



10 Park Road
Rondebosch
7700

26 May 2015

**Group of concerned De Zalze Home Owners
De Zalze Winelands Golf Estate Home Owners Association**

De Zalze
Stellenbosch
7600

Dear A group of concerned De Zalze Home Owners

**RE: DE ZALZE WINELANDS GOLF ESTATE HOME OWNERS ASSOCIATION NPC
OPINION ON: DIRECTORS' POWER TO ENTER INTO AGREEMENT TO CHANGE THE
DEVELOPMENT PLAN**

We confirm the instruction given by a group of concerned De Zalze Home Owners in their capacity as home owners in the De Zalze Winelands Golf Estate Home Owners Association NPC, Registration Number 2003/009588/08 ("De Zalze" and "the Association"), and on behalf of a group of concerned owners, in a consultation held at Paddocks on 19 May 2015, to give our opinion on whether the Board of Directors of the Association are entitled to have entered into an agreement with one of the original developers to change the Development Plan, without having a home owners' resolution to do so, and where the development period has long since ended. For ease of reference by third parties reading this opinion, we will hereafter refer to you in the third person.

A. DOCUMENTS

For the purposes of this opinion we have inspected:

1. The Memorandum of Association and the Articles of Association ("the Memorandum of



Incorporation”) of De Zalze.

2. The Objection together with various Annexures to the Application of Rezoning, Subdivision and Amendment of the Development Plan as per Notice No. P9/15 as advertised in the Eikestad Nuus of 19 March 2015 for submission on due date on or by 20 April 2015 to Stellenbosch Municipality.
3. A written instruction prepared by a group of concerned De Zalze Home Owners.
4. A letter dated 30 September 2014 to the Municipality from Mr. Eben Potgieter, the Chairman of the Association.
5. An opinion dated 10 March 2015 prepared by Mr. Pierre le Roux of Werksmans Attorneys addressed to Mr. Eben Potgieter, the Chairman of the Association.

B. FACTS

Our instructions are that:

1. The Board of Directors of the Association have entered into and signed various agreements with De Zalze Property Investments (Pty) Ltd, the owner of erf 4 in De Zalze, for further development to De Zalze and to change the Development Plan, without having a home owners’ resolution to do so and where the development period has long ended.
2. The owner of erf 4 of De Zalze was one of the developers involved with the original De Zalze development, but is not listed as “the developer” in the Articles of Association, but as “Kleine Zalze” and “Kleine Zalze Realisation,” and is a member of the Association and bound by the Memorandum of Incorporation.
3. In terms of Article 1.1.15 (referred to in A1) of the Articles of Association the development period ended five years after the first erf was registered, which was before July 2008. In terms of Article 4.2 of the Articles of Association the developer is deemed to have abandoned the particular rights conferred upon it during the development period at the end of the development period.
4. The area where the additional 28 units are planned is on agricultural area, which according to the current Development Plan, was supposed to be conserved as a conservation area. The amendment will entail the rezoning of six areas of erf 4 De



Zalze to Resort Zone II (residential use), and the subdivision of such rezoned areas to establish six separately registrable erven.

5. The Chairman gave the impression in the letter (referred to in A4) that the Association supports the application by the registered owner of erf 4 of De Zalze to amend the Development Plan.
6. At no point has a special resolution to authorise this been tabled and voted on by the Association.
7. The agreements relating to the development of erf 4 of De Zalze were signed without input from the home owners, and the Association were only informed of their content and viewed them after they were signed by the Chairman.
8. The Chairman told the Association that he and the Board of Directors had the power to sign such contracts. The Chairman obtained a legal opinion to this end on 10 March 2015 (referred to in A5).
9. The Application for the first contract and first phase of development was advertised on 19 March 2015, when the Stellenbosch Municipality published the Application of Rezoning, Subdivision and Amendment of the Development Plan: Erf 4, De Zalze, Stellenbosch for comment and objections.
10. A substantial Objection has been submitted by the due date in this regard, based on factual objections from environmental, heritage, planning etc (referred to in A2).

C. INSTRUCTIONS AND ISSUES

The issues that I will consider in this opinion are:

1. Did the Chairman or in the alternative the Board of Directors have the authority to enter into the agreements relating to the development of erf 4 of De Zalze?
2. Is a special resolution resolution by the Association required for an application to change Development Plan by the further subdivision and rezoning of erf 4 of De Zalze?



E. OPINION

1. In a Western Cape High Court Judgement *Kenrock Homeowners Association v Allsop and Another* (A224/2011)[2012] ZAWCHC 31 (28 March 2012) it was argued by the respondent in paragraph 22 that “The appellant [the Board/Association] derives all its powers from its constitution and if that instrument does not prescribe such a power, the association cannot exercise such power.” In this regard the respondent relied on LAWSA: Associations Vol 1 (2nd edition) at paragraph 620 where the following is stated:

“The constitution of an association together with all the rules or regulations collectively constitute the agreement which is entered into by its members. This agreement is the crucial factor in the existence of an association. It not only determines the nature and scope of the association’s existence and activities but also, where necessary, prescribes and demarcates the powers of, inter alia, the executive committee, secretary and general meeting, expresses and regulates the rights of members and provides for certain procedural aspects.”

In the *Kenrock* case, the Board had issued recurring penalty levies on a home owner who was in breach of his obligations, whereas the Constitution only allowed for a single penalty levy. Bozelek J and Henney J found that:

“In our view, in the absence of a clear provision in the constitution empowering the appellant [the Board/Association] to impose a penalty levy in appropriate circumstances, it does not possess the power to do so. It follows that the appellant misconstrued its authority to impose a penalty levy and may even have confused it with a provision authorising the imposition of a sanction or penalty in terms of clause 14.2 of the Kenrock Agreement of Sale. Whatever



the case, it acted outside of its powers in purporting to impose a penalty levy under the guise of imposing a fine in terms of clause 11.2.3. Ultimately, having regard to the evidence as a whole the appellant failed to make out a prima facie case that it possessed the power to impose any penalty levy upon the respondents.”

2. Article 23.1 in the Articles of Association sets out the Powers of the Directors and states:

“The management and control of the business of the Association shall be vested in the directors who, in addition to the powers and authorities expressly conferred upon them by these Articles, may exercise all powers and authorities and perform all acts which may be exercised or done by the Association, and are not hereby or by the Act expressly reserved to the Association in general meeting. Such management and control may not be inconsistent with the Articles nor with the provisions of the Act, and the general powers given by this article shall not be limited or restricted by any special authority or power given to the directors by any other Article.”

The Directors’ authority exercise “all the powers and authorities and perform all acts which may be done by the Association” must be read in conformity with all the provisions in the Articles of Association. The Association does not have the authority to further develop De Zalze as it is outside the development period. The Chairman or the Board of Directors do not have the power to support or approve anything that is contrary to the Development Plan. Therefore, the Chairman, or in the alternative the Board of Directors, do not have the authority to further develop De Zalze and to enter into such agreements, or to initiate the Application of Rezoning, Subdivision and Amendment of the Development Plan.



3. The application for the proposed amendment to the Development Plan by the Chairman, or in the alternative the Board of Directors, is contrary to the provisions in the Memorandum of Incorporation (referred to in A1).

4. Article 6.3. in the Articles of Association sets out the Obligations of the Association and states:

“6.3 The Association shall, in managing the common property and the development in general 6.3.1 ensure that all conditions of approval and scheme regulations for the development are complied with;

6.3.2 have due regard to the principles recorded in the Management Framework, the obligations of the SMA Trust and in any environmental management system for the development prepared by the developer; and

6.3.3 comply with the obligations placed on the Association in terms of the management framework and the environmental management system, including, but not limited to, the preparation of environmental audit reports and the submission thereof to the local authority.”

Some conditions of approval that have to be complied with are:

- An extensive Environmental Management Plan, which is incorporated in all the conditions of the Estate, including where no development should occur.
- Conservation of Agricultural land especially for Agricultural Zone 1, where no development was approved, and the developments fall within this area.
- The development to be in three main nodes and clusters and no ribbon development was allowed. The prospective development on erf 4 of De Zalze are ribbon developments.



- The total number of buildings approved by the Minister was 447 (436 residential and 11 non-residential). There are 427 residential and 12 non-residential buildings, totalling 439. Including 10 vacant erven, which may be legally built on, and the farmhouse and shed allowed for on land what was Farm 998 and farm 508 (now part of De Zalze), there is no more scope for development. The building count of 447 has been exceeded.
- In terms of Article 34.4.4.3 of the Articles of Association Kleine Zalze is entitled to “*erect an additional farm homestead and outbuilding on the portion of Farm 508 agreed to between Kleine Zalze and the developer and to erect a homestead and outbuilding on the portion of Farm 998 to be transferred to Kleine Zalze, subject to such homestead and outbuildings being erected on areas agreed to by the developer.*” The Articles of Association thus only allow a homestead and outbuilding to be erected by the developer on Farm 998. The contracts allow three farm houses and sheds (plural) on each of the three proposed subdivisions. Furthermore, the development period is over.

The Chairman, or in the alternative the Board of Directors, did not ensure that all conditions of approval and scheme regulations for the development were complied with.

5. Article 23.5 in the Articles of Association sets out the Powers of the Directors and states that a director is required to:

“23.5.1 perform the functions of office in good faith, honesty and in a transparent manner; and

23.5.2 at all times act in the best interests of the Association, and in such a way that the credibility and integrity of the Association is not



compromised in any way.”

In failing to comply with the above mentioned conditions the Chairman or Board of Directors have acted outside their powers and have not performed the functions of office in good faith, honesty and in a transparent manner in the best interests of the Association.

6. The Chairman or Board of Directors can only conduct what the main business allows as set out in Article 2 of the Memorandum of Association:

“The main business which the Company is to carry on is the business of controlling and managing common facilities and amenities in respect of the property development known as De Zalze Winelands Golf Estate, including all sub-divisions and/or consolidations thereof for the mutual use and benefit of members and their invitees.”

The Chairman or Directors can only conduct what the main object allows as set out in Article 3 of the Memorandum of Association:

“The main object of the Company is to create an association amongst the members of the Company which will entitle the members to share in the use of and benefit from recreational facilities (including but not limited to a golf course), security facilities, parking facilities, gardens, terraces, agricultural areas and other common areas and facilities (“common facilities”) on a common basis subject to a lease and/or management agreement with the golf course operator in respect of the golf course, to share the costs incurred in keeping, repairing and maintaining the common facilities as a common expense and generally to regulate and control access to and the use of the



common facilities.”

Therefore, the Chairman and Directors’ authority is confined to the controlling and managing the common facilities and amenities of De Zalze and to ensuring the mutual use, the keeping, repairing, and maintaining of the common facilities and amenities of De Zalze, and not in initiating further development of De Zalze.

7. Article 38 in the Articles of Association deals with the amendment of the articles and states:

“38.1 Subject to the provisions of 33 [the entrenched provisions] and 38.2, the provisions of these articles may be amended by special resolution given at a general meeting called specifically for such purpose. The notice of such meeting shall, inter alia, set out in specific terms of the proposed amendment of these articles.

38.2 Notwithstanding the provisions of 38.1, the provisions of these articles shall not be amended without the prior written consent of the local authority where such amendment(s) have an effect on the Zoning and Subdivision Approvals.”

Article 1.1.3 in the Articles of Association defines the architectural guidelines and states:

“The general and specific architectural guidelines of the development as amended from time to time. Any amendments having an effect on the Zoning and Subdivision Approvals will be subject to the approval of the local authority.”

It is important to note that no prior consent has been obtained from the Municipality to amend the Articles in terms of Article 38.2 or to amend the architectural guidelines. However, the Application for Erf 4 clearly states Rezoning, Subdivision and Amendment of the Development Plan: Erf 4, De Zalze, Stellenbosch.

8. A special resolution of the Association would be required to change in the



Memorandum of Incorporation and architectural guidelines; to authorise the Chairman or the Board of Directors to initiate the Application of Rezoning, Subdivision and Amendment of the Development Plan; to change in the Environmental Management Plan; to initiate the Application of Rezoning, Subdivision and Amendment of the Development Plan, and to change in the Development Plan.

Thank you for the instruction. Please do not hesitate to revert to us if you have any further queries in this regard.

Yours faithfully,

A handwritten signature in black ink, appearing to read "Carryn", written in a cursive style.

CARRYN MELISSA DURHAM