

MADE AND ENTERED INTO BY AND BETWEEN

KOUGA MUNICIPALITY

Herein represented by the acting Municipal Manager and duly authorised thereto

Of

P O Box 21
JEFFREYS BAY
6330

(hereinafter referred to as the "Council")

and

THE ST FRANCIS BAY RIPARIAN HOME OWNERS ASSOCIATION

(To be incorporated as Association under Section 21 of the Companies Act 1973
[Act 61 of 1973])

herein represented by BERNARDUS MORSINK
in his capacity as trustee for a section 21 company to be incorporated

of

P O Box 88
ST FRANCIS BAY
6312

(hereinafter referred to as the "H.O.A.")

WHEREAS the Council is the registered owner of land in Sea Vista, St Francis Bay on which land a certain waterways system has been constructed; and

WHEREAS the owners of riparian erven in St Francis Bay have the right of access to their properties by land and water; and

WHEREAS the Council is responsible for the maintenance, repair and dredging of the said waterways and is entitled to levy a charge on the owners of erven in the said township for such services; and

WHEREAS the erstwhile St Francis Bay local council has adopted Bylaws to regulate and manage the waterways; and

WHEREAS the Council consider it in the interest of the users of the waterways that the waterways be maintained and managed by the HOA and the HOA is prepared to maintain and manage the waterways for and on behalf of the Council.

NOW therefore the Council and HOA agrees that the HOA shall for and on behalf of the Council manage and maintain the waterways referred to in the conditions of establishment of the township, Sea Vista Extension 7, as well as the waterways and other facilities which form part of the waterways system of St Francis Bay, subject to the following terms and conditions:-

1. DEFINITIONS

In these regulations, word carry their usual meaning and unless expressly indicated Otherwise or altered by context, the following shall mean:-

“Council”	means the KOUGA MUNICIPALITY
“homeowners association”	means the St Francis Bay Riparian Homeowners Association
“jetty”	means Municipal owned structures situated within the yacht harbour and along main canal in the vicinity of the “cove” (Shore Road parking area) which are designed to moor boats.
“Law enforcement Officers”	means Members of the Kouga Municipality staff who are responsible for law enforcement and members of the SAPS and Honorary Canal Wardens
“trustees”	means the members of the HOA who are bylaw the Directors of the Association.
“waterways”	means the length of waterways along which riparian owners properties abut including the western access to the canals
“yacht harbour”	means the portion of waterways which contain the council jetties as well as public open space ¹²⁷⁹ , including existing toilet facilities, boat washing facility and trailer parking area which abuts thereto.
“riparian property owner”	means the owners of all properties which have waterways frontage (who will become members of the HOA) and includes properties registered in the name of a trust, company, close corporation and Municipality.
“riparian levy”	means the annual levy payable by riparian property owners excluding the Kouga Municipality.
“honorary wardens”	means persons appointed by the Council to assist the law enforcement officer in the performance of law enforcement on the waterways.

2. MANAGEMENT PERIOD

The HOA shall manage and maintain the said waterway system for an indefinite period which either party can terminate by giving 12 (twelve) months written notice to that effect.

3. THE CONSTITUTION OF THE HOA

- 3.1 It is recorded that the HOA shall be incorporated as a section 21 Company within 60 (sixty) days from the date hereof and shall register this agreement as a so-called pre-incorporation contract.
- 3.2 The HOA shall, before incorporation, submit to the Council its constitution which shall bind all its members and a copy of the proposed memorandum of articles and statutes which shall provide that all riparian property owners shall be obliged to become members of the HOA by virtue of their registered property ownership.

- 3.3 The members of the HOA shall undertake, when becoming members, to incorporate a condition in their deeds of sale when alienating properties, requiring new owners to become members of the HOA on registration of such properties in their names.

4. MAINTENANCE AND DREDGING

- 4.1 The HOA shall be responsible for the maintenance of the Council owned jetties situated in the yacht harbour and Shore Road parking area (at "The Cove"). The Council shall carry out periodic inspections of the jetties and if necessary shall serve notice on the HOA to effect any repairs within such timeframes contained in any notice served on the HOA.
- 4.2 The HOA shall be responsible for the inspection of all privately owned jetties and report to the Council on all private jetties and canal walls in need of repair. The Council shall serve notice on all riparian owners to effect the necessary repairs which repairs must be effected within the Timeframes stated in such notice.
- 4.3 The HOA shall be responsible for all aspects of maintenance dredging including the calling for and awarding of tenders. The HOA may appoint a private contractor who has the necessary expertise to perform the task properly.
- 4.4 The HOA shall be responsible for all maintenance, repairs and running costs of the dredger (which will remain the property of the Council), including the supply of fuel. Notwithstanding the a foregoing, the HOA shall in their discretion, if maintaining the Council's dredger proves to be too expensive, obtain the services of a private dredger by soliciting bids from the public through an open and transparent tender process. When considering and awarding tenders the HOA shall, where practical and possible take in consideration the BEE qualifications of tenderers.
- 4.5 The HOA shall ensure that the dredger is properly maintained and must effect any repairs timeously. The Council reserves the right to carry out periodic inspections of the dredger and any repairs deemed necessary by the Council must be carried out within the timeframes contained in any notice served on the HOA to repair the dredger in reasonable time.
- 4.6 Council will insure the dredger and recover premiums from the boat licence fees and temporary permits collected.
- 4.7 The HOA must constantly monitor the depth of the waterways and should it be found that excessive silting has resulted due to no dredging taking place because of insufficient funds in the riparian levy account, the Council reserves the right to levy an additional riparian levy to rectify the situation.
- 4.8 Private dredging shall be carried out by the HOA in terms of a written quotation supplied by the HOA and which must be paid to the HOA prior to the commencement of any dredging.
- 4.9 The HOA must take all reasonable steps to ensure that the dredging does not undermine any canal walls which could lead to them collapsing and claims being instituted against the HOA or Council for their repair or reconstruction as a result thereof. Prior inspections and taking photographs of damaged canal walls prior to the commencement of maintenance, dredging is recommended.

5. CHARGES, FEES AND PAYMENT TO HOA

- 5.1 It is recorded that the Council is entitled to levy a charge on owners of riparian erven in the township in respect of the maintenance, repair and periodic cleaning of the waterways in terms of the conditions of establishment of the said township. The Council has the right to levy fees when licensing boats using the waterways system, and fix tariffs, fees and levies in connection with the upkeep or maintenance of the waterways as provided for in Bylaws relating to the Control and Use of the Waterways and their banks in the local area of St Francis Bay (PN339/1987). Such levies, tariffs and fees shall be determined by the HOA annually and be submitted to the Council for ratification as provided for in terms of clause 5.6 hereof.
- 5.2 The Council and not the HOA shall collect such fees, charges and levies payable for the maintenance and upkeep of the waterways, the licensing of boats and permits issued in terms of the above-mentioned regulations.
- 5.3 All riparian levies collected will be used for the maintenance dredging of the canals and all such fees actually collected by Council, including ad hoc charges paid by boat owners doing entertainment cruises on the waterway, licence fees and mooring fees, less a 5 % handling fee which Council shall retain, shall be paid bi-monthly to the HOA to enable it to carry out its maintenance obligations and duties.
- 5.4 Mooring fees collected will be used to maintain the jetties and any surplus will be carried forward to the next financial year.
- 5.5 Mooring fees shall be determined by the Council in consultation with the HOA. The Council shall be responsible for the collection of such fees and pay them over to the HOA by monthly.
- 5.6 The HOA shall annually before 28th February, prepare and submit to the Council for its approval, a budget pertaining to the management and maintenance of the waterways for the period ending June each year, which shall coincide with the Council's financial year.
- 5.7 Notwithstanding anything to the contrary:-
- 5.7.1 All members of the St Francis Bay Riparian Homeowners Association shall be liable to pay an annual riparian levy as determined by the HOA at its AGM and approved by the Council. The levy will be collected by the Kouga Municipality and be kept in a separate account and be paid over to the HOA as determined in par 5.3 above.
- 5.7.2 Each riparian homeowner shall be entitled to one free boat licence as partial compensation towards the riparian levy paid, provided that should the riparian levy determined in terms of 5.7.1 above be less than the boat licence fees determined by council for any particular year, then the difference between the riparian levy and the boat licence fee shall be payable to the Council.
- 6. BOAT LICENCE IDENTIFICATION MARKINGS**
The Council shall be responsible for the printing and numbering of boat licence identification markings, the cost of which shall be recovered from the boat licences and temporary permits collected. Such identification markings will be issued by the Council when boat licence fees are paid. The HOA will refund the Council for the cost of these identification markings on submission of invoices and proof of payment.
- 7. STATIONERY**
The Council shall be responsible for the printing of all stationery relative to the issuing of boat licences, temporary permits, fines, application forms, receipts, etc.,

the cost of which will be recovered from boat licences and temporary permits collected.

8. INDEMNITY AND INSURANCE

8.1 The HOA shall effect and maintain a comprehensive public liability insurance contract to the Council's brokers. It must also ensure that all contractors appointed by it have effected sufficient insurance to meet claims arising out of their activities or negligence.

8.2 The HOA hereby indemnifies and hold harmless the Council against all:-

- (a) demands, claims or proceedings for damages in respect of liability arising out of or in any way connected with the maintenance and management of the waterways with the authority hereby vesting in the HOA;
- (b) claims, which in the opinion of the town Engineer are relevant to the quality of workmanship or any associated cause;
- (c) costs incurred by the Council in examining, resisting or settling any matter referred to in (a) and (b) above subject to clause 9 below.

8.3 The Council shall hand over the control (for maintenance and management purposes) of the jetties and other structures referred to herein to the HOA in a reasonable and serviceable condition. The HOA shall be deemed satisfied that such jetties and other structures are in a reasonable and serviceable condition if no notice to the contrary is received by the Council within a period of 7 (seven) days following signature hereof.

9. DISPUTES

All disputes or differences between the Council and the HOA, whether arising out of the interpretation of this agreement or documents incorporated herein by reference, or upon or after discharge or determination hereof, and concerning any matters specified in this agreement, or its construction or effect, or as to the rights, duties or liabilities of the parties hereto or of either of them under or by virtue of this agreement or otherwise or as to any other matter in any way arising out of the subject matter of this agreement, shall be referred to a practising Senior Counsel, to be nominated by the President from time to time of the General Bar Council Port Elizabeth, of not less than 10 years' standing who, subject of the provisions of the Arbitration Act 1965, shall decide on such matter including costs and whose decision shall be final and binding on both the parties hereto.

10. MUNICIPAL REGULATIONS AND OTHER STATUTORY PROVISIONS

The HOA shall ensure that it and its agents or servants at all times adhere to the provisions of the Council's bylaws and any other statutory provision which may have bearing on the management and maintenance of the waterways or any other related matter. The parties agree that this agreement will be subject to such enactment's shall prevail.

11. BREACH

11.1 Should the HOA fail to perform all or any of the conditions, obligations or undertakings hereof or commit any breach of this agreement of whatsoever nature and fail to remedy such omission or breach within 21 days of the posting of a letter addressed by prepaid registered post to the HOA at the *domicilium citandi et executandi* chosen by it herein, the Council shall have the right to immediately terminate this agreement and will then also have the right to immediately repossess and take charge of the said waterways. The Council shall moreover be entitled to

claim from the HOA all damages which the Council may suffer as a result of such omission or breach.

- 11.2 Should the Council fail to perform all or any of the conditions, obligations or undertakings hereof or commit any breach of this agreement of whatsoever nature and fail to remedy such omission or breach within 21 days of the posting of a letter addressed by prepaid registered post to the Council at the *domicilium citandi et executandi* chosen by it herein, the HOA shall have the right to immediately terminate this agreement. The HOA shall moreover be entitled to claim from the Council all damages which the HOA may suffer as a result of such omission or breach.

12. GENERAL

- 12.1 The HOA may report to Council on all matters relating to the safe and tidy condition of the waterways. These may include:-

- (i) inappropriate or illegal signage;
- (ii) dilapidated canal walls and jetties;
- (iii) abandoned or sunken boats;
- (iv) unruly behaviour on public open spaces abutting onto the waterways and the waterways themselves.

And any other matter which requires the Council's intervention.

13 LAW ENFORCEMENT

- 13.1 It is recorded that the Council is afforded certain law enforcement powers in terms of its Bylaws and will continue with the exercise of such powers notwithstanding this agreement.
- 13.2 The HOA will provide Honorary Wardens to be trained and authorised as law enforcement officers, where after they will be delegated certain powers to assist the Council with the provisions of law enforcement on the waterways where and when necessary.

14 THE MUNICIPAL FINANCE MANAGEMENT ACT

The parties agree that this agreement will impose financial obligations on the Council beyond the financial year as envisaged by the provisions of section 33 of the Local Government Municipal Finance Act 2003. They furthermore record that this agreement contemplates the provision by the HOA of a municipal service, which can be performed by a private party.

This agreement is subject to the Council complying with the provisions of sections 33 and 120 of the said Local Government Municipal Finance Act, 2003. The Council reserves the right to not proceed with the objectives as enumerated herein in view of possible public objections and the advice of state departments whom the Council invites to submit comments in which event the HOA shall not be entitled to be compensated for damages, if suffered.

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