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DIRECTORATE
PLANNING

Our ref.: *Erf 29285 Arboretum*
17/1/2/6/1/3/1 Arboretum

Date: *2018-09-20*

Speaker
Councilor M Siyonzana
Council item

PROPOSED LAND SWAP AGREEMENT: A PORTION OF ERF 29285 ARBORETUM FOR A PORTION OF THE ROAD RESERVE OF 6TH STREET IN ARBORETUM, BLOEMFONTEIN

1. INTRODUCTION

A developer, Carlos Nunes CC, owner of erf 29285, 7th Street, Arboretum, wants to conclude an agreement with the Mangaung Metro Municipality (MMM) to swap a portion of the said erf for a similar sized portion of an unused part of the road reserve of 7th Street in Arboretum.

2. BACKGROUND

As the relevant application has a long history of about 12 years already, it is not practical to describe the full sequence of events in this report. (See **Annexure B** attached hereto for a cryptic summary of the sequence of events that preceded the application/request of Messrs. Carlos Nunes CC).

The current situation can be described as follows:

2.1. The applicant has purchased erf 29285 7th Street, Arboretum from another party, unaware of the fact that a part of a municipal street (7th Street Arboretum) encroaches onto the property.

2.2. The situation had been created by the previous property owner by submitting incorrect subdivision, rezoning and consolidation diagrams to the Free State Provincial Government for approval.

2.3. The subsequent approval by the Free State Provincial Government compromised the status and integrity of the municipal infrastructure.

2.4. The presence of the municipal infrastructure on the application site prevents the applicant from developing the full extent of his property.

2.5. The applicant previously agreed to register a servitude over the property in favour of the municipality in order to temporarily protect the status of the municipal infrastructure on the private property. This was done to obtain approval of building plans.

2.6. The building plans were approved by the municipality on condition that the applicant takes further steps to ensure that the municipal street is located within a formal road reserve.

2.7. The applicant wants to obtain additional land to compensate for the area lost as a result of the presence of the municipal infrastructure.

2.8. The applicant either wants to purchase a redundant part of the road reserve of 7th Street, or to swap a part of the unused road reserve for the part of the application site that is taken up by municipal infrastructure.

2.9. The applicant has already constructed an additional townhouse unit on the application site, encroaching about 5m into the redundant part of the road reserve of 7th Street. (The application site and part of the road reserve currently accommodates 15 townhouse units, while the original building plans only showed 13 townhouse units.)

3. MERITS OF THE APPLICATION

The relevant matter has a long history and it is impacting negatively on the development potential of the applicant's property. The situation also has negative implications for the municipality as municipal infrastructure is located on private property with related legal liabilities. The matter deserves to be speedily resolved. The following aspects must be noted in this regard:

3.1. The developer initially intended to develop 15 townhouse units on the application site in order to make the development feasible. Given the presence of the municipal road and sidewalk encroaching onto the property, only 14 townhouse units could legally be developed on the site.

3.2. Given the delay in either purchasing a part of the 7th Street road reserve or in concluding a land swap agreement with the municipality, the applicant has proceeded with the construction of a 15th townhouse unit, encroaching into a redundant part of the road reserve of 7th Street.

3.3. The applicant thus needs additional land in order to legitimise the additional townhouse unit.

3.4. The part of the road reserve that the applicant wants to consolidate with Erf 29285 is a redundant portion of road reserve that had incorrectly been set aside to accommodate a cul-de-sac turning space. (The cul-de-sac turning space was actually constructed further to the east, outside the area demarcated to accommodate the turning space.)

3.5. Only the applicant can meaningfully develop the redundant part of the 7th Street road reserve, by extending the existing development on Erf 29285.

3.6. Similarly, the municipality needs the part of the applicant's site (erf 29285) on which the cul-de-sac turning space had been constructed in the past.

3.6.1. Common law principles dictate that a service or structure erected on an immovable property cannot be divorced ownership wise from the relevant immovable property. This creates a number of uncertainties for the municipality.

3.6.2. It is unclear what would happen if a traffic accident occurs on the part of the municipal cul-de-sac turning space that is located on Erf 29285. (Who will be liable if the infrastructure is claimed to be substandard? How will insurance companies approach such claims for damage?)

3.6.3. Can the part of the road over the application site be legally regarded as a road with public right of way?

Although it will probably be possible to deal with such matters in future, it remains a liability and it may unnecessarily drain municipal resources. The appropriate approach would be to rectify the matter in a legally sustainable manner.

3.7. Approval of the application will allow the applicant to legitimise the existing presumably unapproved townhouse units. This can be expected to increase the recorded value of the property and subsequently also an increase in revenue from rates and taxes.

3.8. The ideal situation would be to agree on a land swap with the applicant. This will avoid complicated financial calculations. It would also not raise serious issues as far as the Municipal Finance Management Act is concerned.

It is clear that such an agreement will benefit both the applicant and the municipality. It will not harm any other party and can be regarded to be in the public interest.

4. CONCLUSIONS

4.1. The applicant and the municipality are currently both being disadvantaged as a result of incorrect documentation being approved by the Free State Provincial Government in the past.

4.2. The correction of the historic problematic situation will benefit both the applicant and the municipality.

4.3. Correction of the situation will comply with the principles of orderly planning and may increase revenue generated from rates and taxes.

4.4. A land swap agreement will not affect the developability of Erf 5033 directly to the west of the application site.

4.5. A land swap agreement will likely allow the applicant to legitimise unapproved structures on the application site.

4.6. No party will be disadvantaged by the proposed land swap.

5. RECOMMENDATIONS

In view of the above, it is recommended to Council:

(a) that a land swap agreement be approved in principle, pending the finalisation of exchange areas and proposed cadastral boundaries;

(b) that the applicant's professional team submit a formal proposal regarding a land swap agreement, inter alia showing proposed new cadastral boundaries;

(c) that, as a principle, the land swap must involve land parcels of equal size and/or equal value to adequately accommodate the cul-de-sac turning space with a 2.5m wide sidewalk within a formal road reserve and to accommodate all townhouse units on the enlarged application site;

(d) that, pending the support from the HOD: Planning, HOD: Human Settlements and HOD: Engineering Services, the applicant proceed with a formal subdivision, closure, rezoning and consolidation process in terms of the Mangaung Municipal Land Use Planning By-laws, to rectify the historic problematic situation and in order to give effect to the requirements of the in-principle approved land swap agreement;

(e) that MMM grant the applicant the necessary Power of Attorney to deal with the public road reserve on behalf of the municipality;

(f) that the applicant complies with all standard municipal requirements regarding the development on the site, including townhouse units that have been constructed without approved building plans;

(g) that the applicant submits an application for the relaxation of the building line in 7th Street, should the units on the site encroach into the new building line area;

(h) that the applicant submits building plans for all unapproved structures on the enlarged application site; and

(i) that the HOD: Finance advises as to the potential charging of an encroachment fee for the unapproved townhouse unit partially constructed within the road reserve of 7th Street.

Submitted by		W. Loftus **MANAGER: TRANSPORT PLANNING**		
Supported by		M. Mahao **GENERAL MANAGER: TOWN & REGIONAL PLANNING** ~~(Ac)~~		
Supported		B. Mthembu **HOD: PLANNING**		
Supported		Adv. N. Mofokeng **GENERAL MANAGER: LAND DEVELOPMENT & PROPERTY MANAGEMENT**		
Supported		Adv. J. Phaladi **HOD: HUMAN SETTLEMENTS** 14.9.18		
Approved		~~Not Approved~~		Adv. T. B. Mea **CITY MANAGER** 21/09/2018
Approved		~~Not Approved~~		Cllr. O. Mlamleli **EXECUTIVE MAYOR** 21/09/2018

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ANNEXURE A


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ANNEXURE B

The sequence of events that preceded the application/request of Carlos Nunes CC regarding Erf 29285 Arboretum, can be briefly summarised as follows:

1. A developer (Lanamico Investments CC) approached the municipality in the early 2000's to obtain and develop Erven 5034, 5035, 5037 and 5038 Arboretum. The relevant erven were the property of the municipality at the time.

2. The erven were located at the westernmost ends of 6th Street and 7th Street in Arboretum. The relevant two streets were developed as short cul-de-sac streets without an adequate turning space at the western end of 6th Street at the time.

3. The municipality (on 21 May 2002) agreed to sell the properties to the developer, subject inter alia to the following conditions:

   3.1. The applicant must appoint private town planners to subdivide, rezone and consolidate the subject properties.

   3.2. The applicant must construct a cul-de-sac vehicle turning space at the end of 6th Street.

   The municipal decision was presumably based on a submission of the applicant, dated 14 March 2001, which showed the proposed subdivision of erven to accommodate cul-de-sac turning spaces in 6th Street and 7th Street. This submission corresponded with the location of an existing cul-de-sac turning space in 7th Street.

4. An application for the subdivision and rezoning of the erven was subsequently submitted by the applicant to the Free State Provincial Government and advertised in February 2004 for comment, which application included the subdivision of the properties to make provision for cul-de-sac turnaround spaces. The following actions were initiated at the time. (See **Annexure A** for a sketch plan detailing the changes to the properties and reference points referred to below.)

   4.1. Section ABCE was subdivided from Erf 5034 and zoned to "Street".

   4.2. Section CDE was subdivided from Erf 5035 and zoned to "Street".

   4.3. Section HJKN was subdivided from Erf 5038 and zoned to "Street".

   4.4. Section KLMN was subdivided from Erf 5037 and zoned to "Street".

   4.5. Section FGHI was subdivided from the road reserve of 6th Street, closed as a public street and rezoned to "General Residential 3"

   4.6. The remaining portions of the original erven were rezoned from "Single Residential 2" to "General Residential 3" in order to allow the development of a townhouse complex.

   The abovementioned layout of the proposed subdivisions differed from what had been presented by the developer to the municipality earlier in March 2001 and did not correspond with the location of the existing cul-de-sac turning space in 7th Street.

5. The abovementioned application (subdivision, rezoning and consolidation) was approved by the Free State Provincial Government and the decision was published in the Provincial Gazette on 26 November 2004. It is clear that the approved subdivisions and changes to the public road reserve do not correspond with the location of the cul-de-sac turning space in 7th Street.

6. The land was subsequently sold by the developer to Carlos Nunes CC who intended to develop townhouses on the consolidated site. The municipality was informed of the envisaged transfer in July 2007.

7. The developer commenced with the servicing of the consolidated site and the construction of a cul-de-sac turning space in 6th Street. The Services Certificate of the site was issued by the then Director Infrastructure Services in January 2007.

8. The developer at the same time started to compile building plans for the proposed townhouse complex. It was then realised that the boundaries of the consolidated site do not correspond with the actual location of the cul-de-sac turning space in 7th Street. This resulted in a dilemma for the developer as it had the potential to delay his development substantially.

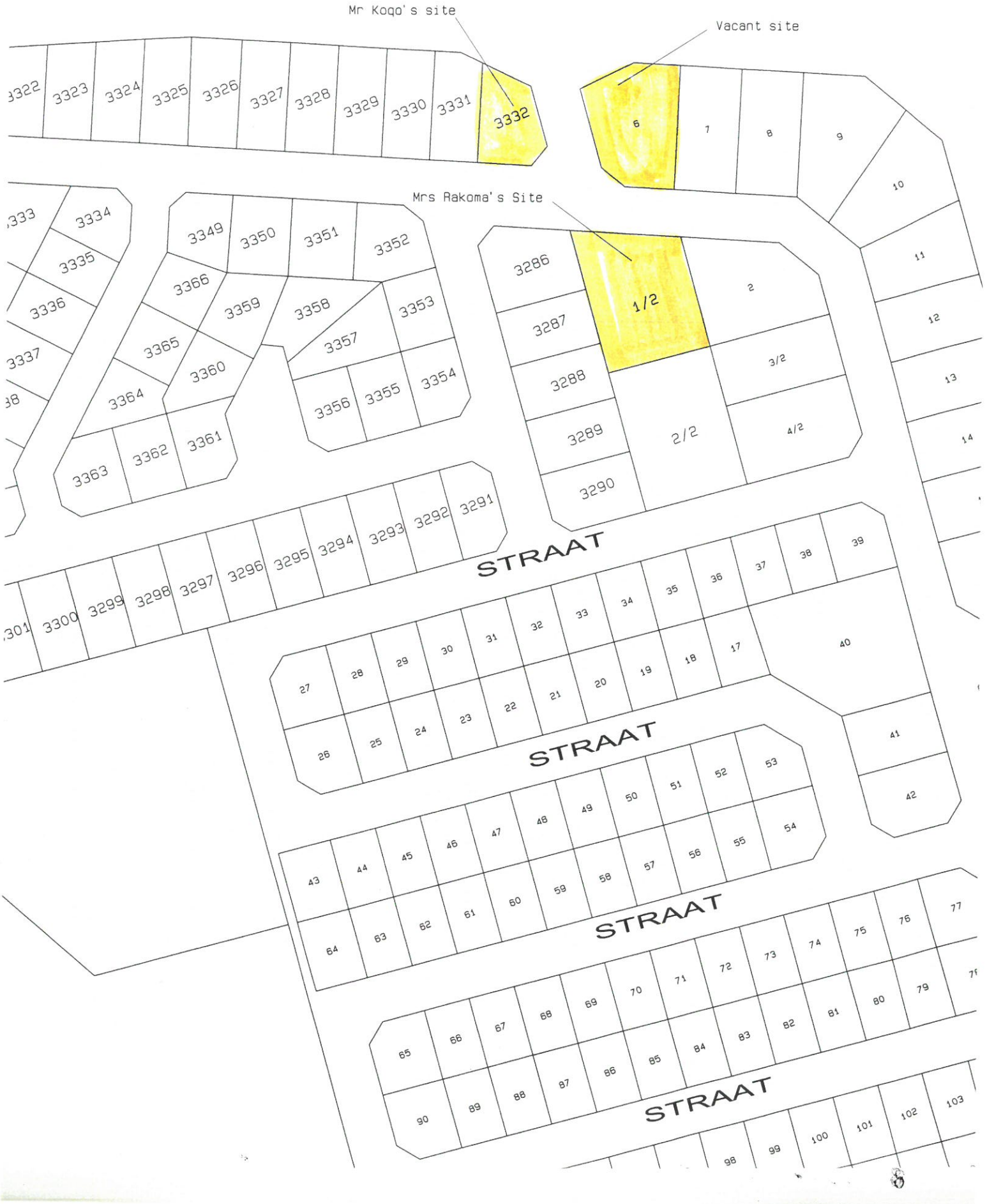
9. As the Building Control Division, responsible for the consideration and approval of building plans resided at the time under the Directorate Economic Development and Planning, the matter was taken up with the officials of the relevant directorate. It was agreed that, in order not to delay the construction of the townhouse complex further, a temporary arrangement be considered that will allow the consideration and approval of building plans in the interim, while the matter is properly addressed in due course.

10. The developer's legal representative proceeded with the registration of a servitude in favour of the municipality in the title of Erf 29285, to reserve an area of 131m² on the site as part of the 7th Street road reserve. This accommodated the historically constructed cul-de-sac turning space as well as a sidewalk with a width of about 2m on the developer's property. (The servitude was successfully registered on 19 March 2009.)

11. The developer's legal representative also approached the municipality to agree on a process to either purchase the unused part of the 7th Street road reserve in order to compensate for the part of the erf that had been taken up by the municipal infrastructure and approved servitude, or to agree to a land swap.

12. It appears that due to inadequate response from the municipality, this matter had still not been resolved after about 8 years. This prompted the property owner to approach the courts in order to get the cooperation of the municipality.

13. It appears that the property owner has in the mean time proceeded with the construction of an additional townhouse unit as part of the larger complex, encroaching about 5m into the municipal road reserve. This part of the road reserve forms part of the land that the developer wants to buy or exchange with the municipality.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