

ROOT 44 – THE TRUTH

Statement by Dax Hunt on behalf of the Daxcon Development Trust.

I have to date intentionally refrained from participating in the ongoing public debate concerning the municipality's refusal to issue an occupancy certificate for the Root 44 building. The building was constructed and fitted out in accordance with the approved plan.

I make this statement because Ms Mettler's statement released yesterday, fails to disclose certain relevant facts and calls on the developer "*to share the full story with members of the public*". I remain of the view that the responsible way to attempt to resolve differences of opinion between the Trust and the municipality, should be via direct discussion between the two parties and not through media statements or litigation. Attempts are underway from our side to engage the municipal manager and hopefully the Mayor, in further discussions.

At this stage suffice it to say the following.

- (a) During 2008 a previous owner applied to the municipality for approval to establish a wine/cuisine/art and tourist destination. The parameters of the project were a two-storey main building with a footprint of 6200m², a gross floor space of ± 7000m² and a covered parking area of ± 1875m². The 2008 application was shelved and was never approved.
- (b) Based on inputs received from interested and affected parties to advertisement of the 2008 application, a revised application was made in 2009 for a drastically reduced building. The footprint of the proposed building was reduced to ± 2000m². Together with decking at mezzanine level it resulted in coverage of ± 2795m² for the main structure. It necessitated that the curbing of intended uses to only those directly associated with wine tasting/ sales, cuisine, art and tourism.
- (d) The application - which is the approved application- was not for an emporium. In fact the word "emporium" was not used in the revised application, nor in the Committee's resolution approving same nor in the conditions of approval. In short, the 2009 approval was not for a wine emporium.
- (e) The 2009 approval granted by the Municipality was for a "*tourist facilities for wine tasting/sales, cuisine, art, tourism and administration offices of approximately 2,800 meters square*".

The Trust, in legitimate reliance upon that approval, purchased the property during 2017 and, again, in reliance on the very wording of the 2009 approval, the Trust managed to raise a loan and constructed the new building.
- (f) The drastic down scaling of the project reduced development costs substantially, yet due to prevailing economic conditions, the Trust decided to first delay the implementation of the 2009 approval. It applied for interim municipal approval (the "Interim Approval") during 2018 to enable it to continue conducting a farmer's market until it would become less risky to implement the 2009 approval.
- (g) After obtaining Interim Approval, the Trust reconsidered the matter, did not act in terms of the Interim Approval but decided to rather proceed with the implementation of the 2009 approval. According to advice obtained, the Interim Approval is therefore legally irrelevant for current purposes.
- (h) However, it is noteworthy that the municipal planning tribunal required, as a condition of the Interim Approval, that the Trust (as owner) should withdraw the 2009 Consent Use approval. This the Trust was not prepared to do. It lodged an appeal with the Appeal Authority (the Mayor). She varied the tribunal decision on 19 August 2019 *inter alia* to read "*The consent use for tourist facility in the form of a tourist market be granted for a period of two years or until the occupation certificate for the wine emporium is issued by the Municipality, whichever is the latter date*".
- (i) In other words, the approval for the interim use of the property as a tourist market would remain in place whilst the new building was under construction, but it would terminate once an occupation certificate has been issued for the new building.

- (j) The use of the word "emporium" became more prevalent in municipal documents over time, apparently to distinguish between the interim use of the property for purposes of a farmer's market; and the future permanent use in terms of the 2009 approval as a tourist facility. The use of the word "emporium" post the 2009 approval, however, cannot serve as basis for elevating it to a condition of approval that was never imposed, nor can it be used retrospectively to add new meaning to words used in the original consent use approval.
- (k) That this is so is evidenced by the Municipality's own letter of 23 October 2020, in which the municipality refused an earlier building plan application, imposing the following requirement: *"The internal layout of the proposed building must reflect the following uses as approved by Council in its letter dated 18 August 2009: (tourist facilities) wine tasting, sales, cuisine, art, tourism and administration offices."*
- (l) At the Municipality's instance, the Trust's architect indicated in colour on the Site Development Plan ("SDP") the floor areas earmarked for "Wine tasting & sales", "Cuisine" and "Art craft tourism" (the approved uses). This having been done, the municipality approved that plan, thereby confirming that it was satisfied that the uses reflected on that plan were in accordance with the approved uses. The approved plan shows that a substantial floor area is earmarked for purposes of "Wine Tasting", that a further area is earmarked for use as "Wine Shop" and yet another area as "Deli Wine Shop". The fit-out subsequently undertaken in reliance upon that approval, is in accordance with the approved plan.
- (l) According to the most recent municipal letter dated 23 September 2021, confirming that the Trust's application for an occupation certificate was yet again refused, the reason for such refusal is that *"Not all conditions of approval attached to the building plan approval in terms of section 7 of the Act has been complied with satisfactorily"*.
- (m) The Trust's attorney transmitted an email to the municipal official concerned on 23 September 2021, *inter alia* stating the following:
- "You failed to identify the condition or conditions that were allegedly not complied with. You are required to forthwith identify the specific conditions or conditions that were imposed with building plan approval which you claim has/ have not been complied with. We demand that you do so immediately.*
- Secondly you are required to clearly explain why you allege the condition or conditions to which you refer, have allegedly not been complied with. You have failed to make adequate discovery, which is required as a matter of fairness. You should have made adequate disclosure and properly apprised our client of the information and reasons which underlies the decision. We demand that you do so immediately.*
- Furthermore, it should be done in a clear and unambiguous language and not in vague generalities."*
- (n) The municipal official concerned was again requested on 28 September 2021 for adequate reasons. He confirmed *" , but I will discuss your attached letter with Mr"*. The Trust's attorney replied: *"Thank you for your quick response. If my letter of the 23rd is not sufficiently clear, I will spell it out in plain English. You are required (a) to identify the conditions or conditions that you claim has/have not been complied with by quoting the condition(s); and (b) explain why and to what extent you allege that the condition(s) has/ have not been complied with satisfactorily."*
- (o) The Municipality has preferred not to respond to paragraphs (a) and b) set out above. Rather, in reply the following email has this afternoon been received from the municipality's Senior Manager: Development Management.
- "Your e-mail with letter of enquiry on the decision letter, both attached for ease of reference, and addressed to Mr., refers.*

I have reviewed the subject decision letter on the application for occupancy.

The reason for the decision is recorded in the letter and is directly related to the relevant considerations of the subject legislative provisions.

The information in the feedback of the decision letter is rationally connected to the conditions attached to the building plan approval, and served as the rationale for the decision and reason.

This information provided in the decision letter is consequently regarded as relevant, reasonable, and rationally connected to the decision and reason.

There are no other reasons, and the decision letter is therefore regarded as adequate."

In the circumstances we have real concerns as to the basis upon which the occupation certificate is being refused but in the interests of a sensible resolution to the situation, will refrain from debating them at this stage.

Hopefully the fact that so many breadwinners and their families that are suffering for not being able to participate in a meaningful way in economic life, will be a sufficient reason to persuade the municipal manager and/or the Mayor to make time available to hear us out and to at least attempt to overcome the current impasse.