



Republic of Namibia  
Ministry of Environment & Tourism

LEGAL ASSESSMENT  
OF **CITY OF WINDHOEK'S**  
**BOUNDARY EXTENSION STATUS**





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## LEGAL ASSESSMENT OF CITY OF WINDHOEK'S BOUNDARIES EXTENSION STATUS

*ASSESSMENT DONE BY:*

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**Namibia Protected Landscape Conservation Areas Initiative (NAM-PLACE)**

The Namibia Protected Landscape Conservation Areas Initiative (NAM-PLACE) is a five year project established by The Ministry of Environment and Tourism (MET), with co-financing from the Global Environment Facility (GEF) and with the United Nations Development Programme (UNDP) as the Implementing Agency.





# CHAPTER 1

## INTRODUCTION

The MET with support from GEF through UNDP is undertaking the Namibia Protected Landscape Conservation Areas Initiative (NAM-PLACE). The five-year project aims to lift barriers for the establishment of a large scale network of protected landscapes in the country. The project has five pilot landscapes namely; Greater Sossusvlei-Namib and Greater Fish River Canyon in the south, Mudumu Landscapes in the northeast and Greater Waterberg and Windhoek Green Belt in central Namibia.

The project goal is to ensure that “Namibia’s Biodiversity and Ecosystem Values are Conserved and Provide Sustainable Benefit Flows at Local, National and Global Levels through the Establishment of Protected Landscape Conservation Areas”. The objective of the project is “Protected Landscape Conservation Areas are established and ensure that land uses in areas adjacent to existing Protected Areas are compatible with biodiversity conservation objectives, and corridors are established to sustain the viability of wildlife populations”.

The project has three complementary output components which will be cost-shared by GEF and co-financing. Each component addresses a different barrier and has discrete outcomes. The first component is the Establishing of new Protected Landscape Conservation Areas (PLCAs). The second component is on Collaborative Governance for PLCAs and the last component is on Incentives and Market Transformation. The realisation of these three component outputs are a primary focus of the NAMPLACE project in the five project pilot landscapes.

As part of the NAMPLACE’s activities implementation, the Windhoek Green Belt Landscape (WGBL) has proved one of the five landscapes with the most challenges. Most of the challenges are attributed to its proximity to the city. The Minister of Regional and Local Government, Housing and Rural Development on 30 September 2011 published Government Notice 184 of 2011 in terms of which the Alteration of the Boundaries of the Local Authority Area of Windhoek was gazetted. The Minister did so in terms of his powers under the Local Authorities Act (Act 23 of 1992) through Government Notice No. 184 contained in the Government Gazette No. 4801 of 2011. This recent extension of the City of Windhoek (CoW) boundaries encloses a significant freehold area of the NAMPLACE’s Windhoek Green Belt landscape together with the Daan Viljoen Game Park. The WGBL’s eleven (11) freehold farms included in this extension are: Triangle; Monte Christo North; Ongos; Augeigas; Hochfels and Otjompau.

Currently, there appears to be a lack of clarity among the affected WGBL’s landholders in terms of what this extension means, especially regarding the level of involvement of the local government (CoW) on their land. Specific to these concerns are service delivery to these largely agricultural and rural areas; payments of rates and taxes; and the issue of land ownership. Further to this and with reference to the NAMPLACE project concept, the affected farmers are skeptical on whether this new development from the CoW side will prioritise biodiversity conservation in the landscape. In efforts to get some light on these issues, WGBL members from the affected farms have decided to seek a legal opinion on the aspects surrounding the CoW boundaries extension and its implication to their privately owned land.

The overall objective of the consultancy is to assist the Windhoek Green Belt Landscape's affected in:

- a. conducting a consultative, legal assessment on the City of Windhoek boundaries' extension status;
- b. inform the members on what implications such an extension has on their lands' development and management and also on the overall biodiversity conservation of the area in light of the WGBL; and
- c. recommend means/ways through which the CoW boundaries' extension and biodiversity conservation and development of the WGBL can be mutually integrated to the benefit of both parties.

Therefore, this assessment should incorporate all the necessary components of the concerned facets including but not limited to: legal status of the CoW boundaries extension; Local authority rules and regulations to govern the recently CoW incorporated WGBL farms; and biodiversity conservation priorities as contained in the individual affect farms management principles; WGBL's draft constitution; CoW's environmental strategic plans; and the NAMPLACE project document.

### 2.1 Legal assessment of the Boundaries Extension Status

When considering the legal status of the boundary extension it is helpful to view this development in its historical (recent history) and political context. On 12 April 2011, The Namibian newspaper published the following article, which is worth reproducing in its entirety here:

## *City Clamps Down On 'Rich Private Townships'*

By: JO-MARÉ DUDDY

*THE City of Windhoek wants approval to extend the borders of the capital, not only to prevent running out of developable land by 2026, but also to clamp down on "upper-class" residential estates mushrooming on the outskirts of the city.*

*At its monthly meeting last week, the City Council resolved to set the wheels into motion to move the existing municipal borders. Currently there is no local governance structure in place to oversee these estates, such as Elisenheim and Omeya.*

*According to the agenda, the City of Windhoek was "urged" to investigate the extension as there was a concern that the private residential developments outside the capital "are perceived as enclaves of the rich and predominantly formerly advanced racial groups in Namibia".*

*"These types of developments thus have the potential to bring about polarisation between black and white and rich and poor – and as such polarisation is reminiscent of the apartheid era, therefore it must be avoided at all costs," the agenda stated.*

*Jerry Ekandjo, Minister of Regional and Local Government, Housing and Rural Development, lashed out at these estates when he addressed ministerial staff in January, accusing it of favouring apartheid practices such as approving visitors and not allowing "home helpers" to live there. He instructed the City of Windhoek to extend its borders so that "any private township" can be governed by the local authority. (our emphasis)*



*According to the municipal agenda residential estates play an important role in housing delivery. “It is true that they cater more for the upper class, but the fact that they are delivering housing which is a need and basic human right irrespective of one’s socio-economic standing cannot be ignored,” the document stated. It furthermore said that these estates provide a safe and secure environment for those living there, as well as an “aesthetically pleasing environment”.*

*The agenda suggested that the granting of rights for private developments “could possibly be subject to such developer being bound to invest a percentage of the profits in a fund that will exclusively be used for low-income development”.*

*A desktop study conducted by the City proposed that Windhoek’s municipal boundaries be extended southwards to the border of the Hardap Region, including all the areas governed by the Aris Town Planning Scheme. Towards the north, the revisited boundaries should stretch to the border of the Otjozondjupa Region, including all areas governed by the Kapps Farm Town Planning Scheme.*

*Westwards the extended borders will go as far as Baumgartsbrunn, including all areas covered by the Aris Town Planning Scheme. Towards the east, the borders will extend to Seeis, also including all areas governed by the Kapps Farm Town Planning Scheme.*

*The Kapps Farm and Aris Town Planning Schemes must be repealed for the extension to proceed. The municipal agenda stated that the extension of municipal boundaries “would not necessarily go hand in hand” with the transfer of ownership of land to the City Council.*

It is thus important to keep in mind the reasons why the City of Windhoek was instructed to extend the boundaries. This also allows one to understand why actual gazettment came as a surprise to many affected landowners and many residents of Windhoek. The Minister was acting under the powers granted to him by section 4(1) of the Local Authorities Act 23 of 1992.

The relevant part thereof reads as follows:

#### **Alterations of declaration of local authorities**

4. Subject to the provisions of this Act, the Minister may from time to time in the Gazette by way of repeal, amendment or substitution of a notice issued under section 3, or of a proclamation issued under that section before the amendment by the Local Authorities Act, 2000,
  - a. alter a declaration made under subsection (1) of that section;
  - b. alter the boundaries of any local authority area by excluding any portion from its area or by adding any area thereto

The Act does not impose an obligation on the Minister to consult with any affected persons, even the local authority, before exercising his powers in terms of section 4(1). It is nevertheless arguable that the state and all its organs, which would include the Ministry Regional and Local Government, Housing and Rural Development, as well as any local authority like the City of Windhoek, are obliged by the principles of administrative justice to consult with affected parties before any administrative action is taken.

*Administrative law is inextricably intertwined with the “quest for administrative justice”. The latter is concerned with ensuring that the powers and duties of government are exercised in accordance with the liberal principles of a democratic constitution and a progressive Bill of Rights, and simultaneously “contribute to the improvement of the technique of government”. The aim of an effective system of administrative law is to ensure both fair dealing and good administration. Administrative justice is effected through the legal and political control of governmental activities and the effective and expeditious legal redress of grievances against government.*

*The fundamental objective of administrative law is to guarantee that the powers of government are exercised within their legal parameters, so as to protect the citizen against abuse of power [.....].*

The principle of administrative justice is in fact enshrined in Article 18 of Namibia's Constitution

### **Article 18 Administrative Justice**

Administrative bodies and administrative officials shall act fairly and reasonably and comply with the requirements imposed upon such bodies and officials by common law and any relevant legislation, and persons aggrieved by the exercise of such acts and decisions shall have the right to seek redress before a competent Court or Tribunal.

Article 18 thus provides any person aggrieved by administrative actions which falls foul of this constitutional provision with a claim which can be brought to court. The two parts in cursory script are highlighted for the purpose of showing the two elements which a litigant against the Ministry or the City of Windhoek would have to meet as a litigant. He must be able to show that

1. due to the administrative action of the state, he is aggrieved, as in is suffering some kind of a loss, and
2. that the action of the state was not within the confines of Article 18 of the Constitution.

After having attended the public meeting which the City of Windhoek CEO, Mr Niilo Taapopi held on 25 October 2012, as well as after having consulted with the City of Windhoek's Project Manager: Boundaries Extension, Mr Hugo Rust on 27 November 2012, we come to the conclusion that it would be very difficult, if not impossible for any litigant to claim that he is already aggrieved at this point. The reason for this conclusion is that on both occasions it was emphasized that the status quo remains the same, because the City has not yet properly investigated all the potential impacts of the decision and has therefore not yet decided which changes will take effect.

### **2.2 Preservation of the Status Quo**

A good example is the question which was raised during the public meeting, whether a farmer may now no longer hunt on his farm, due to the municipal bylaws in terms of which it is illegal to shoot a firearm within an urban area. The response was that the City of Windhoek will not enforce this bylaw on the landowners, whose farmland is now part of the City of Windhoek due to the expansion of the City's boundaries. Equally, the land tax that the landowners are obliged to pay will remain the same, as opposed to being changed, to a rate calculated on the municipal valuation roll. If the city were for argument's sake enforce some of the consequences which would by operation of law apply to all properties now included within the new boundaries of the city, then an affected party could argue that they are aggrieved as their property rights and other interests, have been negatively affected, such as a prohibition on conducting their (hunting) business on their farm or now having to pay an exorbitant tax rate.

With regard to the land tax, Mr Rust, the Project Manager for the Boundaries Extension did confirm though, that the taxes will now be payable to the City of Windhoek, rather than to the Ministry of Agriculture, to which they were payable before. But even that change does not in our opinion substantially or negatively change or affect the rights of the landowners, to warrant legal action under Article 18 of the Constitution.

Mr Rust has emphasized that the City of Windhoek is now investigating all the changes which the boundaries extension brings about, as well as implications on the management of this local authority area by this local authority council. During the investigations, the City of Windhoek will also consider which kind of capacities it has and which not. So, for example should the investigation find that the road network up to the newly incorporated farms are too much for the city to also maintain



and service, then the city will enter into agreements with the Ministry of Roads, Transport & Communication, or the Roads Authority to keep on bearing the responsibility for the roads in the newly incorporated areas. The same applies for the new responsibilities which arise with regard to electricity provision, water provision, refuse collection services etc etc.

### **2.3 Service Delivery Obligations on the City**

The obvious question which arises out of this attitude, is whether the City of Windhoek actually has the freedom not to provide (within the newly incorporated areas) the services which citizens of the city have come to expect as a matter of course. Here it is again instructive to look at the relevant parts of the applicable law. Part V of the Local Authorities Act is entitled Powers, Duties, Functions, Rights and Obligations of the Local Authority Councils. The Sections which follow under this Part V, however only state that a local authority council shall have the power to provide certain services (section 30), or that it may do certain things with regard to service provision (sections 31 & 32). The Act does not impose an obligation on the local authority. There is therefore no right to the services which a resident of the local authority can claim or institute legal action for.

Very importantly, section 33 of the act excludes liability from the local authority council for carrying out any provisions of this Act in respect of any act done in good faith under this Act. This should be kept in mind by any person intending to institute legal action against the City of Windhoek.

During both the public meeting of the CEO of the City of Windhoek as well as the private meeting with the Project Manager for the Boundaries Extension, it was emphasized that the city intends in engaging in an ongoing consultation process with the affected parties and the general public, once the city's internal investigations have been completed, and once it has a set of proposals to be communicated to the Ministry of Regional and Local Government, Housing and Rural Development and to other stakeholders, which will include other ministries such as the Ministry of Agriculture, Ministry of Environment & Tourism, Ministry of Finance and state owned enterprises such as Nampower, Namwater etc.

Mr Rust therefore welcomed our visit to his office (Ms Laudika Halueendo, Namplace Project Landscape Specialist and Mr Vaatz, Chairperson of the Windhoek Greenbelt Landscape Association were present at the private meeting), together with the information submitted to him about the Windhoek Greenbelt Landscape Association, as an important step in ensuring that the Association is known as an important stakeholder in the boundaries extension process. Very importantly, the land use as proposed by the Windhoek Greenbelt Landscape Association will inform the City of Windhoek when it will in future deal with zoning issues or with applications for developments. The representative of the City of Windhoek on the Windhoek Greenbelt Landscape Association, Mr. Olavi Makuti also sits on the committee that deals with the boundary extension project.

In light of the very reason why the boundaries extension was carried out in the first place, one important effect for the Windhoek Greenbelt Landscape Project is that any new development projects or rezoning which any landowner now wants to start, have to be submitted to the City of Windhoek for approval. Mr Rust has indicated already, that until the abovementioned documents such as the zoning, structure plan and town planning scheme are in place, no new private estate developments will be approved. To our understanding this is significant to the Windhoek Greenbelt Landscape Association, as we understand that some members are becoming reluctant to commit to the vision of the landscape, and rather develop housing estates or sell their farms to developers. Inadvertently, even though the purpose of the boundaries extension did not have environmental protection in mind, the effect is that the environment will be protected a bit longer against purely profit driven development projects.

By way of summary, it can be said that the visit to the Project Manager's office was to establish what the implications of the city boundary extension would be on the Windhoek Greenbelt Landscape Association. In short, the answer was expressed by Mr Rust when he indicated that this question cannot be answered, because the issues of zoning and establishing a town planning scheme and drafting a structure plan for the newly incorporated areas will only start in 2014 at the earliest, when the city and the other abovementioned stakeholders have agreed on which responsibilities will be allocated to which entity.

We would therefore recommend that Mr Olavi Makuti of the City of Windhoek be regularly invited by the Namplace Project and the Windhoek Greenbelt Association, so that there is a constant exchange of news and updates about the latest developments in the different institutions.

The City of Windhoek's Integrated Business Plan for the period 2011 to 2016 is a document which the Windhoek Greenbelt Landscape Association should study carefully and refer to on regular occasions. The document was obviously developed without the expansion of the city's boundaries in mind and it in fact predates the extension of the city boundaries. However it does give an important insight into the projects which are of relevance to the Windhoek Greenbelt Landscape Association and which the Landscape Association should liaise with over the coming years.

Some of the relevant 'Key Strategies/Initiatives' to reach certain organizational objectives read as follows:

- Implement clearance certificate to prevent properties to be sold without building plans (p 33)
- Issue Valuation Certificate and Valuation Rolls (p 34)
- Strengthen the electricity network and extent electricity distribution (p 34)
- Develop Environmental Policies and Regulations (p 38)
- Encourage and pursue Public Private Partnership to secure and develop residential land (p 38)
- Obtain vacant land and plan for future cemeteries (p 38)

- Plan a concept for the fitness park (p 39)
- Upgrade the Goreangab and Brakwater Recreational Parks (39)
- Establish Community Oriented Policing and Problem Solving (COPPS) Section (p 40)
- Manage the implementation of the Township Development Projects (p 41)
- Carry out all interim valuation and update valuation system on time (p 41)
- Launch a community fire safety education project for schools, business, media, and the public at large (p 44)
- Implement and monitor an integrated Closed Circuit Television (CCTV) and Automatic License Plate Recognition Systems (ALPR) (p 44)
- Develop and Implement Environmental Policies, regulations, strategies and plans (p 46)
- Reduce environmental impacts of roads and storm water (p 46)
- Influence the review of outdated municipal environmental health legislation (p 48)
- Assist with sound town planning advice to Properties Management in land sales (p 51)
- Secure long term availability of water supply (p 53)
- Develop reserved erven into Family Parks, at least one park annually (p 53)
- Develop a workers Park on erf 5946W in Feld Street (p 53)
- Deliver and avail land within constraints to the various levels of development in the areas (with emphasis on low income areas) (p 65)
- Conduct research aimed at promoting environmental sustainability and implement EMS (p 65)
- Plan for and service land as well as encourage groups to form self help groups to acquire land. 1728 households as part of the project in Tweetheni and Ehangano + same for Oohambo da Nehale/ Havana North (p 66)
- Conduct baseline capacity research on land delivery throughout Namibia (p 66)
- Encourage the City's residents to participate in discussions, forums and planning sessions related to the effective and efficient development and administration of the City (p 68)
- Resurrection of WELA which will create Local Environmental Liaison Association and environmental education committee (p 69)
- Develop Investment & Tourism fact sheet (p 71)
- Promote tourism (p 71)
- Market and Promote the Sport & Recreational facilities for maximum local, national and international use (p 71)
- Promote education on environment (p 71)
- Develop, update, implement, review and monitor policy on being a carrier of carries for communication via optic fibre (p 77)
- Take over Brakwater Electrical Network

At the time of writing this report the City of Windhoek's Strategic Environmental Assessment / Plan SEA and the city's Biodiversity Inventory could not yet be obtained. We will still source these documents and provide copies thereof to the Windhoek Greenbelt Landscape Associations, as they are bound to contain very relevant information for mutual integration with the landscape's environmental programmes and long term developmental prospects.









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