
"Over a barrel?"

REPORT 16 OF 2012/2013

REPORT ON AN INVESTIGATION INTO THE ALLEGED IMPROPER PROCUREMENT OF ERF 246, ROGGEBAAI, CAPE TOWN BY THE CITY OF CAPE TOWN
## INDEX

Executive Summary ........................................................................................................................................... 3
1. INTRODUCTION ........................................................................................................................................... 7
2. THE COMPLAINT ........................................................................................................................................... 7
3. POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR ................................................................. 9
4. THE INVESTIGATION ................................................................................................................................... 10
5. INFORMATION AND EVIDENCE OBTAINED DURING THE INVESTIGATION ........................................ 13
6. EVALUATION OF EVIDENCE AND INFORMATION OBTAINED DURING THE INVESTIGATION ............... 37
7. LEGAL AND REGULATORY FRAMEWORK ................................................................................................. 41
8. RESPONSES TO THE PROVISIONAL REPORT AND ADDITIONAL SUBMISSIONS .................................. 45
9. CONCLUSION ............................................................................................................................................... 62
10. FINDINGS .................................................................................................................................................. 71
11. REMEDIAL ACTION .................................................................................................................................. 72
12. MONITORING ............................................................................................................................................. 72
Executive Summary

(i) “Over a Barrel?” is a report of the Public Protector on an investigation of complaints received from Dr M S Motshekga, Chief Whip of the Majority Party in Parliament (the Complainant). The gist of the complaints were as follows:

(a) Following an article in the Cape Times the Complainant approached the Public Protector on 14 March 2012 requesting an investigation into a deal between the City of Cape Town (“the City”) and Naspers Properties (Pty) Ltd (“Naspers”). Apparently the City was set to buy a piece of parking space from Naspers for R106 000 000 for the expansion of the ICC, in which the City is a shareholder. The Complainant mentioned that, according to independent property experts quoted in the media, the property is valued at no more than R50 000 000. Taxpayers will as a result have to pay double the property’s market value. It was further alleged that this raises serious questions regarding the nature of the relationship between the DA and Naspers. The Complainant requested an investigation into the following:

(b) Whether this deal was above board and of benefit to the people of Cape Town;
(c) Whether the purchase price in the amount of R106 000 000 was justified for the piece of land;
(d) Whether there was collusion between the City of Cape Town and Naspers to short change taxpayers; and
(e) Whether there were individuals who benefited from the deal or “whose palms were greased” through this deal.

(ii) During the investigation the Public Protector identified two additional issues for investigation, namely:
(a) Whether approval by the City Council was required to consent to and register a height restriction against the property which is the subject of the complaint?

(b) Whether the City of Cape Town as the prospective purchaser, took charge of the negotiations which led to the sales agreement?

(iii) The investigation involved the examination of the relevant documentation relating to the property deal; analysis of relevant legislation and prescripts, perusal of relevant newspaper reports; interviews with several officials of the City and other persons as well as commissioning a professional review of a valuation of the property which was the subject of the complaint (Erf 246, Roggebaai, Cape Town).

(iv) The Public Protector made the following findings in respect of the issues that were investigated:

(a) The transaction for the purchase of Erf 246 Roggebaai is found to be above board and to be generally of benefit to the public.

(b) With regard to the issue of whether the purchase price in the amount of R106 000 000 was justified for the piece of land, it was found that the purchase price of Erf 246 is R2 000 000 more than the initial valuation that was obtained by the Cape Town ICC on 20 August 2010 and R1 000 000 more than the subsequent updated valuation. Reports or allegations that the value of the relevant property was no more than R50 000 000, were not substantiated by the evidence obtained.

(c) No evidence could be found to indicate collusion between the City of Cape Town and Naspers to short change taxpayers.
(d) With regard to the issue of whether there were individuals benefiting or whether “palms were being greased” through this deal, no evidence of individuals improperly benefitting through this transaction could be found.

(e) The officials of the City failed to obtain approval from the City Council in terms of Regulation 5(1) of the Municipal Asset Transfer Regulations read with section 4(1) of the City of Cape Town By-law relating to the Management and Administration of the City of Cape Town’s Immovable Property prior to concluding an agreement with Naspers to register a height restriction against Erf 246 in favour of Erf 244 against the title deed of the Erf 246, which condition shall be praedial in nature and endure in perpetuity. This failure constituted maladministration.

(f) With regard to the issue of whether the City of Cape Town, as the prospective purchaser, took charge of the negotiations which led to the sales agreement, it is found that the City failed to take charge of the negotiations from the outset leading to the sales agreement. This failure constituted maladministration.

(v) The Public Protector directed that the following remedial action is to be taken as envisaged by section 182 of the Constitution:

(a) The City Manager is to ensure that the condition to the sale agreement of 18 November 2011 between the City and Naspers, regarding a height restriction against Erf 246 in favour of Erf 244, (to be registered against the title deed of the Erf 246, which condition shall be praedial in nature and endure in perpetuity), be referred to Council for consideration and resolution.
(b) The City Manager, after having had regard to roles and responsibilities of officials, must consider taking disciplinary action should any official be found to have neglected his / her duty.

(c) As far as the ancillary issues and complaints relating to the Cape Town ICC expansion, discussed in paragraph 8.4 of the report are concerned, the Executive Mayor is to establish a task team comprising of *inter alia*, the City Ombudsman and the Head of the Forensic Investigation Unit of the City to attend to all allegations and to report back to the Mayor, Municipal Manager and Complainants concerned.
REPORT ON AN INVESTIGATION INTO THE ALLEGED IMPROPER PROCUREMENT OF ERF 246, ROGGEBAAI, CAPE TOWN BY THE CITY OF CAPE TOWN

1. INTRODUCTION

1.1 “Over a Barrel” is a report of the Public Protector, issued in terms of section 182(1)(b) of the Constitution of the Republic of South Africa (the Constitution) and section 8(1) of the Public Protector Act, 1994 (the Public Protector Act).

1.2 The report is submitted to the following persons:

1.2.1 The Executive Mayor, City of Cape Town;
1.2.2 The City Manager, City of Cape Town (“the City”); and
1.2.2 The Chief Executive Officer of the Cape Town International Convention Centre (“the ICC”).

1.3 A copy of the report is also distributed to the Complainant in this matter, Dr M S Motshekga, Chief Whip of the Majority Party in Parliament (hereinafter referred to as the Complainant).

2. THE COMPLAINT

2.1 The complaint:

2.1.1 On 14 March 2012 the Complainant approached the Public Protector requesting an investigation into a deal between the City of Cape Town and Naspers Properties (Pty) Ltd (“Naspers”). He alleged that the City was set to buy a piece of parking space from Naspers for “a whopping R106 million” for the expansion of the ICC, in which the City is a shareholder. The Complainant mentioned that, according to independent property experts
quoted in the media, the property is valued at no more than R50 000 000. Taxpayers will as a result have to pay double the property’s market value.

2.1.2 It was further alleged that this raises serious questions regarding the nature of the relationship between the DA and Naspers.

2.1.3 The Complainant requested an investigation into the following:

2.1.2.1 Whether this deal was above board and of benefit to the people of Cape Town;

2.1.2.2 Whether the purchase price in the amount of R106 000 000 was justified for the piece of land;

2.1.2.3 Whether there was collusion between the City and Naspers to short change taxpayers; and

2.1.2.4 Whether there were individuals who benefitted from this deal or “whose palms were greased” through this deal.

2.2 Further issues identified during the investigation

During the investigation the following additional issues were identified as issues which required investigation.

2.2.1 Whether approval by the City Council was required to consent to and register a height restriction against the property which is the subject of the complaint? and

2.2.2 Whether the City of Cape Town, as the prospective purchaser, took charge of the negotiations which led to the sales agreement?
3. POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR

3.1 The Public Protector is an independent institution, established in terms of Chapter 9 of the Constitution. Section 182(1) of the Constitution provides that the Public Protector has the power:

3.1.1. To investigate any conduct in state affairs or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice;

3.1.2 To report on that conduct; and

3.1.3 To take appropriate remedial action.

3.2 In terms of section 182(2) of the Constitution, the Public Protector has the additional powers and functions prescribed by national legislation.

3.3 Section 6(4) of the Public Protector Act provides that the Public Protector shall be competent to investigate, on his or her own initiative or on receipt of a complaint, *inter alia*, any alleged:

3.3.1 Maladministration in connection with the affairs of government at any level; or

3.3.2 Abuse or unjustifiable exercise of power or other improper conduct by a person performing a public function.

3.4 The Public Protector may, in terms of section 8(1) of the Public Protector Act, make known to any person any finding, point of view or recommendation in respect of a matter investigated by him or her.

3.5 In terms of the mandate given to the Public Protector, it is therefore expected of her/him to conduct an enquiry that transcends lawfulness and focuses on good administration and proper conduct. Such enquiry has three components:
3.5.1 What happened?

3.5.2 What should have happened; and

3.5.3 Is there a discrepancy between the two and does this constitute improper conduct as envisaged in section 182(1) of the Constitution, maladministration, abuse of power, improper enrichment or conduct resulting in unlawful or improper prejudice to any person, as envisaged in the Public Protector Act?

3.6 In determining whether conduct was improper or constituted maladministration or any of the violations envisaged in the Public Protector Act, the Public Protector compares the conduct of government entities and officials complained of against the relevant legislation and other prescripts, to ascertain whether such conduct complied with the constitutional requirements of fairness, reasonableness, transparency and local and international best practices. The mandate of the Public Protector is not limited to the investigation of complaints, but he/she can also investigate suspicions or allegations of improper conduct on own initiative.

3.7 The complaints lodged with the Public Protector and allegations made against the City referred to in this report, accordingly fall within the jurisdiction and powers of the Public Protector.

4. THE INVESTIGATION

The investigation was conducted in terms of section 182 of the Constitution and sections 6 and 7 of the Public Protector Act.

4.1 Scope of the investigation

4.1.1 The investigation referred to in this report was restricted to the period August 2010 to 19 November 2012 and the sale of Erf 246, Roggebaai by Naspers to the City.
4.2 Method of gathering evidence

The following methods of gathering and analysing information were employed:

4.2.1 Documentation studied and its contents considered

4.2.1.1 Newspaper reports, including an article in the Cape Times of 9 March 2012 entitled “City’s R106m parking lot”;
4.2.1.2 A document entitled “Economic Analysis of the Proposed Expansion of the Cape Town International Convention Centre”;
4.2.1.3 Report of the City dated 20 October 2010 on “Proposed Expansion of the Cape Town International Convention Centre”;
4.2.1.4 Report of the City dated 10 March 2011 on “Foreshore Development: Proposed Expansion of the Cape Town International Convention Centre and unlocking of related development opportunities”;
4.2.1.5 Council resolutions of 27 October 2010 and 30 March 2011;
4.2.1.6 Extracts of the minutes of Convenco board meetings relating to its planned expansion;
4.2.1.7 Report on “Valuation of various properties and portions of properties, Roggebaai, Cape Town” by Appraisal Corporation, prepared by J L Falck;
4.2.1.8 Property Valuation Report of Erf 246 by Old Mutual Investment Group: Property Investments for Naspers dated 1 July 2010;
4.2.1.9 Memoranda of Understanding between the ICC and Naspers dated 30 August 2010 and 30 March 2011;
4.2.1.10 Sale agreement between Naspers and the City signed on 18 November 2011;
4.2.1.11 “Review of Market Valuation of Erf 246 Roggebaai Cape Town”;
4.2.1.12 “Valuation of Naspers Premises, erven 244 and 246 Roggebaai, based on the Memorandum of Understanding dated 30 August 2010” by Appraisal Corporation dated 17 September 2010; and
4.2.1.13 Copies of internal memoranda, correspondence and documents relating to this matter received from the City and ICC.
4.2.2 Correspondence

4.2.2.1 Correspondence and documents received from the Complainant.
4.2.2.2 Response from the City dated 11 April 2012.
4.2.2.3 Further correspondence between the Public Protector and the City as well as the ICC.

4.2.3 Interviews conducted

Interviews were conducted with:

4.2.3.1 Person X;
4.2.3.2 Mr A Human, Manager: Property Development, Property Management Department, City of Cape Town;
4.2.3.3 Mr M Richardson, former Chief Financial Officer, City of Cape Town;
4.2.3.4 Mr M N Munro, Cape Town ICC Expansion: Development Manager, Cape Town ICC;
4.2.3.5 Mr R Toefy, Chief Executive Officer, Cape Town ICC;
4.2.3.6 Mr P Pendlebury, Principal Professional Valuer, Property Management Department, City of Cape Town;
4.2.3.7 Ms L M Muller, Director Shareholding Management in the Finance Department, City of Cape Town;
4.2.3.8 Ms R Gelderbloem, Director of Property Management in the Finance Department, City of Cape Town;
4.2.3.9 Ms J Falck, Professional Valuer of Appraisal Corporation; and
4.2.3.10 Mr E G Rode of Rode & Associates (Pty) Ltd.

4.2.4 Legislation and other prescripts

The relevant provisions of the following legislation and other prescripts were considered and applied, where appropriate:

4.2.4.1 The Constitution;
4.2.4.2 The Public Protector Act;
4.2.4.3 Local Government: Municipal Finance Management Act, 2003
4.2.4.4 Municipal Supply Chain Regulations, Government Notice 868 of 30 May 2005
4.2.4.5 Municipal Asset Transfer Regulations promulgated in terms of the Local Government: Municipal Finance Management Act, 2003;
4.2.4.6 City of Cape Town By-law relating to the Management and Administration of the City of Cape Town’s Immovable Property;
4.2.4.7 Supply Chain Management Policy of the City of Cape Town approved on 23 February 2011
4.2.4.8 The System of Delegations of the City of Cape Town.

5. INFORMATION AND EVIDENCE OBTAINED DURING THE INVESTIGATION

5.1 Newspaper articles

5.1.1 Several newspapers reported on the matter during March 2012.

5.1.2 The Cape Times of 9 March 2012 in an article entitled “City’s R106m parking lot” reported that Mr M Mohamed, former City of Cape Town Executive Director said that he was taken aback when he read about the purchase price and that a valuation of R106 000 000 seemed “very high” under the current market conditions. This article also quoted “top property analyst Erwin Rode” saying that such transactions are not an exact science but that his “..best estimate of the market value of an ‘average’ stand in the Cape Town CBD is about R2 000 to R2 500 per bulk m² (about R48m).” Mr Rode was further quoted saying that R3 000 per bulk square meter is higher than what an average vacant Erf would fetch in the Cape Town CBD, but “[a]n easy explanation for the rather ‘highish’ price is that Naspers evidently had the city over a barrel – it’s not like the city had many, if any, alternative choices, given the plans with that precinct".
5.2 City of Cape Town’s response

5.2.1 The complaint and related issues were raised with the City Manager. A response dated 11 April 2012 together with relevant documentation was provided.

5.2.2 The response stated that Erf 246, Roggebaai (the property that is the subject of this complaint), owned by Naspers, was purchased by the City of Cape Town for the expansion of the ICC. This property together with the adjoining Erf 245 (owned by the City) and a portion of Erf 247 (owned by Lakeside City Trading (Pty) Ltd), are required to accommodate and realize the expansion plans for the ICC. Apparently the location of these properties in relation to the current ICC provides for effective linkages and integration of the current and expanded ICC. Locality as well as expansion development plans are indicated in the figures below:

5.2.3 The City submits that the acquisition is beneficial as it accommodates the required 10 000 square meters (m²) of convention and exhibition space needed for the expansion plans of the ICC.

5.2.4 The City indicated that the expansion plans were approved by the Board of the Cape Town International Convention Centre Company (Pty) Ltd (“Convenco”) and the full Council of the City considered and approved the purchase of Erf 246, Roggebaai from Naspers on 27 October 2010 and 30 March 2011.

5.2.5 As regards the needs determination, it is stated that the need to expand the ICC has been on the cards for a number of years. Attempts by the City to acquire Erf 14734, the “Customs House” property, which is located adjacent and towards the North-East of the ICC, from the National Department of Public Works were unsuccessful. Therefore, the focus for an alternative site was moved to the vacant Erven 245, 246 and 247, Roggebaai, located to the South of the ICC.

5.2.6 It is further stated that an independent property valuer, Appraisal Corporation, provided on behalf of Convenco, on 20 August 2010, a
valuation on these and other properties and determined a market value for Erf 246 at R104 000 000. Old Mutual provided to Naspers a separate valuation of R140 000 000 for this property.

5.2.7 The response indicates that following the above, negotiations commenced with Naspers for the purchase of the property and on 30 August 2010 a Memorandum of Understanding was concluded between Convenco and Naspers regarding the acquisition of Erf 246. On 27 October 2010 and 30 March 2011 the City Council approved the purchase. Finally, on 18 November 2011 a sale agreement was concluded between the City and Naspers at a price of R106 000 000 and an addendum to this agreement was concluded on 29 February 2012.

5.2.8 The City also stated that the authority to purchase immovable property or rights to immovable property is designated to the Executive Mayor in terms of paragraph 6.1 of the Executive Mayor’s delegations as per the System of Delegations of the City of Cape Town. Such authority must be exercised and performed by the Executive Mayor together with members of the Mayoral Committee, and after considering a report from the Director: Property Management. Reports on the acquisition of Erf 246 were considered by the Mayoral Committee on 19 October 2010 and 23 March 2011 and thereafter referred to Council.

5.2.9 It is stated that the funding for the purchase of the property has been provided on the 2011/2012 Capital Budget of the Department of Property Development.

5.3 Documents examined

5.3.1 Documents relating to the proposed expansion of the ICC and identification of Erf 246

5.3.1.1 Extracts of the minutes of Convenco board meeting relating to its planned expansion of 21 May 2010
(a) These documents revealed that the CEO of the ICC reported to the Convenco Board that, due to the lack of response from the relevant government bodies to the ICC’s proposal to expand onto the Customs House site, alternative options were being explored. He stated that significant progress had been made in the discussion with all interested parties pertaining to the ICC acquiring the right to utilize the sites of the City and Naspers for its planned expansion. The minutes revealed that the board mandated the CEO on behalf of the ICC to enter into negotiations with all interested parties in order to secure, for Convenco, the right to jointly develop the site with among others Naspers and to sign the necessary agreements.

5.3.1.2 “Economic Analysis of the Proposed Expansion of the Cape Town International Convention Centre”

(a) The above analysis was prepared by the Graduate School of Business, University of Cape Town and Strategic Economic Solutions in August 2010 and was made available by the City of Cape Town.

(b) The analysis indicated that the proposed expansion of the ICC has a positive net present value both from a national and provincial point of view. It apparently means that the economic benefits of expansion to the adjacent site are greater than the associated economic costs.

5.3.2 Report on “Proposed Expansion of the Cape Town International Convention Centre”

5.3.2.1 A report from the City to Council, dated 20 October 2010, was submitted for Council’s consideration. This report alluded to the economic contribution and impact of the ICC as well as the potential impact of the expansion thereof. It noted that there were two feasible options for expansion, but that the option of expanding into Customs House would for various reasons no longer
further be considered. The proposal therefore considered the option for the expansion towards three vacant erven (245, 246 and 247), which were described as follows:

<table>
<thead>
<tr>
<th>Erf no</th>
<th>Owner</th>
<th>Size (m²)</th>
<th>Use</th>
<th>Height (meters)</th>
<th>PFA (m²)</th>
</tr>
</thead>
<tbody>
<tr>
<td>245</td>
<td>CCT</td>
<td>5 363</td>
<td>General Business (B6)</td>
<td>54</td>
<td>38 441</td>
</tr>
<tr>
<td>246</td>
<td>NASPERS</td>
<td>6 426</td>
<td>General Business (B6)</td>
<td>50</td>
<td>37 000</td>
</tr>
<tr>
<td>247</td>
<td>PGWC</td>
<td>6 540</td>
<td>General Business (B6)</td>
<td>50</td>
<td>37 000</td>
</tr>
</tbody>
</table>

5.3.2.2 The report further stated that the ICC extension plan involves the development of approximately 9 520 m² of floor space of “triple” volume at single (first floor) level and 2 360 m² of office space at 2nd level. The footprint of the proposed building would expand over two of these properties (245 and 246) and a portion of the third property. The report proposed, inter alia, that the City purchases at market value Erf 246 from Naspers. It is further stipulated that the “cost for the purchase by the [City] of the Naspers property is to be set-off against the construction cost for the provision of the [400] undercover parking to Naspers.”

5.3.3 Council resolution of 27 October 2010

5.3.3.1 Following a recommendation from the Executive Mayor, the Council resolved on 27 October 2010 inter alia that:

- The proposals for the expansion of the ICC be approved in principle;
- The purchase of Erf 246 by the City be approved, and, once consolidated with Erf 245 which the City owns, such footprint as is required by the ICC for its expansion programme being made available through a long-term lease to the ICC; and
• City representatives be involved in all negotiations for the overall project and be authorized to negotiate the purchase of Erf 246.

5.3.4 Report on “Foreshore Development: Proposed Expansion of the Cape Town International Convention Centre and unlocking of related development opportunities”

5.3.4.1 A report from the City to the Mayoral Committee dated 10 March 2011 stated its purpose as seeking authority for the City to retain its majority shareholding in the ICC by considering the capital contribution to be made for the expansion of the ICC, such expansion apparently unlocking further development opportunities. This report among others stated that the ICC has been looking for expansion options since 2001 and that the initial concept designs looked at expansion to the North of the current ICC at the Customs House site which is owned by National Government. It further stated that despite numerous interactions with this Department, the necessary approvals have not been provided for development to the North. It further stated that significant progress had been made however with the potential to develop to the South-East (the vacant properties among others Erf 246.).

5.3.5 Council resolution of 30 March 2011

5.3.5.1 On the above date the Council resolved inter alia that-
  ▪ The project to expand the ICC be approved;
  ▪ Approval authority provided for
    ➢ the Property Management Department to purchase Erf 246 from Naspers for an amount of R106 000 000 (excluding VAT);
    ➢ the Executive Mayor to sign a letter of commitment for the City to provide support to Naspers in order to assist Naspers in finding alternative land within the City boundaries for further development.
5.3.5.2 The report from the City which encapsulated the recommendations (resulting in the above-mentioned resolutions) did not explain how the purchase price of R106 000 000 was arrived at.

5.3.6 “Valuation of various properties and portions of properties, Roggebaai, Cape Town” by Appraisal Corporation, prepared by J L Falck dated 20 August 2010

5.3.6.1 The valuation was addressed to Mr R Toefy under cover of a letter dated 20 August 2010, which *inter alia* stated that the valuation was carried out to determine values for a number of erven which were under discussion for extension of the ICC and that they were informed that there were proposals for cooperation between the City, the Provincial Government of the Western Cape and Media 24 Ltd.

5.3.6.2 The Appraisal Certificate to the report certified that the report conformed with recognized standards of appraisal procedure and ethics and that opinions are based on a full and fair consideration of all the pertinent facts available. It further stated that a personal inspection of the neighbourhood area, the subject properties and subject portions was done as well as an investigation of other comparable market data to assist with the valuation.

5.3.6.3 The valuation opined that “a *willing buyer will pay a willing seller the following amount [freehold values] in the open market, for the particular property … at the date of valuation (10 August 2010): Remainder of Erf 237 Roggebaai R21,600.. Erf 245 Roggebaai R115,000,000…

**Erf 246 Roggebaai R104,000,000…**

**Erf 247 Roggebaai R107,000,000…”* (emphasis provided)

5.3.6.4 The report further indicates that the erven 245 to 247 are vacant and used for parking, but have a business potential and zoning, viz “*General Business, subzone B6*”. It is further stated that, according to this zoning,
“development parameters are determined by specific height restrictions, and referred to as maximum permissible floor area (‘PFA’). This is often called bulk and determined by using a predetermined factor multiplied by the site extent”. The report reflects the following in this regard in respect of Erf 246:

Maximum PFA: 37 000 m²

5.3.6.5 The report describes Erf 246 as rectangular with a good front / depth ration, a property with above average exposure, being visible from the incoming elevated freeway and offering “excellent business potential, taken its exceptional location and exposure”.

5.3.6.6 As far as the method of valuation is concerned, the report explains that the main focus of valuation is to interpret how the market will view and react to a property as well as factors such as affordability, who the most likely buyer would be and how this buyer would determine the value. It is further stated that in the case of vacant land, the Market Data Approach of Direct Comparison method is relied on using recent transactions of similar properties, from which a rate per m² is derived and adjusted for variances in location, extent, zoning, use, potential, etc.

5.3.6.7 The report referred to and analysed the details of six market transactions as well as other market evidence relating to development properties that were available at the time. The summary of such market research reflected:

“Erf 142228 ±R3,063 (±31,329 bulk m²) good yardstick, similar extent and location
Erf 173153 ±R3,658 (±27,333 bulk m²) maximum due to smaller extent
Erf 247 ±R2,838 (±37,000 bulk m²) good yardstick
Erf 2700 ±R3,175 (±22,523 bulk m²) good to maximum, smaller extent, but poorer location
Erf 706 ±R4,053 (±9,500 bulk m²) absolute maximum, residential use, extent
Erf 2051 ±R2,223 (±16,191 bulk m²) good, smaller extent but
inferior location

Erf 156  \( \pm R3,600 \) (\( \pm 24,724 \) bulk m²) absolute maximum (smaller, but far superior exposure)

Erf 173147  \( \pm R3,600 \) (\( \pm 6,664 \) bulk m²) absolute maximum, much smaller

Century City  \( \pm R3,222 \) (\( \pm 25,000 \) bulk m²) good to maximum, asking price only”

5.3.7 “Valuation of Naspers Premises, erven 244 and 246 Roggebaai, based on the Memorandum of Understanding dated 30 August 2010” by Appraisal Corporation, prepared by J L Falck dated 17 September 2010

5.3.7.1 This valuation report describes Erf 244 as the property improved with the existing Naspers building. The report also reflects that Erf 244 faces the drawback of a severe lack of parking that affects rental norms and rentability. The valuer concluded that the value of Erf 244 as is based on potential income, is R119 300 000. However, Ms Falcke also concluded that the value of Erf 244 with parking and height restriction on Erf 246, increased with R75 700 000 in the case where 600 underground reserved parking bays are secured (and with R64 200 000 if 500 underground reserved parking bays are secured). It is also noteworthy that Ms Falck considered the height restriction (alone) to have contributed R6 700 000 to the value of Erf 244.

5.3.8 Property Valuation Report of Erf 246 by Old Mutual Investment Group: Property Investments for Naspers dated 1 July 2010

5.3.8.1 This report also states that the traditional and internationally recognized Direct Comparison Method was utilized to arrive at the opinion. It referred to four comparable sales and based on that and other information it was their opinion to apply a bulk rate of R3,750/ m². The report concluded by arriving at a valuation of R140 000 000 in respect of Erf 246.
5.3.9 Memorandum of Understanding between the ICC and Naspers dated 30 August 2010

5.3.9.1 This document among others states that the parties thereto agree that it was their intention to implement a proposed transaction whereby Naspers will sell Erf 246 to the City at a negotiated price and Convenco will provide at a negotiated price an alternative parking solution to service the Naspers building, “which solution will be couched in an ownership structure in favour of and acceptable to Naspers”. It is important to note that Clause 5.3 of this agreement provides as follows:

“In order to achieve the aforementioned arrangement the Parties will negotiate a purchase price for Block B [Erf 246] and the Parking Area and the purchase price of Block B and the Parking Area shall be set-off against each other, with any difference to be settled in cash.”

5.3.9.2 Clause 5.7 of this agreement provided that Convenco shall ensure that the construction on Erf 246 shall not exceed a height of 30 meters and this shall be recorded as a praedial servitude in favour of the Naspers building.

5.3.9.3 It is noteworthy that only the CEO of Convenco and Naspers were signatories to this agreement, even though the City is cited as purchaser.

5.3.10 Memorandum of Understanding between the ICC and Naspers dated 30 March 2011

5.3.10.1 Again, this document reflects that the provisions thereof constituted a statement of the parties to implement a transaction. It should be noted that clause 6.2.1 thereof provides:

“Naspers require a letter of commitment from both the City and the Province, the content of which must be acceptable to the Naspers Board of Directors, in terms of which the City and the Province commit to assist Naspers to
secure an alternative property for the future development of Naspers’ … business interests and commit to supporting Naspers in matters relating to zoning, land use and the like. Both the City and the Province must undertake to process and decide any applications, and to make comments or recommendations that they may be required in law to make, as expeditiously as possible within any statutory timeframes”.

5.3.10.2 The document further indicates that the City will acquire Erf 246 from Naspers for a purchase consideration of R106 000 000 (excluding VAT). It also states in clause 7.5 that “…the building constructed on [Erf 246] shall not exceed a height of 30m (thirty meters) and this restriction shall be factored into the final design … and shall be recorded in a praedial servitude in favour of the Naspers Building.”

5.3.10.3 Again, only Convenco and Naspers were signatories to this agreement.

5.3.11 Sale agreement between Naspers and the City signed on 18 November 2011

5.3.11.1 The agreement provides that the City purchases from Naspers Erf 246 at a purchase consideration of R106 000 000 plus VAT.

5.3.11.2 Clause 5 thereof also stipulates that “[t]he Purchaser hereby undertakes not to construct or allow construction of any building, improvement or structure of any nature on the property, the height which exceeds thirty meters…” and that “[t]he Purchaser shall procure the registration of the Height Restriction in favour of Erf 244 against the title deed of the Property, which condition shall be praedial in nature, endure in perpetuity, and be binding on the Purchaser’s successors in title.”.
5.3.12 Letter and documents received from Naspers Properties (Pty) Ltd

5.3.12.1 On 31 October 2012 Mr A Hugo, Director of Naspers Properties (Pty) Ltd wrote to the Public Protector stating that Naspers takes exception to various comments implying that it entered into the transaction with ulterior motives and secured benefits at the expense of the general public. Accordingly Naspers provided certain information. He indicated that, prior to the unsolicited approach by Convenco during 2010 which resulted in the negotiation in relation to Erf 246, neither he nor his predecessor had any contact “… with the Convenco people and the approach came as a surprise.” Apparently Naspers had always intended to develop Erf 246 for its own commercial purposes and its remains in a position to do so.

5.3.12.2 Mr Hugo further advised that the purpose of the Memorandum of Understanding with Convenco was to ensure, inter alia, that Convenco bind Naspers to an agreement not to dispose of Erf 246 while Convenco explores the viability of the expansion and to record the material terms upon which Naspers was willing to dispose of Erf 246, namely to secure adequate parking to replace the parking it will lose in selling Erf 246. The latter resulted in a sub-lease agreement between Naspers and Convenco. Mr Hugo concluded by stating that during all negotiations since inception Naspers negotiated in good faith, at arm’s length and without any undue influence.

5.3.12.3 The following two additional valuations were provided by Mr Hugo:

(a) Property Valuation Report prepared by Old Mutual Investment Group: Property Investments dated 1 April 2009

This report arrived at a value of R103 000 000 in respect of Erf 246.
5.4 Information obtained during interviews conducted

Generally, discussions with interviewees regarding the background to this matter revealed that, in January 1996 the City, Provincial Government and Media 24 contemplated a joint venture to develop the Northern Foreshore through a Northern Foreshore Agreement (in the area where Erf 246 is situated). In terms of this agreement inter alia the rezoning, consolidation, subdivision, development rights and transfer of the various land parcels to the three parties as well as development agreements for the development of various land parcels would have been facilitated. It appears that there are some concerns regarding the development process, transparency, contracts and whether there is fair competition. These are of course issues that might be the subject of disputes or other processes in future, but are not directly related to the complaint as outlined above and discussed further in paragraph 8.4.

5.4.1 Person X

5.4.1.1 Person X was interviewed and provided the Public Protector with verbal as well as documentary evidence. The subject of the investigation as raised by the Complainant was clarified as well as jurisdictional aspects.

5.4.1.2 Person X advised that judging by what is proposed to be built on the land as opposed to the value of the bulk of the land, the price from the public’s perspective is questionable as less than two thirds will be utilized. Apparently 10 to 12 storeys could be built on the property in question, whilst only three storeys will be utilized. On the other hand this is a great deal for Naspers as they appear to have negotiated uninterrupted views over the erf.
5.4.1.3 It was also stated that the justification for the purchase price of Erf 246 on what was paid for Erf 247, is not correct. Apparently an independent valuation for Erf 247 in 2006 was R42 000 000. Bids on this property comprising 37 000 m² bulk, were apparently on average around R50,000,000 which means the average price per bulk m² was around R1365. However, the highest bidder tendered R106 000 000 in 2006, which was around R2 865 per m² (more than double). It is stated if the City based its value on this sale, the land from the date of the tender had in fact had no appreciation in six years.

5.4.1.4 Person X concluded that the City is substantially overpaying for the land from a bulk m² perspective, because it is not utilizing the bulk potential.

5.4.1.5 Person X indicated that s/he would have facilitated a third person/s to approach the Public Protector with additional information. This never materialized during the investigation.

5.4.1.6 This person also suggested that “there may have been a deal within a deal in respect of additional land”. This referred to another piece of land that

Naspers allegedly needs at Joostenberg Vlakte and that the City would “assist” Naspers in this connection. Person X however confirmed that he/she has no evidence that palms are being greased or money changed hands.

5.4.2 Mr A Human, Manager: Property Development, Property Management Department, City of Cape Town, interviewed on two occasions

5.4.2.1 Mr Human stated that he manages three sections: acquisitions, land disposals and development and facilitation. He explained that the acquisition of land is dealt with under a delegation to the Executive Mayor to take such decision in consultation with members of the Mayoral Committee.
However, he further advised that the Council took the decision to purchase Erf 246 because the whole ICC expansion formed part of a council decision.

5.4.2.2 Mr Human further stated that at the time of the first submission to Council, he was aware of the valuation of Appraisal Corporation, the MOU between the ICC and Naspers as well as the approval of the valuation by the internal valuers. Mr Human confirmed that he was aware of the height restriction to be imposed on Erf 246. He however confirmed that the height restriction was not reported to Council. When asked why not, he responded that he could not think of any reason. Mr Human further remarked that normally they request Council to approve and then further negotiations follow which result in agreements between the parties.

5.4.2.3 As far as Council’s decision that the Executive Mayor was to sign a letter of commitment for the City to provide support to Naspers in order to assist Naspers in finding alternative land within the City boundaries for further development, Mr Human stated the following. He indicated that Naspers was looking for a very specific property and the City made it clear to them that all that could be done, was to assist them like any investor who approaches the City to acquire land. Apparently all that was done, was a search on the database or that they knew of in the private sector. If City property was available, Naspers would have been required to follow normal procedures. Mr Human stated that they could not find anything that would satisfy Naspers’ needs.

5.4.2.4 Mr Human confirmed the contents of his e-mail of 26 October 2010 to the legal representative of the ICC stating inter alia, “… the [Property Management] Department has not been party to the negotiations to date and finds itself being asked to comment/respond after the fact and without having had the benefit of insight into how the proposals have developed or on what basis or business case the proposals purportedly have been agreed to by the City.” When asked why the City, who would pay for Erf 246, allowed this situation, Mr Human was at pains to explain that a lot has changed since
and frequent meetings are held. Mr Human also conceded that it is a concern that the City, who would purchase Erf 246, was never a party to the Memoranda of Understanding which preceded the sales agreement.

5.4.2.5 As far as the Sub-lease Agreement in respect of parking between Convenco and Naspers is concerned, Mr Human confirmed that 500 parking bays would be let to Naspers on an agreed market-value rental, 250 of which will be in proximity of the Naspers building (possibly at expansion area of ICC / Salazar square or under the freeway) and a further 250 further away (owned by the ICC in their current facility) for a period of 20 years, with the option to renew. The lease will be R875 per covered parking bay, back-dated and an annual escalation of 6.65% would apply. The monthly rental in respect of this lease will be payable by Naspers to Convenco (unless Salazar square is used, which is owned by the City).

5.4.2.6 With regard to the change from a situation where the construction cost of the parking bays would have been set-off against the purchase price to a Sub-lease Agreement, Mr Human explained that the cost of three levels of super-basement parking would have been too expensive. As far as the income from the lease is concerned, the construction costs would be recovered approximately by the 20th year of the lease, from when a profit would be gained. However, Mr Human indicated that the deal regarding parking is somewhat fluid at the moment. Mr Human confirmed that Naspers was no longer interested in buying the parking bays.

5.4.2.7 It was put to Mr Human that the initial valuation of Erf 246 was R104 000 000, but that the documentary evidence shows that the height restriction would contribute R6 700 000 to the value of Erf 244 (the Naspers building). When asked, why during the negotiations, the City settled for a purchase price of R106 000 000 nonetheless, Mr Human explained that was the price that Naspers required “take it or leave it”.

28
5.4.2.8 It was put to Mr Human that it was critical to Council to have been informed of the height restriction imposed because it was essentially not the same property described in the first report to Council where an in principle decision was taken to purchase Erf 246 (with a height of 50 meters) – after transfer, the City will be the owner of Erf 246 (with a height of 30 meters). Mr Human responded that, if it was the only issue, Council should have been approached, but this formed part of the expansion of the ICC and the erven would be consolidated. When asked who should approve when the City alienates a right relating to the City property (such as imposition of a height restriction to be registered against the title deed of its property), Mr Human responded that Council should approve in terms of the Municipal Asset Transfer Regulations. When asked whether the deal in question actually requires two approvals, firstly the acquisition of Erf 246 and then alienation of the right to a height of 50 meters and limiting it to 30 meters, he responded that it is an interesting thought, but if necessary Council could be approached in this connection.

5.4.3 Mr M Richardson, former Chief Financial Officer, City of Cape Town

5.4.3.1 Mr Richardson confirmed that both the City and municipal entities (the ICC) are required to comply with the Local Government: Municipal Finance Management Act and as such the ICC forms part of the assets of the City. As the ICC was a successful entity, met its operating costs and facilitated certain spin-offs, a decision was taken approximately four years ago to expand same. Initially the idea was to expand towards Customs House, but three years’ discussions with the owner, National Department of Public Works, failed. Therefore expansion towards erven 245, 246 and 247 were considered. Regarding the property deal in question Mr Richardson indicated that this land is one of the last few lucrative development properties available in the Foreshore area and if the land in question unlocks a property development of R1 billion which will be an asset to the City, it is probably worth it. He also mentioned that, unfortunately when the City wants to buy land, the seller has it over a barrel as it wants it for a specific purpose.
He considered the purchase price to have been reasonable in the circumstances.

5.4.4 Mr M N Munro, ICC Expansion: Development Manager, Cape Town ICC

5.4.4.1 Mr Munro was appointed as the consulting development manager for the ICC expansion. His function was to assist the CEO of the ICC to procure development agreements and the services of professional teams, design and construction. He stated that one component of the transaction with Naspers was to drive the purchase price from the level of their valuation of R140 000 000 down to an acceptable level, which was achieved in this case.

5.4.4.2 Mr Munro further mentioned that he was aware of the height restriction imposed on Erf 246. In his view it did not affect the City or ICC to fully utilize the maximum permissible floor area (or bulk) within the footprint of the site.

5.4.5 Mr R Toefy, Chief Executive Officer, Cape Town ICC

5.4.5.1 Mr Toefy mentioned that he had been the CEO of the ICC for seven years. He stated that the ICC creates R2.3 billion economic spin off every year, so it is about leveraging public money to create economic spin offs and job creation. According to him, Cape Town ICC is the most successful convention centre in Africa, but they are operating at full capacity. The ICC created last year about 7000 jobs, indirect and direct. Now that number is starting to plateau out, because it cannot facilitate any more meetings. Mr Toefy stated that their study has shown that by the time they have opened this building, they would have created almost up to 10 000 jobs because of the expanded facility. He advised that the ICC is a state owned company and that 51% of the shares are owned by the City.

5.4.5.2 Mr Toefy confirmed that they were unable to expand towards Customs House. He therefore considered the alternative of expanding towards Erven 245, 246 and 247. He explained that a convention centre requires large
spaces without pillars – a flat voluminous structure. Instead of a single storey convention centre they designed it to become a double storey convention centre. Mr Toefy confirmed that the ICC will use the majority of the allowable bulk of 37 000 m² on Erf 246 without even reaching the height restriction line. Accordingly he was adamant that their development and needs are not limited by the height restriction. When asked whether he included in the brief of the valuer, Ms Falcke, the fact that a height restriction would be imposed, Mr Toefy said that he believes he would have told her that.

5.4.6 Mr P Pendlebury, Principal Professional Valuer, Property Management Department, City of Cape Town

5.4.6.1 Mr Pendlebury explained that he is the acting head of the Market Valuation section in the City and his division vets, checks and comments on external valuations. He stated that Mr A Human requested him to vet the deal. He perused the report and could not find anything wrong with the price. His methodology of vetting was to check whether the correct valuation basis was utilized, whether the price is commensurate with similar transactions. He in fact apparently noted that two other properties fetched higher bulk rates than the one in question (i.e. erven 211 and 245).

5.4.6.2 Mr Pendlebury also opined that the bulk or permissible floor area is the most important aspect from a business perspective. He however remarked that the footprint of Erf 246 is large – accordingly you do not need a lot of height to utilize the maximum bulk, probably 19 meters or 6 storeys. He also stated that, even if he had known of the height restriction, he would not have come to a different valuation as long as the bulk is achievable within that height.

5.4.6.3 He confirmed that the height restriction to be imposed on Erf 246 was not conveyed to Council.
5.4.7 Ms L M Muller, Director Shareholding Management in the Finance Department, City of Cape Town

5.4.7.1 Ms Muller indicated that her function among others entails ensuring corporate governance. She also serves as a non-participatory observer on the Convenco Board. Ms Muller stated that the Memoranda of Understanding relating to the property deal were initiatives by the ICC and the City was not involved in that. She mentioned that at some point she approached the CEO of the ICC and informed him that the City had to conduct the negotiations. She also said that the assistance that the City rendered to Naspers basically consisted of identifying land for Naspers, but Naspers was also not satisfied with the land that they identified.

5.4.7.2 Regarding the parking lease agreement, she mentioned that although the sub-lease has been signed, the various options, such as when the parking will be available, where and who would be providing it have still not been finalised. From December 2015, after the completion of the construction, Naspers will receive “permanent parking”. The value of the parking varies, and is based on the location and the number of parking bays. She was emphatic that Naspers would pay market value for the 500 bays. When it was pointed out to her that, according to one of the valuations prepared by Appraisal Corporation it is very expensive to construct parking, she responded that the City/Convenco will be able to recoup this cost of construction over the 20 year lease period.

5.4.8 Ms R Gelderbloem, Director of Property Management in the Finance Department, City of Cape Town

5.4.8.1 Ms Gelderbloem advised that she oversees the direct leasing, acquisition and strategic planning of City immovable assets with a focus on land and buildings. She advised that Mr A Human dealt with the project and he

reports to her. She said that one must remember that whereas the purchase of Erf 246 was an acquisition for the City, the business case was done by Convenco. Underlying all this is that Council makes the final decision.

5.4.9 Ms J L Falck, Professional Valuer of Appraisal Corporation

5.4.9.1 Ms Falck explained that during August 2010 she was tasked to conduct a valuation of, among others, Erf 246. The valuation process entailed, inter alia, identification and inspection of the property; a title deed search – to determine if there are any onerous conditions in respect of servitudes or conditions or mortgage bonds; obtaining zoning certificates from the City; market research – comparing other transactions that had taken place; speaking to brokers on properties on the market or properties that have recently been registered etc. and thereafter drafting a valuation report.

5.4.9.2 She further explained that the applicable methodology was to use the Direct approach or the Market Data approach, i.e. to look at comparisons of other similar transactions, to analyse them in terms of selling price per square metre and apply that with adjustments to the relevant property.

5.4.9.3 Ms Falck stated that she was not aware of the height limitation at the time of conducting the valuation. When asked whether such limitation would have changed her valuation, she responded that she considers what is available in terms of height and bulk. If that bulk is configured in a different way (whether a high smaller structure or a low broader structure), it would not change her valuation- it would still have the same end value. Ms Falck added, on the other hand, if the 37 000 m² permissible floor area or bulk change, that would have a substantial effect on the valuation.

5.4.9.4 Ms Falck indicated that she subsequently performed an updated valuation on Erf 246 and increased the valuation with R1 000 000 to R105 000 000. The reason for this is because a number of properties have been bought,
upgraded or extended in that area during the past two years – there is a greater interest in that area. This resulted in a valuation of R2 850 per bulk m².

5.4.9.5 Ms Falck also expressed her concern about inaccurate reporting in the media. She was adamant that reference to Erf 246 as the “City’s R106000000 parking lot is untrue and nonsense. She maintained it is a 37 000 m² development site.

5.4.10 Mr E G Rode of Rode & Associates (Pty) Ltd

5.4.10.1 Mr Rode, who is a professional valuer and property economist, mentioned that his enterprise has for the past 24 years conducted surveys quarterly of the property market. As far as valuation in this connection is concerned, he remarked that the key question to ask is what is the market per bulk square metre in the Cape Town CBD. He explained that bulk square meters means the amount of square meters that the municipality will allow you to build on a certain property. The higher the square meters, the more the value will be. He stated that even if the height was restricted, but the bulk could be accommodated within the height limitation, it would generally not affect the value of such property.

5.4.10.2 He quoted the following definitions from the Rode’s Report on the South African Property Market 2010:3:

“**Bulk**: The market value of office and shopping-centre land is generally expressed as the value per **bulk** square metre. Bulk square meters refer to the gross building area (GBA) of a building … it excludes.. parking (basements or above ground) …”

“**Market value**: The most probable price that a voluntary, informed and prudent purchaser will pay a voluntary, informed and prudent seller in a normal open-market (arms-length) transaction at the date of valuation – after
allowing for proper marketing prior to the valuation date – when neither party is under any compulsion to sell or to purchase, other than their normal desire to transact”.

5.4.10.3 Mr Rode expressed the view that the purchase price of Erf 246 was more or less within the range within which the market value of the property could have been at the time.

5.4.10.4 When asked about his statement to the reporter of the Cape Times that his “...best estimate of the market value of an ‘average’ stand in the Cape Town CBD is about R2 000 to R2 500 per bulk m² (about R48m)”, Mr Rode checked his records and mentioned that this range is correct. He confirmed that one calculates the value of the property by multiplying the value per bulk m² with the PFA or bulk m² attached to the erf (in this case 37 000), for instance if a value of R2 250 per bulk m² is taken, the calculation is:

\[
2 250 \times 37 000 = R83 250 000
\]

Mr Rode stated that seemingly the reporter who wrote the article who phoned him did not provide him with the correct bulk of the property and therefore arrived at the incorrect figure of R48 000 000. (The reporter, Mr B Ndenze was interviewed subsequently and asked how the figure of R48000000 was arrived at. He stated that, from his recollection either Mr Rode assisted him with the calculations or Mr Rode might have done the calculations and forwarded the figure to him. He would have attempted to trace his documents, including e-mails and reverted to the Public Protector with more details, but nothing has been forthcoming. The actual valuation obtained by the ICC / City was never made available to him).

5.4.10.5 Mr Rode confirmed his statement that the value of a stand in the Cape Town CBD was about R2 000 to R2 500 per bulk m², but not the total value in respect of Erf 246 as reported in the Cape Times (R48 000 000).
5.4.11 Communication with Mr M Mohamed

5.4.11.1 Contact was made with Mr Mohamed during the investigation. He indicated that he was approached by a newspaper reporter quite unexpectedly. He however could not provide any evidence relating to the issues under investigation.

5.5 Professional review

5.5.1 In view of the technical nature of the matter and the questions that arose during the investigation, the Public Protector deemed it prudent to commission its own professional review of the relevant valuation of Appraisal Corporation. After consultation with the SA Institute of Valuers and others, suitable valuers with no interest in the matter were considered to conduct the professional review.

5.5.2 Following the above a professional review was conducted by Steer & Co. The review explained the methodology used and encapsulated detailed calculations and findings. The review concluded that, having carefully inspected the market valuation report, the opinion is held that Ms Falck applied her mind correctly in determining the market value and that a fair market value of Erf 246, Roggebaai as at 10 August 2010 was R104000000.

5.5.3 The review also concluded that in the case of the reduction in permissible height for the subject property to 30 meters, the PFA of 37000 m² applied in Ms Falck’s valuation is still possible. Because the extent of possible improvements does not change, there is no change in the market valuation as at 10 August 2010. The Valuer explained that there are in fact several advantages of having a ‘shorter’ building with the same PFA.
6. EVALUATION OF EVIDENCE AND INFORMATION OBTAINED DURING THE INVESTIGATION

6.1 As far as the need for expansion of the ICC and identification of Erf 246, Roggebaai is concerned, the investigation revealed the following:

6.1.1 An analysis by the Graduate School of Business, University of Cape Town and Strategic Economic Solutions in August 2010 indicated that the economic benefits of expansion to the adjacent site are greater than the associated economic costs. In this regard Mr Toefy mentioned the ICC creates R2.3 billion economic spin off every year, leveraging public money to create economic spin offs and job creation. The ICC is a state owned company and 51% of the shares are owned by the City. The ICC is operating at full capacity and need to expand to have a greater impact, including creating almost up to 10 000 jobs. The ICC needed approximately 10 000 m² land.

6.1.2 There were only two viable options – expansion towards Erf 14734 owned by the National Department of Public Works or towards the ‘block’ of vacant erven 245, 246 and 247. The City already held ownership of Erf 245 and only a portion of Erf 247 (at that time owned by Lakeside City Trading) was needed. On 21 May 2010 the CEO of the ICC reported to the Convenco board that, due to the lack of response from the relevant government bodies to the ICC’s proposal to expand onto the Customs House site, alternative options were being explored. He stated that significant progress had been made in the discussion with all interested parties pertaining to the ICC acquiring the right to utilize the sites of the City and Naspers for its planned expansion.

6.2 On 27 October 2010 the Council approved in principle the proposals for expansion of the ICC and approved the purchase of Erf 246 and authorized city representatives to negotiate the purchase thereof.
6.3 On 30 March 2011 the Council approved that the Property Management Department purchase Erf 246 from Naspers for an amount of R106 000 000 (excluding VAT). Council further approved that the Executive Mayor signs a letter of commitment for the City to provide support to Naspers in order to assist Naspers in finding alternative land within the City boundaries for further development. The report from the City which encapsulated the recommendations (resulting in the above-mentioned resolutions) did not explain how the purchase price of R106 000 000 was arrived at.

6.4 As far as valuation is concerned, Mr Rode (who was quoted in the Cape Times) explained that bulk square meters means the amount of square meters of floor area that the municipality will allow you to build on a certain property. The higher the square meters, the more the value will be. When asked about his statement to the reporter of the Cape Times that his “..best estimate of the market value of an ‘average’ stand in the Cape Town CBD is about R2 000 to R2 500 per bulk m² (about R48m)”, Mr Rode checked his records and mentioned that this range is correct. He confirmed that one calculates the value of the property by multiplying the value per bulk m² with the PFA or bulk m² attached to the erf (in this case 37 000), for instance if a value of R2 250 per bulk m² is taken, the calculation is:

\[ 2 250 \times 37 000 = R83 250 000 \]

6.4.1 Mr Rode stated that seemingly the reporter who phoned him did not provide him with the correct bulk of the property.

6.4.2 Mr Rode therefore confirmed his statement that the value of a stand in the Cape Town CBD was about R2 000 to R2 500 per bulk m², but not the total value in respect of Erf 246 as reported in the Cape Times (R48 000 000).

6.5 The valuation report of Appraisal Corporation confirmed that Erf 246 is vacant and used for parking, but have a business potential and zoning of
“General Business, subzone B6”. The report further reflected in respect of Erf 246 a maximum PFA or bulk of 37000 m². The report also described it as a property with above average exposure, being visible from the incoming elevated freeway and offering “excellent business potential, taken its exceptional location and exposure”. The Market Data Approach of Direct Comparison methodology was relied on using recent transactions of similar properties, from which a rate per m² was derived and adjusted for variances in location, extent, zoning, use, potential, etc. The report referred to and analysed the details of six comparable market transactions, five of which the purchase price were in excess of R2 800 per bulk m². The Valuer considered two transactions as particular good yardsticks, viz Erf 142228 where the purchase price was ±R3,063 per bulk m² and Erf 247 at ±R2,838 per bulk m². Ms Falck initially (on 20 August 2010) valued Erf 246 at R104 000 000, but subsequently performed an updated valuation on Erf 246 and increased the valuation with R1 000 000 to R105 000 000 because of the recent greater interest in that area. This resulted in a valuation of R2,850 per bulk m².

6.6 On the other hand, the valuation by Old Mutual Investment Group was at R3 750 per bulk m².

6.7 An independent professional review by Steer & Co concluded that, having carefully inspected the market valuation report, Ms Falck applied her mind correctly in determining the market value and that a fair market value of Erf 246, Roggebaai as at 10 August 2010 was R104 000 000.

6.8 Erf 246 was sold for R106 000 000 i.e. at R2 865 per bulk m².

6.9 As far as the utilization of Erf 246 is concerned, Mr Toefy explained that a convention centre requires large spaces without pillars – a flat voluminous structure. Instead of a single storey convention centre they designed it to become a double storey convention centre. Mr Toefy confirmed that the ICC will use the majority of the allowable bulk of 37 000 m² on Erf 246 without
even reaching the height restriction line. Accordingly he was adamant that their development and needs are not limited by the height restriction.

6.10 It is further common cause that the City agreed contractually that it would not construct any structure on Erf 246 the height of which exceeds thirty meters and that it would ensure registration of the height restriction in favour of Erf 244 against the title deed of the Property, which condition shall be praedial and permanent in nature. Even though the Council approved that Erf 246 be purchased for R106 000 000, it was not communicated to Council that a height limitation of 30 meters would be registered against it. Mr Human confirmed that the height restriction was not reported to Council. When asked why not, he responded that he could not think of any reason. It was critical to Council to have been informed of the height restriction imposed because it was essentially not the same property described in the first report to Council where an in principle decision was taken to purchase Erf 246 (with a height of 50 meters) – after transfer, the City will be the owner of Erf 246 (with a height of 30 meters). When asked who should approve it when the City alienates a right relating to the City property (such as imposition of a height restriction to be registered against the title deed of its property), Mr Human responded that Council should approve in terms of the Municipal Asset Transfer Regulations. When asked whether the deal in question actually requires two approvals, firstly the acquisition of Erf 246 and then alienation of the right to a height of 50 meters and limiting it to 30 meters, he responded that it is an interesting thought, but if necessary Council could be approached in this connection.

6.11 As regards the possible impact of the height restriction on the valuation, Ms Falck stated that she was not aware of the height limitation at the time of conducting the valuation. When asked whether such limitation would have changed her valuation, she responded that she considers what is available in terms of height and bulk. If that bulk is configured in a different way (whether a high smaller structure or a low broader structure), it would not change her valuation- it would still have the same end value. The
Professional Review also concluded that the reduction in permissible height for Erf 246 to 30 meters, the PFA of 37 000 m² applied in Ms Falck’s valuation is still possible. Because the extent of possible improvements does not change, there is no change in the market valuation as at 10 August 2010.

6.12 Person X who was interviewed, suggested that there might have been a deal within a deal in respect of additional land in respect of which the City would allegedly have assisted Naspers. S/he however indicated that there is no available evidence in support of such allegation. The investigation only revealed a clause in the Memorandum of Understanding between the ICC and Naspers that a letter of commitment from both the City and the Province would be required to assist Naspers to secure an alternative property for the future development of Naspers’ business interests and commit to supporting Naspers in matters relating to zoning, land use and the like, requires further scrutiny. In this connection Mr Human explained that the City made it clear to Naspers that all that could be done, was to assist them like any investor who approaches the City to acquire land. Apparently all that was done, was a search on the database or that they knew of in the private sector. If City property was available, Naspers would have been required to follow normal procedures. Mr Human stated that they could not find anything that would satisfy Naspers’ needs.

7. LEGAL AND REGULATORY FRAMEWORK

7.1 The Constitution

7.1.1 Section 217 of the Constitution provides when an organ of state in the national, provincial or local sphere of government contracts for goods and services, it must do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective.
7.2 Local Government: Municipal Finance Management Act, 2003

7.2.1 Section 111 of the Local Government: Municipal Finance Management Act (MFMA) provides that *inter alia* each municipality and each municipal entity must have and implement a supply chain management policy. Section 112 provides *inter alia* that the supply chain management policy of a municipality or municipal entity must be fair, equitable, transparent, competitive and cost-effective and comply with a prescribed regulatory framework for municipal supply chain management, which must cover among others the range of supply chain management processes that municipalities and municipal entities may use, including tenders, quotations, auctions and other types of competitive bidding; when a municipality or municipal entity may or must use a particular type of process; procedures and mechanisms for each type of process; and the delegation of municipal supply chain management powers and duties, including to officials.

7.3 Municipal Supply Chain Regulations, Government Notice 868 of 30 May 2005

7.3.1 Regulation 11 (1) provides among others that a supply chain management policy must provide for an effective system of acquisition management in order to ensure that goods and services are procured by the municipality or municipal entity in accordance with authorised processes only.

7.3.2 Regulation 36(1)(a) provides *inter alia* for deviation from procurement processes in that a supply chain management policy may allow the accounting officer to dispense with the official procurement processes established by the policy and to procure any required goods or services through any convenient process, which may include direct negotiations, but only, among others, if such goods or services are produced or available from a single provider only.
7.4 Municipal Asset Transfer Regulations promulgated in terms of the Local Government: Municipal Finance Management Act, 2003

7.4.1 Regulation 5(1) provides *inter alia* that a municipality may transfer or dispose of a non-exempted capital asset only after the municipal council has approved in principle that the capital asset may be transferred or disposed of.

7.4.2 Regulation 1 provides for the following definitions:

“Capital asset” means “any immovable asset such as land, property or buildings; …”

“Subsidiary asset” in relation to a capital asset means “an asset that forms an integral part of the capital asset or of the operation or maintenance of the asset”.

“Transfer” in relation to “a capital or subsidiary asset, means transfer of ownership in the asset as a result of a sale or other transaction”.

7.4.3 Regulation 3 encapsulates certain governing principles and provides that the regulations are governed and must be implemented in accordance with, among others, the following principle:

“Asset preservation principle, i.e. the need to prevent the indiscriminate or unsustainable transfer or disposal of a municipal capital asset in order not to undermine the ability of the municipality or municipal entity to render or expand municipal services in the longer term.”

7.5 City of Cape Town By-law relating to the Management and Administration of the City of Cape Town’s Immovable Property

7.5.1 In terms of the above By-law (section 3) the Council may acquire immovable property and rights in immovable property within or outside its municipal area by purchase, expropriation, exchange, donation, gift, lease or otherwise.
7.5.2 This By-law defines “municipal immovable property” as immovable property and real rights registered in the name of the municipality or is entitled to have registered in its name and any other immovable property which, by law vests in the municipality. “Alienate” is defined as, to part with ownership of immovable property in favour of another person with the intention of transferring the ownership of the immovable property to the acquirer thereof. In terms of section 4(1) of this By-law it is the Council that may alienate municipal immovable property under such conditions, terms and circumstances as it may prescribe.

7.6 Supply Chain Management Policy of the City of Cape Town approved on 23 February 2011

7.6.1 In terms of paragraph 283 of this Policy the City Manager may dispense with the official procurement processes established by the Policy and procure any required goods through any convenient process, which may include direct negotiation, but only in respect of, among others, any goods or services which are available from a single provider only.

7.7 System of Delegations of the City of Cape Town, adopted 27 August 2007, as amended

7.7.1 Acting in terms of section 60(3) of the Local Government: Municipal Structures Act, the Council designated *inter alia* the following powers and functions to be exercised and performed by the Executive Mayor together with the members of the Mayoral Committee:

“To authorise the purchase of immovable property or rights in or to immovable property for cash or any other consideration, after considering a report from the Director: Property Management...”
8. RESPONSES TO THE PROVISIONAL REPORT AND ADDITIONAL SUBMISSIONS

8.1 The Public Protector issued a Provisional Report on the matter investigated on 5 November 2012. The Provisional Report was presented to the Complainant, the Executive Mayor and City Manager of the City of Cape Town as well as the CEO of the Cape Town ICC (CONVENCO). The Complainant and the other interested and affected parties were provided with an opportunity to respond to the contents of the Provisional Report. The CEO of the ICC did not respond to the Provisional Report.

8.2 Responses by the complainant and the City of Cape Town regarding the valuations and purchase of Erf 246

8.2.1 The complainant stated regarding the valuation of Erf 246, that the decisive finding of the Public Protector is that, save for the R2 000 000 increase in the valuation discrepancy, the valuation of Erf 246 is market related and accordingly the purchase price is fair. However, the Provisional Report in itself acknowledges several serious discrepancies in the valuations of Erf 246. In this regard it is stated:

“*The Report on “Valuation of various properties and portions of properties, Roggebaai, Cape Town” by Appraisal Corporation, prepared by JL Falck gives a valuation of **R104 million**. What is very interesting is that the Falck report also puts a value of R115 million on Erf 245 which is next to Erf 246 and is the property of the City.

*The Property Valuation Report of Erf 246 by Old Mutual Investment Group: Property Investments for Naspers dated 1 July 2010 values the property at **R140 million**.

*The Property Valuation Report of Erf 246 by Old Mutual Investment Group: Property Investments dated 1 April 2009 values the property at **R103 million**.

Many other valuations also appear in the Provisional Report which are noted.*
The Valuation of Erf 246 Cape Town, Western Cape for media 24 Ltd by Alliance Group dated 1 April 2009 values the property at R92.5 million."

It is mentioned that the inconsistencies in the valuations are significantly large to warrant a more vigorous investigation into the method and the information used in the valuation determination. In addition each valuation is relied upon because it was done by “experts” in the field yet the variations and inconsistencies are not investigated or adequately explained.

8.2.2 On the other hand the City contends that the finding / comment that the purchase price of Erf 246 was “slightly” (R2 000 000) more than the initial valuation, is not relevant to the finding because the valuation was subsequently adjusted to R105 000 000 and thus only R1 000 000 less than the purchase price. It is also submitted that valuations are not an exact science and a single valuation should not be used as the only valuation in making a determination of the fair value – as such it is used as a guideline in negotiating a price and serves as best estimates. The City argues that valuations by respected and independent valuers ranged from the adjusted R105 000 000 (obtained by the ICC) to R140 000 000 (obtained by Naspers from another valuer) both of which should have been referred to in the findings as this indicates firstly the wide range in values which existed and also how close (2%) the final price was to the lowest valuation. The City argues that reference in this finding to the fact that one of the valuations was less than the final price is in their view irrelevant to the finding. It is submitted that reference should not be made to a single valuation, but if so, it should refer to the lowest valuation and not the initial valuation. The City contends that valuations were obtained simultaneously by the respective parties and both were used in negotiating the purchase price.

8.2.3 The Public Protector’s decision in the above-mentioned regard is as follows:

8.2.3.1 Regarding the observation by the complainant that the valuation by Ms Falck of Erf 245, which adjoins Erf 246, is R115 000 000 whilst Erf 246 is
valued at R104 000 000, the relevant valuation report of Ms Falck of 20 August 2010 explained the difference as follows:

“**Erf 245 Roggebaai** Of the three remaining freehold properties, this property has the most favourable location, especially with regard to exposure and access. As such it should reflect the highest rate per m² of these three erven … This takes into account its average bulk extent of 38,441m², good access, corner location and exposure.”

The Public Protector therefore does not consider this to be a discrepancy.

8.2.3.2 With regard to the different property valuations of Erf 246 obtained by Naspers from Old Mutual Investment Group: Property Investments on 1 April 2009 (R103 000 000) and Alliance Group on 1 April 2009 (R92 500 000), the Public Protector noted that these valuations were conducted more than a year prior to the relevant valuation by Ms Falck (initially in 2010 at R104 000 000 and subsequently updated to R105 000 000). It is however puzzling and of grave concern that the difference in range between the Old Mutual valuation obtained by Naspers in 2009 at R103 000 000 and the valuation obtained by Naspers from Old Mutual in 2010 at R140000000 could be as broad as 36% in the same industry. Accordingly, the City cannot rely on the latter valuation to explain the difference between the valuation obtained by the ICC and the purchase price. It will be prudent for City officials to negotiate on the basis of a valuation obtained by itself (or its entity *in casu*) as such service provider would have been vetted and procured under its prescribed supply chain prescripts. Furthermore, the City of Cape Town or its municipal entity is expected to rely on the valuation commissioned by it to ensure cost-effectiveness, competitiveness and accountability. The Public Protector therefore made the factual determination of the difference (R2 000 000 and R1 0000000 respectively) between the purchase price and the initial valuation (obtained by the ICC) as well as the updated valuation (obtained by the ICC).
8.2.3.3 Regarding the differences between valuations, it was emphasized during the investigation by members of the valuation profession, that property valuation is not an exact science. The Public Protector further established that, in cases of uncertainty about a specific valuation, it is common practice in the industry to have a professional review of a valuation done by another professional valuer. It is for this reason that the Public Protector commissioned its own professional review of the valuation by Ms Falck, which confirmed the correctness of the valuation.

8.3 Response of the City regarding the failure to comply with Regulation 5(1) of the Municipal Asset Transfer Regulations read with section 4(1) of the City By-law

8.3.1 The City responded that it had no legal obligation to obtain approval from the City Council in terms of regulation 5(1) of the Municipal Asset Transfer Regulations as the Regulation (along with section 4(1) of the City of Cape Town By-law relating to the Management and Administration of the City of Cape Town’s Immovable Property) does not find application in the circumstances. It is argued that that Regulation 5(1) of these Regulations only applies to the “transfer” or “disposal” of a non-exempted capital asset. “Transfer” is defined in the Regulations as the “transfer of ownership in an asset” [the City’s emphasis] and “Disposal” ‘includes the demolition of buildings and other immovable property and the dismantling of plant and equipment where ownership of a capital asset is lost otherwise than by way of a transfer of ownership’. Consequently the City argues that Regulation 5(1) applies only to instances where an agreement will result in the loss of ownership, whether through a transfer or other means. (The City also discussed Chapter 4 of the Regulations that regulates the granting by municipalities and municipal entities of rights to use, control or manage municipal capital assets and prescribes that such rights may only be granted after a prescribed procedure has been followed, and concluded the agreement to impose a praedial height restriction grants a right in favour of Erf 244 to restrict the City’s use of Erf 246 but the imposition does not grant
a third party the right to use, control or manage the capital asset and therefore the provisions of Chapter 4 do not find application in these circumstances.)

8.3.2 The Public Protector did not suggest that Chapter 4 of the Municipal Asset Transfer Regulations is applicable in casu and therefore does not deem it necessary to deal with that issue. The interpretation of the City that Regulation 5(1) only applies and that the Council only has oversight to approve when the Municipality transfers ownership (and not where it transfers or grants a limited real right in its property) in a non-exempted capital asset is narrow and restrictive. Attention is directed to the following:

(a) Silberberg and Schoeman’s *The Law of Property* (p 93) emphasizes the characteristics of ownership, including the fact that it has a residuary character and that ownership is a “mother right” in the sense that it confers the most comprehensive control over a thing, but that an owner can, however, dispose of many of the entitlements of use and enjoyment by granting limited real rights to others. Silberberg *et al* (p332) further points out that a praedial servitude may originate (as in this case) from an agreement between the owner of the dominant tenement and the owner of the servient tenement. But the servitude as a (limited) real right comes into existence only when the agreement has been registered of a notarial deed, accompanied by an appropriate endorsement against the title deeds of the dominant and servient tenements, respectively (which will also be applicable in this case).

(b) The Municipal Asset Transfer Regulations define “capital asset” as “any immovable asset such as land, property or buildings; …” and “subsidiary asset” in relation to a capital asset as “an asset that forms an integral part of the capital asset or of the operation or maintenance of the asset”. The word “transfer” is defined in relation to a capital or subsidiary asset, as “the transfer of ownership in the asset as a result of a sale or other transaction”. 

49
By law limited real rights or praedial servitudes are in the same category of rights as ownership of property, i.e. real rights.

(c) Further, Regulation 3 of the Municipal Asset Transfer Regulations encapsulates certain governing principles and provides that the regulations are governed and must be implemented in accordance with, among other, the following principle:

“As asset preservation principle, i.e. the need to prevent the indiscriminate or unsustainable transfer or disposal of a municipal capital asset in order not to undermine the ability of the municipality or municipal entity to render or expand municipal services in the longer term.”

(d) In view of the aforesaid, the narrow interpretation of the Regulations by the City is not justifiable and is not supported by its purpose referred to above. Accordingly, the use of the phrase “transfer of ownership” includes the transfer (or granting of) of limited real rights. Such interpretation is in fact in accordance with the response provided by the City’s Manager: Property Development and Property Management during the interview (vide paragraph 5.4.2.8 supra). In fact the City’s report to Council which was approved on 30 March 2011, sought approval for the registration of certain servitudes. Hence the height restriction should have been referred to Council for consideration.

8.4 Response of the City regarding the finding that the City failed to take charge of negotiations leading to the sale of the property

8.4.1 The City provided the following additional information:

(a) In September 2010 correspondence was entered into between Convenco and officials of the City regarding the possible acquisition and bulk rights of erf 245 and erf 246, Roggebaai. On 27 October 2012 Council approved the
purchase of the land at a price to be negotiated and it mandated City representatives to be involved in all negotiations for the purchase of Erf 246. Various City officials is said to have been involved in the negotiations to agree to the terms and conditions of the sale. On 30 March 2011 the Council mandated the Property Management Department to conclude the purchase of Erf 246 and to negotiate the related agreements. It is stated that the negotiating team consisted of members of the Shareholder Management Department, Property Management Department falling within the Finance Directorate and the Legal Department and a senior practising attorney. This team carried on the negotiations with Naspers.

(b) It is stated that following months of meetings with the legal teams of Convenco and Naspers various drafts, addenda and amendments were considered and negotiated culminating in the conclusion of the agreement of sale on 18 November 2011. Apparently the purchase price was negotiated having regard to the Naspers valuation of R140000000 thereafter a proposal of R110 000 000 and the price was finally agreed at R106 000 000. The City states that on 19 April 2011 it received the first draft of the sale agreement for comment and thereafter negotiations commenced to negotiate the terms and conditions of the sale agreement and the related agreements in the transaction.

(c) The City advises that the initial MOU was entered into between Convenco and Naspers in respect of erf 246 which made no reference to price but merely referred to the acquisition of the land for the purpose of Convenco’s expansion project. The City states that at this stage there was no need for the City to be involved as Convenco was merely identifying potential sellers or lessors who could be part of the ICC expansion project. Various investigations and negotiations took place in order for Convenco to determine its needs for the establishment of the expanded Convention Centre and ultimately a second MOU was entered into on 31 March 2011 between Convenco and Naspers. It is mentioned that this MOU was not binding on the City as the City was neither a party nor signatory to the MOU.
As such Convenco was charged with securing a commitment from Naspers to dispose of the property at a price to be negotiated by the parties. It is stated that this is accepted practice to ensure that Naspers does not negotiate with third parties and this was clearly beneficial to the City in order to secure the best price for the land. In April 2011 an initial draft of a proposed sale agreement was submitted by Naspers for consideration by the City.

(d) It is stated that the Property Management Department took control of the project and immediately (4 April 2011) appointed attorney Bowman Gilfillan to take the lead in respect of negotiating the sale agreement. On 20 April 2011, Louise Muller of the Finance Directorate addressed a letter to the Head of Property Management stating “we need Paul [attorney at Bowman Gilfillan] to negotiate hard for the City”. This is stated to be a clear indication that the City was putting everything into ensuring that a fair transaction was negotiated between the parties. It is stated that all of the agreements were negotiated over the period April 2011 to August 2012, the sale agreement being signed on 18 November 2011. It is mentioned that the City negotiated various extensions for the fulfillment of the suspensive conditions of the sale agreement in order to ensure that it complied with all its various regulatory processes to ensure that the other agreements including the parking agreement and the various other sales agreements were concluded to its satisfaction.

(e) The City contends that, given the above additional information which was not fully canvassed in the Public Protector’s provisional report it is apparent that the City took charge of the negotiations from the time that it was mandated by Council and following confirmation that Convenco was able to pursue a feasible project to expand the ICC. It is submitted that the City officials acted in an extremely diligent and conscientious manner by appointing attorneys to negotiate the various agreements including the sales agreement which endured over a period of 14 months. Accordingly there is sufficient evidence to refute any form of maladministration by the City.
8.4.2 While the response of the City is noted, it failed to clarify or dispel the following concerns in this regard, particularly during the initial stages of negotiations until the time that the purchase price was agreed upon:

(a) The Manager: Property Development and Property Management’s e-mail of 26 October 2010 to the legal representative of the ICC stating inter alia, “…the [Property Management] Department has not been party to the negotiations to date and finds itself being asked to comment/respond after the fact and without having had the benefit of insight into how the proposals have developed or on what basis or business case the proposals purportedly have been agreed to by the City.” Prior to this period and up to March 2011 was the period during which the purchase consideration was agreed upon. The investigation also revealed corroborating evidence during the interview of the Director Shareholding Management in the Finance Department of the City, that she also approached the CEO of the ICC and informed him that the City had to conduct the negotiations.

(b) Even after the above-mentioned caution, the second MOU was concluded between the ICC and Naspers without the City being party thereto. In this MOU the ICC / Convenco acts as the City’s mouthpiece for instance in paragraph 3.2 it is stated that “…the City will acquire [Erf 246] from Naspers for a purchase consideration of R106, 000, 000…” It is noteworthy that, both the second MOU encapsulating the purchase price and the second Council resolution approving the purchase price of R104 000 000 occurred on the same day viz 30 March 2011. Both MOUs laid the basis for the entire transaction, for instance in the second MOU it is confirmed that “[t]he parties wish to record their understanding regarding the proposed Transaction in terms of which Naspers disposes of [Erf 246] to the City, and the City provides an alternative parking solution to service the Naspers Building”. It is evident that the City was an essential partner to the deal (in fact having to pay a sizable amount of money), but was still not party to the MOU. In this connection the Manager: Property Development and Property Management
also conceded that it is a concern that the City, who would purchase Erf 246, was never a party to the MOU which preceded the sales agreement

(c) As regards the City’s comment that Ms L Muller on 20 April 2011 addressed a communication to the Head of Property Management that “we need [the attorney] to negotiate hard” for the City, it is ironic that in an e-mail from a representative of Naspers on 19 April 2011 to a representative of the ICC it is stated that “… the Buy-Back Option was included in the MOU as signed by all parties on 30th March 2011 and Convenco has committed themselves to the condition. Naspers is not going to waive or amend the provision in the agreement.” It is clear that at this stage several of the definitive terms of the transactions had been solidified.

8.5. Response of the City regarding findings of maladministration

8.5.1 The City contends that maladministration is not defined in the Public Protector Act, 1994 and reference is made to the Collins English Dictionary which refers to “bad, inefficient or dishonest management of the affairs”. It is stated that given the fact that the City is of the view that proper process was conducted and this is supported by legal opinion, there can be no finding of bad or inefficient management. The City also indicated that the report does not find that there is any evidence of dishonesty and accordingly any charge of maladministration is misguided given the facts. It was finally submitted that, given the findings and evidence, the title of the report is misleading and should be amended in the final report.

8.5.2 The Public Protector has to point out that Ombudsman jurisdictions all over the world have the mandate to investigate maladministration. The Public Protector is similarly empowered to investigate alleged maladministration, but lists examples of maladministration. The Public Protector Act does not contain a definition of maladministration. Many jurisdictions have resisted attempts to define maladministration too rigidly to avoid a situation where it might lead to an overly restrictive view of the types of complaints that could
be entertained, and because such definitions have the tendency of becoming outdated. Most ombudsman offices have instead opted to list qualities and traits that might constitute maladministration, for example the European Union lists administrative irregularities; administrative omissions; administrative abuse of power; negligence; unfairness; malfunction or incompetence; discrimination; avoidable delay and lack or refusal of information. There is however not a *numerus clausus* of examples or characteristics of maladministration. It is in this context that findings of maladministration are made. It should however be noted that dishonesty is not necessarily an element of maladministration. As far as the name of the report is concerned, the title is retained as it concisely reflects the subject matter, investigation and conclusions.

8.6 **Response of the complainant regarding the MOUs**

8.6.1 The complainant states that the Memoranda of Understanding between the ICC and Naspers dated 30 August 2010 and 30 March 2011 excluded the City of Cape Town who was the ultimate purchaser. There is no indication in the Provisional Report that the ICC or its officials acted as agents or were properly mandated to act on behalf of the City. Therefore factually or legally the MOUs are of no force and effect. It is stated that the Public Protector has not adequately investigated the irregularity in concluding the MOUs. These MOUs form the prelude to the actual transaction and has for all intents and purposes influenced the purchase price and sale of Erf 246. The MOUs are said to have created an expectation on behalf of the Seller, Naspers and furthermore inflicts serious and onerous obligations on the City which appears to be quite happy to accept the burden. The ICC had no mandate to do this. The questions are raised on what basis did they go ahead and to what extent did the City collude in these irregular acts?

8.6.2 The Public Protector’s determination in this regard was as follows:
8.6.2.1 The investigation revealed that paragraph 4 of the first MOU that was concluded on 30 August 2010 between Naspers and the ICC on the “NATURE, STATUS AND DURATION OF THIS MOU”, provides in sub-paragraph 4.1 that-

“The Parties agree that the provisions of this MOU constitute a statement of the Parties’ intention to implement the Transaction, and is intended to provide a framework within which the Parties may continue with negotiations and a summary of the material terms upon which further negotiations will be predicated and ... shall not create legally binding and enforceable rights and obligations on the Parties.”

8.6.2.2 The MOUs are accordingly not legally binding on the parties thereto, and particularly not the City, which was neither a party nor signatory thereto, but it is deemed to be an important source of information of how this transaction came about.

8.6.2.3 Furthermore, as stated in paragraph 5.3.12, the investigation revealed that Naspers had always intended to develop Erf 246 and accordingly the purpose of the MOU with Convenco was to ensure that Convenco bind Naspers to an agreement not to dispose of Erf 246 while Convenco explores the viability of the expansion. The City also confirmed that Convenco was charged with securing a commitment from Naspers to dispose of the property at a price to be negotiated by the parties. It is stated that this is accepted practice to ensure that Naspers does not negotiate with third parties. The investigation revealed that the transaction and subsequently the purchase consideration were duly approved by the Council on 27 October 2010 and 30 March 2011, which was ultimately the requirement that had to be met.

8.7 Response of the complainant regarding the fact that the investigation was restricted to the period August 2010 to 31 October 2012 and the sale of Erf 246 to the City
8.7.1 Concern is expressed that the Public Protector has restricted the investigation to the period August 2010 to 31 October 2012 and the sale of Erf 246 to the City. Yet it is clear from the Provisional Report that contrary to what the officials of Naspers had told the Public Protector, interest in Erf 246 had started prior to 2010. It is mentioned that the decision to restrict the investigation to the period August 2010 to 31 October 2012 has resulted in a narrow and incorrect finding on the true value of Erf 246. All indications are that there was much interest and activity regarding the acquisition of Erf 246 by the City far earlier than 2010. The Public Protector should therefore continue the investigation to attend to the aforesaid matters.

8.7.2 The Public Protector’s response in this regard is that the documentary, viva voce and other evidence gathered by the Public Protector preceded August 2010 (see paragraph 5.3.1 and paragraph 5.4.3 - interview of Mr M Richardson). However, most of the evidence relevant to the complaint emanated from and after that period, which explains the time period. This is confirmed by the subsequent response by the City that in September 2010 correspondence was entered into between Convenco and officials of the City regarding the possible acquisition and bulk rights of Erf 245 and Erf 246, Roggebaaii. The reason for this is that expansion towards Customs House was previously considered, but did not materialize. Following the provisional report, further information was obtained as reflected below and therefore the period of investigation was adjusted. Finally, whilst cognizance was taken of the surrounding circumstances, the investigation was centered on the sale of Erf 246 as per the complaint of the complainant (refer to paragraph 2.1 above).

8.8 Ancillary matters and issues raised by other parties

8.8.1 Issues raised by Mr S Lukey
8.8.1.1 During the investigation Mr S Lukey, Managing Director of S H Lukey & Associates (Pty) Ltd approached us and a meeting was held on 13 November 2012. He mentioned that the Erf that has been sold by Naspers to the City of Cape Town, was part of the “Northern Forshore Land Transaction” dating back to 1996 and that he was employed by Naspers / the City / Provincial Government at the time to be the project champion and certain work to be done when development in terms of the agreements were to take place. He alleges that Naspers / the City and the Provincial Government breached the contract resulting in damages and denial of rights.

8.8.1.2 Mr Lukey referred to a City of Cape Town Council recommendation (from a report that served before Council) of 18 October 2012 that apparently propose a resolution in respect of the land transactions relating to the ICC expansion including the granting of lease and “step-in –rights” over certain City-owned properties. He refers to the following alleged irregularities that informed the Council’s resolution:

8.8.1.3 Their proposed resolution only addresses one objector when there are allegedly in fact many. These include all those professional consultants related to the Joint Planning Agreement that obtained the current property rights, and were not paid. Apparently these parties have substantial claims against the City and related parties for outstanding fees and obligations in relation to the original land transaction. Apparently a number of tender objections have also been raised by various parties, in relation to related transactions such as processes, and professional appointments informing the viability and design of the proposed developments on the properties in question. The Auditor-General’s reports over the last two years, in relation to supply chain irregularities at the ICC, and in particular, to the proposed ICC expansion, are allegedly also being probed, as it is alleged that the ICC board and some of the current appointed professionals entered into irregular or unauthorised agreements. Apparently a Public Access to Information Act enquiry that was undertaken is also being probed, as the answers provided
by the City in respect of the enquiry are allegedly false, misleading and continue to perpetuate the lack of provision of material information.

8.8.1.4 The above report informing the resolution of Council, does allegedly not address the significant role of the objectors and the appointed Project Champion of the Joint Planning Venture team. This team obtained the material development rights on the land in question, and the Project Champion (Mr Lukey) was also instrumental in drafting the mechanics of the related agreements, over a period of 10 years. This has substantially been overlooked. No explanation has allegedly been given as to why the Joint Venture Agreement between the City, Naspers/Media24 and the Province, has not been adhered to. Apparently various agreements with consultants have not been resolved in terms of outstanding obligations and payments in respect of the above Joint Venture. The Land Transaction Agreement of 2005 and its attached agreements remain alive until all the suspensive conditions have been met, services agreements have been concluded and the necessary changes in policy or rights are in fact promulgated. He states that deviations from this agreement are therefore likely to be met with further objections e.g. the Sky Bridge Policy, Servitudes and delegated powers.

8.8.1.5 Mr Lukey also states that the resolutions of council also anticipate agreements to agree, in future (i.e. open ended agreements). The City, by virtue of these resolutions is apparently putting the cart before the horse by entering into agreements now, when substantial risks still exist including Public Participation, Parking, Traffic and related Town Planning Requirements including Servitudes, Services Agreements and Joint Development agreements that are still a work in progress and may not even materialise.

8.8.1.6 Mr Lukey concluded that the City should stay any decisions regarding this transaction until all the outstanding complaints are sufficiently and properly addressed on a face to face basis with the parties; thereby eliminating all risks. He recommends that an independent technical and related specialist
body, including the original mandated Joint Venture Team, that obtained the property rights without flaw, audits the transaction, and that an independent enquiry into the CTICC’s awards of professional consultants tenders in relation to the transaction is concluded prior to any further consideration of the matter.

8.8.2 Issues raised by Mr G Truen and other parties

8.8.2.1 Mr Lukey also referred Mr G Truen of Stefan Antoni Olmesdahl Truen Architects to the Public Protector, who raised the following allegations on 19 November 2012 in respect the architectural / design tender of the ICC expansion:

(a) The award of the tender to a Disqualified Party
   Apparently members of the tenderer CTICC2 namely; Stauch Vorster and VDMMA, were employed to do a design for the Naspers site prior to the tender and their drawings were used in the tender package. CTICC2 Architects in Association were then allowed to participate in and were awarded the tender when they should have been disqualified on the basis that their members had been involved with the bid specification committee.

(b) History of Irregular Appointments
   Convenco has allegedly twice previously appointed these two members of CTICC2 to work on projects where no tender process was implemented. These projects were for the expansion onto the Customs House site and then the expansion onto the Naspers site (prior to the tender).

(c) Deviation from the advertised evaluation process
   Apparently a two stage design evaluation process was set out in the tender. The designs would be submitted and assessed and the parties would each be given 24hrs to respond with changes to their design. This step was removed after the first presentation and the parties were not allowed to make revisions to their designs as set out in the tender, this had a material
effect on the scoring of the designs to the advantage of CTICC2 and to the
disadvantage of the consortium that won the tender, GAPP / Henning Larsen.

(d) Tender Awarded to party with lowest score.

The GAPP/Henning Larsen consortium won the tender with a score of 94.75 whilst CTICC2 [the acronym for one of the tenderers] came last out of the last 3 tenderers with a score of 80.29.

(e) Information withheld from tenderers other than CTICC2

As part of the land deal Naspers asked for 500 parking bays. This information was not given to the tenderers and none of the parties provided for it. CTICC2 however included a multi storey parking garage in their design because they had been informed that it was a requirement. The addition of this huge element that did not form part of the brief given to the tenderers should have disqualified their design. The tender document noted that the City already owned the properties when they did not.

(f) Use of a Disqualified Person to Resolve Objection

Instead of using an impartial person who is not part of the supply chain management unit, as set out in the relevant act, the ICC appointed Fairoza Parker who as General Manager Finance is the head of their supply chain management unit and disqualified to undertake this task.

(g) Defective Tender Period

The tender was not advertised for a period of 30 days as required by law; it was only advertised for 29 days.

8.8.3 Mr Lukey also referred Dr IP de Villiers of De Villiers Consulting Civil and Structural Engineers to us indicating on 19 November 2012 that he is aware of various investigations regarding a proposed land transaction agreement
and he would like to address his concerns to the Public Protector. He states that he is aware that the Public Protector will publish a report which may “severely affect and prejudice” his rights. He was requested telephonically to submit his concerns in writing, but he indicated Mr Lukey will lead in this matter.

8.8.4 Mr Lukey also referred Mr T Lochner of Lochner Procon Realtors Property Consultants and Administration Services to the PPSA. Mr Lochner advised on 19 November 2012 that he is an interested and affected party in relation to the land transaction between the City of Cape Town and Naspers. He further states that the consummation of the land rights was initiated through a sole mandate provided to his company by Naspers in 1996, which lead to the Joint Venture Agreement between the City and Naspers. He further said that it came to his attention that the Public Protector will publish a report on Erf 246 over which obligations are still outstanding to his company. He is concerned that the report will “drastically and adversely affect” his rights and interests. He requests a meeting as he would not want any actions that the City may take by virtue of the interpretation of the Public Protector's report, to negatively impact on the recovery of his rights.

9. CONCLUSION

9.1 Was the deal above board and of benefit to the people of Cape Town?

9.1.1 All the available evidence indicated that there is a need for expansion of the Cape Town International Convention Centre (ICC), which would result in benefits. The ICC is a State owned company and 51% of its shares are owned by the City. An analysis by the Graduate School of Business, University of Cape Town and Strategic Economic Solutions in August 2010 indicated that the economic benefits of expansion to the adjacent site are greater than the associated economic costs. The ICC indicated that it creates R2.3 billion economic spin off every year, leveraging public money to create economic activity and job creation. The ICC further contended that it
is operating at full capacity and need to expand to have a greater impact, including creating almost up to 10 000 jobs.

9.1.2 The ICC and the City stated that there were only two viable options for the expansion of the ICC, which required approximately 10 000 m² land. On 21 May 2010 the CEO of the ICC reported to Convenco Board that, due to the lack of response from the relevant government bodies to the ICC’s proposal to expand onto the Customs House site (Erf 14734 owned by the National Department of Public Works), the alternative option was being considered. He stated that significant progress had been made in the discussion with all interested parties pertaining to the ICC acquiring the right to utilize the sites of the City and Naspers for its planned expansion. The ICC explored expansion towards the block of vacant erven 245, 246 and 247 Roggebaai. The City already held ownership of Erf 245, Naspers ownership of Erf 246 and only a portion of Erf 247 (at that time owned by Lakeside City Trading) was needed.

9.1.3 Naspers Properties (Pty) Ltd confirmed that prior to the unsolicited approach by the ICC during 2010, they had no contact with Convenco and negotiated in good faith and at arm’s length, without undue influence. Erf 246 had not been in the market prior to the transaction. Naspers further stated that it had to secure adequate parking to replace the parking it would lose in selling Erf 246. The latter resulted in a sub-lease agreement between Naspers and Convenco.

9.1.4 The investigation found that on 27 October 2010 the Council approved the purchase of Erf 246 and authorized City representatives to negotiate the purchase thereof and on 30 March 2011 the Council approved that the Property Management Department purchase Erf 246 from Naspers for an amount of R106 000 000 (excluding VAT). The supply chain management prescripts and Policy of the City allow procurement through direct negotiation if goods are available from a single provider only, which was applicable in this case.
9.1.5 It was found that Erf 246 allows the owner currently to construct a building up to a height of 50 meters. The City however agreed contractually that it would not construct any structure on Erf 246 the height of which exceeds 30 meters and that it would ensure registration of the height restriction in favour of Erf 244 against the title deed of Erf 246, which condition shall be praedial and permanent in nature. The investigation revealed that the valuer was not aware of the height limitation at the time of conducting the valuation. The reason why the Chief Executive Officer of the ICC or the City failed to do so was not clear from the available evidence. Consequently the question arose whether such limitation would have changed the valuation and affected the basis of the purchase price, which is an integral part of the transaction. The evidence revealed that the maximum permissible floor area or bulk (the amount of square meters that the City will allow to be built on the property) connected to Erf 246 could still be utilised within the height limitation of 30 meters and that this would therefore not change the valuation. The professional review of the valuation which served as the basis for the purchase price of Erf 246, also confirmed this fact.

9.2 Was the purchase amount of R106 000 000 justified for the piece of land?

9.2.1 The evidence revealed that, even though Erf 246 is vacant and is currently being used for parking, it has a business potential and zoning, with development parameters of a maximum permissible floor area or bulk of 37000 m². As mentioned above this is the amount of square meters of floor area that is allowed to be built on such property and an important feature in determining the value thereof.

9.2.2 The Complainant stated that according to independent property experts quoted in the media, the property is valued at no more than R50 000 000.
9.2.3 An article in the Cape Times of 9 March 2012 quoted “top property analyst Erwin Rode” saying that such transactions are not an exact science but that his “best estimate of the market value of an ‘average’ stand in the Cape Town CBD is about R2 000 to R2 500 per bulk m² (about R48m).”

9.2.4 When Mr Rode of Rode & Associates (Pty) Ltd was interviewed regarding this matter, he expressed the view that the purchase price of Erf 246 was more or less within the range within which the market value of the property could have been at the time. When asked about his statement to the reporter of the Cape Times that his “...best estimate of the market value of an ‘average’ stand in the Cape Town CBD is about R2 000 to R2 500 per bulk m² (about R48m)”, Mr Rode checked his records and mentioned that this range is correct. He confirmed that one calculates the value of the property by multiplying the value per bulk m² with the PFA or bulk m² attached to the erf (in this case 37 000), for instance if a value of R2 250 per bulk m² is taken, the calculation is: 2 250 × 37 000 = R83 250 000. Mr Rode therefore confirmed his statement that the value of a stand in the Cape Town CBD was about R2 000 to R2 500 per bulk m², but not the total value in respect of Erf 246 as reported in the Cape Times (R48 000 000).

9.2.5 Mr M Mohamed, also referred to in the Cape Times article, could not provide any evidence relating to the issues under investigation.

9.2.6 The investigation revealed that the ICC obtained a valuation from Ms J Falck of Appraisal Corporation dated 20 August 2010 concluding that a willing buyer will pay a willing seller R104 000 000 in the open market for the Erf 246, Roggebaai as at 10 August 2010. The valuer opined that the property has excellent business potential and above average exposure. Subsequently an updated valuation on Erf 246 was conducted and the valuation was increased with R1 000 000 to R105 000 000 because of the recent greater interest in that area. This resulted in a valuation of R2 850 per bulk m². The valuation report referred to and analysed the details of six
comparable market transactions, in the cases of five of which the purchase price were in excess of R2 800 per bulk m².

9.2.7 The valuation of Old Mutual Investment Group: Property Investment for Naspers of 1 July 2010 valued the property at R140 000 000. (Two valuations obtained by Naspers more than a year prior to the valuation of Appraisal Corporation, arrived at values of R103 000 000 and R92 500 000 respectively.)

9.2.8 The following valuations were therefore conducted on Erf 246:

<table>
<thead>
<tr>
<th>DATE</th>
<th>VALUATION REQUESTED BY:</th>
<th>VALUATION BY:</th>
<th>VALUATION</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 April 2009</td>
<td>Naspers</td>
<td>Alliance Group</td>
<td>R92 500 000</td>
</tr>
<tr>
<td>1 April 2009</td>
<td>Naspers</td>
<td>Old Mutual</td>
<td>R103 000 000</td>
</tr>
<tr>
<td>1 July 2010</td>
<td>Naspers</td>
<td>Old Mutual</td>
<td>R140 000 000</td>
</tr>
<tr>
<td>20 August 2010</td>
<td>Cape Town ICC</td>
<td>Appraisal Corporation</td>
<td>R104 000 000</td>
</tr>
<tr>
<td>2011</td>
<td>Cape Town ICC</td>
<td>Appraisal Corporation</td>
<td>R105 000 00</td>
</tr>
</tbody>
</table>

9.2.8 The Public Protector also commissioned an independent professional review by Steer & Co, which concluded that the valuer (Ms Falck of Appraisal Corporation) applied her mind correctly in determining the market value and that a fair market value of Erf 246, Roggebaai as at 10 August 2010 was R104 000 000.

9.2.9 The overwhelming evidence revealed that the valuation of Appraisal Corporation, of R 104 000 000 and subsequently updated to R 105 000 000, which served as the basis for the purchase price of Erf 246 Roggebaai, was correct.
9.2.10 The purchase price of Erf 246 for R106 000 000 is R2 000 000 more than the initial valuation that was obtained by the Cape Town ICC on 20 August 2010 and R1 000 000 more than the subsequent updated valuation. The difference is not considered to be material in view of the fact that the other contracting party obtained a valuation in the amount of R140 000 000.

9.3 Is there collusion between the City of Cape Town and Naspers to short change taxpayers?

9.3.1 For the reasons mentioned in paragraph 9.2, the investigation did not find evidence of collusion between the City of Cape Town and Naspers to short change taxpayers. Naspers stated that an unsolicited approach by the ICC led to the negotiations. On the other hand, the City and ICC confirmed that after their first option to expand towards Erf 14734 owned by the National Department of Public Works did not materialise, Naspers was approached with a view to acquiring Erf 246.

9.3.2 In this regard during the investigation, the following issue was discovered, which required an explanation. A clause in the Memorandum of Understanding between the ICC and Naspers provided that a letter of commitment from both the City and the Province would be required to assist Naspers to secure an alternative property for the future development of Naspers’ business interests and commit to supporting Naspers in matters relating to zoning, land use and the like. This was clarified by a City official as meaning all that could be done, was to assist Naspers like any investor who approaches the City to acquire land by means of a search on the database or if they knew of anything in the private sector. If City property was available, Naspers would have been required to follow normal procedures. The City official confirmed that they could not find anything that would satisfy Naspers’ needs.

9.4 Were there individuals who benefitted from the deal or “whose palms were being greased” through this deal?
9.4.1 The investigation did not yield evidence that individuals improperly benefited from the transaction to purchase Erf 246 Roggebaai.

9.4.2 It was found that the property deal was beneficial to Naspers in that, according to a valuation by Appraisal Corporation of 17 September 2010, the value of their building (Erf 244) with the parking arrangement of 500 underground reserved parking bays and height restriction imposed on Erf 246 will increase with R64 200 000. On the other hand the construction costs to be undertaken by the ICC / City for the parking would be recovered approximately by the 20th year of the lease, from when a profit would be gained. Despite these benefits to Naspers, the City was unable to negotiate a better price, which is somewhat disconcerting.

9.4.3 Nevertheless, the investigation revealed that the City and the ICC needed the acquisition of Erf 246 in order to achieve the expansion of the ICC. As such the City might to some extent have been over a barrel to accept the purchase price.

9.5 Is approval by the City Council required to consent to and register a height restriction against Erf 246 Roggebaai?

9.5.1 The report from the City to Council dated 20 October 2010 described Erf 246 as for use of General Business (B6), with a height limitation of 50 meters and a maximum permissible floor area of 37000 bulk m². On the basis of inter alia this information, the Council approved in principle on 27 October 2010 that Erf 246 is purchased. However, the sale agreement between Naspers and the City stipulates Erf 246 as a property that will, after transfer, have a height restriction of 30 meters. The City will therefore after registration acquire a property with diminished use compared to that which it had approved to purchase. Theoretically, in future after the lease by the ICC of Erf 246 had expired, the City as owner will be unable to build a tower building on Erf 246 higher than 30 meters. The fact that the height limitation
might not have affected the valuation or purchase price is neither here nor there in this regard, it is about potential use. For this reason the City officials should have informed Council of the height limitation prior to its resolutions. The Council had two opportunities to do so, i.e. at the time of the City’s reports / submissions dated 20 October 2010 and again on 10 March 2011. The investigation could not find any acceptable reason for the City’s failure to do so.

9.5.2 The transaction in this matter actually requires two approvals, firstly the acquisition of Erf 246 Roggebaai by the City by registration in the Deeds office and then alienation of the real right to a height of 50 meters on that property and limiting it to 30 meters, to be registered in favour of Erf 244 against the title deed of Erf 246. In terms of the City of Cape Town By-law relating to the Management and Administration of the City of Cape Town’s Immovable Property, it is the Council that may alienate municipal immovable property (which includes real rights thereto) under such conditions, terms and circumstances as it may prescribe. In terms of Regulation 5(1) of the Municipal Asset Transfer Regulations such alienation has to be approved by Council. The investigation could not find evidence that the height limitation was communicated to and approved by Council. Accordingly, registration of the height limitation without Council approval will contravene the aforesaid provisions.

9.6 Did the City of Cape Town, as the prospective purchaser, take charge of the negotiations which led to the sales agreement?

9.6.1 The investigation found that the ICC proceeded with negotiations regarding the purchase of Erf 246, obtaining valuations in connection therewith and entered into Memoranda of Understanding with Naspers, with little involvement of or consultation with the City’s relevant functionary, i.e. the Property Management Department. City officials raised concern in this regard to the ICC in person and in writing on 26 October 2010 when the
negotiations were already at an advanced stage. The investigation did not reveal any reasonable explanation why the City, even though the purchaser of Erf 246 (an integral part to the development), was never party to the memoranda of understanding between the ICC and Naspers. The failure on the part of the City to take charge of the negotiations from the outset leading to the sales agreement, constituted maladministration.

9.6.2 Due diligence in this regard could possibly have resulted in a better negotiated price

10. FINDINGS

The Public Protector makes the following findings:

10.1 The transaction for the purchase of Erf 246 Roggebaai is found to be above board and to be generally of benefit to the public.

10.2 The purchase price of Erf 246 for R106 000 000 is R2 000 000 more than the initial valuation that was obtained by the Cape Town ICC on 20 August 2010 and R1 000 000 more than the subsequent updated valuation. Reports or allegations that the value of the relevant property was no more than R50 000 000, were not substantiated by the evidence obtained.

10.3 No evidence of collusion could be found between the City of Cape Town and Naspers, to short change taxpayers.

10.4 No evidence could be found to substantiate the allegation that individuals improperly benefited from the transaction to purchase Erf 246 Roggebaai.

10.5 The officials of the City failed to obtain approval from the City Council in terms of Regulation 5(1) of the Municipal Asset Transfer Regulations read with section 4(1) of the City of Cape Town By-law relating to the Management and Administration of the City of Cape Town’s Immovable
Property prior to concluding an agreement with Naspers to register a height restriction against Erf 246 in favour of Erf 244 to the title deed of the Erf 246, which condition shall be praedial in nature and endure in perpetuity. This failure constituted maladministration.

10.6 The City, as the purchaser in this transaction, failed to take charge of the negotiations from the outset leading to the sales agreement. This failure constituted maladministration.

11. **REMEDIAL ACTION**

The Public Protector directs the following remedial action to be taken as envisaged by section 182 of the Constitution:

11.1 The City Manager is to ensure that the condition to the sale agreement of 18 November 2011 between the City and Naspers, regarding a height restriction against Erf 246 in favour of Erf 244, (to be registered to the title deed of the Erf 246, which condition shall be praedial in nature and endure in perpetuity), be referred to Council for consideration and resolution.

11.2 The City Manager, after having had regard to roles and responsibilities of officials, should consider taking disciplinary action with a view to establish whether any official has neglected his / her duty.

11.3 As far as the ancillary issues and complaints relating to the Cape Town ICC expansion discussed in paragraph 8.8 are concerned, the Executive Mayor is to establish a task team comprising of *inter alia* the City Ombudsman and the Head of the Forensic Investigation Unit of the City to attend to all allegations and to report back to the Mayor, Municipal Manager and Complainants concerned.
12. MONITORING

The City Manager is to:

12.1 Submit to the Public Protector an implementation plan in respect of the remedial action to be taken in paragraph 11 above within 30 days from the date of this report; and

12.2 Submit a report to the Public Protector on the implementation of the remedial action referred to in paragraph 11 above within 90 days from the date of this report.

ADV T N MADONSELA
PUBLIC PROTECTOR OF THE REPUBLIC OF SOUTH AFRICA
Date: 03/12/2012

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