CHAND
Environmental Consultants • Public & Stakeholder Engagement Specialists

Suite 1.2A
Richmond Centre
174-206 Main Road
Plumstead
7800

P.O Box 238
Plumstead, 7801

TEL: (021) 762-3050
FAX: 086 6657430
E-MAIL: info@chand.co.za
Website: www.chand.co.za

The Minister of Local Government Affairs & Development Planning
For Attention: Minister Anton Bredell (c/o Mr Marius Venter)
c/o Deputy Director

Environmental and Planning Appeals Coordinator
Department of Environmental Affairs and Development Planning
Room 809, 8th Floor, Utilitas Building,
1 Dorp Street Cape Town

Per Email : DEADP.Appeals@westerncape.gov.za
Marius.Venter@westerncape.gov.za

RE: RESPONDING STATEMENT – HOUMOED EXTENSION PHASE 2
(EIA Reference: 16/3/3/1/A6/50/2046/19)

Introduction

1. I am submitting this Responding Statement in response to the appeal from the Noordhoek Environmental Action Group (the Appellant) submitted on 14 July 2020 against the Environmental Authorisation for the Houmoed Avenue Extension: Phase 2 granted to the City of Cape Town (the City).
2. The City wishes to extend Houmoed Avenue, Sunnydale in order to help relieve traffic congestion ("the Project"), and proposes undertaking the Project in two phases, each of which require an environmental authorisation under the National Environmental Management Act ("NEMA").
3. I was appointed by the City (via HHO Consulting Engineers) to be the environmental assessment practitioner ("EAP") responsible for undertaking the environmental impact assessment ("EIA") processes on behalf of the City for both Phase 1 and Phase 2 of the Project.
4. The Appellant has appealed against the granting of the environmental authorisation for both phases of the Project. Among the grounds of appeal advanced by the Appellant in both appeals are that there exists a reasonable apprehension that the manner in which I conducted the EIAs was biased because I am a director of a construction company (Martin & East) and that I failed to declare the existence of a potential conflict of interests to interested and affected parties ("I&APs") or to the competent authority.
5. These allegations are completely without merit as I will explain below. Nevertheless, the mere fact that the Appellants have made these allegations has the potential to damage both my reputation and that of my firm Chand Environmental Consultants, and to cause financial loss. Furthermore, if this ground of appeal were to be upheld it would mean that I would have to resign as a director of Martin & East in order to avoid being precluded from being an EAP on any project for which Martin & East might conceivably tender for at some future date. Consequently, I have an interest in, and am affected by, this appeal. Furthermore, I am advised

Sadia Chand (MPhil Environmental Science, Cape Town) BSc Honours, Toronto) RegNo. CK 1998/012514/23

that the principles of natural justice (in particular the principle of *audi alteram partem*) require that I be given an opportunity to respond.

6. The allegations in this Appeal also affect Martin & East in that the implication is that I abused my position as an EAP in order to benefit Martin & East, and that there may be corruption involved. The Appellants do not offer any evidence whatsoever in order to support this scurrilous accusation. In this regard I attach a response prepared by attorneys representing Martin & East that comprehensively debunks this defamatory allegation (see **Annexure A**). I agree with and support the representations made by Martin & East.

Relevant facts

7. The Appellant's entire argument regarding alleged bias and lack of independence is based on two facts: (a) that I am a director of Martin & East and (b) that the company had previously won a tender to construct another road in the Noordhoek valley (an entirely separate project). These facts are correct but fall very far short of what would be required to establish these grounds of appeal.

8. It is noteworthy that the Appellant does not provide any evidence whatsoever of actual bias or that the EIA process or the final report was incorrect, deficient, or lacking in objectivity in any way. For example the Appellants do not allege that I misrepresented the environmental impacts of the Project, or the contents of the Expert Reports.–The fact that the Appellants do not challenge the substance of my work in any way is because there is no basis on which they could do so – the Basic Assessment Report that has been prepared in accordance with the Environmental Impact Assessment Regulations, 2014 ("EIA Regulations, 2014"), is objective and unbiased. (It is also interesting to note that the Appellants do not argue that the Project is fatally flawed from an environmental perspective or that the decision to grant the environmental authorisation was irrational or otherwise unjustifiable.)

9. In essence, the Appellant's argument is that <u>it thinks</u> that I <u>may have been</u> biased and may not be sufficiently independent, and it thinks that others might think the same. However, this is not the test and the Appellant's subjective opinions on these issues are irrelevant.

Alleged failure to disclose directorship

10. I freely admit that I am a director of Martin & East, this is a matter of public record, and I have never attempted to hide it. Indeed, even the Appellant states that "information regarding the EAP principal's position on the Board of Martin & East is readily available in the public domain as the result of the most cursory Google search"[1]

11. The Appellant seeks to imply that the fact that my curriculum vitae that was included in the Basic Impact Assessment Report does not mention my directorship of Martin & East is sinister and amounts to a failure to disclose material information that may have the potential of influencing the objectivity of its report in contravention of regulation 17(f) of the EIA Regulations, 2014. That is incorrect. The purpose of including the EAP's CV in an assessment report is to provide evidence that the EAP has the necessary professional expertise to conduct the EIA competently. The fact that I am a director of Martin & East is not relevant to my competence as an EAP and consequently I did not include that information.

12. The Appellant also argues that because regulation 17(f) of the EIA Regulations, 2014 provides that the EAP must disclose to the applicant and the competent authority all material information that reasonably has, or may have, the potential of influencing the objectivity of its report, meant that I should have disclosed my directorship in Martin & East to the City and to the Department of Environmental Affairs and Development Planning ("DEA&DP"). There are two responses to this:

[1] Appendix 1, p. 7 last para/)

12.1 first, this is not a fact that had the potential to influence the objectivity of the report (as explained below) and consequently I was not under a duty to disclose it; and

12.2 secondly, this information was disclosed to both the City and to the DEAD&P before the competent authority granted the environmental authorisation which is the subject of this appeal.

13. As a consequence of the publication on 3 March 2020 of an article in GroundUp which made the same allegations that the Appellant relies upon, DEA&DP wrote to me requesting further information about my Martin & East directorship (see **Annexure B**). On 18 March 2020 I sent a detailed response to DEA&DP (see **Annexure C**) and forwarded a copy of that letter to the City. Consequently, the decision-maker investigated the allegation that I was not independent, and was fully aware of the relevant facts when making the decision to grant the environmental authorisation.

Appendix 1 to the Appeal

14. The rest of the Appellant's case in this regard is based on a document attached as Appendix 1 to its appeal which bears the title "THE EXISTENCE OF A REASONABLE APPREHENSION OF BIAS ON THE PART OF THE EAP: GROUNDS FOR JUDICIAL REVIEW". This document is undated and the author is not disclosed. The Appellant refers to "our legal opinion shared in Appendix 1."[2] However I am advised by my legal advisors that the arguments in that document are not legally sound and this view is shared by the attorneys advising Martin & East (see **Annexure A**). In short it is not a legal opinion and is nothing more than the expression of a (mainly incorrect) view on the law coupled with unsubstantiated and defamatory speculation about alleged corruption, by some unknown person. It should be rejected out of hand and not relied upon in any way.

15. As is apparent from the letter from Cullinan & Associates Inc that is attached as **Annexure D**, I am advised that Appendix 1 is riddled with errors of law, including the following.

15.1 Chand Environmental Consultants is not an organ of state as defined in the Constitution.

15.2 I am not a public official and neither the International Code of Conduct for Public Officials nor the OECD Recommendations of the Council on Guidelines for Managing Conflict of Interest in the Public Service, apply to me or are relevant to this matter.

15.3 The United Nations Convention against Corruption does not impose any obligations on me or on Chand and are entirely irrelevant to this matter.

15.4 The conduct by an EAP of an EIA process and the preparation of a Basic Assessment Report is not "administrative action" for the purposes of the Promotion of Administrative Justice Act (PAJA) and cannot be subjected to judicial review under PAJA.

15.5 The test of "reasonable apprehension of bias" (which is applied in relation to judges or persons performing quasi-judicial functions) is not applicable to EAPs. The EIA regulations require that the EAP must be independent and specifies what that means.[3] Furthermore, the test is <u>not</u> whether there is a reasonable apprehension that there are circumstances that may compromise the objectivity of an EAP.

---

[2] Appeal, page 6 final paragraph.

[3] The EIA Regulations, 2014 contain the following definition:

" "**independen**t", in relation to an EAP, a specialist or the person responsible for the preparation of an environmental audit report, means-

(a)that such EAP, specialist or person has no business, financial, personal or other interest in the activity or application in respect of which that EAP, specialist or person is appointed in terms of these Regulations; or

(b)that there are no circumstances that may compromise the objectivity of that EAP, specialist or person in performing such work;

15.6 It is incorrect to conclude that I had a conflict of interest when undertaking the environmental impact assessment because decisions might be taken in future by other parties which may benefit Martin & East. A conflict of interest does not arise simply because an EAP who is the director of a construction company conducts an EIA on a project which that construction company might submit a tender for, at some future date, if an environmental authorisation is granted for that project and the project is put out to tender. (The EAP plays no part in deciding whether or not the environmental authorisation is granted, whether the project is put out to tender, and who is awarded the tender.).

16. Appendix 1 also argues that the requirement in the EIA Regulations, 2014 that an EAP must be independent should be widely interpreted and consequently comes to the conclusion that "no EAP should ever conduct public participation processes on behalf of the state and simultaneously sit on the Board of any construction company."[4] The EIA Regulations, 2014 require "that there are no circumstances that may compromise the objectivity of that EAP". In other words, it envisages an objective enquiry into the facts. The Appellant incorrectly interprets this to mean that an EAP cannot be independent if there are any facts (however circumstantial, as in this case) that might lead any person to believe that the objectivity of the EAP may be compromised. This is a wholly unworkable and unbusinesslike interpretation that is contrary to the principles of interpretation laid down by the Supreme Court of Appeal.[5]

17. In this regard it is important to appreciate that companies like Martin & East appoint EAPs or other persons knowledgeable about environmental matters to their boards in order to improve their environmental performance and to become more environmentally responsible. If the Appellants argument were to be upheld, this would mean that no EAP could ever join the board of a company which may at some future date bid for a project that required an environmental authorisation. This would not advance ecologically sustainable development or the objectives of NEMA.

Reasons why this ground of appeal has no merit

18. I do not wish to repeat all that has already been stated in my submissions to the competent authority and in the response from Martin & East and consequently will confine myself to summarising why there is no merit to the Appellant's argument that I had a conflict of interest or was biased.

19. The Appellant has not produced any evidence of actual bias or that that the reports reflect a lack of independence. The test is not "reasonable apprehension of bias" and even if the Appellant has an apprehension of bias, it is not reasonable because it is not supported by the facts.

20. The few facts on which the Appellant relies do not support the conclusion that circumstances exist that may have compromised my objectivity and consequently my independence. It is simply not reasonable to reach such a conclusion based on the fact that I am a director of a company that previously won a separate tender in the same area and could conceivably bid for the tender to undertake the Houmoed Avenue Extension: Phase 2 at some future date.

---

excluding –
(i)normal remuneration for a specialist permanently employed by the EAP; or
(ii)fair remuneration for work performed in connection with that activity, application or environmental audit;"

[4] Appendix 1, page 8.

[5] Natal Joint Municipal Pension Fund v Endumeni Municipality (920/2010) [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) (16 March 2012). The court stated at para 26 of the judgment that "An interpretation will not be given that leads to impractical, unbusinesslike or oppressive consequences or that will stultify the broader operation of the legislation or contract under consideration."

21. There are no facts to support the allegation that I may have had a conflict of interest. There is not even an explanation of what personal interest I could possibly have in the preparation or outcome of the EIA report, or of why it might cause me to prepare a report that is biased or lacking in objectivity.
22. The Appellant does not identify anything in the reports that I prepared that could possibly be construed as favouring Martin & East and indeed it is very difficult to imagine how this could happen. As an EAP I was not involved in, nor could I influence the decision-making process in relation to the granting of an environmental authorisation.
23. At present, Martin & East has no involvement in the Houmoed Avenue Extension: Phase 2 project. The construction of this road extension has not even been put out to tender.
24. I am not a shareholder in Martin & East, I am not remunerated on the basis of the projects that Martin & East win and my remuneration would not be affected by whether or not Martin & East win any tender for a project.
25. I have no capacity to influence the awarding of tenders by the City.
26. DEA&DP investigated the allegations that I was not independent and had a conflict of interest and must have been satisfied that they were not valid because it granted the environmental authorisation.

Conclusions

27. In my view the allegations of conflict of interest, lack of independence and bias made against me are no more than an *ad hominem* attack made by an Appellant in attempt to bolster its appeal. They are based on an incorrect understanding of the law and speculation that verges on the paranoid and are without merit.

Yours faithfully

SADIA CHAND

LIST OF ANNEXURES

Annexure A: Responding statement from Martin & East attorneys

Annexure B: DEA&DP query on allegation of bias

Annexure C: Chand's response to the DEA&DP query

Annexure D: Legal opinion from Cullinan & Associates

ANNEXURE A

Responding statement from Martin & East attorneys

MATTHEW WALTON & ASSOCIATES
Attorneys and Conveyancers

The Deputy Director
Environmental and Planning Appeals Co-Ordinator
Department of Environmental Affairs and Development Planning
Western Cape Government

By Email : marius.venter@westerncape.gov.za

Attention : Mr Marius Venter

Our Ref. MLW/SP/M.155
Your Ref. 3 August 2020

Dear Sir

HOUMOED PHASE 2 EXTENSION : NEAG APPEAL
RESPONSE PREPARED ON BEHALF OF MARTIN & EAST (PTY) LIMITED

1. I act for Martin & East (Pty) Limited.

2. I refer to the appeal lodged in the name of the Noordhoek Environmental Action Group, in which it is sought to set aside the Environmental Authorisation issued in relation to that second phase.

3. The appeal filed by the Noordhoek Environmental Action Group in relation to Phase 2 contains allegations and submissions which falsely imply or allege that Martin & East (Pty) Limited is a party to corruption, bias and conflicts of interest.

4. Martin & East (Pty) Limited has instructed me to prepare a document which demonstrates the falsity of those submissions and allegations.

5. That document is attached, for your consideration.

6. Please let me know if you require anything further to assist you in your deliberations.

Matthew Walton & Associates Inc.
PO Box 31280, Tokai, 7966
Unit 3, 51 Bell Crescent
Westlake Business Park, 7945, Cape Town
Tel: 021 702 0541/42 - **Fax:** 021 702 0536

Registration number: 2011/009761/21
Director: Matthew Walton
Email: matthew@barefootattorneys.co.za
Senior Associate: Chris Walton
Email: chris@barefootattorneys.co.za

Yours faithfully

MATTHEW WALTON

MARTIN & EAST'S RESPONSE TO NEAG APPEAL

FACTUAL BACKGROUND

1. The Noordhoek Valley is urbanising at an increasingly rapid pace, causing steadily worsening traffic congestion.

2. The City of Cape Town ["the City"] intends to extend Houmoed Avenue, Sunnydale in order to help relieve this congestion.

3. That proposed extension ["the extension"] will proceed in two (2) phases, assuming the requisite authorisations are obtained.

4. In terms of section 24 of the National Environmental Management Act 107 of 1998 ["NEMA"], the City is obliged to apply for Environmental Authorisation from the Department of Environmental Affairs and Development Planning in the Western Cape Government ["the Department"] before proceeding with the extension.

5. In terms of regulation 12(1) of the Environmental Impact Assessment Regulations, 2014, promulgated in terms of NEMA, anyone making an application for Environmental Authorisation (in our case, the City) must appoint an Environmental Assessment Practitioner ["EAP"] to manage the assessment process.

6. One of the EAP's responsibilities is to prepare an Environmental Impact Assessment report ["the EIA report"], the purpose of which is self-evident, namely to provide a comprehensive summary of the impact of any proposed development on the affected natural environment.

7. The EIA report prepared by the EAP is then considered by the relevant official in the Department, who decides whether or not to issue an Environmental Authorisation.

8. If the relevant official in the Department approves an application and issues an Environmental Authorisation, this is not the end of the matter.

9. NEMA permits interested parties to appeal against an Environmental Authorisation.

10. The City applied to the Department for Environmental Authorisation for the first two (2) phases of the extension.

11. The relevant official in the Department issued Environmental Authorisations for both Phase 1 and Phase 2 of the extension.

12. Appeals have been filed by interested parties in relation to the Environmental Authorisation for both Phase 1 and Phase 2 of the extension.

13. Those appeals will be considered and ruled on by the MEC responsible for the Department.

14. One of the appellants in relation to both phases is the Noordhoek Environmental Action Group [“NEAG”], which has filed two (2) written appeal submissions.

15. The bulk of the submissions made in support of the NEAG appeal filed in relation to the Environmental Authorisation issued for Phase 2 of the extension, are set out in a 13-page document entitled :

    “*Appendix 1 : THE EXISTENCE OF A REASONABLE APPREHENSION OF BIAS ON THE PART OF THE EAP : GROUNDS FOR JUDICIAL REVIEW*”.

    15.1. This document has been prepared in response to that appendix.

    15.2. In this document, that appendix will be referred to as “the NEAG Appeal”.

16. The NEAG Appeal in relation to Phase 2 of the extension is similar in many respects to the appeal filed by the same organisation in relation to Phase 1.

17. The purpose of this document is to demonstrate that the NEAG Appeal is fundamentally flawed, and should be dismissed.

18. In order to do so, further background facts are necessary.

19. We have already pointed out that it was the obligation of the City, in order to comply with the prescribed requirements in relation to its application for Environmental Authorisation for both phases, to appoint an EAP to manage the environmental assessment process.

20. The City, via HHO Consulting Engineers, appointed Sadia Chand, the sole director of Chand Environmental Consultants, as the EAP responsible for managing the assessment process for both phases of the extension.

21. Chand is also on the board of directors of Martin & East, a civil engineering construction company.

22. Chand serves a strategic role on the board of directors of Martin & East, providing advice in matters relating to environmental and social responsibility and governance.

THE BASIS OF THE NEAG APPEAL

23. The NEAG Appeal is based entirely on only two (2) facts :

    23.1. Chand is both the EAP and a director of Martin & East.

    23.2. Martin & East was awarded the tender for the Kommetjie Road extension.

24. On this tiny factual edifice is built flimsy and unsubstantial argument running to thirteen (13) pages.

25. To the extent that those thirteen (13) pages can be said to contain an actual argument, that argument is that those two facts lead one inevitably to the following conclusions :

    25.1. A "*conflict of interest*" arises "*automatically*".

    25.2. In performing her role as EAP, Chand was "*biased in favour of her other employer*", namely Martin & East.

    25.3. The "*conflict of interest*" postulated above "*could be an indicator of actual or potential corruption*".

    25.4. There exist "*strong grounds for judicial review of the entire process*".

THE NEAG APPEAL MASQUERADES AS A LEGAL OPINION

26. The NEAG Appeal cites a great deal of legislation and other legal authority.

27. The NEAG Appeal is dressed up as a legal opinion. In fact, it is no such thing.

28. There is no indication on the NEAG Appeal as to who its author is.

29. Throughout the NEAG Appeal, reference is made to regulations promulgated in terms of NEMA; on the basis of these references the author draws certain damaging conclusions.

30. An actual legal opinion should cite the correct law.

31. However, the NEAG Appeal, which is not an actual legal opinion, cites and relies on NEMA regulations which are out of date and have been superseded.

32. It is clear from the repeated references in the NEAG Appeal to the NEMA regulations, that the author was referring to the NEMA regulations of 2010.

33. Unfortunately for the author, the 2010 NEMA regulations have been superseded and replaced by the 2014 NEMA regulations.

34. This error is not merely an error of citation – it has profound consequences. For example :

    34.1. The author, in the NEAG Appeal, with reference to the outdated 2010 NEMA regulations, incorrectly asserts that, if the Department at any stage during its consideration of an application for Environmental Authorisation, has reason to believe that the EAP may not be independent, the Department ***must*** suspend the application until the question of potential lack of independence has been resolved.

    34.2. In fact, regulation 14 of the 2014 NEMA regulations has changed that position and stipulates that, if a belief arises that an EAP may not be independent, the Department ***may*** notify the EAP and the applicant of the reasons for the belief, and may go on to suspend the application until the matter is resolved.

    34.3. Although the 2010 NEMA regulations made a suspension of the application compulsory, the 2014 NEMA regulations changed this – they gave the Department a discretion whether or not to suspend the application, depending on the Department's view of the allegations of lack of independence.

34.4. Despite the fact that the 2014 NEMA regulations clearly stipulate that the suspension of the application is discretionary, the NEAG Appeal incorrectly asserts that suspension is compulsory.

35. An actual legal opinion does not make defamatory allegations without compelling evidence.

36. The NEAG Appeal, however, blithely accuses Chand (and Martin & East as well, by necessary implication) of "*corruption*".

37. In the NEAG Appeal it is asserted that Chand's directorship of Martin & East "*could be an indicator of actual or potential corruption*".

37.1. It is worth fleshing out the nature of this inflammatory allegation.

37.2. The NEAG Appeal is in fact asserting the possibility that Martin & East offered some form of bribe to Chand to persuade her to falsify or slant her EIA report, and that Chand accepted that bribe.

38. Not even the tiniest shred of evidence is supplied for this monstrous suggestion.

39. Had the NEAG Appeal been an actual legal opinion, it would have first quoted the definition of the phrase "*offence of corruption*" as it appears in section 3 of the Prevention and Combating of Corrupt Activities Act, 12 of 2004.

40. That section defines the offence of corruption to include a person accepting "*gratification*" in order to act in a manner that amounts to the "*illegal (or) dishonest*" carrying out of any powers.

41. Not only does the NEAG Appeal fail to define "*corrupt*" or "*corruption*"; it also fails to provide any evidence of Chand receiving or agreeing to accept any "*gratification*", or agreeing to act in an illegal or dishonest manner.

42. The NEAG Appeal does not provide any such evidence because none exists, because neither Chand nor Martin & East is corrupt.

43. Chand's directorship of Martin & East cannot possibly be "*gratification*" as contemplated in the definition of "*corruption*", for the simple reason that Chand was a director of Martin & East long before she was appointed as the EAP in this matter. She could accordingly not have accepted the directorship as a "*gratification*" in order to act dishonestly or in a biased manner.

    43.1. In any event, not a shred of evidence is put up in the NEAG Appeal that the EIA report was biased, or was prepared in a biased manner.

    43.2. If Chand had slanted the EIA report in favour of the City or anyone else, such bias would be evident from the text of the report itself.

    43.3. However, there is not a single word in the NEAG Appeal which challenges or attacks the merits of the EIA report, or shows any defects in the evidence on which it is based, or the conclusions it reaches, or which even attempts to demonstrate that its contents are biased or slanted.

44. What the NEAG Appeal does is throw in suggestions of serious offences such as corruption, without providing any evidence, in the hope that the reader will assume guilt on the part of Chand and Martin & East.

THE "*CONFLICT OF INTEREST*" RED HERRING

45. The phrase "*conflict of interest*" is a favourite among the uninformed.

46. A person is affected by a conflict of interest where :

    46.1. He/she is obliged to perform a duty or function in a disinterested and objective manner; but

    46.2. He/she has a personal interest in the performance of that duty or function, or in the outcome of that performance, and is accordingly unable to perform that duty in a disinterested and objective manner.

47. In such a case the conflict is between the personal interest of the person performing the duty, and the interests of third parties in having the duty performed objectively and disinterestedly.

48. Throughout the NEAG Appeal it is asserted that Chand's directorship of Martin & East creates a "*conflict of interest*".

49. The NEAG Appeal does not, however, explain :

    49.1. What personal interest Chand could possibly have in the preparation or outcome of the EIA report; or

    49.2. How or why this supposed personal interest (of which neither a description nor any evidence is provided) could or would be in conflict with the public interest in Chand preparing an objective and disinterested EIA report.

50. The NEAG Appeal does not explain this because there is in fact, properly speaking, no conflict of interest created by Chand's directorship of Martin & East.

51. The mere fact that Chand serves on the board of directors of Martin & East does not give rise to a conflict of interest:

51.1. The final Environmental Authorisation for Phase 2 of the proposed extension is either granted or rejected by the Department, not by Chand.

51.2. The Department takes the EIA report into consideration when considering the City's Application, but it is not the only relevant factor.

51.3. The EIA report is accompanied by specialist reports particular to the type of environment affected. Any information provided in Chand's assessment must be consistent with the specialist reports.

51.4. If there is a discrepancy, this will be picked up by the Department.

51.5. It would be impossible for Chand to include false or misleading information in her EIA report, unless she was in cahoots with the specialists providing reports, and with the Department official making the final decision, none of whom stand to benefit personally or financially from the Environmental Authorisation being approved.

51.6. Further, should the City ultimately decide to advertise Phase 2 of the extension for tender, Chand will have no influence on who is awarded the tender for the proposed extension.

51.7. Equally obviously, the fact that Martin & East was awarded the tender to improve or extend another road in the Noordhoek Valley, will in no way give Martin & East an advantage if it decides to bid for any tender which may be issued in relation to Phase 2 of the extension, a different road.

51.8. Chand is also not a shareholder in Martin & East, and her remuneration as a director remains constant regardless of the number of projects the company undertakes.

51.9. Even if Martin & East was ultimately awarded the tender for Phase 2 of the extension, Chand does not stand to gain financially or personally whatsoever from such an award.

THE "*JUDICIAL REVIEW*" RED HERRING

52. The NEAG Appeal repeatedly implies or asserts that one or more decisions or actions in the assessment process conducted by Chand, should be taken on "*judicial review*".

53. Of course, as expected, the NEAG Appeal does not stipulate which decisions, or which conduct or actions, should be judicially reviewed.

54. There are in fact no decisions or actions in the process involving Chand, which stand to be taken under judicial review.

55. The Promotion of Administrative Justice Act 3 of 2000 ["PAJA"] provides for the judicial review of administrative action under certain circumstances.

56. PAJA's definition of administrative action includes conduct of private actors exercising a public power or function in terms of an empowering provision.

57. Although Chand, in her role as an EAP, is a private actor performing a function in terms of an empowering provision, it simply cannot be argued that her function is of a public nature.

58. A public power or function implies some form of delegation of powers or functions usually reserved for organs of state, to private actors.

59. It cannot be said that Chand, who was hired as an independent contractor and reimbursed accordingly, was performing a function usually reserved for organs of state.

60. Further, section 6 of PAJA contains a *numerus clausus* of grounds upon which administrative action is judicially reviewable. Administrative action is not automatically reviewable simply because it is administrative action.

61. The NEAG Appeal does not refer to a single ground upon which it is alleged that Chand's actions are judicially reviewable.

62. The only reasonable conclusion is that one does not exist.

REFERENCE TO IRRELEVANT AUTHORITY

63. In an attempt to add substance to the flimsy non-argument contained in it, the NEAG Appeal dedicates considerable space to the contention that NEMA and its regulations should be interpreted in line with the relevant articles of the United Nations Convention Against Corruption ["UNCAC"].

64. NEAG clearly believes that referencing UNCAC, and describing the "*massive endemic corruption*" that exists locally and on a global scale adds gravitas and importance to this non-argument.

65. These inclusions are irrelevant and inflammatory.

66. While the NEAG Appeal's reliance on international law is clearly misplaced, it is worth noting that Article 8.5 of UNCAC, which he cites, places an obligation on the party states to *endeavor*, where appropriate, to establish measures and systems obliging public officials to declare any potential conflicts of interest with respect to their functions as public officials.

67. It is clear that Chand is not a public official for purposes of this Article.

68. In any event, this Article clearly places an obligation on the state party to endeavor to enact legislation, adopt policies and promulgate regulations obliging public officials to disclose potential conflicts of interest.

69. Therefore, we need look no further than NEMA and the regulations promulgated thereunder to ascertain the disclosure obligation on public officials.

70. The NEAG Appeal further states that state parties are *required* to take disciplinary measures against officials who violate these systems.

71. This is patently incorrect. Article 8.6 of UNCAC holds that "*each State Party* shall consider *taking, in accordance with the fundamental principles of its domestic law, disciplinary or other measures against public officials who violate the codes or standards established in accordance with this article*."

72. In what seems to be an afterthought, the author of the NEAG Appeal references the Code of Ethics for the International Association for Impact Assessment ["IAIA"], by which he/she contends Chand is bound.

73. Regardless of whether or not Chand is in fact a member, membership of the IAIA is voluntary for practitioners; and the IAIA is not a regulatory body in terms of NEMA. Membership of IAIA does not guarantee or enforce compliance with any provisions of NEMA, but rather provides a code of good practice.

* * * * *

REBECCA WALTON
MATTHEW WALTON
31 JULY 2020

ANNEXURE B

DEA&DP query on allegation of bias

Western Cape Government
Environmental Affairs and Development Planning

Directorate: Development Management (Region 1)

REFERENCE: 16/3/3/1/A6/50/2046/19
ENQUIRIES: RONDINE ISAACS
DATE: 2020 -03- 12

The Director
Chand Environmental Consultants
PO Box 238
PLUMSTEAD
7801

Attention: Ms Sadia Chand

Tel.: (021) 762 3050
Fax: (086) 665 7430

Dear Madam

RE: PROPOSED PHASE 2 EXTENSION OF HOUMOED AVENUE AND THE UPGRADING OF THE MASIPHUMELELE SETTLEMENT, SUNNYDALE AND MASIPHUMELELE

1. The proposed Phase 2 extension of Houmoed Avenue and the upgrading of the Masiphumelele settlement, Sunnydale and Masiphumelele project, and the final Basic Assessment Report and cover letter dated 2 December 2019, as received by this Department on the same date, respectively, refer.

2. An article published by GroundUp dated 3 March 2020 alleges that "you are a director of the civil engineering construction company Martin & East and that there is reasonable apprehension of bias as a result of potential conflict of interest".

3. You are hereby requested to confirm whether you are indeed a director of the civil engineering construction company Martin & East and whether this company will tender for the Phase 2 Houmoed Avenue extension project.

4. The information requested in paragraph 3 above must be submitted to this Department within a period of 10 calendar days from the date of this letter.

5. Kindly quote the abovementioned reference numbers in any future correspondence in respect of the application.

6. This Department reserves the right to revise initial comments and request further information based on any new or revised information received.

Yours faithfully

HEAD OF DEPARTMENT
DEPARTMENT OF ENVIRONMENTAL AFFAIRS AND DEVELOPMENT PLANNING
CC: (1) Mr Mark Pinder (City of Cape Town)

Fax: (021) 400 2902

7th Floor, 1 Dorp Street, Cape Town, 8001 Private Bag X9086, Cape Town, 8000
Tel: +27 21 483 4098/3185 fax: +27 21 483 4372 www.westerncape.gov.za/eadp

ANNEXURE C

Chand's response to the DEA&DP query

CHAND
Environmental Consultants • Public & Stakeholder Engagement Specialists

Suite 1.2A
Richmond Centre
174-206 Main Road
Plumstead
7800

P.O Box 238
Plumstead, 7801

TEL: (021) 762-3050
FAX: 086 6657430
E-MAIL: info@chand.co.za
Website: www.chand.co.za

Attention: Mr Eldon Van Boom

Department of Environmental Affairs and Developmental Planning

1 Dorp Street

Cape Town

18 March 2020

RE: PROPOSED PHASE 2 EXTENSION OF HOUMOED AVENUE AND THE UPGRADING OF THE MASIPHUMELELE SETTLEMENT, SUNNYDALE AND MASIPHUMELELE

DEADP REFERENCE: 16/3/3/1/A6/50/2046/19

Dear Mr van Boom

I am responding to your letter dated March 12, 2020. Your query is centered around the Ground Up article which alleges that "there is a reasonable apprehension of bias [on my part] as result of a potential conflict of interest" in conducting the environmental process for the above mentioned project and my directorship at Martin & East.

These allegations have no merit (as I explain below).

It is correct that I serve on the Board of Martin & East fulfilling a strategic role in matters relating to environmental/social responsibility and governance. It is important to note that my role on the Board does not involve input into the operational aspects or day-to-day decision-making in the company. This means that I do not know whether or not Martin & East will tender to undertake the Phase 2 Houmoed Avenue extension project if the environmental authorization for that project is granted. In any event, it would be premature for such a decision to be made given the fact that the decision about whether or not to authorize the project has not yet been made, and no request for proposals has been issued by the City of Cape Town.

With regards to the allegations made by the author/source of the article, it is important to appreciate that they are incorrect in saying that the existence of a "reasonable apprehension of bias" on my part would be sufficient to establish a ground for reviewing any decision to grant an environmental authorization for the project. That test is applied to judges and members of administrative tribunals, because it is important that the public have faith that whoever adjudicates a matter is unbiased. My role in this matter is not as a decision-maker or adjudicator but as an environmental assessment practitioner ("EAP").

The Ground Up article names Andre van der Spuy as the person who alleges my lack of independence. It is perhaps worth noting that, as many EAPs will attest, Mr van der Spuy is something of a professional objector in EIA processes, and attacking the professional integrity of the EAPs involved is part of his usual *modus operandi*.

As an EAP I am required to meet the requirements for independence in the Environmental Impact Assessment Regulations, 2014. I also accept that I have a professional duty to conduct my work as an EAP in an objective and unbiased manner. To the best of my knowledge, Ground Up/AVDS have not put forward any evidence that I have not done so, and consequently in this response I have focused primarily on responding to the allegation that my relationship with Martin & East created a conflict of interest which disqualified me from being an EAP on this project.

Sadia Chand (MPhil Environmental Science, Cape Town) BSc Honours, Toronto) RegNo. CK 1998/012514/23

As you know, the Environmental Impact Assessment Regulations, 2014 require EAPs to be independent and defines that term as follows:

"**independent**", in relation to an EAP, a specialist or the person responsible for the preparation of an environmental audit report, means-

(a) that such EAP, specialist or person has no business, financial, personal or other interest in the activity or application in respect of which that EAP, specialist or person is appointed in terms of these Regulations; or

(b) that there are no circumstances that may compromise the objectivity of that EAP, specialist or person in performing such work;

excluding –

(i) normal remuneration for a specialist permanently employed by the EAP; or

(ii) fair remuneration for work performed in connection with that activity, application or environmental audit;"

Chand Environmental Consultants (Chand), of which I am the sole member, was appointed via HHO Consulting Engineers to undertake the environmental process on the Houmoed Avenue Extension Phase 2 on behalf of the City of Cape Town.

The following is relevant to this discussion around a conflict of interest and the question of independence:

- As stated above, I am independent from the City of Cape Town (the Applicant) and have no personal interest in the outcome of the application.
- Martin & East is not the Applicant, nor did they have any role to play in appointing Chand to undertake the Basic Assessment process.
- Specialists that are independent from Chand and the City of Cape Town provided specialist assessments on this application. Their input was incorporated in an accurate and comprehensive manner in the BAR, thereby demonstrating an objective and non-biased approach.
- The Comments and Responses Report captured the issues raised by I&APs, and the accuracy thereof was supported by the submission of the original comments to your Department for verification.
- As is evidenced by the above, I remained objective at all times and did not present any false or misleading information which could lead to a question of my independence.
- The possible construction of the project may follow should the Environmental Authorisation be issued in favour of the Applicant. If this happens, the City will advertise a construction contract in the open market in accordance with its supply chain management processes and the Municipal Finance Management Act.
- Should a tender be advertised for this project, Chand as a company nor I as an individual would not have any part to play in the adjudication of the City tender.
- My role on the Martin & East board does not involve input into the day to day operation or function of the company. For this reason, I am not in a position to speculate as to whether or not Martin & East would choose to tender for this project, should a Request for Proposal be advertised by the City.
- Therefore, <u>should</u> the project receive a favourable Environmental Authorisation, and <u>should</u> the City choose to advertise it for construction, Martin & East <u>may</u> tender for the job. And <u>should</u> they choose to tender for the project, the City's adjudication process would determine the successful bidder. <u>I would have no influence on whether or not Martin & East tender on the job or on how the City adjudicates the tender submissions</u>. In other words, there is no way in which I could create an unfair advantage for Martin & East.
- Finally, I am not a shareholder at Martin & East, and as such my remuneration remains the same regardless of how many construction jobs the company is awarded/successfully completes. Therefore, should the scenario play out that Martin and East submit a tender for

this project, and that they are the successful tenderer, it would have no bearing on my remuneration.

As such, none of the actions I undertook during the environmental process stand to benefit Martin & East, or me in my personal capacity. As I have explained above:

- I have no financial or other interest in whether or not the application is granted;
- there is no evidence that I have acted in an unobjective of biased manner; and
- the mere fact that I serve on the Board of a construction company, that might or might not bid for the contract to build the road (if the environmental authorisation is granted) and may or may not be awarded the contract, does not mean that I have any personal interest in the project, nor does it create circumstances that may compromise the objectivity of my work.

Thus, I meet the requirements of independence for conducting this Basic Assessment process.

I trust that I have responded fully to your query and in a manner which clearly documents that the alleged conflict of interest has no foundation.

Should you require any further information on this issue, please contact me.

Sincerely

SADIA CHAND
Chand Environmental Consultants

ANNEXURE D

Legal opinion from Cullinan & Associates

CULLINAN & ASSOCIATES
Environmental and green business attorneys

TRANSMITTED BY EMAIL

TO:	**Chand Environmental Consultants**	Date:	31 July 2020
ATT:	Sadia Chand	Your ref:	
EMAIL:	sadia@chand.co.za	Our ref:	
Total pages:	3		cormac@greencounsel.co.za

Dear Sadia

APPEAL AGAINST GRANTING OF ENVIRONMENTAL AUTHORISATION FOR HOUMOED EXTENSION: PHASE 2 (EIA Reference: 16/3/3/1/A6/50/2046/19)

Introduction

1. On 14 July 2020 the Noordhoek Environmental Action Group (the Appellant) submitted an appeal against the Environmental Authorisation for the Houmoed Avenue Extension: Phase 2 granted to the City of Cape Town ("the Appeal"). In the body of the Appeal the Appellant refers to "our legal opinion shared in Appendix 1."[1] Appendix 1 bears the title "THE EXISTENCE OF A REASONABLE APPREHENSION OF BIAS ON THE PART OF THE EAP: GROUNDS FOR JUDICIAL REVIEW".
2. You have requested us to advise you on the correctness or otherwise of the legal interpretations contained in Appendix 1. It would require an extensive (and expensive) legal opinion to explain in detail why most of the legal conclusion in that document are incorrect and to cite the relevant authorities. Accordingly, we have confined ourselves to identifying what we regard as the most significant legal errors in Appendix 1.
3. At the outset it is important to appreciate that Appendix 1 should not be regarded as a legal opinion. This document is undated, it is not on the letterhead of a law firm and the author is not disclosed. In

[1] Appeal, page 6 final paragraph.

short there is nothing to indicate that it was written by a lawyer. It is nothing more than the expression by some unknown person of (mainly incorrect) views on the law coupled with unsubstantiated and potentially defamatory speculation about alleged corruption.

Legal errors

4. Appendix 1 contains many errors, including those listed below.

5. The Appendix incorrectly concludes that Chand Environmental Consultants is an organ of state as defined in the Constitution. It is not.

6. The Appendix concludes that because you are an environmental assessment practitioner ("EAP") that performs task prescribed in legislation, you are a public official. This is incorrect and neither the International Code of Conduct for Public Officials nor the OECD Recommendations of the Council on Guidelines for Managing Conflict of Interest in the Public Service, apply to you. For this and other reasons, these documents have no relevance to this matter.

7. The United Nations Convention against Corruption does not impose any obligations on you or on Chand Environmental Consultants and is not relevant to the appeal. The Appellants do not provide any evidence of corruption and the references to this Convention are entirely gratuitous.

8. The conduct by an EAP of an EIA process and the preparation of a Basic Assessment Report is not "administrative action" for the purposes of the Promotion of Administrative Justice Act ("PAJA") and cannot be subjected to judicial review under PAJA as suggest in Appendix 1.

9. The test of "reasonable apprehension of bias" (which is applied in relation to judges or persons performing quasi-judicial functions) is not applicable to EAPs. The EIA regulations require that the EAP must be independent and specifies what that means.[2] The test is <u>not</u> whether there is a reasonable apprehension that there are circumstances that may compromise the objectivity of an EAP.

10. It is incorrect to conclude that you had a conflict of interest when undertaking the environmental impact assessment because decisions might be taken in future by other parties which may benefit the construction company of which you are a director. A conflict of interest does not arise simply because an EAP who is the director of a construction company conducts an EIA on a project which that construction company <u>might s</u>ubmit a tender for, at some future date, <u>if</u> the competent authority grants an environmental authorisation for that project and the City puts the project out to tender. (Clearly the EAP does not play any part in deciding whether or not the environmental authorisation is granted, whether the project is put out to tender, and who is awarded the tender.)

---

[2] The EIA Regulations, 2014 contain the following definition:
" "**independen**t", in relation to an EAP, a specialist or the person responsible for the preparation of an environmental audit report, means-
(a)that such EAP, specialist or person has no business, financial, personal or other interest in the activity or application in respect of which that EAP, specialist or person is appointed in terms of these Regulations; or
(b)that there are no circumstances that may compromise the objectivity of that EAP, specialist or person in performing such work;
excluding –
(i)normal remuneration for a specialist permanently employed by the EAP; or
(ii)fair remuneration for work performed in connection with that activity, application or environmental audit;"

11. The argument is also made in Appendix 1 that the requirement in the EIA Regulations, 2014 that an EAP must be independent should be widely interpreted and consequently the writer comes to the conclusion that "no EAP should ever conduct public participation processes on behalf of the state and simultaneously sit on the Board of any construction company."[3]

12. The EIA Regulations, 2014 require "that there are no circumstances that may compromise the objectivity of that EAP". In other words, it is necessary to conduct an objective enquiry into the facts. The Appellant incorrectly interprets this to mean that an EAP cannot be independent if there are any facts (however circumstantial, as in this case) that might lead any person to believe that the objectivity of the EAP may be compromised. This is a wholly unworkable and unbusinesslike interpretation that is contrary to the principles of interpretation laid down by the Supreme Court of Appeal.[4]

13. Although Appendix 1 purports to explain the legal basis for the existence of a reasonable apprehension of bias on the part of the EAP and the grounds for judicial review, the 'reasonable apprehension of bias' test is not relevant and the preparation by an EAP of an environment impact assessment report is not administrative action and cannot be judicially reviewed under PAJA.

Yours sincerely

CULLINAN & ASSOCIATES INC.

per: Cormac Cullinan (director)

[3] Appendix 1, page 8.

[4] Natal Joint Municipal Pension Fund v Endumeni Municipality (920/2010) [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) (16 March 2012). The court stated at para 26 of the judgment that "An interpretation will not be given that leads to impractical, unbusinesslike or oppressive consequences or that will stultify the broader operation of the legislation or contract under consideration."