C-E.

81.2. The appointment of Chand Environmental Consultancy was made by HHO Consulting Engineers and, as such, was in contravention of Regulation 12 (1). Regulation 12 (1) states: A proponent or applicant must appoint an EAP at own cost...) According to the applicant, it is not permissible for the appointment to have been made by HHO Consulting Engineers as opposed to the City.

The applicant has not established a reviewable irregularity

82. The applicant cannot in reply seek to supplement this ground as it has sought to do. It is trite that the applicant must stand or fall on the case made out in its founding papers.⁷

83. As to the appointment of Chand, aside from it having been impermissibly raised for the first time in reply, I am in agreement with the opposing respondents that the challenge must fail. I am in agreement with the MEC's reasoning in the appeal, more particularly:

83.1. The contractual appointment is between Chand as the legal entity and the City. It is for Chand to then designate individuals as the EAP.

83.2. In this instance, Chand appointed both Sadia Chand and Ingrid Eggert.

83.3. To appoint more than one EAP is not uncommon, particularly in respect of larger projects.

83.4. In the final BAR 2019, the BAR pro-forma report outline asks the applicant to "*provide the details of the lead EAP*". This means that more than one EAP may

⁷ *National Council of Societies for the Prevention of Cruelty to Animals v Openshaw* 2008 (5) SA 339 (SCA) paras 29 – 30.

well work on the same project.

84. In any event, the purpose of having an independent EAP appointed is to ensure that the BAR process is performed in an impartial and reliable manner by a registered EAP who is a trained professional to conduct these processes independently. The manner in which the two EAPs (Sadia Chand and Ms Eggert) were appointed through Chand Consultancy does not undermine this purpose.
85. In any event, the complaint amounts to a distinction without a difference. Whilst Chand is a close corporation, its two employees were appointed as EAP's in their personal capacities and, as such, both signed declarations of independence in August 2019.
86. Finally, both these challenges are in any event time barred and no extension of time has been sought.

REVIEW GROUND 8: THE MEC DID AN ABOUT-TURN IN RESPECT OF THE RELEVANCE OF THE PREVIOUS EIA PROCESS TO THE CURRENT APPROVAL PROCESS

87. This ground of challenge relates to the MEC having changed his approach on whether or not the comments of the previous BAR were taken into account.
88. This ground of challenge has no merit. The MEC has explained that there was no *volte face*. The MEC has explained that the intention of his statement in his appeal decision in paragraph 3.1.2 was not to convey that he and the Competent Authority did not take into account the previous comments. They quite clearly were taken into account as shown by the comprehensive comment and response table, which served before the decision makers, and the MEC has stated that they were taken into account.

ORDER

89. In the circumstances, I am of the view that there is no merit to any of the grounds of challenge and that this application must fail.
90. In light of the well-established rule in respect of costs in matters such as these as set out by the Constitutional Court in **Biowatch Trust v Registrar Genetic Resources and Others 2009 (10) BCLR 1014 (CC)**, I am of the view that each party must pay its own costs.
91. I do not accept that it is appropriate for the costs order to be divided between constitutional relief and other relief and that costs should follow the result in respect of the so-called non constitutional relief. In my view, this application relates, in its entirety to the vindication of constitutional rights and, as such, **Biowatch Trust** finds application.
92. In the circumstances, I make the following order:
- 92.1. The amendment sought by the applicant to paragraph 4 of its notice of motion by deleting the words “*a single natural person*” and replacing it with “*an individual*” is granted.
- 92.2. The application is dismissed.
- 92.3. Each party shall pay its own costs.



Pillay AJ

Acting Judge of the High Court

APPEARANCES:

For the Applicant : Adv. M J M Bridgman

Instructed by: Michalowsky Geldenhuys and Humphries Attorneys

For the First Respondent: Adv. M D Edmunds & Adv. J Blomkamp

Instructed by: Brink Thomas Cassiem Inc.

For the Second and Sixth Respondents: Adv. A Toefy

Instructed by: The State Attorney (Cape Town)