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**Integration of social, economic and environmental factors into land-  
use/town planning decisions in eThekweni Municipality.**

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(Environmental Law) at the University of KwaZulu-Natal, Pietermaritzburg Campus**

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## ABSTRACT

The aim of the study is to show how eThekweni Municipality ('eThekweni') incorporates the principles of sustainable development and relevant environmental considerations into its development planning decision-making. The study included assessment of eThekweni's land management planning and land-use management system, particularly the use of the Durban Metropolitan Open Space System (D'MOSS) in considering environmental factors, which are explicitly provided for in the Spatial Planning and Land Use Management Act 16 of 2013 (SPLUMA) and the eThekweni Municipality Spatial Planning and Land Use Management By-law, 2016 ('Planning By-law'). It benchmarks eThekweni's environmental considerations in its planning, parallel to identifying areas in need of improvement in eThekweni planning decision-making. The study finds that eThekweni uses D'MOSS to consider environmental factors as part of its planning decision-making on land development application ('application') in terms of the Planning By-law (s 44((t) of the Planning By-law; and Regulations 9.4.1 and 9.5 of the Central, Inner-West, North, Outer-West and South (eThekweni Regional) Land Use Schemes ('Schemes')). eThekweni included D'MOSS as part of the Schemes in 2010 to allow regulation of activities within D'MOSS areas in terms of Schemes (Municipal Spatial Development Framework 2019/2020 Final Draft Report [May 2019] at 116).

Schemes require prospective developers to obtain 'environmental approval' for undertaking activities within D'MOSS areas prior to undertaking such activities in order to protect biodiversity in those areas by preventing transformation of natural areas flagged by D'MOSS (Regulations 9.4 and 9.5 of Schemes; and Davids et al 12). Environmental approval decision-making includes consideration of environmental/biodiversity impact advice after screening of proposed activities (proposal), by eThekweni's Environmental Planning and Climate protection Department (Environmental Department) 'for potential' impacts on biodiversity (Regulations 9.4 and 9.5. of Schemes; and Davids et al 12). This Department would receive an application/proposal 'proposed within or adjacent to D'MOSS', screen and provide comment/advice to eThekweni planning decision-maker or the enquirer/applicant, whether or not it supports such proposal from an environmental perspective (Regulations 9.4.1 and 9.5 of Schemes). It is found that although environmental consideration is undertaken as part of eThekweni planning, decision-making on Schemes' D'MOSS provisions lacks synergy with the Planning By-law decision-making on categories of applications regulated in terms of the Planning By-law.

The study's findings conclude that the Planning By-law and Schemes need to be reviewed and possible amendments proposed regarding lacking synergy, in order to align the two. The synergy will provide clarity as to whether or not it is necessary to obtain environmental approval where the proposal also needs Planning By-law approval.

Other municipalities may benefit from this study by benchmarking their environmental considerations in their planning with those of eThekweni while learning about areas that need improvement in eThekweni planning decision-making and -processing.

Key words: municipal planning, land development applications, land management planning, land-use management, sustainable development, environmental considerations, environmental factors, comments, synergy, D'MOSS, Schemes, eThekweni planning decision-making.

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# CHAPTER 1

## INTRODUCTION

### I THEORETICAL FRAMEWORK

It is critical that certain concepts and how they evolved are explained so that when this study analyses eThekweni Municipality ('eThekweni')'s integration of environmental considerations into its land development applications ('applications') decision making. The terminology used when mentioning critical concepts (including planning, municipal planning, environment, sustainable development and Durban Metropolitan Open Space Systems (D'MOSS)) must be understood. Phases of planning; how municipal planning fits into the environment and vice versa to achieve development that is sustainable; municipal planning legal mandate issues, which were first clarified by case law prior to being written into current planning legislation; and problem areas are described and contextualised in this chapter.

### II CONCEPTUAL AND CONTEXTUAL BACKGROUND

Planning involves 'land management planning', which deals with prior drawing of spatial plans/tools/frameworks for use when administering land use changes; and 'land development management', which regulates/administers land use changes 'as determined in the original plan/tool/framework'.<sup>1</sup> The latter involves consideration of, and making-decisions on, various applications, which are normally undertaken by explicitly authorised bodies/persons.<sup>2</sup> Such bodies/persons will be identified as decision-makers for those applications. Planning in South Africa is regulated by the Spatial Planning and Land Use Management Act.<sup>3</sup> It legislates mostly municipal planning, which the Constitution of the Republic of South Africa, 1996 ('Constitution') directly assigns to municipalities exclusively, as was affirmed by the Constitutional Court ('CC') in *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others*.<sup>4</sup>

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<sup>1</sup> J van Wyk 'The Law on Planning and the Environment' in ND King, HA Strydom & FP Retief (eds) *Fuggle and Rabie's Environmental Management in South Africa* (2018) at 1137–1138, 1148–1152.

<sup>2</sup> J van Wyk (n 1) at 1138.

<sup>3</sup> 16 of 2013 (SPLUMA).

<sup>4</sup> (CCT8909) [2010] ZACC 11 (*Gauteng Development Tribunal*) paras 70 and 86; Schedule 4 Part B of Constitution; and section 5(1)(c) of SPLUMA; DJN Keyser *The implications of recent planning and environmental reform for the South African planning profession* (Master of Art and Science in Urban and Regional

Municipal planning was first defined by the CC in 2010 after the Constitution had been promulgated in 1996, in *Gauteng Development Tribunal* as being broadly

*‘the control and regulation of the use of land within the municipal area where (the) nature, scale and intensity of the land use do not affect the provincial planning mandate of provincial government or the national interest.’*<sup>5</sup>

The CC provided for this definition about 14 years after the Constitution had provided for a municipal planning mandate to municipalities.

SPLUMA, which came into effect on 1 July 2015, has adopted the abovementioned definition of ‘municipal planning’.<sup>6</sup> The eThekweni Municipality: Spatial Planning and Land Use Management By-law,<sup>7</sup> which started regulating eThekweni planning on 27 August 2016 (a little over a year after SPLUMA had come into effect) repeated this definition for application in eThekweni.<sup>8</sup> The Planning By-law is a replica of SPLUMA. Both SPLUMA and the Planning By-law have given effect to the Constitution and the abovementioned CC judgment in this regard.<sup>9</sup> SPLUMA also defines provincial and national planning.<sup>10</sup>

Both SPLUMA and the Planning By-law describe planning as including ‘compilation, approval and review of IDPs’, as well as Spatial Development Frameworks (‘SDF’) and land use schemes (‘Schemes’), as part of planning.<sup>11</sup> Spatial plans/tools/frameworks include the SDFs, which are developed as part of an Integrated Development Plan (‘IDP’) and Schemes.<sup>12</sup> The development of these tools is part of the abovementioned land management planning.<sup>13</sup> SPLUMA and the Planning By-law define an

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Panning thesis, North-West University, 2018) at 46; and J de Visser and J de Visser and X Poswa ‘Municipal Law Making under SPLUMA: A Survey of Fifteen “First Generation” GDT Municipal Planning By-Laws’ (2019) 22 PER 1 at 3..

<sup>5</sup> *Gauteng Development Tribunal* supra note 4 para 57.

<sup>6</sup> Section 5(1)(c); and J van Wyk (n 1) at 1142.

<sup>7</sup> 2016 (Planning By-law).

<sup>8</sup> Sections 5(c) and 94 of the Planning By-law; and Municipal Spatial Development Framework 2019/2020 Final Draft Report (May 2019) at 44.

<sup>9</sup> Preamble to SPLUMA; Sections, 5(c) of SPLUMA; and 5(1)(c) of Planning By-law.

<sup>10</sup> Section 5.

<sup>11</sup> Sections 5(1)(a) & (b); 24 of SPLUMA; and 5(a) & (b); and 14 of the Planning By-law; and see van Wyk (n 1) at 1147–1148 & 1151–1154.

<sup>12</sup> Sections 9(5)(a) of Planning By-law; 20(2) of SPLUMA; 26(e) of Local Government: Municipal Systems Act 32 of 2000 (MSA); and J van Wyk (n 1) at 1142 & 1147.

<sup>13</sup> Van Wyk (n 1) at 1147–1148 & 1151–1154.

SDF as a ‘spatial vision for a particular area’.<sup>14</sup> The SDF is used to manage land use by showing development types which are spatially appropriate for certain pieces of land.<sup>15</sup>

eThekwini is also vested with the abovementioned municipal planning mandate directly from the Constitution, as provided in SPLUMA and as in terms of the Planning By-law applied within its area.<sup>16</sup> eThekwini has developed its SDF (‘the eThekwini SDF’) to provide *inter alia* a basis for decisions on applications while providing a framework for the development of schemes.<sup>17</sup> Schemes are used for allocation of land-use rights.<sup>18</sup> There are other environmental tools which eThekwini has developed/is developing, in addition to these planning tools, as part of its forward planning, in terms of SPLUMA, MSA and the Planning By-law, however, such tools are dealt with in chapter two. eThekwini considers that municipal planning includes ‘planning of open spaces so that the natural environment, specifically the ecosystem goods and services it provides within the municipality, are adequately protected’.<sup>19</sup>

eThekwini Council decided to integrate its Durban Metropolitan Open Space Systems (D’MOSS) into its schemes in 2010, as part of its planning to include open space to encourage and enable protection of the natural environment and ecosystem goods and services.<sup>20</sup> December 2010 marked eThekwini’s history-making transition, when it moved to integrate D’MOSS into Schemes in order to regulate activities taking place within D’MOSS.<sup>21</sup> D’MOSS has been described as a system, a plan, a layer or an overlay. D’MOSS ‘is a system of open spaces incorporating areas of high biodiversity value (private- and public-owned) linked together in an ecologically viable network of open spaces and it is composed of a variety of habitat types.’<sup>22</sup> An area where D’MOSS is overlaid becomes a D’MOSS Controlled area and is defined in scheme, as meaning

*‘any area demarcated upon the map by overprinting of a green hatched pattern (or by a green layer on the GIS), where, by reasons of the natural biodiversity, the existence of flora and fauna,*

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<sup>14</sup> Sections, 9(1)(a) of Planning By-law; 12(1)(a) of SPLUMA; and J de Visser and X Poswa (n 4) at 7.

<sup>15</sup> J de Visser and X Poswa (n 4) at 2.

<sup>16</sup> eThekwini Municipality: Development Assessment Guidelines, undated (but making reference to Turpie J, et al (2017) Promoting Green Urban Development in Africa: Enhancing the relationship between urbanisation, environmental assets and ecosystem services. Part I: A Spatial Valuation of the Natural and Semi-Natural Open Space Areas in eThekwini Municipality. World Bank, Aecom, Anchor Environmental) at page after page 1.

<sup>17</sup> Sections 22(1) & 42(1)(b) of SPLUMA; s 44(1)(f) of Planning By-law; Municipal Spatial Development Framework 2019/2020 (n 8 at 15; and see J de Visser and X Poswa (n 4) at 17.

<sup>18</sup> Ibid.

<sup>19</sup> Development Assessment Guidelines (n 16) at page after page 1.

<sup>20</sup> Ibid.

<sup>21</sup> *Le Sueur v Ethekwini Municipality* (9714/11) [2013] ZAKZPHC 6 (30 January 2013); and Municipal Spatial Development Framework 2019/2020 (n 8) at 116.

<sup>22</sup> Municipal Spatial Development Framework 2019/2020 (n 8) at 116–118.

*topography, or the environmental goods and services provided or other like reasons, development or building may be prohibited, restricted, or permitted upon such conditions as may be specified having regard to the nature of such area’.*<sup>23</sup>

D'MOSS flags areas needing schemes' protection, by restricting activities that may be undertaken within D'MOSS.<sup>24</sup> D'MOSS is not a law but Schemes, which talk to D'MOSS, are law.<sup>25</sup>

Schemes provide that–

- ‘(a) Without the prior written approval of the Municipality, no person shall within a D'MOSS Controlled Area:*
- (i) develop, excavate or level any land; or*
  - (ii) remove any natural vegetation; or*
  - (iii) erect any structure of any nature whatsoever; or*
  - (iv) dump on;*
  - (v) permit any domesticated animal to cause harm to flora and fauna or the environment generally; or*
  - (vi) carry out any work’.*<sup>26</sup>

These Scheme provisions are taken from the Central Scheme. However, they are similar for all four other Schemes, namely Outer-West, Inner-West, South and North.<sup>27</sup> The Schemes control land use and change or impose ‘development controls’ (such as controls on land ‘within D'MOSS’) at application processing and decision-making.<sup>28</sup> Although a list of activities needing prior environmental approval prior to undertaking them is specified in the Schemes, the activity ‘carry out any work’ means that any activity/development proposal within D'MOSS requires prior environmental approval by eThekwini.<sup>29</sup> Schemes are used for determination of appropriate development that promotes *inter alia*, ‘minimal impact on public health, the environment and natural resources’.<sup>30</sup> eThekwini Development Assessment Guidelines; Boon et al, Keyser, Davids et al and Humby consider D'MOSS to be a plan for

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<sup>23</sup> Regulation 2.1 of Schemes.

<sup>24</sup> Regulations 9.5(b) of Central, 9.5.2 of North, and 9.4.1 (b) of the three other Schemes read with Regulation 2 of the Schemes.

<sup>25</sup> Section 16(1)(a) of Planning By-law.

<sup>26</sup> Regulation 9.5(a) of Central Scheme.

<sup>27</sup> Ibid and 9.4.1(a) of the three other Schemes.

<sup>28</sup> eThekwini Municipality: Land Use Management available at [http://www.durban.gov.za/City\\_Services/development\\_planning\\_management/Pages/Land-use-Management-\(LUMs\)-2.aspx](http://www.durban.gov.za/City_Services/development_planning_management/Pages/Land-use-Management-(LUMs)-2.aspx), accessed on 16 April 2019.

<sup>29</sup> See Regulation 9.5(a)(vi) of Central Scheme.

<sup>30</sup> Section 15(1)(c) & (d) of Planning By-law.

eThekwini to manage biodiversity protection and protection of services provided to environment by ecosystems within or ‘adjacent to D’MOSS’.<sup>31</sup> These introduce other triggers for eThekwini environmental considerations, which are not provided for in the Schemes’ provisions. The analysis of how proposal within D’MOSS, adjacent to D’MOSS and on environmentally sensitive areas impact on planning decision-making is dealt with below.

eThekwini had been using D’MOSS to protect biodiversity within its area since about 1989, as eThekwini Council’s policy directive, which was problematic from legal status perspective, compared with land use zones, which were already incorporated in Schemes.<sup>32</sup> At the time of D’MOSS as policy directive, some development activities, ‘within D’MOSS’ areas, would be undertaken by developers, without considering environment falling under D’MOSS, because they did not know about D’MOSS’s existence or did not understand its role.<sup>33</sup> The D’MOSS overlay amendment was undertaken by the MPT in September and December 2016 for areas with Schemes and by eThekwini Council for areas outside the Schemes.<sup>34</sup> D’MOSS is also integrated in eThekwini’s IDP and SDF for spatial planning to protect environment.<sup>35</sup>

eThekwini’s integration of D’MOSS into Schemes was challenged, just after eThekwini Council made a decision to integrate, before the KwaZulu-Natal High Court in *Le Sueur v Ethekwini Municipality*.<sup>36</sup> The court considered environment as constitutional listed functional area of concurrent competency for national and provincial spheres of government, which literally excluded municipalities’ mandate to regulate environment, when read in isolation of other provisions.<sup>37</sup> However, the High Court also considered another constitutional provision which gives municipalities competency to perform any matter that is incidental to their effective planning<sup>38</sup> It decided that eThekwini’s integration of D’MOSS into Schemes

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<sup>31</sup> DJN Keyser (n 4) at 124; R Davids, M Rouget and R Boon et al ‘Identifying ecosystems service hotspots for environmental management in Durban, South Africa’ (2016) *Bothalia – African Biodiversity & Conservation* 1 at 3; ‘T Humby ‘Localising Environmental Governance: The Le Sueur Case’ (2014) 17:4 *Potchefstroom Electronic Law Journal* 1660 at 1660; W Freedman ‘The Legislative Authority of the Local Sphere of Government to Conserve and Protect the Environment: A Critical Analysis of *Le Sueur v eThekwini Municipality* [2013] ZAKZPHC 6 (30 January 2013)’ (2014) 17:1 *Potchefstroom Electronic Law Journal* 567 at 584; and Development Assessment Guidelines’ (n 16) at page after 1.

<sup>32</sup> Section 94 of Planning By-law; W Freedman (n 31) at 584; and Municipal Spatial Development Framework 2019/2020 (n 8) at 44 and 116.

<sup>33</sup> Development Assessment Guidelines (n 16) at page before 2.

<sup>34</sup> Municipal Spatial Development Framework 2019/2020 (n 8) at 116.

<sup>35</sup> Regulation 2.1 of Central (and other three) Schemes; Durban State of Biodiversity Report 2017/2018 page 6; and Municipal Spatial Development Framework 2019/2020 (n 8) at 116.

<sup>36</sup> *Le Sueur* supra note 21.

<sup>37</sup> Schedule 4 Part A of Constitution.

<sup>38</sup> Schedule 4 Part B read with section 156 (1), (2), and (5), of Constitution; and *Le Sueur* supra note 21 para 29.

was authorised because it regulated environment incidental to its planning.<sup>39</sup> This High Court decision signifies that municipality's regulation of environment is limited in this regard, that municipalities do not have legal mandate to regulate on environment in isolation of its planning.

The need to take care of environment is enshrined in the Constitution, under environmental right, which requires all government spheres, including eThekweni, to protect, promote and fulfil *inter alia* such right, including human health and well-being.<sup>40</sup> SPLUMA and the Planning By-law consist of these similar requirements.<sup>41</sup> The Constitution's protection of ecology is one of 'important features of' the right to environment because it 'introduced the internationally-accepted concept of sustainable development'.<sup>42</sup>

NEMA gave effect to environmental right and binds eThekweni (as state organ) to ensure consideration of social, economic and environmental factors into its planning decision-making in terms of other legislation (including SPLUMA and/or the Planning By-law), with a view that such factors' consideration would ensure development that is sustainable.<sup>43</sup> SPLUMA has requirements in line with this obligation.<sup>44</sup> This study seeks to show how eThekweni is implementing this obligation in its applications' decision-making. The term 'environment' is defined in NEMA as meaning 'land, water, atmosphere of the earth, micro-organisms, plant or animal life and interrelationship among and between' any of these, 'within which humans exist and how any of them affect the 'health and wellbeing' of humans.<sup>45</sup> Environment is therefore either of or a combination of abovementioned aspects; therefore, reference to a certain aspect of environment must be explicit. This study will show how different aspects of environment are integrated in eThekweni planning decision-making.

The abovementioned interpretation by eThekweni of what the planning mandate involves and the meaning of municipal planning, constitutional environmental right, NEMA and SPLUMA 'sustainable development' factors/principles have formed the basis of current

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<sup>39</sup> *Le Sueur* supra note 21 para 40; Schedule 4 Part B read with s156(1), s156(2), and s156(5) of Constitution; J Van Wyk (n 1) at 1143; T Humby (n 31) at 1677 and 1680; and W Freedman (n 31) at 584.

<sup>40</sup> Sections, 7(2) & 24 of Constitution; Johan G Nel, W du Plessis and Anel du Plessis 'Instrumentation for local environmental governance' in ND King et al (eds) *Fuggle and Rabie's Environmental Management in South Africa* (2018) at 95; and J van Wyk (n 1) at 1146.

<sup>41</sup> Sections, 2(4) of NEMA; and 7 of SPLUMA.

<sup>42</sup> PGW Henderson 'Some Thoughts on Distinctive Principles of South African Environmental Law' (2001) 8:2 *South African Journal of Environmental Law and Policy* 139 at 149–150.

<sup>43</sup> Sections, 24(b) of Constitution, 2(4)(a) of NEMA, & 7 of SPLUMA; and A Blackmore 'The relationship between the NEMA and the Public Trust Doctrine: The Importance of the NEMA Principles in Safeguarding South Africa's Biodiversity' (2015) 20:2 *The South African Law Journal of Environmental Law and Policy* 87 at 93.

<sup>44</sup> Preamble to SPLUMA read with its objective in section 3(d).

<sup>45</sup> Section 1 of NEMA.

eThekwini's integration of environmental considerations into its planning regime. eThekwini had not even had a chance to implement the use of Schemes' provisions on D'MOSS on planning decision-making when its D'MOSS integration into Schemes was challenged however the High Court was not called on to deal with the content of such Schemes provisions, to assess their use in applications decision-making, which this study seeks to show.

eThekwini's planning process, in terms of the Planning By-law, is divided into a pre-application enquiry, where a prospective developer enquires with relevant eThekwini office to determine municipal line functions or other government authorities to comment on application, and an application lodging whereby a fully packaged application is lodged for consideration and decision-making.<sup>46</sup> At the enquiry stage, the prospective developer may determine and obtain approvals required in terms of other relevant legislation such as environmental authorisation (EA) in terms of NEMA-Environmental Impact Assessment Regulations, 2014,<sup>47</sup> where proposal triggers it as the Planning By-law requires that such EA be obtained prior to its application processing.<sup>48</sup> Schemes require prospective developers for developments to obtain approval from eThekwini (as a decision-maker) prior to undertaking such activity, while the Planning By-law requires approval for undertaking any categorised application from authorised body/person (decision-maker).<sup>49</sup> The Schemes require all activities proposed within D'MOSS to be approved prior to being undertaken.<sup>50</sup> It will be assessed in this study if any restricted D'MOSS activity is linked to any of the categorised planning applications regulated in the Planning By-law, to be dealt with in chapter two.

For protection of environment, within D'MOSS, eThekwini Schemes' provisions in respect of D'MOSS regulate mandatory consultation with eThekwini Deputy Head: Environmental Planning and Climate Protection (DH: Environmental Department) to advise on development proposals involving any Schemes' listed activity within D'MOSS.<sup>51</sup>

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<sup>46</sup> Sections 21(2) & (6) read with 22(1) & (2) of Planning By-law.

<sup>47</sup> EIA Regulations.

<sup>48</sup> Sections 22(2) read with 44(1)(z) of Planning By-law; and 42(2) of SPLUMA

<sup>49</sup> Regulations 9.5(a) of Central, 9.4.1 (a) of Inner West, 9.5.1 of North, 9.4.1(a) of Outer West and 9.4.1(a) of South, and Regulation 2 (definition) of, Schemes; section 21(1) of Planning By-law; J van Wyk (n 1) at 1138; DJN Keyser (n 4) at 124; R Davids ...et al 'Spatial analysis of threats to ecosystem services hotspots in Greater Durban, South Africa' South Africa' (2018) *PeerJ* 1–25 at 3;and Richard Boon, Jessica Cockburn and Errol Douwes et al 'Managing a threatened savanna ecosystem (KwaZulu-Natal Sandstone Sourveld) in an urban biodiversity hotspot: Durban, South Africa' (2016) available at <https://abcjournal.org/index.php/abc/article/view/2112/20134>, accessed on 16 April 2019 at paragraph titled 'Planning application and biodiversity impact assessment'. Inner West, Outer West, and South Schemes (other three Schemes).

<sup>50</sup> Ibid.

<sup>51</sup> Ibid.

The genesis of municipalities' ensuring sustainable development in planning includes assessing their skills set and capability of officials involved in processing applications in order to ensure appropriate processing of applications.<sup>52</sup> eThekweni has capacitated itself with dedicated line functions, including the Environmental Planning and Climate Protection Department ( 'Environmental Department') to advise on biodiversity considerations, Health to advise on environmental health and well-being issues, and Pollution Control to advise on air quality issues, for consideration during application processing/decision-making in terms of Planning By-law.<sup>53</sup>

A requirement to screen development proposal involving any Schemes' listed activity 'within D'MOSS' is a regulated trigger for environmental consideration in terms of Schemes and/or Planning By-law. This study will show whether or not consideration of environmental impacts on areas 'adjacent to D'MOSS and environmentally sensitive areas'<sup>54</sup> is also regulated in the Planning By-law. Planning decision-makers are obligated to consider environmental comments from relevant eThekweni line function, including Environmental Department. The Planning By-law does not defer from consideration of comments because planning application is for development within D'MOSS, adjacent to D'MOSS or within environmentally sensitive area. However, the Environmental Department may comment on a development application because of such application triggering requirements in terms of environmental legislation<sup>55</sup> administered by other government authorities<sup>56</sup> because planning decision-makers are required to ensure that such requirements are complied with.<sup>57</sup> Requirements for screening of proposals

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<sup>52</sup> JG Nel, A du Plessis and F Retief 'Key elements of municipal action' in A du Plessis (Ed) Environmental Law and Local Government in South Africa (2021) at 2–30.

<sup>53</sup> Sections 21(2) & 22(1) of Planning By-law; The Role of Biodiversity Impact Assessment in Protecting Ecosystems accessed at [http://www.durban.gov.za/City\\_Services/development\\_planning\\_management/environmental\\_planning/Climate\\_Protection\\_Biodiversity\\_Impact\\_Assessment/Pages/The-Role-of-biodiversity-impact-assessment-in-protecting-D'MOSS.aspx](http://www.durban.gov.za/City_Services/development_planning_management/environmental_planning/Climate_Protection_Biodiversity_Impact_Assessment/Pages/The-Role-of-biodiversity-impact-assessment-in-protecting-D'MOSS.aspx), accessed on 19 June 2020; Application Procedures available at [http://www.durban.gov.za/City\\_Services/development\\_planning\\_management/Documents/Application%20Procedure%20for%20Land%20Development.pdf](http://www.durban.gov.za/City_Services/development_planning_management/Documents/Application%20Procedure%20for%20Land%20Development.pdf), accessed on 11 September 2019 at 1. The planning official includes 'Senior Professional Planner, Professional Planner, Senior Technical Planner or Technical Planner' (By-Law Workflow available at [http://www.durban.gov.za/City\\_Services/development-planning-management/Documents/By-Law%20%2c%20Appeal%20and%20Contravention%20Work%20Process.pdf](http://www.durban.gov.za/City_Services/development-planning-management/Documents/By-Law%20%2c%20Appeal%20and%20Contravention%20Work%20Process.pdf), accessed on 11 September 2019); and Forms and Applications: Land Use Management available at [http://www.durban.gov.za/City\\_Services/development\\_planning\\_management/Documents/Application%20Form.pdf](http://www.durban.gov.za/City_Services/development_planning_management/Documents/Application%20Form.pdf), accessed on 16 October 2019.

<sup>54</sup> Including watercourses and grassland not necessarily protected by SPLUMA or NEMA.

<sup>55</sup> Such as NEMA, National Water Act 36 of 1998 (NWA) and National Forests Act 84 of 1998 (NFA).

<sup>56</sup> Including KwaZulu-Natal Economic Development, Tourism and Environmental Affairs Department for NEMA, National Department of Water and Sanitation for NWA and National Department of Forestry Fisheries and Environment for NFA.

<sup>57</sup> Sections, 22 read with 44(1)(z) of Planning By-law; 42(2) of SPLUMA; and Development Assessment Guidelines (n 16) at pages 8–10.

adjacent to D'MOSS and on environmentally sensitive areas are contained only in eThekwini Development Assessment Guidelines ('Development Guidelines'), which merely guide 'developers, landowners' and potential land purchasers on what the Environmental Department considers when assessing potential impacts of proposed development within such area.<sup>58</sup>

### III PURPOSE/AIM OF STUDY

This study aims to analyse how eThekwini integrates decision-making on the environment with land development applications. Such analysis will include–

- studying spatial planning and land use management legislation and related workflow processes, applied in eThekwini, including–
  - how social, economic and environmental factors are integrated into its planning applications' decision-making; and
  - how non-compliance with the Schemes' provision on D'MOSS is undertaken;
- identifying any problem areas with planning application decision-making; and
- recommending solutions to identified problem areas to ensure eThekwini's improved regimen on integration of environment in its planning decision-making.

### IV RESEARCH QUESTION

It is necessary for this study to answer the following main question in order to achieve its purpose:

- How are principles of sustainable development and relevant environmental considerations incorporated into application decision-making in eThekwini?

### V HYPOTHESIS

This study hypothesises that eThekwini incorporates principles of sustainable development and relevant environmental considerations into its planning decision-making by first overlaying D'MOSS in its map on natural areas, determined as areas in need of environmental protection,

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<sup>58</sup> Development Assessment Guidelines (n 16) page ii.

including D'MOSS in its Schemes' provisions and scrutinising development proposed within such areas.<sup>59</sup>

## VI OBJECTIVES

This study reviews eThekwini planning process, including decision-making, environmental/biodiversity screening and comment/advice processes to applications. The relevant provisions in Schemes and the Planning By-law and their interpretation will also be reviewed while showing areas where there are issues in the process or manner relevant provisions in its planning legislation, are written.

## VII SIGNIFICANCE OF STUDY

This study attempts to contribute to research regarding how municipal planning applications' decision-making may be used to incorporate environmental issues in order to contribute to ensuring developments that are sustainable within respective municipalities areas. Its relevance includes benchmarking that municipal open space systems or similar may be incorporated into municipal Schemes and used as triggers for alerting decision makers of environmental consideration needs of relevant proposals, and environmental skills municipalities must consider having for performing related duties. eThekwini's D'MOSS integration into its planning may also be used as a case study for current SANBI proposals for municipalities to make environmental overlay and consider such overlay in their planning.<sup>60</sup>

It will also attempt to contribute to ensure 'in perpetuity' environmental benefits to generations.<sup>61</sup> Municipalities' contribution to environmental protection may be most needed because they are closest to the people.<sup>62</sup> It is hoped that it will also help inform eThekwini of a need to consider reviewing the Planning By-law's and Schemes' provisions on D'MOSS and other environmental matters in order to align these two.

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<sup>59</sup> See Regulations 2(1) of Schemes, 9.5(a) of Central, 9.4.1 (a) of Inner West, 9.5.1 of North, 9.4.1(a) of Outer West and 9.4.1(a) of South, Schemes.

<sup>60</sup> SANBI 'Draft Land Use Scheme Guidelines Addendum in Respect of incorporating Biodiversity into Land Use Schemes' (August 2019) at 15.

<sup>61</sup> See PA Regoniel 'Two Tips on How to Write the Significance of the Study' *Simply Educate Me* (2015) available at <https://simplyeducate.me/2015/02/09/two-tips-on-how-to-write-the-significance-of-the-study/>, accessed on 03 May 2019; and section 24 of Constitution.

<sup>62</sup> Section 21(2) of Planning By-law.

## VIII RESEARCH METHODOLOGY

This study consists of desktop review of literature, including legislation, textbooks, journal articles, eThekwini publications and online resources, as well as relevant thesis. This literature critically analyses theoretical application of legislation regarding integration and consideration of environment into eThekwini planning decision-making. With eThekwini having integrated the environment into municipal planning from about eleven years ago, it is a good case for studying how it did/does it, what are challenges and what could be solutions to challenges.<sup>63</sup> eThekwini, as commended by DJN Keyser, has set an example for (possibly) other municipalities' benchmarking regarding environmental protection as part of their planning, with eThekwini's current environment-considerate regimen having been initiated about a decade and a half ago.<sup>64</sup>

eThekwini is selected as a case study, in qualitative method, for analysing its planning, including application's decision-making, because it has preceded how 'environmental overlay' (D'MOSS) may be used for ensuring environmental protection of certain high biodiversity value/environmentally sensitive areas during planning decision-making.<sup>65</sup> It is assumed that analysing the eThekwini planning process would assist in identifying problem areas, then proposing solutions to such problems in order to close any gap that may exist in the system.

Technical scientific information used by various specialist environmental scientists is considered in this study. However, the study does not intend to be a science or environmental science study.

## IX OVERVIEW OF CHAPTERS

The study follows with discussion of municipal planning and environment legal framework, particularly applicable to eThekwini, including role of spatial tools/plans/frameworks, their legal status, definition of some terms and relevant case law, in chapter two. Chapter three focuses on explaining eThekwini's planning application process and integration of environment, analysing how the process works, identifying problem areas in Schemes' and the

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<sup>63</sup> See Municipal Spatial Development Framework 2019/2020 (n 8) at 116.

<sup>64</sup> Regulations 9.5(a) of Central, 9.4.1 (a) of Inner West, 9.5.1 of North, 9.4.1(a) of Outer West and 9.4.1(a) of South, read with a definition in Regulation 2 of, Schemes; DJN Keyser (n 4) at 124; and R Davids et al (n 31) at 3.

<sup>65</sup> DJN Keyser (n 4) at 7–8; and 123–124; and Municipal Spatial Development Framework 2019/2020 (n 8) at 116.

Planning By-law's provisions regarding such process, and suggesting solutions to problems. The study's conclusion, including a 'summary of findings' answer to the research question, recommendations of amendments to relevant Schemes' provisions on D'MOSS and the Planning By-law to align these two, together with suggestions of possible future research, are dealt with in chapter four.<sup>66</sup>

## X CONTENT OF CHAPTER 2

Relevant national and provincial spatial planning legislation as well as case law, which played a role in currently implemented eThekweni's planning legislation, including the roles and legal nature of the IDP, the eThekweni SDF and the Schemes to give context to the need for development of such tools prior to their use at decision-making, will be discussed in detail in chapter two.

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<sup>66</sup> Dissertation Proposal Outline, *Academic Coaching and Writing* (Unpublished note, LLC, 2019) available at <https://academiccoachingandwriting.org>, accessed on 04 May 2019.

## CHAPTER 2

# ETHEKWINI MUNICIPALITY PLANNING AND ENVIRONMENTAL LEGAL FRAMEWORK

## I INTRODUCTION

The spatial plans, including the Municipal Spatial Development Framework ('SDF') and Integrated Development Planning ('IDP'), play a role in development, aiming at ensuring that development is sustainable, as mentioned in chapter one.<sup>1</sup> The term 'development' is defined in the Local Government: Municipal Systems Act<sup>2</sup> as meaning 'sustainable development' and includes 'integrated social, economic, environmental, spatial, infrastructural, institutional, organisational and human resources upliftment of the community'.<sup>3</sup> The definition of 'sustainable development' in the National Environmental Management Act<sup>4</sup> expressly includes the balancing of economic, social and environmental factors as core to ensuring development that is sustainable.<sup>5</sup> Development planning should promote sustainable development by *inter alia* ensuring protection of natural resources that provide good ecosystems services to humans.<sup>6</sup> If ecosystems are not protected, the results may be 'negative effects ... such as biological hazards, invasive species, floods, storms, heat waves and pests', thus, those factors which promote unsustainable development.<sup>7</sup>

eThekwini Municipality: Spatial Planning and Land Use Management By-law,<sup>8</sup> which is used to process land development applications ('applications') in eThekwini Municipality ('eThekwini'), came into operation after the national spatial planning and land-use management legislation, the Spatial Planning and Land Use Management Act.<sup>9</sup> It would appear from SPLUMA provisions (to be dealt with below) that the Planning By-law is

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<sup>1</sup> J van Wyk 'The Law on Planning and the Environment' in ND King, HA Strydom & FP Retief (eds) *Fuggle and Rabie's Environmental Management in South Africa* (2018) at 1135, 1137–1138, & 1146.

<sup>2</sup> 32 of 2000 (MSA).

<sup>3</sup> Sections 1, 4(2)(d) & 7(2)(d) of MSA; and A du Plessis and JG Nel 'An introduction' in AA du Plessis (eds) *Environmental Law and Local Government in South Africa* (2015) at 10.

<sup>4</sup> 107 of 1998 (NEMA).

<sup>5</sup> Section 1 of NEMA.

<sup>6</sup> Rashieda Davids, Mathieu Rouget and Richard Boon et al 'Identifying ecosystems service hotspots for environmental management in Durban, South Africa' (2016) *Bothalia – African Biodiversity & Conservation* 1 at 2.

<sup>7</sup> *Ibid.*

<sup>8</sup> 2016 published in Municipal Notice 114 of 2017, Provincial Gazette No. 1871 of 31 August 2017 (Planning By-law).

<sup>9</sup> 16 of 2013 (SPLUMA).

consistent with it in many ways. It is shown below how eThekweni's planning, including spatial planning, land-use management and systems is administered in terms of various pieces of national and local legislation, including, *inter alia*, the SPLUMA and MSA as well as the Planning By-law.

Each of the SPLUMA and the Planning By-law plays a role in ensuring appropriate municipal development and decision-making. The KwaZulu-Natal Planning and Development Act<sup>10</sup> which eThekweni previously used (together with the provisions of the Town Planning Ordinance<sup>11</sup> that remained useful at the time) to process applications within its area, was first replaced by SPLUMA, then the Planning By-law, regarding applications in eThekweni, although this legislation has not been repealed.<sup>12</sup> The theme of this study being environmental consideration in eThekweni's planning to ensure sustainable decision-making within eThekweni, NEMA's role in ensuring sustainable development at local government will also be studied. It includes studying the NEMA principles with which all organs of state, including municipalities, are required to align their actions 'that may significantly affect the environment'.<sup>13</sup> This is in line with SPLUMA's requirement of integration of economic, social and environmental objectives into SDFs of all three spheres of government.<sup>14</sup> The Constitution of the Republic of South Africa, 1996 ('Constitution')<sup>15</sup> requires all organs of state to 'protect, promote and fulfil the rights in the Bill of Rights'.<sup>16</sup> Such rights include the 'right to environment'.<sup>17</sup> The Constitution, NEMA and SPLUMA therefore require municipalities, national and provincial environmental and planning authorities to 'protect the environment', human health, and the well-being of citizens.<sup>18</sup> The Constitution provides a framework for the country's legislation on planning and environment.<sup>19</sup> This will be studied further below as to how it fits in with eThekweni's planning decision-making and environmental considerations.

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<sup>10</sup> 6 of 2008 (KZNPDA).

<sup>11</sup> 27 of 1949.

<sup>12</sup> KZNPDA; and eThekweni Municipality: Development Planning, Environmental and Management Unit 'A Developer's Guidebook, March 2013.

<sup>13</sup> Section 2(1) of NEMA.

<sup>14</sup> Section 12(1)(h) of SPLUMA.

<sup>15</sup> Hereafter Constitution.

<sup>16</sup> Section 7(2) of the Constitution.

<sup>17</sup> Section 24 of the Constitution.

<sup>18</sup> JG Nel, W du Plessis and A du Plessis 'Instrumentation for local environmental governance' in ND King et al (eds) *Fuggle and Rabie's Environmental Management in South Africa* (2018) at 95.

<sup>19</sup> Sections 24(b) & 155(7) of the Constitution; and 2(1)(a) of SPLUMA.

## II ESTABLISHING AN INTEGRATED LAND USE PLANNING SYSTEM IN SOUTH AFRICA PRIOR TO THE CONSTITUTION

Prior to the current Constitutional regime (dealt with below), decisions about what development happens in municipal areas of jurisdiction were taken by provincial spheres of government.<sup>20</sup> The position changed when municipalities were mandated to decide on certain components of planning within their areas of jurisdiction.<sup>21</sup> The planning legislation has been evolving from just before the Constitution was passed, to rationalise legislation that was implemented during apartheid in South Africa up to the development of SPLUMA.<sup>22</sup> The Development Facilitation Act<sup>23</sup> was aimed at rationalising racially segregated planning legislation and it became effective just prior to the commencement of the Constitution.<sup>24</sup>

The DFA attempted to facilitate urgently the ‘establishment of an integrated system’ of land-use planning to be undertaken.<sup>25</sup> This Act was temporary and was to be in force only until ‘comprehensive land-use legislation, that would rationalise’ laws that existed at the time was in place.<sup>26</sup> Following the implementation of the DFA, the process of developing planning legislation was started up with development of a White Paper from 2001.<sup>27</sup> The process was followed by the preparation of a Draft Land Use Management Bill, published<sup>28</sup> in 2001. Another generation of the Bill was published in 2008<sup>29</sup> to introduce a rationalised national planning law. The Bill was not into operation from the date of its publication in 2008 until the Constitutional Court (CC) judgment in *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others*<sup>30</sup> in 2010.<sup>31</sup> Before moving too far with what happened after the CC judgment, it is necessary to deal with relevant Constitutional provisions and other legislation in eThekweni spatial and development planning.

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<sup>20</sup> J de Visser and X Poswa ‘Municipal Law Making under SPLUMA: A Survey of Fifteen “First Generation” GDT Municipal Planning By-Laws’ (2019) 22 PER 1 at 5.

<sup>21</sup> Ibid.

<sup>22</sup> See K Joscelyne *The Nature, Scope and Purpose of Spatial Planning in South Africa: Towards a more coherent legal framework under SPLUM* (MPhil Minor Dissertation, University of Cape Town) 2015, accessed on 30 April 2018) 22–42; J van Wyk (n 1) at 1135–1137; and J de Visser and X Poswa (n 20) at 5–11.

<sup>23</sup> 67 of 1995 (DFA).

<sup>24</sup> K Joscelyne (n 22 at 3–4).

<sup>25</sup> Long Title and s2 of DFA; and *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others* (CCT8909) [2010] ZACC 11 paras 32 and 33; and s2 of DFA.

<sup>26</sup> M Kidd *Environmental Law* 2 ed (2001) 211; *Gauteng Development Tribunal* (CCT8909) [2010] ZACC 11 para 30; S Berrisford ‘The Evolution of Urban Planning Law and Policy, 1994-2014: Implications for South African cities’ at 215.

<sup>27</sup> Sections 5&6 read with 14 of DFA; and J van Wyk (n 1) at 1136.

<sup>28</sup> GN 1658 GG 22473 of 20 July 2001.

<sup>29</sup> GG 30979 of 15 April 2008 (SPLUM Bill 2008).

<sup>30</sup> (CCT8909) [2010] ZACC 11 (*Gauteng Development Tribunal*).

<sup>31</sup> *Gauteng Development Tribunal* supra note 30 para 33; SPLUM Bill op cit 29; and S Berrisford (n 26) at 6.

### III APPLICABLE CONSTITUTIONAL PROVISIONS

There have been a number of studies of levels of development of planning legislation. However, it is relevant to understand the legislation applicable to eThekweni's planning and environmental considerations for the developments proposed on areas within the Durban Metropolitan Open Space Systems (D'MOSS) areas using the Planning By-law. A brief explanation on how such legislation evolved and the role of eThekweni's Development Assessment Guidelines ('Development Guidelines') will also be shown, together with how everything connects with other aspects of the system.

The abovementioned legislative framework (on 'municipal planning' and environmental considerations by municipalities) as well as relevant subordinate legislation and case law will be studied in the following authoritative legislation:

- the Constitution of the Republic of South Africa ('Constitution') and the case law in which relevant provisions of the Constitution were interpreted;
- national legislation;
- case law on municipal environmental consideration; and
- by-laws, including the Schemes.

#### (a) *Municipal Planning*

The Constitution is the first legal framework that is relevant for studying the hierarchy of how municipal planning evolved as well as how the environment is incidental to municipal planning. The Constitution introduced in 1996 the concept of 'municipal planning' as an exclusive competency for municipalities in order for them to regulate administration and perform competently.<sup>32</sup> However, even after this Constitutional provision, some municipal planning decisions continued being undertaken by provincial planning authorities until the matter was challenged before the Constitutional Court ('CC') in 2010.<sup>33</sup> As mentioned in Chapter one, the CC maintained the constitutionally provided exclusivity of 'municipal planning' mandate to local government and this function was clarified and subsequently administered exclusively by municipalities.<sup>34</sup>

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<sup>32</sup> Schedule 4 Part B read with s156(1) and s156(2), and s156(5) of the Constitution.

<sup>33</sup> *Gauteng Development Tribunal* supra note 30.

<sup>34</sup> Ibid paras 70 and 86; DJN Keyser *The implications of recent planning and environmental reform for the South African planning profession* (Master of Art and Science in Urban and Regional Planning thesis, North-West University, 2018) at 46; and J de Visser and X Poswa (n 20) at 3.

The CC further held that ‘municipal planning’ includes ‘the functions and powers of rezoning of land, township establishment, measures to control land-use and ‘integrated development planning’ within the municipal areas and the SDF, which forms part of the IDP.<sup>35</sup> The adoption of SPLUMA and the Planning By-law emphasised the CC’s broad meaning of ‘municipal planning’ legislation dealt with in chapter one. The enabling powers of these pieces of legislation to develop plans to manage development planning are dealt with in chapter one.

Chapter one also dealt with how the KwaZulu-Natal High Court in *Le Sueur v eThekweni Municipality*<sup>36</sup> adjudicated on regulation of the environment, which eThekweni had started integrating into its Schemes in 2010 by means of a D’MOSS layer on environmentally sensitive areas, making them incidental to effective municipal planning, which was dealt with in chapter one.<sup>37</sup>

(b) *Environment*

Another important functional area for which the Constitution provides is the ‘environment’. However, this is the concurrent competency of both provincial and national government spheres.<sup>38</sup> It is set out in the Constitution that a beneficial environment is one—

- without ‘pollution and ecological degradation’;
- on which conservation is promoted; and
- on which ‘development and use of natural resources’ are undertaken in a manner that sustains ecology while promoting development in the economy and social aspects.<sup>39</sup>

The need to ensure that the environment is beneficial to generations in perpetuity is an essential element of ‘sustainable development’. It is not for the benefit of just a generation existing at

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<sup>35</sup> Sections 12(1) of SPLUMA; 26(e) of MSA & 12(2) of Planning By-law; *Gauteng Development Tribunal* supra note 30 para 18; and R Davids et al (n 6) at 6.

<sup>36</sup> (9714/11) [2013] ZAKZPHC 6 (30 January 2013) (*Le Sueur*).

<sup>37</sup> Schedule 4 Part B read with s156(1) and s156(2), & s156(5) of the Constitution; Paras 29 and 40; J Van Wyk (n 1) at 1143; T Humby ‘Localising environmental governance: The Le Sueur case’ (2014) 17 *PER* 1660 at 1660, 1677 and 1680; and W Freedman ‘The Legislative Authority of the Local Sphere of Government to Conserve and Protect the Environment: A critical Analysis of *Le Sueur v eThekweni Municipality* [2013] ZAKZPHC 6 (30 January 2013)’ (2014) 17:1 *Potchefstroom Electronic Law Journal* 567 at 584.

<sup>38</sup> Schedule 4A of the Constitution.

<sup>39</sup> Section 24(b) of the Constitution.

the time of a decision being made with regard to development, but for generations to come.<sup>40</sup> Environmental protection is one manner of ensuring such benefits. These environmental rights components are relevant to this study because it is concerned with environmental protection by eThekweni in its planning undertaking. The Constitution played a role in informing the making of the National Environmental Management Act (NEMA).<sup>41</sup>

#### IV NATIONAL LEGISLATION

##### (a) *NEMA: The Environmental Framework Legislation and Municipalities' Responsibility*

The NEMA gave effect to section 24(b) of the Constitution and came into operation on 29 January 1999, just over two years after the Constitution was promulgated.<sup>42</sup> Section 2 of NEMA provides for factors that must be applied during decision-making by all organs of state, including municipalities, even if such decision-making is processed and made in terms of other legislation, including SPLUMA and Planning By-law.<sup>43</sup> NEMA places the responsibility on organs of state to protect the environment for the benefit of present and future generations.<sup>44</sup>

Municipalities should therefore lead by example in undertaking their environmental protection (for which they are made responsible in NEMA) and this requirement is emphasised in SPLUMA.<sup>45</sup> This calls for ensuring adequate capacity, in terms of competent and capable officials, as 'an important enabler of sustainability at the local level.'<sup>46</sup> This is greatly needed because, as Nel, Du Plessis and Retief stated with regard to municipalities, it would be difficult to undertake responsibility for environmental protection if there were complexities related to the technical 'knowledge, skills and resources' required for compliance.<sup>47</sup> There is a view that the other reasons regarding difficulty in compliance within this environmental obligation may have been due to challenges regarding planners' willingness

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<sup>40</sup> This has been referred to as the 'principle of intergenerational equity' (PGW Henderson 'Some Thoughts on Distinctive Principles of South African Environmental Law' (2001) 8:2 *South African Journal of Environmental Law and Policy* 139 at 152).

<sup>41</sup> See section 24(b) of the Constitution.

<sup>42</sup> Proclamation R8 in GG 19703 of 29 January 1999.

<sup>43</sup> A Blackmore 'The relationship between the NEMA and the Public Trust Doctrine: the Importance of the NEMA Principles in Safeguarding South Africa's Biodiversity' (2015) 20:2 *The South African Law Journal of Environmental Law and Policy* 87 at 93.

<sup>44</sup> *Ibid.*

<sup>45</sup> Sections 3(b); 7(b)(iii), 7(c)(ii); 7(d); 12(1)(h) & (m); 14(f), 19(g), 21(j), 24(2)(b), 25(1); and 42(2) of SPLUMA.

<sup>46</sup> JG Nel, A du Plessis and F Retief 'Key elements of municipal action' in A du Plessis (Ed) *Environmental Law and Local Government in South Africa* (2021) at 2–30.

<sup>47</sup> G Nel, A du Plessis and F Retief 'Key elements of municipal action' in AA du Plessis (eds) *Environmental Law and Local Government in South Africa* (2015) at 43 and 44.

to undertake the screening of proposed developments for environmental legislative requirements.<sup>48</sup> It was expected that the transition would find planners who were already processing planning applications, but without having to consider the environment.<sup>49</sup> Prior to consideration at the stage of application processing, environmental screening would be necessary to determine which ‘ecosystem services’ would be beneficial to humans and which services/benefits would no longer be required/provided by such ecosystems after they had been compromised by proposed development, as indicated by Davids.<sup>50</sup> Such screening may be too technical for municipal planners because of the technicalities relating to an environmental subject.

Some national environmental management principles in NEMA directly mention sustainable development.<sup>51</sup> NEMA principles are guidelines to assist decision-makers with regard to environmental management to ensure ‘open and unbiased’ taking of decisions in terms of NEMA or any other statute which intends to protect the environment, including SPLUMA and the Planning By-law.<sup>52</sup> The fragmented decision-making on environment and municipal planning is blamed for compromising integration which was introduced in NEMA and later supported in SPLUMA to negate such fragmentation.<sup>53</sup> SPLUMA sought to deal with planning fragmentation by forcing relevant municipal line functions which perform some planning or environmental mandate together with environmental authorities to work towards ensuring sustainable development. Environment and planning legislation shows that the definitions of ‘sustainable development’, environmental management principles and development principles require all state organs, including municipalities, to work together from planning to implementation of development projects.<sup>54</sup> Development principles in terms of SPLUMA are dealt with below.

SPLUMA objectives include *inter alia* ensuring that the ‘system of spatial planning and land use management promotes social and economic inclusion’ and provide for

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<sup>48</sup> R Davids et al (n 6) at 2.

<sup>49</sup> Ibid.

<sup>50</sup> Ibid.

<sup>51</sup> This includes a provisions that the ‘Development must be socially, environmentally and economically sustainable’, non-exhaustive list of factors to be considered in order to ensure ‘sustainable development’; and people; and ‘The social, economic and environmental impacts of activities, including disadvantages and benefits, must be considered, assessed and evaluated, and decisions must be appropriate in the light of such consideration and assessment’ (s 2(3), ss 4(a), and s 4(i) of NEMA respectively).

<sup>52</sup> A Blackmore (n 43); and s2(4)(k) of NEMA.

<sup>53</sup> DJN Keyser (n 34) at 2; and Angelika Wilhelm-Rechmann and Richard M Cowling ‘Local land-use planning and the role of conservation: An example analysing opportunities’ (2013) 109:4 *South African Journal of Sciences* 1 at 4–5.

<sup>54</sup> Sections 1 & 2 of NEMA; and s7 of SPLUMA.

‘the sustainable and efficient use of land’.<sup>55</sup> Ensuring a development that is sustainable is one of SPLUMA’s critical objectives because planning is undertaken to improve people’s lives and for life to improve, the environment must be considered during planning.<sup>56</sup> The High Court confirmed eThekweni’s constitutional legal mandate to regulate or make legislation on environmental matters.<sup>57</sup> However, such matters are undertaken as part of municipal planning, and regulating environmental matters supports the social and ecological resilience.<sup>58</sup> With the High Court’s clarification of the legal principle and the coming into effect of SPLUMA, municipalities should have no doubt of their responsibility to ensure environmental protection during their decision-making in respect of planning.

(b) *SPLUMA: A National Planning Legislation with Municipal Environmental Protection*

It was quite a few years after the *Gauteng Development Tribunal* judgment that SPLUMA was published on 5 August 2013. It was brought into operation on 1 July 2015.<sup>59</sup> Regulation of municipal planning in SPLUMA is in line with the *Gauteng Development Tribunal* judgment.<sup>60</sup> SPLUMA is described as framework legislation regarding municipalities’ exercise of their ‘planning powers’.<sup>61</sup> SPLUMA, in its preamble and relevant provisions, emphasises ‘environmental legislation and environmental instruments’.<sup>62</sup> SPLUMA also links municipal land development planning and the right to environment by including, in its preamble, parts of the Constitutional right to the environment. It also recognises that the ‘land use planning system’ is one of the measures required by section 24(b)(iii) of the Constitution.<sup>63</sup> In striving for sustainable development, SPLUMA also requires *inter alia* socio-economic and environmental factors to be integrated in the making of IDP and SDF as well as at ‘ongoing land use management’.<sup>64</sup> This integration will ensure sustainable development as envisioned in the Constitution.<sup>65</sup>

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<sup>55</sup> Section 3(b) and (d) of SPLUMA.

<sup>56</sup> J Van Wyk (n 1) at 1135.

<sup>57</sup> *Le Sueur* supra note 36 para 40; Schedule 4 Part B read with s156(1), s156(2), and s156(5) of Constitution; J Van Wyk (n 1) at 1143; T Humby (n 37) at 1677 and 1680; and W Freedman (n 37) at 584. See also chapter one.

<sup>58</sup> *Ibid.*

<sup>59</sup> Section 61(1) of SPLUMA; and Proclamation R26 in GG No. 38828 of 27 May 2015.

<sup>60</sup> J de Visser and X Poswa (n 20) at 3.

<sup>61</sup> Introduction to Preamble of SPLUMA.; and J de Visser and X Poswa (n 20) at 12.

<sup>62</sup> See sections 3(b); 7(b)(iii), 7(c)(ii); 7(d); 12(1)(h) & (m); 14(f), 19(g), 21(j), 24(2)(b), 25(1); 42(2) of SPLUMA.

<sup>63</sup> SPLUMA Preamble; and J van Wyk (n 1) at 1146. This part of the Constitutional provisions talks to conservation of natural resources and protection of ecology (Section 24(b)(iii) of the Constitution).

<sup>64</sup> Sections 20(2), 21(a) read with 7(d) of SPLUMA; and J van Wyk (n 1) at 1146.

<sup>65</sup> Section 24(2)(b) of the Constitution.

SPLUMA also provides for relevant development principles which must be considered by land development decision-makers when undertaking decisions in terms of the Planning By-law.<sup>66</sup>

Most relevant principles for this study are spatial, efficiency and resilience principles which relate to environmental sustainability, and they are also provided for in NEMA.<sup>67</sup> The decision-making in SPLUMA is guided by such development principles, as well as *inter alia* ‘norms and standards’ and the SDF.<sup>68</sup> SPLUMA paved the way for the Planning By-law in municipalities’ use of the SDF, developed to shape the space where different developments may occur, which land must be left undeveloped for, *inter alia*, conservation purposes, by clearly requiring that decisions on applications are consistent with such SDF.<sup>69</sup> It will be shown below how the Planning By-law is, to a large extent, the mirror of SPLUMA in the eThekweni area. The KZNPDA, which was implemented by eThekweni in its planning prior to the commencement of SPLUMA, is dealt with next.

## V PROVINCIAL LEGISLATION IN RESPECT OF MUNICIPAL PLANNING

Municipalities which could manage land use prior to the coming into operation of SPLUMA undertook those in terms of provincial Ordinances and the relevant provincial legislation for KwaZulu-Natal province was the KZNPDA.<sup>70</sup> eThekweni managed land use in its processing of applications, decision-making and appeals in terms of KZNPDA and the Planning Ordinance prior to SPLUMA and the Planning By-law.<sup>71</sup> KZNPDA also required municipalities not to approve proposed developments if such developments were inconsistent with such municipalities’ ‘land use and development norms and standards, IDP or Scheme’.<sup>72</sup>

## VI ETHEKWINI MUNICIPALITY PLANNING: SPLUMA AND BY-LAW

Municipalities may process applications in terms of SPLUMA, which eThekweni undertook for about one year. It started processing its applications in terms of the Planning By-law from

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<sup>66</sup> See sections 7 and 42(1)(a) of SPLUMA; and s44(1)(c) of Planning By-law.

<sup>67</sup> Section 7(b)(iii), (vi); (c)(ii); (d); of SPLUMA; sections 2((3) & (4)(a)(i) of NEMA.

<sup>68</sup> Sections 42(1)(a) & (b) of SPLUMA; and 44(1)(f) & (y) of Planning By-law.

<sup>69</sup> Sections 22(1) & 42(1)(b) of SPLUMA; 8(1) & 44(1)(f) of Planning By-law; and Municipal Spatial Development Framework 2019/2020 Final Draft Report (May 2019) at 15. See also J de Visser and X Poswa (n 20) at 17.

<sup>70</sup> J de Visser and X Poswa (n 20) at 9; 11 and 14.

<sup>71</sup> J de Visser and X Poswa (n 20) at 11; and eThekweni Municipality: Development Planning, Environmental and Management Unit ‘A Developer’s Guidebook, March 2013 (n 12).

<sup>72</sup> Section 20 of KZNPDA.

about 31 August 2017.<sup>73</sup> eThekweni exercised its powers granted in the Constitution, SPLUMA and MSA to enforce its Schemes or make by-laws for the implementation of SPLUMA in order to regulate its planning. This resulted in the Planning By-law.<sup>74</sup> SPLUMA also empowers municipalities to make, *inter alia*, categories of applications to be decided on by its authorised officials, and those that must be decided on by the Municipal Planning Tribunal (MPT).<sup>75</sup>

The eThekweni MPT was established and commenced its planning decision-making duties in terms of SPLUMA on 2 September 2016.<sup>76</sup> The next round of MPT was established at the expiry of the abovementioned body's term of office, which was September 2018, in compliance with the Planning By-law and for it to be effectively applied.<sup>77</sup>

eThekweni has acted in line with SPLUMA by authorising certain officials as decision-makers and has categorised applications into four application categories which must be submitted to it for processing and decision-making.<sup>78</sup> The categories are as follows:

- Category 1 includes the Scheme's adoption and 'amendment or review'.<sup>79</sup>
- Category 2 includes departures from SDF provisions; land rezoning 'where objections to the application have been lodged'; 'an introduction of a new area and an existing zone' into the Scheme; land zoning; and one or more of developments 'set out in (a) to (d)' of applications in this category, combined with any application in Category 3 or 4.<sup>80</sup>
- Category 3 includes 'special consent'; subdivision; 'subdivision and consolidation'; 'township establishment'; closure of 'roads and public open spaces'; rezoning to align with SDF; 'removal, amendment or suspension of a restrictive condition'; 'development of land outside of a Scheme'; and one or more of developments 'set out in (a) to (h) above' of applications in this category, combined with any application in Category 3 or 4.<sup>81</sup>

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<sup>73</sup> Section 92 of Planning By-law. eThekweni process and procedure, in terms of Planning By-law is briefly dealt with in chapter one and to be further dealt with in chapter three.

<sup>74</sup> Schedule 4 Part B read with s156(2) of the Constitution; S11(3)(m) read with (e) of MSA; S32(1) of SPLUMA; Municipal Spatial Development Framework 2019/2020 (n 69) at 44; J de Visser and X Poswa (n 20) at 20; and W Freedman (n 37) at 568.

<sup>75</sup> Section 35(2) and (3) of Planning By-law.

<sup>76</sup> Municipal Spatial Development Framework 2019/2020 (n 69) at 44.

<sup>77</sup> Section 38(1) of Planning By-law; and Municipal Spatial Development Framework 2019/2020 (n 69) at 478.

<sup>78</sup> Sections 26–29 of Planning By-law.

<sup>79</sup> Section 26 of Planning By-law.

<sup>80</sup> Section 27 of Planning By-law; J van Wyk (n 1) at 1168; and J de Visser and X Poswa (n 20) at 13.

<sup>81</sup> Section 28(2) of Planning By-law.

- Category 4 includes the following where the necessary consent or consents have been obtained:
  - relaxation;
  - ‘exemption from’ Scheme’s provision;
  - ‘notarial tie of adjacent land’; and
  - ‘development of land outside of a Scheme’ in respect of relaxation or exemption application.<sup>82</sup>

These categories of applications are dealt with by different decision-makers, namely: the Municipal Council for Category 1; the MPT for Category 2; the Head – Development Planning, Environment and Management Unit (Head – DPEM) for Category 3; and the Deputy Head – Development Planning Department (DH-Development Planning) for Category 4.<sup>83</sup> SPLUMA and the Planning By-law require decision-makers to ‘ensure compliance with environmental legislation’ when deciding on developments that may affect the environment.<sup>84</sup> The Planning By-law also requires that MPT membership constitutes three minimum registered professional members, namely: a senior legal advisor, an environmental practitioner and a planner.<sup>85</sup> This means that MPT has a dedicated environmental specialist and is more likely, when compared to other decision-makers, to advise on or confirm environmental consideration (if required) and applicable environmental legislative requirements on Category 2 application decision-making. SPLUMA also enables MPT or the designated official to conduct investigations on ‘any matter relevant to an application being considered’ by it.<sup>86</sup> MPT may also suggest to the Municipal Council that the official should be designated for such investigations.<sup>87</sup>

SPLUMA requires the municipality to consult with the government authority, which is also required to approve proposed development or activity in terms of legislation administered by such authority, for purposes of coordinating decision-making processes and avoiding duplication.<sup>88</sup> The Planning By-law provides for a similar requirement.<sup>89</sup> Linked to this, SPLUMA’s coordination of processes is the alignment of the decision-making processes by the municipality and such authority, where they are both required to approve proposed

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<sup>82</sup> Section 29(2) of Planning By-law.

<sup>83</sup> Sections 26, 27, 28(1) and 29(1) of Planning By-law.

<sup>84</sup> Sections 44(1)(t) of Planning By-law; and 42(2) of SPLUMA.

<sup>85</sup> See section 40(3) of Planning By-law.

<sup>86</sup> Section 48(1) of SPLUMA.

<sup>87</sup> Section 48(2) read with 32(3) of SPLUMA.

<sup>88</sup> Section 29(1) of SPLUMA.

<sup>89</sup> Section 53(1) of Planning By-law.

development or activity in terms of SPLUMA for the municipality and other legislation in terms of the authority.<sup>90</sup> This is provided in section 54(1) of the Planning By-law. The municipality and an authority may then decide whether to issue ‘integrated authorisation’ or ‘separate authorisation’.<sup>91</sup> These provisions are or may be implemented at the processing of the application part of planning. There is prior spatial planning, which involves the development, amendment or alignment of tools that also play a critical role in application processing.<sup>92</sup> Planning tools (such as IDP, SDF and Schemes) must be considered by decision-makers at decision making, as required in the Planning By-law.<sup>93</sup> The inclusion of such tools and Schemes with provisions of D’MOSS would force integration of the environment at that stage of the decision-making, where necessary.

## VII ADOPTION, ROLE AND LEGAL STATUS OF PLANNING TOOLS BY SPLUMA AND THE PLANNING BY-LAW

### (a) *SDF in General*

Generally, SDF plays a role in both land-use planning and land-use management, the latter of which includes development decision-making in order to indicate spatially the implementation of the IDP because SDF is required to be part of the IDP, as required in the MSA, SPLUMA and the Planning By-law, land-use management also include the use of spatial tools *inter alia* to grant rights.<sup>94</sup> The SDF shows development corridors, which are places to be prioritised for business investments and their facilitation for the five-year span of the IDP.<sup>95</sup> The failure to consider the IDP and SDF, which also incorporate D’MOSS, during applications processing and decision-making, would be non-compliant with SPLUMA and the Planning By-law.<sup>96</sup> SPLUMA and the Planning By-law require decision-makers to ensure that their decisions are consistent with SDF, except that the MPT may deviate from SDF in its decision-making if justifying ‘specific circumstances’ exist.<sup>97</sup> The applications that deviate from SDF are mandated to MPT for decision-making.<sup>98</sup> The MSA is the first national legislation to have

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<sup>90</sup> Section 30(1) of SPLUMA.

<sup>91</sup> Ibid. and s 54(1) of Planning By-law.

<sup>92</sup> Municipal Spatial Development Framework 2019/2020 (n 69) at 15, 80 and 106.

<sup>93</sup> Section 44(1)(f) and (h) of Planning By-law.

<sup>94</sup> Sections 21(b) & (d) of SPLUMA; and 9(1)(a) & 12(2) of Planning By-law.

<sup>95</sup> Sections 21(d) of SPLUMA; & 10(1)(b) and (d) of Planning By-law

<sup>96</sup> Sections 22(1) and 42(1) (a) read with s 7(a)(ii) of SPLUMA; and 44(1)(f) of Planning By-law.

<sup>97</sup> Sections 22(1) & 42(1)(b) of SPLUMA; 8(1) of Planning By-law; and J de Visser and X Poswa (n 20) at 16 and 17.

<sup>98</sup> Section 8(1) and (2) read with 27(1)(a) of Planning By-law; section 22(2) of SPLUMA; and J de Visser and X Poswa (n 20) at 13 and 16-1-17.

provided for the making of SDFs at municipalities.<sup>99</sup> However, it does not provide details.<sup>100</sup> SPLUMA and the Planning By-law have elaborated on the legal role of SDFs in municipal planning decision-making.<sup>101</sup>

The legal nature of IDPs and SDFs and the interpretation of section 26(e) of MSA were dealt with by the Gauteng High Court in *Parkhurst Village Association (aka Parkhurst Village Residents Association) v Capela*.<sup>102</sup> It was confirmed in this case that the SDF was never meant to grant or take away ‘town planning rights’ though it prevailed as ‘the spatial planning policy of the city’ at the time.<sup>103</sup> The MSA also views the SDF as providing only ‘basic guidelines for a land-use management system for the municipality’.<sup>104</sup> Joscelyne considered the SDF’s provision in MSA, and said it was for purposes of guiding, in general, future development, highlighting challenges in relation to spatial plans and guiding land-use management.<sup>105</sup> However, it must be noted that this interpretation was given prior to the commencement of SPLUMA.

SDF must also include ‘strategic environmental assessment’ (SEA) of ‘pressures and opportunities within the municipal area, including the spatial location of environmental sensitivities, high potential agricultural and coastal access strips, where applicable’.<sup>106</sup> SEA is defined as a tool that is used to proactively integrate ‘environmental sustainability into municipal plans’.<sup>107</sup> eThekweni is in the process of developing its SEA.<sup>108</sup> These tools are meant to ensure the approval of appropriate developments.<sup>109</sup> IDP will not be discussed further because it is implemented by SDF and SDF is discussed in detail above as IDP’s component.

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<sup>99</sup> K Joscelyne (n 22 at 24; S Berrisford (n 26) at 5; J de Visser and X Poswa (n 20) at 7; and DJN Keyser (n 34).

<sup>100</sup> Ibid.

<sup>101</sup> Sections 22 of SPLUMA; 8 of Planning By-law; J van Wyk (n 1) at 1150.

<sup>102</sup> [2010] JOL 25759 (GSJ) (*Parkhurst*).

<sup>103</sup> *Parkhurst* supra (n 102) para 9.

<sup>104</sup> Section 26(e) of MSA.

<sup>105</sup> K Joscelyne (n 22) at 33.

<sup>106</sup> Sections 21(j) of SPLUMA; and 10(1)(j) of Planning By-law. SEA is drafted and undertaken in terms of Local Government: Municipal Planning and Performance Management Regulations GNR 796 GG 22605 of 24 August 2001 (Regulation 2(4)(f)); Municipal Spatial Development Framework 2019/2020(n 69) at 130; and eThekweni Municipality ‘Public Notice Invitation to Register on the Strategic Environmental Assessment (SEA) Database’ available at [http://www.durban.gov.za/Resource\\_Centre/public\\_notices/April%202019/Public%20Notice%20SEA%20Advert\\_Revised%20Eng.pdf](http://www.durban.gov.za/Resource_Centre/public_notices/April%202019/Public%20Notice%20SEA%20Advert_Revised%20Eng.pdf), accessed on 28 October 2019.

<sup>107</sup> Municipal Spatial Development Framework 2019/2020 (n 69) at 304.

<sup>108</sup> eThekweni Municipality ‘Public Notice Invitation to Register on the Strategic Environmental Assessment (SEA) Database’ (n 106).

<sup>109</sup> J de Visser and X Poswa (n 20) at 17.

SDFs, since the coming into effect of SPLUMA, have played a huge role in the process of granting or refusing land-use rights by municipalities. SPLUMA and the Planning By-law have linked SDF and Schemes by requiring that Schemes be made consistent with SDFs and that Schemes be reviewed annually as SDFs are reviewed annually.<sup>110</sup>

(b) *Schemes in General and As They Are Developed in eThekweni Municipality*

Schemes manages ‘the development which occurs within’ eThekweni jurisdictional area.<sup>111</sup> As Schemes are the Planning By-law’s subordinate legislation and law, eThekweni is required to adopt one ‘within five years’ from when SPLUMA came into effect.<sup>112</sup> The SPLUMA also requires municipalities to make individual Schemes within five years of its commencement.<sup>113</sup> It is said that Schemes implement ‘the broader’ IDP and eThekweni SDF policies of land development.<sup>114</sup>

Land-use or development must be in line with Schemes’ provisions.<sup>115</sup> This means that they are binding on every person intending to undertake land development within eThekweni and on decision-makers.<sup>116</sup> Schemes also play a role in decision-making and SPLUMA specifically provides that they have the force of law.<sup>117</sup> Their provisions are used to guide municipal decision-makers in decision-making.<sup>118</sup> Schemes are designed for purposes of granting the rights to develop in a manner that ‘promote(s) minimal impact on public health, the environment and natural resources’.<sup>119</sup> SPLUMA requires a Scheme to ‘comply with environmental legislation’ and a Scheme’s development (by municipalities) has to consider relevant environmental authorities’ ‘adopted environmental management instruments’.<sup>120</sup> This means that even development of Schemes must comply with environmental legislative

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<sup>110</sup> Sections 24(2)(e) & (g), 25(1), 27(1) of SPLUMA; 12(8),14(6)(c) & (e), 15(1) of Planning By-law; and J de Visser and X Poswa (n 20) at 16 and 17.

<sup>111</sup> Regulation 2.1 of Central Scheme of eThekweni Municipality, July 2019 (Central Scheme), & in Inner-West, Outer-West, and South, Scheme, except for North Scheme where this is provided in Regulation 2; Municipal Spatial Development Framework 2018/2019 Final Draft Report (May 2018) at 105; and Municipal Spatial Development Framework 2019/2020 (n 69) at 106.

<sup>112</sup> Sections 14(1) and 16(1) of Planning By-law.

<sup>113</sup> Sections 24(1) and 26(1)(a) of SPLUMA.

<sup>114</sup> Municipal Spatial Development Framework 2019/2020 (n 69) at 342.

<sup>115</sup> Sections 16(2) of Planning By-law; and 26(2) of SPLUMA.

<sup>116</sup> Sections 16(1) of Planning By-law; and 26(1)(a) of SPLUMA.

<sup>117</sup> Sections 26(1)(a) of SPLUMA, and 44(1)(f) of Planning By-law; J de Visser and X Poswa (n 20) at 17.

<sup>118</sup> Section 44(1)(h) of Planning By-law; and see J de Visser and X Poswa (n 20) at 17.

<sup>119</sup> Sections 15(1)(d) & 16(1)(c) of Planning By-law; 25(1)(d) & 26(1)(c) of SPLUMA; and J de Visser and X Poswa (n 20) at 2,13 and 17.

<sup>120</sup> Sections 14(5) & (6) of Planning By-law; and 24(2)(b) of SPLUMA.

requirements. eThekweni is required to develop a Scheme;<sup>121</sup> however, it has recently adopted five (5) Schemes.<sup>122</sup> Some Schemes provisions are dealt with in chapter one.

eThekweni is in the process of introducing additional Schemes in rural areas ('rural Schemes') such as uMnini Rural Scheme within the municipal area, because uMnini and such areas are some of the eThekweni areas that do not currently have Schemes.<sup>123</sup> uMnini is managed by the uMnini Tribal Authority and the proposed rural Scheme proposes co-management by the tribal authority and eThekweni.<sup>124</sup>

The process of environmental approval of certain development activities within D'MOSS, as provided for in Schemes, and the role of the Environmental Planning and Climate Protection ('Environmental Department') during such approval, as part of development application approval in terms of the Planning By-law, is discussed and analysed in chapter three.

The integration of D'MOSS into Schemes survived the legal challenge in *Le Sueur* and KwaZulu-Natal High Court confirmed eThekweni's legal mandate to regulate environment as part of its planning mandate, as discussed in chapter one.<sup>125</sup> The role and legal nature of Schemes in decision-making for developments and applications is discussed in detail below. It will be shown in chapter three that Development Guidelines also require proposals on land 'adjacent to D'MOSS' and environmentally sensitive land (not necessarily within D'MOSS) to be screened for environmental issues and advice for consideration of such advice at decision-making.<sup>126</sup>

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<sup>121</sup> Sections 14(1) of Planning By-law; and 24(1) of SPLUMA.

<sup>122</sup> Regulations 9.5 of Central Scheme (July 2019) and North Scheme (May 2019); and 9.4 of Inner-West (May 2019), Outer-West (July 2019), and South (Review Date: not stated but effective date: October 2012), Schemes. The Inner-West, Outer-West and South Schemes are hereafter the 'other three Schemes'.

<sup>123</sup> Section 24(2)(c) of Planning By-law; and Municipal Spatial Development Framework 2019/2020 (n 69) at 358.

<sup>124</sup> Ibid.

<sup>125</sup> *Le Sueur* supra note 36 para 40.

<sup>126</sup> eThekweni Municipality: Development Assessment Guidelines' undated (but refers to Turpie J, et al (2017) Promoting Green Urban Development in Africa: Enhancing the relationship between urbanisation, environmental assets and ecosystem services. Part I: A Spatial Valuation of the Natural and Semi-Natural Open Space Areas in eThekweni Municipality. World Bank, Aecom, Anchor Environmental at unnumbered page after 1 and page before 17; and Biodiversity Impact Assessment Process available at [http://minutes.durban.gov.za/City\\_Services/development\\_planning\\_management/environmental\\_planning\\_climate\\_protection/Biodiversity\\_Impact\\_Assessment/Pages/C-Guidelines-for-Development.aspx](http://minutes.durban.gov.za/City_Services/development_planning_management/environmental_planning_climate_protection/Biodiversity_Impact_Assessment/Pages/C-Guidelines-for-Development.aspx), accessed on 14 April 2019.

(c) *Legal Status of Development Assessment Guidelines*

The Environmental Department has developed versions of the Development Guidelines and has regularly updated them to guide developers and their officials when screening proposals within and adjacent to D'MOSS as well as on environmentally sensitive areas, as mentioned in chapter one.<sup>127</sup> These guidelines are neither law nor policy in terms of eThekweni planning legislation.

The process of environmental screening and comments in terms of Development Guidelines is dealt with in chapter three.

(d) *Proposed National Minimum SDF Standards and Schemes Guidelines*

The South African National Biodiversity Institute (SANBI) has drafted a land use guidelines addendum which proposes the making of an 'environmental overlay' for purposes of assisting municipal planning decision-makers for development of 'Municipal Spatial Planning and Land Use By-laws and Land Use Schemes'.<sup>128</sup> The overlay is proposed to guide municipalities nationally to improve or start 'integration of biodiversity information' into Schemes.<sup>129</sup> Environmental overlay is similar to a 'D'MOSS layer' that is used by eThekweni.

The minister responsible for environmental affairs has proposed minimum standards regarding environmental considerations in preparations and reviews of SDFs to standardise content of such SDF.<sup>130</sup> These Schemes guidelines and proposed SDF minimum standards will not be discussed further owing to this study's limitations.

## VIII CONCLUSION

The municipality's legal mandate to integrate planning of spatial planning and land-use management with the environment was expanded in SPLUMA, which consisted of further guidance regarding municipality obligations as part of its planning, compared to the legislative planning regimen that was implemented prior to SPLUMA.<sup>131</sup> SPLUMA ensures that municipal planning of land developments at municipal areas is administered by

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<sup>127</sup> See eThekweni Municipality 2010 Development Assessment Guidelines (Revised 2013); and Development Assessment Guidelines' (n 126) at unnumbered page before 3.

<sup>128</sup> SANBI 'Draft Land Use Scheme Guidelines Addendum in Respect of Incorporating Biodiversity into Land Use Schemes' (August 2019) 1.

<sup>129</sup> Ibid 15–16.

<sup>130</sup> Department of Environmental Affairs 'Consultation on Minimum Standards for the Consideration of Environmental Aspects in the Preparation and Review of Municipal SDFs' GN 647 GG 42451 of 10 May 2019.

<sup>131</sup> J de Visser and X Poswa (n 20) at 3.

municipalities.<sup>132</sup> The CC, prior to the SPLUMA, had confirmed that the constitutional municipal planning functional area is the exclusive competency of municipalities.<sup>133</sup> Critical to municipal planning in respect of land development is ensuring environmental protection, for which SPLUMA provides.<sup>134</sup>

eThekwini started considering the environment in its development decision-making, using D'MOSS, before 2010, at a time when the administration of planning by municipalities in their areas was interpreted limited.<sup>135</sup> In 2010, eThekwini started integrating D'MOSS into Schemes so that proposals within D'MOSS would be regulated under Schemes.<sup>136</sup> This process was challenged in the *Le-Sueur* case; however, the KwaZulu-Natal High Court decided in favour of eThekwini, holding that environmental consideration may be undertaken by municipalities as incidental to 'municipal planning'.<sup>137</sup> The municipal consideration of matters incidental to performance of municipal functions is provided for in the Constitution.<sup>138</sup>

eThekwini's first MPT's three-year term of office expired in August 2018, meaning it was established while SPLUMA was already in operation, probably established in terms of SPLUMA.<sup>139</sup> eThekwini currently undertakes its planning in terms of the Planning By-law, which consist of provisions substantially similar to SPLUMA.<sup>140</sup>

The next chapter deals with an explanation and analysis of eThekwini's processing of applications for development on land within D'MOSS, the protection of areas adjacent to D'MOSS in terms of the Development Guidelines, and the abovementioned problem areas with regard to the manner in which environmental considerations are currently integrated into the Planning By-law. The manner in which such problems may be resolved will be examined.

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<sup>132</sup> Section 33(1) of SPLUMA.

<sup>133</sup> Supra note 30 paras 32, 33, 70 and 86.

<sup>134</sup> Sections 3(b); 7(b)(iii), 7(c)(ii); 7(d); 12(1)(h) & (m); 14(f), 19(g), 21(j), 24(2)(b), 25(1); and 42(2) of SPLUMA.

<sup>135</sup> *Le Sueur* supra (n 36); and eThekwini Municipality: 2010 Development Assessment Guidelines (Revised 2013).

<sup>136</sup> *Le Sueur* supra (n 36).

<sup>137</sup> Ibid para 40; J Van Wyk (n 1) at 1143; T Humby (n 37) at 1677 and 1680; and W Freedman (n 37) at 584.

<sup>138</sup> Schedule 4 Part B read with sections 156(1), 156(2), and 156(5) of the Constitution

<sup>139</sup> Municipal Spatial Development Framework 2019/2020 (n 69) at 478.

<sup>140</sup> By-Law Workflow available at [http://www.durban.gov.za/City\\_Services/development-planning-management/Documents/By-Law20%2c%20Appeal%20and%20Contravention%20Work%20Process.pdf](http://www.durban.gov.za/City_Services/development-planning-management/Documents/By-Law20%2c%20Appeal%20and%20Contravention%20Work%20Process.pdf), accessed on 11 September 2019.

## CHAPTER 3

# EXPLANATION OF CURRENT ETHEKWINI MUNICIPALITY PLANNING DECISION-MAKING PROCESS AND ANALYSIS OF LEGAL REQUIREMENTS REGARDING ENVIRONMENTAL CONSIDERATIONS

## I INTRODUCTION

It was shown in chapter 2 that environmental consideration in eThekweni Municipality ('eThekweni') is incidental to its planning, as it was established in the decision by the Natal High Court in *Le Sueur v eThekweni Municipality*.<sup>1</sup> Municipal planning is directly assigned to municipalities to administer and regulate, as established by the Constitutional Court (CC) in *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others*,<sup>2</sup> discussed in chapter 2. The ideal situation, in line with the principle established in the *Le Sueur* case, would be for municipalities to manage environment, including biodiversity, and enforce compliance as part of municipal planning management and compliance enforcement.

The role and legal status of municipal planning tools, namely the Integrated Development Plan ('IDP'), the Municipality Spatial Development Framework ('SDF') and particularly the land-use Schemes ('Schemes') in protecting the environment during the land development application ('application') decision-making process were reviewed in the preceding chapter. The legal framework explaining the role of such tools and their relevance to municipal planning decision-making processes in relation to environmental protection was also dealt with. The legal framework includes the Development Facilitation Act,<sup>3</sup> which regulated development planning from just before the passing of the Constitution of the Republic of South Africa<sup>4</sup> to land development planning in terms of the eThekweni Municipality: Planning and Land Use Management By-law.<sup>5</sup> It was shown that the Planning

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<sup>1</sup> 2013 SA 6 (ZAKZPHC) 6.

<sup>2</sup> (CCT8909) [2010] ZACC 11.

<sup>3</sup> 67 of 1995.

<sup>4</sup> 1996 ('Constitution').

<sup>5</sup> 2016 published in Municipal Notice 114 of 2017, Provincial Gazette No. 1871 of 31 August 2017 (Planning By-law).

By-law concurs in many respects with the Spatial Planning and Land Use Management Act,<sup>6</sup> which is the national land development planning legislation.

The South African national framework legislation for environmental regulation is the National Environmental Management Act.<sup>7</sup> It is stated above that it requires all state organs, such as municipalities, to consider NEMA principles of environmental management when taking decisions in terms of any legislation.<sup>8</sup> Therefore, eThekweni is also expected to consider the NEMA principles when taking planning decisions in terms of the Planning By-law.<sup>9</sup> This had not been so clearly articulated in spatial and land use planning legislation prior to SPLUMA. The SPLUMA categorically requires municipal decision-makers to ensure that environmental legislative requirements are complied with by a person proposing development ('prospective developer') and to consider such compliance prior to making a decision on an application.<sup>10</sup> It is accepted that an application that is not compliant with environmental legislation would either be referred to the prospective developer for compliance or would be refused.

It was outlined that the principles of environmental management, as read from the definition of the term 'sustainable development', 'includes integration of social, economic and environmental factors into planning, implementation and decision-making'.<sup>11</sup> These are factors provided for in NEMA as principles of environmental management in addition to 'relevant factors' that must be considered to ensure sustainable development.<sup>12</sup> The relevant factors include avoidance and prevention of or minimisation and remediation of any activity/development that disturbs ecosystems; causes of loss of biodiversity; pollution/degradation of the environment; and use/exploitation of ecosystems in a manner that compromises their integrity or negatively impacts the environment and 'people's environmental right'.<sup>13</sup> The responsibility for ensuring that the environment continues *inter alia* to provide benefits to current and future generations is mandated to all state organs in terms of NEMA, including municipalities.<sup>14</sup> eThekweni is therefore also responsible for ensuring the

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<sup>6</sup> 16 of 2013 (SPLUMA).

<sup>7</sup> 107 of 1998 (NEMA).

<sup>8</sup> Section 2(1) of NEMA.

<sup>9</sup> Ibid.

<sup>10</sup> Section 42(2) of SPLUMA. The Planning By-law provides for a similar requirement in section 44(1)(t).

<sup>11</sup> Section 1 of NEMA.

<sup>12</sup> Section 2(3) & (4)(a) of NEMA.

<sup>13</sup> Section 2(4)(a)((i), (ii), (vi) and (viii) of NEMA.

<sup>14</sup> Section 24(b)(iii) of the Constitution; s2(1) of NEMA; and Municipal Spatial Development Framework 2019/2020 Final Draft Report (May 2019) at 424.

continued provision of ecosystem services to humans. The development is sustainable if it does not disturb the environment to the level that it cannot provide the services it would naturally provide to ‘present and future generations’; therefore, it is the outcome of development that will determine whether the development is sustainable or not.<sup>15</sup> Decision-making must be appropriate for the environment that will be impacted by such a decision.<sup>16</sup>

The abovementioned activities, in relation to factors included in NEMA principles, are similar to activities regulated by Schemes in areas within the Durban Metropolitan Open Space System (‘D’MOSS’), which will be discussed in detail below. It will also be shown how eThekweni ensures that proposed development within its area does not degrade or pollute the environment, including its natural resources. It will be shown that while the Planning By-law provides for consideration of the environment in the application of decisions, there is no synergy between the regulation of activities within D’MOSS in relation to Schemes and development proposals (‘proposals’) in terms of the Planning By-law. The analyses will show if the currently implemented eThekweni legal planning framework would benefit from being reviewed and amended to improve municipal planning and environmental considerations.

This chapter seeks to deal with each aspect regarding the land development process undertaken within eThekweni, who should undertake it, how it works, and details regarding environmental considerations and application processing. The analysis will attempt to answer the research question: How are principles of sustainable development and relevant environmental considerations incorporated into application decision-making in eThekweni? This is the aim of this chapter.

## II PLANNING ENQUIRY AND APPLICATION SUBMISSION

Any prospective developer who has decided to undertake development in an area within eThekweni jurisdiction must visit the eThekweni Development Planning Department (r ‘Planning Department’) at the Land Use Management ‘(LUM’) office, in the region that covers the area on which development is proposed, to undertake a planning enquiry, as explained

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<sup>15</sup> Section 1 of NEMA; and M Kidd, F Retief and R Alberts ‘Integrated Environmental Assessment and Management’ in ND King, HA Strydom & FP Retief (eds) *Fuggle and Rabie’s Environmental Management in South Africa* 3 ed (2018) 1213–1277 at 1213 and 1223.

<sup>16</sup> J de Visser and X Poswa ‘Municipal Law Making under SPLUMA: A Survey of Fifteen “First Generation” GDT Municipal Planning By-Laws’ PER (2019) 22 1 at 2.

below.<sup>17</sup> A planning official of LUM will attend to the prospective developer and furnish him/her with a planning enquiry and application forms.<sup>18</sup> The planning official would then determine (by crossing the appropriate box in the planning enquiry form) the municipal line function that must be approached by the prospective developer to obtain comments on the proposal.<sup>19</sup> The Environmental Department and the Biodiversity Impact Assessment Branch ('BIA Branch') are two among the eThekweni line functions listed in the planning enquiry form which may be marked by the planning official as being required in order to screen the proposal for environmental concerns and provide environmental comments.<sup>20</sup> The BIA Branch is subsidiary to the Environmental Department. It therefore does not matter which function, between these two, is determined for comments.<sup>21</sup> The government authorities ('authorities') which may be required to provide clearance at a planning enquiry include the KwaZulu-Natal Economic Development, Tourism and Environmental Affairs ('EDTEA'), in respect of environmental authorisation relating to NEMA, and the Department of Water and Sanitation ('DSW'), in respect of a water use licence or general authorisation in terms of National Water Act.<sup>22</sup>

The Planning By-law gives eThekweni the mandate to require a prospective developer to conduct planning enquiry (also known as an 'initial consultation').<sup>23</sup> The prospective developer is required to undertake such consultation in order to complete

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<sup>17</sup> There are five regional offices within e-Municipality: North, Outer West, Inner West, South and Central regional offices and each regional office covers areas demarcated to be within it (s 25(2) read with definitions of 'SPLUMA office' and 'Regional office' of the Planning By-law and the Development Planning Management available at [http://www.durban.gov.za/City\\_Services/development\\_planning\\_management/Land\\_Use\\_Management/Pages/default.aspx](http://www.durban.gov.za/City_Services/development_planning_management/Land_Use_Management/Pages/default.aspx) accessed on 16 October 2019).

<sup>18</sup> The planning official includes 'Senior Professional Planner, Professional Planner, Senior Technical Planner or Technical Planner' (S22(2) of Planning By-law; By-Law Workflow available at [http://www.durban.gov.za/City\\_Services/development-planning-management/Documents/By-Law%20%2c%20Appeal%20and%20Contravention%20Work%20Process.pdf](http://www.durban.gov.za/City_Services/development-planning-management/Documents/By-Law%20%2c%20Appeal%20and%20Contravention%20Work%20Process.pdf), accessed on 11 September 2019; and Application Procedures available at [http://www.durban.gov.za/City\\_Services/development\\_planning\\_management/Documents/Application%20Procedure%20for%20Land%20Development.pdf](http://www.durban.gov.za/City_Services/development_planning_management/Documents/Application%20Procedure%20for%20Land%20Development.pdf), accessed on 11 September 2019 at 1).

<sup>19</sup> Ibid.

<sup>20</sup> The BIA is a branch under Environmental Department therefore it does not matter which function is determined for comments (The Role of Biodiversity Impact Assessment in Protecting Ecosystems available at [http://www.durban.gov.za/City\\_Services/development\\_planning\\_management/enviromrnt\\_planning>climate\\_protection\\_Biodiversity\\_Impact\\_Assessment/Pages/The-Role-of-biodiversity-impact-assessment-in-protecting-D'MOSS.aspx](http://www.durban.gov.za/City_Services/development_planning_management/enviromrnt_planning>climate_protection_Biodiversity_Impact_Assessment/Pages/The-Role-of-biodiversity-impact-assessment-in-protecting-D'MOSS.aspx), accessed on 19 June 2020). It is assumed that the trigger for such a comment would be a proposal within D'MOSS. The role of Environmental Department regarding proposals within or adjacent to D'MOSS and on environmental sensitive areas is dealt with below.

<sup>21</sup> The Role of Biodiversity Impact Assessment in Protecting Ecosystems (n 20).

<sup>22</sup> 36 of 1998 (NWA); and s22(2) of Planning By-law read with By-law Workflow (n 18); and Application Procedures (n 18).

<sup>23</sup> Section 22(1) of Planning By-law.

application prior to submission to eThekweni.<sup>24</sup> The enquiry would allow eThekweni to advise or direct the prospective developer regarding ‘requirements, procedures’, or anything necessary, including applicable national or provincial requirements required for the preparation of an application and submission to it.<sup>25</sup> The Planning By-law also gives eThekweni a discretionary power to require the prospective developer to approach relevant state organs to get all authorisations/clearance necessary for the proposal, in terms of legislation administered by such state organs, and approach line functions to get comments regarding proposed development.<sup>26</sup> eThekweni has chosen to exercise this discretion by developing and writing it into the Workflow and Application Procedures that *inter alia* provide steps and procedures for undertaking planning enquiry, submission of application, requesting further information, public participation where necessary, decision recommendation and making.<sup>27</sup> The abovementioned legislation includes NEMA (environmental legislation) which eThekweni decision-makers must consider prior to decision-making when making a decision on an application, to determine whether or not the application complies with it.<sup>28</sup>

It also requires eThekweni application decision-makers to consult *inter alia* with the abovementioned authorities because of their interest in regulating certain environmental aspects of a proposal in terms of their legislation.<sup>29</sup> This consultation requirement was necessitated, prior to SPLUMA and the Planning By-law, by having many authorities (at different spheres of government) regulating part of or all activities, in application to municipalities, in terms of legislation administered by such organs for purposes of protecting various natural resources including the environment, ‘agricultural production, heritage ... and water resources.’<sup>30</sup> The application processes of relevant authorities are required to be aligned for purposes of coordinating their decision-making as well as reducing duplication of the prospective developer’s actions to obtain approvals and possibly delays in obtaining them.<sup>31</sup> It does not matter whether separate or integrated decisions are issued at the end of processing. The abovementioned eThekweni Workflow and Application Procedure is, however, silent

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<sup>24</sup> Sections 21(2); 22(1), (2); and 24(1) read with section 1 definition of ‘complete application’ in terms of Planning By-law; By-law Workflow (n 18); and Application Procedures (n 18).

<sup>25</sup> Section 22(1) of Planning By-law.

<sup>26</sup> Section 22(2) of Planning By-law.

<sup>27</sup> The workflow is accessible on eThekweni’s website and explained in the 2019/20 Annual Report on 2017/18 to 2021/22 SDF (By-Law Workflow (n 18); and Application Procedures (n 18). The Workflow is dealt with in detail in chapter two.

<sup>28</sup> Section 44(1)(t) of Planning By-law; see also Appendices 1.

<sup>29</sup> Section 53(1) of Planning By-law. A similar provision is in s29(1) of SPLUMA. These authorities administer environmental legislation to be dealt with in this chapter below.

<sup>30</sup> J de Visser and X Poswa (n 16) at 4–5.

<sup>31</sup> J de Visser and X Poswa (n 16) at 5.

regarding the abovementioned alignment of the processes' requirement. It is not clear as to when and how eThekwini consults environmental authorities, such as EDTEA, when processing applications involving undertaking of activities that also require environmental approvals in terms of NEMA, read with its Environmental Impact Assessment Regulations<sup>32</sup> and applicable Listing Notice,<sup>33</sup> NWA or any environmental legislation.

### III ENVIRONMENTAL ENQUIRY

The eThekwini Municipality, through its Environmental Department, protects biodiversity and some environmental assets within its area and processes environmental enquiries using D'MOSS, while the Planning Department processes applications for decision-making.<sup>34</sup> The Environmental Department currently screens and comments, in terms of the Planning By-law, Schemes and/or Development Guidelines on proposals on land–

- within D'MOSS;<sup>35</sup>
- proposals adjacent to D'MOSS;<sup>36</sup>
- within 'environmentally sensitive' areas;<sup>37</sup> and
- developments with activities that may trigger a need for environmental authorisation.<sup>38</sup>

A prospective developer (private, another organ of state or eThekwini line function) approaches the Environmental Department with an enquiry regarding a proposal on a site 'within or adjacent to D'MOSS' or another environmental sensitive site, for review of the site against the proposal.<sup>39</sup>

eThekwini has uploaded its geographic information systems with a D'MOSS layer and has made its website available for public view when considering development 'within

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<sup>32</sup> 2014 GNR.326 in GG40772 of 7 April 2017 ('EIA Regulations').

<sup>33</sup> Any of three EIA Listing Notices as prescribed in GNR324, GNR325 and GNR327, in GG40772 of 7 April 2017 (LN1, LN2 and LN3, respectively).

<sup>34</sup> eThekwini Municipality: Development Assessment Guidelines, undated (but making reference to Turpie J, et al (2017) Promoting Green Urban Development in Africa: Enhancing the relationship between urbanisation, environmental assets and ecosystem services. Part I: A Spatial Valuation of the Natural and Semi-Natural Open Space Areas in eThekwini Municipality. World Bank, Aecom, Anchor Environmental) available at 7 & 9.

<sup>35</sup> Regulation 9.5 of Central and North, Schemes and 9.4 of the other three Schemes; and Development Assessment Guidelines (n 34) at unnumbered page before 3.

<sup>36</sup> Development Assessment Guidelines (n 34) at unnumbered page before 3.

<sup>37</sup> Ibid.

<sup>38</sup> Development Assessment Guidelines (n 32) at 8–14.

<sup>39</sup> Ibid. (n 34) at unnumbered page before 3.

D'MOSS', which may be used to confirm if the proposed site is within or outside D'MOSS.<sup>40</sup> eThekweni has recently introduced an online portal for prospective developers to lodge environmental enquiries online so that its services are accessible despite the difficulty of physically accessing offices as a result of the Covid-19 pandemic.<sup>41</sup> The Environmental Department may be approached by a prospective developer at any time prior to planning decision-making (including after planning enquiry or application submission) for environmental comment on proposals within D'MOSS.<sup>42</sup> The environmental enquiry may also be submitted to the Environmental Department by the planning official in the Regional Office of LUM, after finding out that the environmental requirements were not considered prior to his/her signing off the report certifying the application's compliance with the Planning By-law for submission to the Joint Advisory Committee (JAC).<sup>43</sup> If an application is already before the JAC, it may be referred to the planning official if the JAC is of the view that environmental comments are required prior to advising a decision-maker, or the JAC may advise the decision-maker that such comments are required prior to decision-making.<sup>44</sup>

The environmental screening may lead to a prospective developer being required, at his/her own cost, to ensure the undertaking of certain studies necessary for management of the environment prior to the finalisation of the environmental comment and any recommendation of necessary condition.<sup>45</sup> The decision-makers may also request the undertaking of specialists reports or any further information, when deemed necessary.<sup>46</sup> The Municipality is required to provide approval for undertaking of an activity in the Schemes (in Reg 9.5(a)) after examination and satisfaction that their undertaking may not degrade, destroy

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<sup>40</sup> Development Assessment Guidelines (n 34 at 4; and Corporate GIS Map Viewer available at <http://gis.durban.gov.za/ethekwinimunicipality/viewer/cgisPublicViewer.html>, accessed on 19 June 2020. The EPCPD has enquiry forms for both municipal infrastructure and private development projects obtainable from EPCPD offices or eThekweni website for filling in if intending to develop within the abovementioned sites and submit them to EPCPD (Development Assessment Guidelines (n 34 at unnumbered page before 18; and the Biodiversity Impact Assessment Branch Process available at [http://www.durban.gov.za/City\\_Services/development\\_planning\\_management/environment\\_planning\\_climate\\_protection/Biodiversity\\_Impact\\_Assessment/Pages/C.-Guidelines-for-Development.aspx](http://www.durban.gov.za/City_Services/development_planning_management/environment_planning_climate_protection/Biodiversity_Impact_Assessment/Pages/C.-Guidelines-for-Development.aspx) accessed on 18 April 2019.

<sup>41</sup> EServices available at <https://eservices.durban.gov.za/cbs/>, accessed on 19 June 2020.

<sup>42</sup> Section 22(1) of Planning By-law; Richard Boon, Jessica Cockburn and Errol Douwes et al 'Managing a threatened savanna ecosystem (KwaZulu-Natal Sandstone Sourveld) in an urban biodiversity hotspot: Durban, South Africa' (2016), available at <https://abcjournal.org/index.php/abc/article/view/2112/20134>, accessed on 16 April 2019 at the paragraph titled at paragraphs titled 'Planning application and biodiversity impact assessment'; and Development Assessment Guidelines (n 34) at unnumbered pages after 1 and before 17.

<sup>43</sup> Section 30(9) of Planning By-law.

<sup>44</sup> Sections 23(4); 30(11); and 44(1)(x), of Planning By-law.

<sup>45</sup> Including the study of delineation of a wetland and/or assessment of vegetation (Development Assessment Guidelines (n 34) at unnumbered pages after 14).

<sup>46</sup> Section 45(2)(f) of Planning By-law.

or have negative impacts ‘on the integrity of the biodiversity and/or environmental assets found or generated within the D’MOSS’.<sup>47</sup> The Deputy Head – Environmental Department (‘DH-Environmental Planning’) is required to undertake such examination and advises the Municipality regarding any condition that may be necessary for control of development so that eThekweni can attach such a condition to approval of such activity.<sup>48</sup> The Environmental Department’s recommendations would include applicable development restrictions if the development might compromise ‘ecosystems goods and services’ protected by D’MOSS.<sup>49</sup> The conditions that may be recommended include restrictions such as imposing buffers to be maintained when undertaking development which may result in reduction of the development footprint, or layout revision to avoid environmentally sensitive areas which are not supported for development.<sup>50</sup> The Development Guidelines give guidance as to the extent of the buffer, depending on the environmental aspect being protected from proposed development, that may be required to be kept by the prospective developer.<sup>51</sup> The decision-maker may issue such conditions when deciding to approve an application in terms of the Planning By-law by attaching them to a decision.<sup>52</sup> The environmental screening process may also lead to a requirement that a prospective developer must register ‘a non-user conservation servitude’ (‘NUCS’) in the title deed of land where the development is proposed.<sup>53</sup> The proposal for future development on land with a NUCS would, in addition to other development approvals, be subjected to a requirement to apply to eThekweni for ‘removal, amendment or suspension of a restrictive condition’ prior to undertaking any development.<sup>54</sup> This would be an extra layer of protection.

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<sup>47</sup> Reg 9.5(b) of Central; 9.5.2 of North; and 9.4.1(b) of other three, Schemes.

<sup>48</sup> Ibid; and Regulations 9.5(d) of Central Scheme (July 2019) (Central Scheme); 9.5.2 & 9.5.5(g) & (h) of North Scheme (May 2019) (North Scheme); and 9.4.1 (b), (d)(ix) & (d)(x) of Inner West Annexure A (May 2019) (Inner West Scheme), Outer West (July 2019) (Outer West Scheme), and South (Review Date: not stated but Effective Date: October 2012 (South Scheme), Schemes (the latter three Schemes are hereafter other three Schemes) and Development Assessment Guidelines (n 34) at unnumbered page after 14.

<sup>49</sup> Regulations 9.5 (b) & (c) of Central, 9.5.2 & 9.5.3 of North and 9.4.1 (b) & (c) of other three, Schemes; and Development Assessment Guidelines (n 34 at unnumbered pages before 3 and after 14.

<sup>50</sup> Regulations 7(3): Development Facilitation Table on Conservation zone in Central Scheme; and 9.5(d) of Central, 9.4.1 (d) of other three Schemes, 9.5.4 of North, Schemes; and R Boon, et al (n 42).

<sup>51</sup> Development Assessment Guidelines (n 34 at 7, 9, and 11.

<sup>52</sup> Sections 45(2) and 47 of Planning By-law; and Development Assessment Guidelines (n 34) at unnumbered page after 14.

<sup>53</sup> Development Assessment Guidelines (n 34 at unnumbered page after 14; and R Boon et al (n 42) at paragraphs titled ‘Planning applications and biodiversity impact assessment’.

<sup>54</sup> Section 28(2)(g) of Planning By-law.

The Environmental Department's legislated role in environmental approval regards activities 'within D'MOSS' in Schemes, to be dealt with below. The non-legislated part is expanded in Development Guidelines.<sup>55</sup>

The Development Guidelines and review of other writers' studies explain the abovementioned process of obtaining environmental approval for development within D'MOSS, and include triggers for a need to screen proposals on land 'adjacent to D'MOSS', and on environmentally sensitive site.<sup>56</sup> They provide guidelines for environmental screening and comments on the proposal as mentioned above.<sup>57</sup> The environmental screening process is also available to help application decision-makers in their legal duty to ensure that the application complies with environmental legislative requirements prior to making a decision on it. The abovementioned environmental enquiry process is informal.<sup>58</sup> The term 'adjacent' is, however, not defined in the Planning By-law, Schemes or Development Guidelines. eThekweni may consider amending the Schemes to define the term 'adjacent' and include this in Schemes in order to make additional regulation triggers in terms of Schemes. It seems that the environmental screening process is also available to help decision-makers in their legal duty to ensure that applications comply with environmental legislative requirements prior to making a decision.<sup>59</sup> This process also helps prospective developers with their planning before a formal planning application is submitted.<sup>60</sup> The Environmental Department informal enquiry process is accessible from the Department through filling in and submission of a prescribed enquiry form.<sup>61</sup>

The NEMA requires prior environmental authorisation where listed activities would be triggered by a proposal.<sup>62</sup> The Schemes also regulate activities of developments

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<sup>55</sup> See Regulations 9.5(d) of Central; 9.5.2 & 9.5.5(g) & (h) of North Schemes; 9.4.1 (b), (d)(ix) & (d)(x) of other three Schemes; and Development Assessment Guidelines (n 34) at unnumbered page before 3.

<sup>56</sup> Development Assessment Guidelines (n 34 at page ii, unnumbered pages after 14 and before 3 & 17; R Davids ... et al 'Spatial analyses of threats to ecosystem service hotspots in Greater Durban, South Africa' (2018) PeerJ 12 available at <https://peerj.com/articles/5723.pdf>, accessed on 16 April 2019 at 12; and R Boon et al (n 42) at paragraphs titled 'Planning applications and biodiversity impact assessment'.

<sup>57</sup> Development Assessment Guidelines (n 34 at ii and unnumbered page before 17; and EServices (n 41). The guidelines will be dealt with below.

<sup>58</sup> Development Assessment Guidelines (n 34 at unnumbered page ii and unnumbered page before 17.

<sup>59</sup> Sections 44(1)(t) & 53(1) of Planning By-law.

<sup>60</sup> Development Assessment Guidelines (n 34) at unnumbered page before 17.

<sup>61</sup> Biodiversity Impact Assessment Process accessed at [http://minutes.durban.gov.za/City\\_Services/development\\_planning\\_management/environmental\\_planning\\_climate\\_protection/Biodiversity\\_Impact\\_Assessment/Pages/C-Guidelines-for-Development.aspx](http://minutes.durban.gov.za/City_Services/development_planning_management/environmental_planning_climate_protection/Biodiversity_Impact_Assessment/Pages/C-Guidelines-for-Development.aspx) on 14 April 2019.

<sup>62</sup> Section 24F(1) of NEMA read with activities in LN1, LN2 or LN3, whichever is applicable in the proposal; and Development Assessment Guidelines (n 34) at unnumbered page after 14.

proposed within D'MOSS.<sup>63</sup> The Environmental Department's screening would include screening and preparation of comments to advise whether or not the environmental assessment is required in terms of the National Environmental Management Act<sup>64</sup> EIA Regulations, 2014 ('EIA Regulations').<sup>65</sup> This would mean advising on requirements that would be triggered by proposals in terms of Planning By-law and/or Schemes' D'MOSS provisions.<sup>66</sup> The Environmental Department also screens proposals regarding triggers in the EIA Regulations, the National Water Act<sup>67</sup> and the National Forestry Act<sup>68</sup> in order to facilitate and promote compliance with such environmental legislation.<sup>69</sup> This advice would facilitate a prospective developer's compliance with the Planning By-law requirements regarding obtaining authorisations from other state organs and submission of such documents together with applications to eThekwini.<sup>70</sup>

#### IV DOES ENVIRONMENTAL ENQUIRY ABSOLVE PROSPECTIVE DEVELOPERS FROM COMPLIANCE?

The abovementioned eThekwini's internal process involving municipal line functions' advisory role to prospective developers and process of authorities, commenting or providing clearance on application and the informal environmental enquiry aid the compliance process for the prospective developer. It does not absolve the prospective developer from an obligation to comply with the Planning By-law and the Schemes for activities proposed within D'MOSS.

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<sup>63</sup> Regulations 9.5 of Central, North Schemes; and 9.4 of other three Schemes, Schemes. It is explained in chapter 2 that Schemes are subordinate legislation under Planning By-law as they are made in terms of it (Sections 14 & 16(1) of Planning By-law; and 26(1)(a) of SPLUMA).

<sup>64</sup> 107 of 1998 (NEMA).

<sup>65</sup> eThekwini Municipality: Development Assessment Guidelines (n 34 at 5 –11 & unnumbered pages after 1 and 14; and R Boon et al (n 42) at paragraphs titled 'Durban Metropolitan Open Space System and systematic conservation assessment' and 'KwaZulu-Natal Sandstone Sourveld'.

<sup>66</sup> Ibid 8–14; and s 44(t) of Planning By-law. The Environmental Department comments on applications for authorisations in terms of *inter alia* NEMA, EIA Regulations, and NWA regarding environmental impacts of proposals, on behalf of eThekwini as 'interested and affected party' (section 24K(1) of NEMA; and Reg. 40 of EIA Regulations).

<sup>67</sup> 36 of 1998.

<sup>68</sup> 84 of 1998.

<sup>69</sup> DJN Keyser *The implications of recent planning and environmental reform for the South African planning profession* (Master of Art and Science in Urban and Regional Planning thesis, North-West University, 2018) 2; A Wilhelm-Rechmann and RM Cowling 'Local land-use planning and the role of conservation: An example analysing opportunities' *South African Journal of Sciences* (2013) 109 4 at 103 Table 4–8; and 123–124; and Development Assessment Guidelines (n 34) at pages 8 to unnumbered page after 14.

<sup>70</sup> Section 22(2) of Planning By-law; Development Assessment Guidelines (n 34 at unnumbered page after 14; and R Boon et al (n 42) at paragraphs titled 'Planning applications and biodiversity impact assessment'.

## V FACTORS FOR DECISION-MAKING

The most critical factors for this study are the provisions of the Scheme, the comments of eThekweni's line functions, 'compliance with environmental legislation' and section 42 of SPLUMA, because they relate to environmental considerations as part of municipal planning.<sup>71</sup> As stated above, section 42 of SPLUMA further requires decision-makers to 'ensure compliance with environmental legislation' if such applications have/may have effects on the environment.<sup>72</sup> The decision-makers, after consideration of factors in terms of the Planning By-law, may make a decision as shown in Appendix 1. The decision is appealable in terms of the Planning By-law, as shown in Appendix 1.<sup>73</sup> When planning legislation, a planning decision or its condition/s is/are not complied with, the person failing to comply may face legal implications for such failure.

## VI COMPLIANCE ENFORCEMENT OF D'MOSS PROVISIONS IN PLANNING AND SCHEMES

The Inspectorate under LUM enforces compliance with the relevant provisions of the Planning By-law and the Schemes.<sup>74</sup> The Inspectorate or the Municipality may serve a non-compliant person with a 'contravention notice'.<sup>75</sup> The remedial measures available to eThekweni for environment-related compliance enforcement include removal of 'unauthorised structure' and rehabilitation of 'the environment to restore the land ... to its original form', in terms of the Planning By-law.<sup>76</sup>

## VII SPATIAL PLANNING TOOLS AND THEIR ROLE IN THE PROCESSING OF APPLICATIONS

eThekweni's strategic planning tools such as the eThekweni SDF (as a component of the IDP), environmental tools, including the Environment Conservation Reserves ('ECRs'), Conservation Zones ('CZs') and D'MOSS as well as Schemes, are explained in this section.

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<sup>71</sup> Section 44(1)(h), (m) and (t) of Planning By-law).

<sup>72</sup> Section 42(2) of SPLUMA. The decision-makers in terms of SPLUMA are MPT or municipal official and are subjected to same provisions of SPLUMA therefore where MPT is mentioned in Planning By-law, it also refers to municipally authorised official (Section 35(4) of SPLUMA).

<sup>73</sup> Chapter 12.

<sup>74</sup> Designated in terms of section 72(1)(a) of Planning By-law; and eThekweni Municipality: Land Use Management [http://www.durban.gov.za/City\\_Services/development\\_planning\\_management/Pages/Land-use-Management-\(LUMs\)-2.aspx](http://www.durban.gov.za/City_Services/development_planning_management/Pages/Land-use-Management-(LUMs)-2.aspx) accessed on 16 April 2019 and By-law Workflow (n 18).

<sup>75</sup> Sections 72(1)(a) & 76(2)(a) of Planning By-law; and eThekweni Municipality: Land Use Management op cit note 74; and By-law Workflow (n 18).

<sup>76</sup> Section 76(3)(b).

(a) *Spatial Development Framework and Independent Development Plan*

As required by the Local Government: Municipal Systems Act,<sup>77</sup> SPLUMA and the Planning By-law, eThekweni has developed its SDF ('eThekweni SDF') as part of the IDP. The eThekweni SDF reviewed for this study is the 2019/2020 annual report which covers the third year of the five-year cycle (2017/2018 to 2021/2022).<sup>78</sup> The Strategic Spatial Planning Branch ('SSP') under the Planning Department develops and reviews the eThekweni SDF.<sup>79</sup> The eThekweni SDF is a strategic guideline for land use, spatial priorities and the provision of strategic infrastructure in its area in order to implement vision, goals and objectives of its IDP.<sup>80</sup>

The eThekweni's IDP has eight (8) plans.<sup>81</sup> The plan relevant for this study is 'Develop and Sustain our Spatial, Natural and Built Environment'.<sup>82</sup> This plan's goal is 'to lead, direct and manage the spatial, built and natural environment to ensure the sustainable and integrated growth and development of eThekweni for its citizens' benefit'.<sup>83</sup> The outcome sought to be achieved under programmes developed for this plan include the development and implementation of 'sustainable and integrated spatial planning system'; ensuring 'the long term sustainability of the natural resources base'; and integrating 'coastal management'.<sup>84</sup> It appears that the eThekweni SDF is aimed at integrating 'strategic municipal planning strategies' with 'economics, environment and society'.<sup>85</sup> These goals are in line with sustainable development, which must be sought by all state organs, including eThekweni, when planning development.

The eThekweni SDF's strategy for achieving the abovementioned outcome is management of 'urban growth', construction and maintenance 'of viable built environment' and sustaining 'natural environments and resources' as well as ensuring safe development by assessing its potential impacts and the potential of the development to cause, for instance,

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<sup>77</sup> 32 of 2000 (MSA).

<sup>78</sup> Section 25(1) & (2) of MSA read with s24(1) of Local Government: Municipal Structures Act 117 of 1998, read s21(b), (e), (g), (h) of SPLUMA; sections 10(1)(b), (e), (g), (h) and 12(2) of Planning By-law; and Municipal Spatial Development Framework 2019/2020 (n 14) at 15.

<sup>79</sup> This SSP promotes compliance with 'a single integrated spatial planning and land use management system that gives effect to' inter alia integrity or upliftment of socio-economic and environmental factors as well as sustainability and it also undertakes drawing 'Local Area Plans' (which are described as 'lower order integrated spatial plans), Functional Area Plans, Precinct Plans (Strategic Spatial Planning available at [durban.gov.za/City\\_Services/development\\_planning\\_management/Pages/Strategic-Spatial-\(Framework-Planning-2.aspx](http://durban.gov.za/City_Services/development_planning_management/Pages/Strategic-Spatial-(Framework-Planning-2.aspx) accessed on 11 September 2019; and Development Applications & Approvals Branch: Understanding the Building Plan Submission/Approval Process (August 2017) 3 available at [www.durban.gov.za](http://www.durban.gov.za), accessed on 14 April 2019).

<sup>80</sup> Section 9(1) of Planning By-law; and Municipal Spatial Development Framework 2019/2020 (n 14) at 15.

<sup>81</sup> Ibid 342,

<sup>82</sup> Ibid.

<sup>83</sup> Ibid.

<sup>84</sup> Ibid.

<sup>85</sup> Ibid.

flooding.<sup>86</sup> This would also ensure ‘environmental protection and enhancement’. In line with ‘sustainable development’ the factors to ensure protection of environment are ‘consideration of ‘economic, environmental, social and cultural implications of development and spatial investment decisions on communities’.<sup>87</sup>

The eThekwini SDF requires *inter alia* that development, management and regular updating of D’MOSS should be done ‘in keeping with the best available science to identify environmentally significant areas within eThekwini area’.<sup>88</sup> The D’MOSS is to be managed in a manner that ensures that the best ‘ecosystem services’ are provided to people.<sup>89</sup> The eThekwini SDF outlines the land use management guidelines for, *inter alia*, integration of D’MOSS into strategic spatial planning and Schemes as well as ensuring that ‘proposed development’ does not take place in environmentally sensitive land, in flood plains, and on land at risk of a rise in sea level.<sup>90</sup> These guidelines also require jobs to be created by proposed developments and an economic boost to rural communities.<sup>91</sup> The environmental instruments/tools are also included in the eThekwini SDF to integrate, coordinate, align and express ‘development policies and plans’ of various government authorities, which must be applied in the eThekwini area.<sup>92</sup> The eThekwini SDF considers that NEMA and the National Environmental Management: Integrated Coastal Management Act<sup>93</sup> are critical for the municipal planning legislative framework.<sup>94</sup>

The eThekwini SDF must be considered when a decision for any application is made.<sup>95</sup> The application may, however, be approved contrary to what the eThekwini SDF would prefer provided it is in line with *inter alia* the ‘local area plan’ that has been adopted by eThekwini Council for the preparation of Schemes for an area where development is proposed.<sup>96</sup> Secondly, it may be approved contrary to what the eThekwini SDF would prefer but in line with a Scheme or land use right that existed prior to the eThekwini SDF and has been used for more than 18 months prior to a decision being sought.<sup>97</sup> These are some ‘site

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<sup>86</sup> Ibid 346.

<sup>87</sup> Ibid.

<sup>88</sup> Ibid 348.

<sup>89</sup> Ibid. The details of whether the D’MOSS is made in terms of ‘best available science’ or not would not be studied further because this is not the focus of this study.

<sup>90</sup> Municipal Spatial Development Framework 2019/2020 (n 14) at 348.

<sup>91</sup> Ibid.

<sup>92</sup> Section 9(5)(b) of Planning By-law; and Municipal Spatial Development Framework 2019/2020 (n 14) at 42.

<sup>93</sup> 24 of 2008.

<sup>94</sup> Municipal Spatial Development Framework 2019/2020 (n 14) at 42.

<sup>95</sup> Section 44(1)(f) of Planning By-law.

<sup>96</sup> Ibid; and s11(6) of Planning By-law.

<sup>97</sup> Section 8(1) and (2) of Planning By-law.

specific circumstances’ under which a proposal may be approved in conflict with the eThekweni SDF.<sup>98</sup> Allowing consideration of these circumstances shows the role of eThekweni SDF as guiding development rather than granting or taking away land use rights, as do Schemes.<sup>99</sup>

(b) *Land Use Schemes*

The Schemes are law that binds prospective developers and decision-makers when deciding the use of land on Schemed areas.<sup>100</sup> The Schemes consist of maps, including D’MOSS, ‘and associated regulations which guide and manage land use practices’.<sup>101</sup> It is said that Schemes implement ‘the broader’ IDP and eThekweni SDF policies at land development level, meaning that development decisions are made in line with Schemes, which already consist of IDP and eThekweni SDF policies.<sup>102</sup> eThekweni currently has five ‘Primary Schemes’, namely Central, Inner-West, Outer-West, North and South Schemes, which were all already in existence prior to SPLUMA and the Planning By-law, except the Central Scheme, which previously existed as the Durban Scheme.<sup>103</sup> The Schemes were developed by LUM office of eThekweni.<sup>104</sup>

The Inner-West and North Schemes were adopted by eThekweni Council on 26 September 2012 (reviewed in May 2019), the South Scheme was adopted in September 2012 but does not have a recent review date, while the Outer-West and Central Schemes have no adoption date but were reviewed in July 2019.<sup>105</sup> All these Schemes are said to have been adopted in terms of the Planning By-law.<sup>106</sup> However, it will be shown below that it does not seem that this particular provision of the Schemes was aligned with the Planning By-law. eThekweni is in the process of ensuring all of its areas are covered by a Scheme so that all areas under it are managed in terms of a Scheme applicable in that area, as required by SPLUMA and the Planning By-law.<sup>107</sup> The part of eThekweni not covered by any Scheme is about two-

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<sup>98</sup> Ibid.

<sup>99</sup> Parkhurst Village Association (aka Parkhurst Village Residents Association) v Capela [2010] JOL 25759 (GSJ) (Parkhurst) para 9; K Joscelyne The Nature, Scope and Purpose of Spatial Planning in South Africa: Towards a more coherent legal framework under SPLUM (MPhil Minor Dissertation, University of Cape Town) 2015, available at <https://open.uct.ac.za/handle/11/427/19785>, accessed on 30 April 2018) 22–42 at 33; and DJN Keyser (n 69) at 79.

<sup>100</sup> Section 16(1) of Planning By-law.

<sup>101</sup> Regulation 2.1 of Central Scheme.

<sup>102</sup> Municipal Spatial Development Framework 2019/2020 (n 14) at 342.

<sup>103</sup> Land Use Management (n 71).

<sup>104</sup> Ibid.

<sup>105</sup> Municipal Spatial Development Framework 2019/2020 (n 14) at 105

<sup>106</sup> Municipal Spatial Development Framework 2019/2020 (n 14) at 106.

<sup>107</sup> Sections 24(1) of SPLUMA; 14(1) and (15(2) of Planning By-law; and Municipal Spatial Development Framework 2019/2020 (n 14) at 42 and 107–114. The eThekweni may fail to meet the SPLUMA’s requirement of

thirds of its area and such part may not be legally managed in terms of any of abovementioned Schemes. eThekweni is therefore in the process of developing rural Schemes regarding application processing in such areas and their co-management with the relevant traditional authorities/councils.<sup>108</sup>

eThekweni has planning and environmental management controls at planning consideration and decision-making, for instance, ensuring compliance with the Schemes' provisions by a decision-maker when deciding on any application.<sup>109</sup> This should also apply to proposals for development activities within D'MOSS, listed as prohibited in terms of Schemes, if those activities are without prior authorisation, as development on such areas would be contrary to the Scheme's provisions.<sup>110</sup> Otherwise, the decision-maker must 'refuse application' or postpone making a decision on it 'to allow for investigation' on such D'MOSS environmental issues and obtain 'technical advice' or receive a 'further information' submission by a prospective developer if there are critical considerations that were not considered prior to tabling an application for decision-making.<sup>111</sup> The Schemes consists of three main environmental protection tools provided for minimisation of development impacts and protection of 'environmentally sensitive areas'. These are ECR and CZ as well as D'MOSS.<sup>112</sup>

(c) *Environmental Conservation Reserves and Conservation Reserves/Zones*

As mentioned above, the Schemes are for management of 'land use rights' including 'conservation of ... natural environment, in order to *inter alia* promote sustainable development' in the eThekweni area.<sup>113</sup> The ECR and CZ are applied for purposes of differentiating land that must be maintained for 'conservation purpose' from other land, such as 'Public Open Space', that on which activities that are contrary to conservation may be undertaken.<sup>114</sup> The CZs are used on privately owned land and allow only 'nature based tourism'

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having a single scheme in all its areas within five years since this period is nearing expiry however may still comply with Planning By-law in this regard (See s24(1) of SPLUMA; and s14 of Planning By-law).

<sup>108</sup> Sections 16(3) and 79 of Planning By-law.

<sup>109</sup> Section 44(1)(h) of Planning By-law.

<sup>110</sup> Section 28(2), 21(1) & (2) of Planning By-law read with Reg. 1.25.1 (iv) of Central Scheme. This application would be lodged and dealt with as Category 3 for decision by the Head or Category 2 for decision making by MPT if such application is combined with application for any land use in s27(1) (a)-(d) (sections 28(1) & 27(1)(e) of Planning By-law).

<sup>111</sup> Section 46(1)(c) & (d) of Planning By-law.

<sup>112</sup> Regulations 6 or 7 of Schemes; and R Boon et al (n 42) at the paragraph titled 'Land use planning'

<sup>113</sup> Regulations 1.4.2 (iv)(b) of Central Scheme, Inner-West, and South schemes, in 1.4.2(iii)(c) of Outer-West and 1.4.2(v)(c) of North, Schemes.

<sup>114</sup> Regulation 2.1 definition of CR/CZ; R Boon et al (n 42) at paragraph titled 'Implementation efforts to conserve KZNSS'.

to be undertaken on such land upon obtaining a ‘special consent’ from eThekweni, which is a Category 3 application for approval by the Head of Development Planning, Environment and management Unit (‘Head-DPEM’) in terms of Planning By-law.<sup>115</sup> The ‘publicly owned land’ may be zoned with ECR and such zoning may be used only for ‘the conservation and management of natural areas of land/or water for ... ecosystem services that the areas provide and ... biodiversity, which they support’.<sup>116</sup> The ECR and CZ therefore serve a similar purpose. Their overlay is based on whether land is owned publicly or privately. The D’MOSS is overlaid over land with ECR, CZ or any other zoning to ensure that any development proposed within such zoning requires screening for environmental concerns and protection of natural resources within such zoning or ECR/CS and D’MOSS.<sup>117</sup> Any development activity determined within ECR or CZ may take place only upon approval by the Municipality in or after consultation with,<sup>118</sup> or ‘after consultation with’,<sup>119</sup> the DH-Environmental Department, in the same way as it is for proposals within D’MOSS.<sup>120</sup> It is noted that the manner of consultation is not the same for land with ECR and CZ. For ECR a decision is taken in consultation with the DH-Environmental Department, while for CZ, it is taken after consultation with the DH-Environmental Department.

(d) *D’MOSS and Implementation*

The current D’MOSS is said to have been developed in accordance with the best available science as required in the eThekweni SDF.<sup>121</sup> It was adopted as part of Schemes in terms of the

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<sup>115</sup> Section 28(1) and (2) of Planning By-law; Regulation 7: Development Facilitation Table on Conservation zone in Central Scheme; and R Davids, et al (n 56) at 12; R Boon et al (n 42); and T Humby ‘Localising environmental governance: The Le Sueur case’ (2014) 17 PER 1660 at 1660.

<sup>116</sup> Regulations 6 & 7 of, read with 2.1 definition of ECR in, all Schemes, R Davids, et al (n 56); R Boon et al (n 42); and T Humby (n 117) at 1660.

<sup>117</sup> D’MOSS an Integral Component of the eThekweni Planning Schemes available at [www.durban.gov.za/City\\_Services/development\\_planning\\_management/environmental\\_planning\\_climate\\_protection/Publications/Documents/EPCPD%20DMOSS%20FAQs%202011.pdf](http://www.durban.gov.za/City_Services/development_planning_management/environmental_planning_climate_protection/Publications/Documents/EPCPD%20DMOSS%20FAQs%202011.pdf) accessed on 14 April 2019; and Development Assessment Guidelines (n 34 at unnumbered page after 1

<sup>118</sup> With regards to ECRs.

<sup>119</sup> With regards to CZ/CR.

<sup>120</sup> Regulations 6 & 7 of Schemes, and Regulations 7(1) & (4): Development Facilitation Table on Conservation zone in Central Scheme.

<sup>121</sup> Municipal Spatial Development Framework 2019/2020 (n 14) at 348; Durban ‘State of Biodiversity Report’ (2017/18) accessed at

[http://www.durban.gov.za/City\\_Services/development\\_planning\\_management/environmental\\_planning\\_climate\\_protection/Publications/Documents/StateofBiodiversity2017\\_18.pdf](http://www.durban.gov.za/City_Services/development_planning_management/environmental_planning_climate_protection/Publications/Documents/StateofBiodiversity2017_18.pdf) on 25 June 2020 at 6; and What is the Durban Metropolitan Open Space System? available at

[http://www.durban.gov.za/City\\_Services/development\\_planning\\_management/environmental\\_planning\\_climate\\_protection/Documents/2016\\_DMOSS\\_English\\_Background.pdf](http://www.durban.gov.za/City_Services/development_planning_management/environmental_planning_climate_protection/Documents/2016_DMOSS_English_Background.pdf), accessed on 12 April 2019.

Planning By-law.<sup>122</sup> This By-law is the currently implemented planning and land use management legislation, including development application processing, in eThekweni.<sup>123</sup> The Schemes regulate *inter alia* development, excavation or levelling; natural vegetation clearance; structure erection; dumping; allowing a ‘domesticated animal to’ damage plants and other animals or the environment generally; or undertaking an activity or work, proposed on land in D’MOSS in order to maintain the intention of having D’MOSS on such land.<sup>124</sup> The Schemes require the Municipality’s approval prior to undertaking any of abovementioned activities when proposed within a ‘D’MOSS Controlled Area’.<sup>125</sup> The D’MOSS is used, in eThekweni, as a trigger for confirming whether or not environmental comments for purposes of planning decision-making and environmental approval, in terms of Schemes, are required from the Environmental Department.<sup>126</sup> SANBI has proposed Schemes guidelines which require the environmental overlay to be incorporated into municipal Schemes in order for them to consider the environment in their planning.<sup>127</sup> This proposed guideline is similar to eThekweni’s D’MOSS layer that is incorporated into its Schemes.

The eThekweni SDF includes the responsibility of eThekweni to incorporate ‘coastal planning and management’ as well as managing polluting and degrading activities within eThekweni coastal environment area.<sup>128</sup> The activities include ‘development pressures, informal settlement areas and shoreline developments’ when planning for development along or within its coastal areas.<sup>129</sup> eThekweni has incorporated this into its Central Scheme, which provides for the Coastal Management Controlled Area (‘coastal area’).<sup>130</sup>

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<sup>122</sup> Development Assessment Guidelines (n 34; Durban ‘State of Biodiversity Report’ (n 121); What is the Durban Metropolitan Open Space System (n 121).

<sup>123</sup> Development Assessment Guidelines (n 34; Durban ‘State of Biodiversity Report’ (n 121) at 6; What is the Durban Metropolitan Open Space System (n 121).

<sup>124</sup> Regulations 9.5(a) of Central, 9.5.1 of North, Schemes; and 9.4.1(a) of other three Schemes, all read with a definition of ‘D’MOSS Controlled Area’ in Regulation 2 of, Schemes. The definition is dealt with in chapter 2.

<sup>125</sup> Ibid.

<sup>126</sup> Development Assessment Guidelines (n 34) at unnumbered page after 1;

By-Law Workflow (n 18); and D’MOSS an Integral Component of the eThekweni Planning Schemes (n 117).

<sup>127</sup> SANBI ‘Draft Land Use Scheme Guidelines Addendum in Respect of incorporating Biodiversity into Land Use Schemes’ (August 2019) 15–18.

<sup>128</sup> Municipal Spatial Development Framework 2019/2020 (n 14) at 104.

<sup>129</sup> Ibid.

<sup>130</sup> The coastal areas on which development is regulated in eThekweni are areas in Central Region areas (Regulations 9.6 and 9.6.1 of Central Scheme). This Region seems to be only one with coastal management provisions and this may be because other regions do not have coastal areas.

(e) *Coastal Management and Implementation*

Similar activities that are prohibited ‘within D’MOSS’ are also prohibited within coastal areas.<sup>131</sup> The prospective developers of such activities must obtain approval from the municipality, the same way they would for activities within D’MOSS.<sup>132</sup> However, for processing of approvals within coastal areas, the Project Executive: Coastal Policy must be consulted *inter alia* to obtain approval conditions and advise whether approving the proposal will be a good decision or not.<sup>133</sup> eThekweni continues to pursue environmental protection, including proposing additional tools and zones, such as the Strategic Environmental Assessment<sup>134</sup> and the Nature Reserves Zone.<sup>135</sup>

(f) *Strategic Environmental Assessment and Nature Reserve Zones*

The Strategic Environmental Assessment (SEA) is being developed and is intended to be part of the existing eThekweni SDF as a requirement in terms of the *Local Government: Municipal Planning and Performance Management Regulations*<sup>136</sup> and SPLUMA.<sup>137</sup> The SEA may proactively integrate ‘environmental sustainability into municipal plans’.<sup>138</sup> It is proposed that the SEA should be undertaken during compilation of the eThekweni SDF.<sup>139</sup> eThekweni is also proposing a nature reserve zone to introduce an extra layer of protection, requiring the Head-DPEM to decide regarding development in such zone.

## VIII ETHEKWINI LINE FUNCTIONS AND GOVERNMENT AUTHORITIES FOR PLANNING AND ENVIRONMENTAL CONSIDERATION

The approval for development in D’MOSS areas must be granted by the municipality (in terms of Schemes) upon it being satisfied that environmental degradation, destruction or negative

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<sup>131</sup> Regulation 9.6.1 of Central Scheme.

<sup>132</sup> Ibid.

<sup>133</sup> Regulation 9.6.2 of Central Scheme.

<sup>134</sup> Hereafter SEA.

<sup>135</sup> See Public Notice Invitation to Register on the Strategic Environmental Assessment (SEA) Database at [http://www.durban.gov.za/Resource\\_Centre/public\\_notices/April%20202019/Public%20Notice%20SEA%20Advert\\_Revised%20Eng.pdf](http://www.durban.gov.za/Resource_Centre/public_notices/April%20202019/Public%20Notice%20SEA%20Advert_Revised%20Eng.pdf), accessed on , accessed on 28 October 2019; and Proposed Amendment of the Land Use Schemes of eThekweni by the Introduction of a Nature Reserve Zone Designated for Nature Reserves both Proclaimed in terms of the National Environmental Management Protected Areas Act No. 57 of 2003 and Identified D’MOSS areas under Consideration for such Proclamation., Report to the Economic Development and Planning Committee dated 20 March 2019 at 7–8.

<sup>136</sup> GNR 796 GG 22605 of 24 August 2001, under MSA (MSA Regulations).

<sup>137</sup> Regulation 2(4)(f) of MSA Regulations; s 21(j) of SPLUMA; Municipal Spatial Development Framework 2019/2020 (n 14) at 131; and Public Notice Invitation to Register on the Strategic Environmental Assessment (SEA) Database (n 135).

<sup>138</sup> Municipal Spatial Development Framework 2019/2020 (n 14) at 305.

<sup>139</sup> Ibid.

impacts on biodiversity integrity and the impact on ‘environmental services generated within D’MOSS’ will not be material or permanent.<sup>140</sup> It will be shown below that it does not appear that this approval aligns with the approval of applications in terms of the Planning By-law. The work undertaken by each of the following line functions on planning and processing of applications is undertaken to ensure development is appropriate, protects the environment, promotes investment and mitigates ‘environmental risks’.<sup>141</sup>

(a) *Municipality and Development Planning, Environment and Management Unit*

The Development Planning, Environment and Management Unit (‘DPEM Unit’) leads eThekweni planning under the Head-DPEM leadership.<sup>142</sup> The Head-DPEM is a decision-maker of Category 3 applications.<sup>143</sup> The other three Categories are dealt with by other designated decision-makers, as shown in chapter two. The other discretionary role of Head-DPEM is to advise decision-makers on acceptance and refusal of comments from eThekweni line functions.<sup>144</sup> This role may be used by the Head-DPEM to consider comments from the Environmental Department and advise decision-makers when deciding on Category applications assigned to them, whether or not to approve such application. The environmental advice to decision-makers is dealt with below.

(b) *Land Use Management Branch and Planning Enquiry*

The LUM is responsible *inter alia* for application processes including issuing clearance for further processing of application for other approvals, including building plans.<sup>145</sup> The LUM takes receipt of the application form, processes it, and recommends decisions as required in the

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<sup>140</sup> Regulations 9.5(b) of Central, 9.5.2 of North, Schemes; and 9.4.1(b) of Inner West, Outer West & South.

<sup>141</sup> Referred to as ‘value chain management’ (Gerhard Plenert ‘Value Chain Management’ available at [https://www.referencefor\\_business.com/management/Tr-Z/Value-Chain-Management.html](https://www.referencefor_business.com/management/Tr-Z/Value-Chain-Management.html), accessed on 15 November 2019; and J de Visser and X Poswa (n 16) at 2.

<sup>142</sup> Development Planning, Environment and Management available at <http://www.durban.gov.za/City-Services/development-planning-management/Pages/default.aspx>, accessed on 16 April 2019.

<sup>143</sup> Section 28(1) read with the definitions of ‘head’ in s1 of Planning By-law.

<sup>144</sup> Section 31 of Planning By-law.

<sup>145</sup> Development Applications & Approvals Branch: Understanding the Building Plan Submission/Approval Process (n 79) at 2. The abovementioned planning enquiry is also undertaken by planner under LUM (s25(2) read with definitions of ‘SPLUMA office’ & ‘Regional office’ of the Planning By-law, and Development Planning Management (n 17)). The planning official includes ‘Senior Professional Planner, Professional Planner, Senior Technical Planner or Technical Planner’ (By-Law Workflow (n 18); and Application Procedures available at [http://www.durban.gov.za/City\\_Services/development\\_planning\\_management/Documents/Application%20Procedure%20for%20Land%20Development.pdf](http://www.durban.gov.za/City_Services/development_planning_management/Documents/Application%20Procedure%20for%20Land%20Development.pdf) accessed on 11 September 2019).

Planning By-law.<sup>146</sup> The LUM is a major role-player in eThekweni application processing. Its responsibilities/duties therefore appear in different sections of this chapter.

(c) *Environmental Department and Environmental Enquiries*

The DH-Environmental Department is required *inter alia* to comment on and provide conditions of approval, if any, regarding proposals submitted to the Municipality for development involving the undertaking of the abovementioned activities within the Schemes.<sup>147</sup> This approval would be obtained after the Environmental Department's comments regarding potential impacts on biodiversity. If the environment will be materially or permanently impacted by the proposal, the municipality should not approve commencement with the proposal.<sup>148</sup>

It appears from the Schemes' D'MOSS provisions that the aspect of environment on which the Environmental Department comments is biodiversity.<sup>149</sup> Other specific environmental aspects such as coastal and pollution control are dealt with by other line functions, including the Economic Development Unit, which deals with economic issues.<sup>150</sup>

(d) *Other eThekweni Functionaries' Roles in Planning Enquiry*

eThekweni's Environmental Health Services under the Health Unit ('EHS') is responsible for 'environmental pollution control', air quality management', 'noise management', 'water quality monitoring', and the protection of human health and well-being.<sup>151</sup> Therefore, comments on proposals regarding these aspects should be provided by EHS at the planning enquiry. The mandate of Economic Development includes promotion of 'economic

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<sup>146</sup> Section 23(1) of Planning By-law; Land Use Management (n 31); and By-law Workflow (n 18). The LUM also furnishes 'development planning input' required by other municipal line functions when such other line functions process their assigned legal mandates in terms of other By-laws or legislation involving permitting certain aspects developments (Land Use Management (n 31).

<sup>147</sup> Regulations 9.4.1(b) of other three Schemes; 9.5.2 of North, and 9.5 (d)(viii) of Central, Schemes.

<sup>148</sup> Regulations 9.5 (b) & (c) of Central, 9.5.2 & 9.5.3 of North and 9.4.1 (b) & (c) of other three Schemes; Development Assessment Guidelines (n 34) at unnumbered page after 1; and R Boon et al (n 42) at paragraphs titled 'Planning application and biodiversity impact assessment'.

<sup>149</sup> Development Assessment Guidelines (n 34); and Durban 'State of Biodiversity Report' (2017/18) (n 121) at 7 and 9.

<sup>150</sup> Economic Development available at

[http://www.durban.gov.za/City\\_Services/Economic\\_development/Pages/default.aspx](http://www.durban.gov.za/City_Services/Economic_development/Pages/default.aspx), accessed on 25 June 2020.

<sup>151</sup> Environmental Health Service accessed at

[http://www.durban.gov.za/City\\_Services/health/Environmental\\_Health\\_Services/Pages/default.aspx](http://www.durban.gov.za/City_Services/health/Environmental_Health_Services/Pages/default.aspx), accessed on 16 November 2019. Other eThekweni line functions are responsible for environmental aspects mandated to them on terms of relevant environmental related By-laws discussed in detail in chapter 2.

development, job creation, economic transformation and economic intelligence’ within the eThekweni area.<sup>152</sup>

The Project Executive: Coastal Policy is responsible for coastal management, as mentioned above.<sup>153</sup> The Environmental Department enquiry process also considers and advises developers on environmental requirements of legislation administered by other authorities.<sup>154</sup>

*(e) Government Authorities and Environmental Clearance in Applications Submission*

It is not enough that planning legislation attempts to integrate planning including consideration of the environment; the legal duties of functionaries involved in such planning must be clarified and must also be integrated to remove any element of fragmentation. The abovementioned line functions and authorities play a role, in terms of the legislation framework they administer, in the commencement of the proposed development. It is necessary for them also to undertake their duties in an integrated manner.

## IX ANALYSIS OF INTEGRATION OF ETHEKWINI MUNICIPALITY PLANNING PROCESSES

*(a) Environmental Approval Versus Development Applications*

The Municipality must engage with the DH-Environmental Department to discuss and reach agreement/consensus regarding compliance with the Schemes’ D’MOSS provisions prior to making a decision on a proposal.<sup>155</sup> The SPLUMA enables eThekweni to authorise its officials to decide on certain applications.<sup>156</sup> It seems eThekweni has not authorised an official, in terms of this provision, to decide on proposals within D’MOSS. It is problematic that decision-making for proposals ‘within D’MOSS’ lies only with the municipality, whereas there are four decision-makers for applications in terms of the Planning By-law.<sup>157</sup> There is also nothing to connect the municipality’s decision-making on activities within D’MOSS and decision-making on applications in terms of the Planning By-law. The abovementioned enquiry process

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<sup>152</sup> Economic Development (n 150).

<sup>153</sup> Regulation 9.6.2 of Central Scheme.

<sup>154</sup> Development Assessment Guidelines (n 34) at pages 8 to unnumbered page after 14.

<sup>155</sup> Regulation 1.20.1 of Central Scheme.

<sup>156</sup> Section 35(2).

<sup>157</sup> The Municipal Council, MTP, Head and Deputy Head-Development Planning are assigned decision-making mandate on application Categories 1, 2, 3 and 4, respectively, in terms of Planning By-law (sections 26–29 of Planning By-law). These Categories are discussed in detail in chapter two.

involving determination of eThekweni line functions which must comment on the proposal does not seem sufficient to link the two approvals and their processes because the process *inter alia* does not clearly set out identified activities within D'MOSS as criteria for determining a need for environmental screening.

It seems that the current planning regimen makes it possible for planning decision-makers to issue approval for development in terms of the Planning By-law while such development involves an activity that must be approved by the municipality in terms of Schemes without considering if such approval was obtained. If activities within D'MOSS are found to have commenced on site, the developer should be legally directed, in terms of the Planning By-law, *inter alia* to cease undertaking of such activity, commission studies to assess environmental damage, and rehabilitate the site in order to try to restore the environment to the state it was in just before activities were undertaken.<sup>158</sup> The matter must be dealt with as a contravention. However, the question is: how does eThekweni enforce compliance against non-compliance with a subordinate regulatory framework (the Scheme) in instance where another approval has been issued by the designated decision-makers in terms of principal legislation (the Planning By-law)? If synergy existed between the two abovementioned approvals, this situation might be avoided. Enforcement is dealt with in the section below.

Synergy is lacking between Schemes' environmental approval and Planning By-law's planning approval.<sup>159</sup> Such lack of synergy may be compromising the effectiveness of eThekweni's current planning regimen in so far as environmental integration into its planning is concerned. Related to this problem is undertaking of compliance enforcement relating to failure to comply with Schemes' provisions on D'MOSS and/or delegations. Enforcement is dealt with in the section below.

*(b) Policy for Planning and Processing of Environmental Considerations*

eThekweni has discretionary powers to develop a policy in terms of the Planning By-law to serve as a guideline 'for the submission and processing of applications'.<sup>160</sup> However, the abovementioned By-law Workflow, Application Procedures and Development Guidelines have been shown above not to be a policy in this regard as no literature was found regarding

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<sup>158</sup> Section 76(3) of Planning By-law.

<sup>159</sup> See Regulations 9.5(a) of Central, 9.5.1 of North, Schemes; 9.4.1 (a) of other three Schemes; and sections 25(1), and 26–29 of Planning By-law.

<sup>160</sup> Section 23(5) of Planning By-law.

these having been adopted as guidelines in terms of this or any relevant provision.<sup>161</sup> The Workflow Process and Application Procedure are mentioned in the adopted eThekweni SDF; however, such mention does not make them eThekweni policy documents, as intended in the Planning By-law.

There may be criteria used by planning officials to determine line functions and authorities which must comment on or provide clearance for a submission with an application. However, this is not shown or stated in the abovementioned By-law Workflow, see also Appendix 1. Furthermore, planning officials must acquire necessary basic environmental skills, if they do not already have such skills, in order to identify a trigger for proposal or application that needs the abovementioned environmental screening and comments.<sup>162</sup> For instance, activities that would be undertaken during development may require approval of building plans in terms of the National Building Regulations and the Building Standards Act,<sup>163</sup> in addition to approval in terms of the Planning By-law, and in that instance, By-law approval must be obtained prior to a ‘building plan’.<sup>164</sup> Such basic skills may be useful to a planning official in identifying the Environmental Department responsible for a need to provide comments at any stage prior to decision-making (where the environment ought to have been considered), the official assessing building plan may also need to refer such plan to the Environmental Department or back to the LUM for a planning official to ensure such requirement is met.<sup>165</sup> The applicable Scheme’s D’MOSS provision, By-laws and municipal policies<sup>166</sup> and applicable activities in terms of environmental legislation<sup>167</sup> may be stated (in the By-law Workflow or the proposed Policy of Planning Processes) as criteria for determination of a requirement for environmental consideration and possibly a need to obtain clearance from the authorities at a planning enquiry. The provision of such criteria may contribute towards linking the planning enquiry with the environmental enquiry in relation to the Schemes’ D’MOSS provisions and the abovementioned regulated activities. Making these policy guidelines in terms of the Planning By-law may also help to clarifying responsibilities and strengthen

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<sup>161</sup> Some of the workflow process is included in the 2019/20 annual report on 2017/18 to 2021/22 SDF (eThekweni Municipality ‘MSDF 2019/2020’ Report (n 13) at 46).

<sup>162</sup> Development Applications & Approvals Branch: Understanding the Building Plan Submission/Approval Process (n 79) at 2; Development Planning Management (n 17); and By-Law Workflow (n 18).

<sup>163</sup> 103 of 1977.

<sup>164</sup> Section 47(4) of Planning By-law.

<sup>165</sup> Development Applications & Approvals Branch: Understanding the Building Plan Submission/Approval Process (n 79). The Planning enquiry is dealt with below.

<sup>166</sup> Regarding, for instance, the considerations of economic and social factors.

<sup>167</sup> LN1, 2 or 3 as well as EIA Regulations in terms of NEMA, regulated activities in terms of NWA, etc. environmental legislation.

compliance by officials involved in the processing of application enquiries, applications, decision-making and commenting and issuing clearances on proposed development.<sup>168</sup>

Where a planning decision has been granted with environmental conditions, as advised by the DH-Environmental Department, it would be logical and is a legal requirement in terms of Schemes for the Environmental Department to be involved in enforcement of compliance on contraventions of environmental conditions attached to ‘planning approvals’, as well as on any other environment-related contravention.<sup>169</sup>

(c) *Compliance with Enforcement on Environment-Related Transgressions*

(i) *Planning By-law and Schemes*

eThekwini is mandated while using discretion to ‘designate a municipal official’ (as an enforcement officer) ‘to ensure compliance with’ the Planning By-law and appears that it may have designated relevant officials in the LUM Inspectorate as enforcement officers for such a purpose.<sup>170</sup> It is noted that only compliance with the Planning By-law is enforceable in terms of this provision. The municipality is directly assigned with the mandate to ‘serve a contravention notice’ for non-compliance with:

- a provision of the Planning By-law;
- a Scheme, such as undertaking any of the abovementioned prohibited activities ‘within a D’MOSS controlled area’ without approval; or
- an approval condition ‘contained in’ a notice of decision on an application, including the abovementioned environmental condition attached to development approval after being recommended by the Environmental Department during environmental screening and comments.<sup>171</sup>

The designation of enforcement of compliance with the Schemes and approval conditions are not mentioned in the Planning By-law but may be read into the abovementioned provision as the sole mandate of the municipality. There is no provision enabling the municipality to delegate such enforcement functions to an eThekwini official or to designate

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<sup>168</sup> See WH Boshoff ‘Policy Making for Local Government Excellence’ 2008 at 9.

<sup>169</sup> See Regulation 1.20.1 of Central, Inner West and Outer West Schemes as well as Regulation 1.20 of North and South Schemes.

<sup>170</sup> Section 72(1) of Planning By-law; Land Use Management (n 71; and By-law Workflow (n 18).

<sup>171</sup> Section 76(2) read with s1: definition of ‘contravention’, of Planning By-law. The contravention notice may include an instruction, to a non-complying person, to ‘remove or alter any unauthorised structure or work and rehabilitate the environment or restore the land, as the case may be, to its original form’ (s76(3)(b) of Planning By-law.

an official for such enforcement.<sup>172</sup> There is no definition of what the ‘Planning By-law’ includes, such as the Schemes. Instead, the term ‘By-law’ is defined in the Schemes to mean ‘the bylaws or regulations of the Municipality for the time being in force in the area of the Scheme’.<sup>173</sup>

The municipality is therefore ‘the only authority responsible for enforcing and carrying out the effect of’ Schemes’ provisions.<sup>174</sup> The Planning By-law gives a discretionary mandate to the municipality, on compliance with enforcement actions regarding the Planning By-law, Scheme or approval condition, *inter alia* to circulate complaints to the identified line functions, including the Environmental Department, where non-compliance regards the contravention to be ‘within D’MOSS’.<sup>175</sup> The Schemes, on the other hand, require the municipality to consult with the DH-Environmental Department before enforcing non-compliance with the Schemes’ D’MOSS provision.<sup>176</sup> For the Planning By-law, relevant eThekweni line functions may be requested to comment on such complaints, whereas for Schemes, the DH-Environmental Department must comment on alleged non-compliance involving contravention ‘within D’MOSS’.

The municipality may, upon findings after investigation related to D’MOSS’s contraventions, instruct a person who is alleged to have contravened such environmental condition ‘to comply with’ approval condition as ‘contained in’ a planning ‘decision notice’.<sup>177</sup> A ‘contravention notice’ may also be issued for non-compliance with the Schemes, include the Schemes’ D’MOSS provisions.<sup>178</sup>

The Schemes therefore intend the Environmental Department to play a role in investigating a contravention of a Scheme provision in relation to D’MOSS. However, the resources reviewed for this study did not indicate whether compliance enforcement on biodiversity transgressions is undertaken as required by the Schemes or if the Planning By-law discretion is implemented in such cases.<sup>179</sup> The Environmental Department has a small function (the Environmental Department-CME) responsible for compliance and enforcement of

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<sup>172</sup> See s76(2) read with s1: definition of ‘contravention notice’ of Planning By-law.

<sup>173</sup> Regulation 2.1 of Central Scheme.

<sup>174</sup> Regulation 1.2 of Central Scheme.

<sup>175</sup> Section 75(6) and (7) of Planning By-law.

<sup>176</sup> Regulation 1.20.1 of Central, Inner West and Outer West Schemes as well as Regulation 1.20 of North and South Schemes.

<sup>177</sup> Section 76(2)(c) read with s76(3)(c) of Planning By-law.

<sup>178</sup> Section 76(2)(b) of Planning By-law.

<sup>179</sup> Section 75 of Planning By-law and Regulation 1.20.1 of Central, Inner West and Outer West Schemes as well as Regulation 1.20 of North and South Schemes.

contraventions that are environmentally damaging ‘on priority biodiversity areas’, in order to carry out compliance enforcement duties on D’MOSS contraventions.<sup>180</sup> The Environmental Department-CME may therefore advise its Deputy Head, DH-Environmental Department, where he/she is required to comment on an environmental non-compliance complaint being investigated by planning enforcement officers. Furthermore, eThekweni may designate Environmental Department-CME officials as enforcement officers in terms of the Planning By-law (as part of proposed amendments), to enforce non-compliance with the Schemes’ D’MOSS provisions and related approval conditions, because of technical environmental expertise such officials may possess.<sup>181</sup> As part of reviewing the Planning By-law, the Schemes’ provision in this regard must be written into the Planning By-law, save for provisions that are specific to a geographical area. The Planning By-law must include a provision mandating the municipality to delegate or designate relevant eThekweni officials to enforce compliance of Schemes and approval conditions.

The municipality may also enforce environmentally degrading non-compliance as a directly assigned mandate in terms of the Environment Conservation Act.<sup>182</sup>

(ii) *Environment Conservation Act*

The ECA mandates local authorities, including eThekweni, to issue a directive to a person to ‘cease such activity; or take’ any steps deemed fit by eThekweni, if it is of the opinion that such person’s activity or failure to act ‘is or may be seriously’ damaging, endangering or detrimentally affecting the environment.<sup>183</sup> This provision may be used by eThekweni to enforce environmentally or biodiversity damaging activity within and outside D’MOSS areas. The municipality may delegate undertaking this function to its official. Therefore, it may rely on ECA for delegating enforcement of certain instances of environmental non-compliance (in or outside D’MOSS areas, including identified environmentally sensitive areas) where the municipality cannot enforce the infringements in terms of the Planning By-law, perhaps as a result of not having sufficient time to undertake operational matters, such as the abovementioned investigation and issuing of contravention notices. The environmental non-compliance may be undertaken in terms of the ECA, while the Planning By-law and/or Schemes is/are reviewed for amendments to increase effectiveness in biodiversity protection,

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<sup>180</sup> R Boon et al (n 42) at paragraphs titled ‘Planning applications and biodiversity impact assessment’.

<sup>181</sup> Section 72(1) of Planning By-law; Land Use Management (n 71); and By-law Workflow (n 18). The eThekweni may need to consider increasing the capacity of Environmental Department-CME if such designation is desired.

<sup>182</sup> Act 73 of 1989 (ECA).

<sup>183</sup> Section 31A.

as mentioned above. The eThekweni SDF states that the Planning By-law was to have been reviewed in 2019/2020; however, at the time of this study, no review process had been undertaken.<sup>184</sup>

(d) *Rationalising the Planning By-law with the Environment*

The abovementioned Development Guidelines attempt to create a link between the two approvals by stating that development restrictions or ‘development setbacks’ determined after environmental screening of proposal on sites within D’MOSS or environmentally sensitive sites must be ‘included in any planning approval granted’.<sup>185</sup> However, the link must first be made clear in an applicable legislative framework, the Planning By-law in this case, before being made part of processes. eThekweni may consider rationalising its planning legislation and amending it to ensure that the Schemes’ D’MOSS provisions are complied with prior to planning decision-making, in almost the same way that it requires a competent authority’s clearance or environmental authorisation for applications involving activities that require environmental authorisation and to ensure ‘compliance with’ *inter alia* ‘environmental legislation’. eThekweni must not just consider the Schemes as provided for in section 44(1)(h) of the Planning By-law.<sup>186</sup> This should be the case if the intention of the Planning By-law was to retain the requirement for approval of activities within D’MOSS rather than decision-makers considering comments from the Environmental Department when making decisions.

Furthermore, the Planning By-law already provides for advice of decision-makers by the Joint Advisory Committee (JAC), prior to decision-making on application.<sup>187</sup> The JAC advice may also assist in bridging the abovementioned lacking synergy.

(e) *Joint Advisory Committee’s Advice on Environment*

The JAC makes recommendations to decision-makers (Municipal Council, MPT, Head-DPEM and Deputy-Head Development Planning (‘DH-Planning Department’)) on an application as shown in Appendix 1. The Planning By-law requires JAC to consist of four ‘registered planners’ who are ‘municipal officials’ as a minimum.<sup>188</sup> This means that the Head may appoint to JAC as an additional member a person with any other needed skill, including environmental

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<sup>184</sup> Municipal Spatial Development Framework 2019/2020 (n 14) at 44.

<sup>185</sup> Development Assessment Guidelines (n 34 at unnumbered page after 14.

<sup>186</sup> See sections 22(2) and 44(1)(t) of Planning By-law; By-law Workflow (n 18); and Application Procedures (n 18).

<sup>187</sup> Section 30(2) of Planning By-law.

<sup>188</sup> Section 30(3) of Planning By-law.

technical expertise.<sup>189</sup> The Environmental Department already has officials with environmental technical specialist skills from whom additional JAC members may be appointed by the Head-DPEM to provide environmental input in compilation of recommendations, as the Department is already providing such a service with regard to all enquiries submitted to it.<sup>190</sup> The JAC would then be capacitated to advise decision-makers who do not have environmental specialist skills.

Alternatively, the abovementioned discretionary advisory role of the Head-DPEM, including an advisory on environment-related matters (proposals within D'MOSS), may need to be made mandatory to all decision-makers rather than on a discretionary basis as is done currently, so that relevant application processing will ensure consideration of environment. The consequential changes would be necessary to amend a decision-maker of Category 4 application from the DH-Planning Department to a more senior municipal or other official at a position equivalent to the Head-DPEM, who would be playing an advisory role to such decision-maker. The DH-Environmental Department may also be legally mandated, in the Planning By-law, to provide an environmental advisory role to all planning decision-makers. This option is preferred because it will not necessitate changes in decision-making authority.

(f) *Municipal Planning Tribunal*

The applications' decision-making bodies/persons include the Municipal Planning Tribunal (MPT), a body which considers and decides on Category 2 applications.<sup>191</sup> The MPT is dealt with in chapter two and dealt with in more detail here for its unique composition of persons and the individual skills sets required of its members. The MPT is the decision-making body that is legally required to have a 'registered Environmental Practitioner' ('EP') as its Environmental Specialist member.<sup>192</sup> The MPT must ensure applicable environmental concerns and legislative requirements are taken care of prior to decision-making.<sup>193</sup> Having an EP for MPT decision-making may serve as an additional assurance of environmental

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<sup>189</sup> Ibid.

<sup>190</sup> J Cockburn, M Rouget, R Slotow et al 'How to build science-action partnerships for local land-use planning and management: lessons from Durban South Africa' *Ecology and Society* (2016) 21 (1) 28 available at <https://www.ecologyandsociety.org/vol21/iss1/Art28/ES-2016-8109.pdf> , accessed on 16 April 2019 at Table A4.1: Description of key decision-making products in the KZNSS conceptual research framework (Figure A4.1) demonstrating how they relate to practice of biodiversity management and climate change adaptation through various implementation activities at eThekweni Municipality.

<sup>191</sup> Section 27 of the Planning By-law. Other categories are provided for in sections 26, 28 and 29 of the Planning By-law.

<sup>192</sup> Section 40(3)(b) of the Planning By-law.

<sup>193</sup> Section 40(3)(b) of the Planning By-law; and see Appendix 1.

considerations and compliance with environmental legislative requirements, although MPT decisions may be taken without the EP's presence at meetings because the EP does not form a mandatory part of the quorum for meetings where decisions are taken.<sup>194</sup>

Furthermore, the decision-making bodies, in respect of other categories of applications, are not required to consist of registered EP or person with environmental technical skills. However, this does not mean that environmental concerns or legislative requirements are not considered at decision-making in respect of Categories 1, 3 and 4 applications. The system may be improved by requiring EP to make a quorum in order to minimise mistakes of not considering where the environment should be considered.

## X                   ROLE PLAYERS FOR RATIONALISATION OF ETHEKWINI PLANNING LEGISLATIVE FRAMEWORK

eThekwini may initiate a process of reviewing its whole Planning By-law in order to identify all sections of the Planning By-law and/or Schemes that may need amendment, in addition to the ones dealt with and to be recommended in this study. It is found that the Planning Department leads the development of strategic planning tools, leads on applications' processing for decision-making, the DH-Planning Department is even a decision-maker on Category 4 applications, it is therefore logical that it leads the process of rationalisation of the Planning By-law. Because such process includes the environment, the Environmental Department would need to be involved during such rationalisation. The Head-DPEM may instruct Head-Development Planning to lead such rationalisation as it leads municipal planning in eThekwini.<sup>195</sup> However, Development Planning may need the legal team, including instructing eThekwini's legal services section or appointing a panel of Attorneys, to assist in such planning legislation rationalisation.

## XI                   CONCLUSION

This chapter has shown that eThekwini incorporates factors of sustainable development and relevant environmental considerations from the preparation of its strategic planning tools by ensuring that the environment is considered when such tools are developed to when they are considered at decision-making on application or at compiling comments for regarding environmental approval of a proposal that may negatively impact the environment. The

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<sup>194</sup> See section 40(5) of the Planning By-law.

<sup>195</sup> See Development Planning, Environment and Management (n 142).

Schemes were found to be legal tools to control developments in processing and approval of applications as proposals must comply with them. Alternatively, there must be a special consent application specifically dealing with approval of a proposal contrary to the applicable Scheme. The D'MOSS, as provided for in Schemes, is used as an overlay over environmentally sensitive areas in respect of the environment, which needs protection and may be negatively impacted by development.<sup>196</sup> The D'MOSS therefore serves as a trigger for a requirement to screen the proposal for environmental protection, although it is not specified in the By-law Workflow or Applications Procedure as such a trigger. The prospective developers are required to obtain environmental approval from the municipality with regard to the Schemes when proposing development within D'MOSS.

The inclusion of the environment in decision-making on applications in terms of the Planning By-law and the requirement for environmental approval of proposals in respect of applicable activities within D'MOSS in terms of the Schemes' D'MOSS provisions will link the two and possibly ensure approval of the development that is sustainable.<sup>197</sup> Environmental considerations are undertaken by Environmental Department when screening and commenting on proposals within D'MOSS in terms of Schemes, adjacent to D'MOSS or within environmentally sensitive areas (in or outside D'MOSS) in terms of Development Guidelines, when approached informally or at planning enquiry, application submission, or the decision recommendation stage in terms of Planning By-law. The Environmental Department advises on conditions that may be attached to application or proposal approval.

The environmental considerations on applicable proposals will ensure that when planned development is undertaken, the environment remains able to provide the benefits it naturally provides to humans or other ecosystems the existence of which is beneficial to humans from generation to generation. However, such may be compromised by lack of synergy between the Schemes' provisions and the Planning By-law in relation to processing applications for proposals within D'MOSS, as mentioned above. This goes further to lack of an enabling provision for eThekweni to designate municipal officials to enforce compliance with the Schemes or approval conditions in terms of the Planning By-law in relation to environmental and proposals within D'MOSS. The other problem is that the municipality, which is directly assigned a mandate to enforce compliance on those issues, may not have the

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<sup>196</sup> Regulation 9.5(b) of Central; 9.5.2 of North, Schemes; and 9.4.1(b) of other three Schemes.

<sup>197</sup> Regulations 9.5(b) of Central, 9.5.2 of North, Schemes; .4.1 (b) of Inner West and South, Schemes; and 9.4.1(a) of Outer West; and Development Assessment Guidelines (n 34) at unnumbered pages after 1 and 14.

time or the relevant expertise to attend to non-compliances within D'MOSS. This problem may compromise the compliance enforcement or cause unregulated contraventions of the Schemes' D'MOSS provisions.

It is therefore found that eThekweni has incorporated and continues to incorporate principles of sustainable development and relevant environmental considerations into application decision-making by—

- making provisions in its Schemes that are relevant to environmental/natural resources' protection within a specific area;
- making a D'MOSS layer and overlaying it on its map and including it in Schemes as a trigger for a need to apply abovementioned Schemes' provisions on development proposals within such areas;
- making provisions, in its Planning By-law, requiring decision-makers to ensure compliance with other environmental legislative requirements, including NEMA, EIA Regulations, NWA and NFA; and
- undertaking necessary due diligence regarding natural areas' protection, including protection of areas adjacent to D'MOSS, by working with prospective developers to advise them regarding environmental issues related to their proposals.

However, the manner in which the relevant Schemes and the Planning By-law provisions (dealt with above) are written and applied as shown in Appendix 1, showed lack of synergy between such provisions and the associated requirements of Schemes and Planning By-law.

The solution to the abovementioned problems may be a review of the Planning By-law and the Schemes' provisions regarding regulation of activities within D'MOSS in order to create synergy and provide clarity between/regarding the two approvals or the decision-making processes. Such review must include regulation of proposals applicable to D'MOSS, both on and adjacent to environmentally sensitive areas, as additional triggers for environmental screening.

The next chapter deals with the conclusion of this study and recommendations.

### CONCLUSIONS AND RECOMMENDATIONS

#### I CONCLUSIONS

##### (a) Introduction

The aim of the study was to show how eThekweni Municipality ('eThekweni') incorporates the principles of sustainable development and relevant environmental considerations into its development planning decision-making. Based on the analysis of the initial Planning Enquiry including environmental screening, the formal application process, the role of the eThekweni spatial development framework ('eThekweni SDF') and the land Use Schemes ('Schemes'), consisting of provisions relating to Durban Metropolitan Open Space Systems (D'MOSS), it can be concluded that eThekweni uses D'MOSS for consideration of the environment in its development planning decision-making.<sup>1</sup> The D'MOSS, as a layer, highlights areas of environmental concern (on privately or public owned land) that needs biodiversity protection by restricting activities that may be undertaken on an area with such a layer in terms of Schemes.<sup>2</sup>

The D'MOSS is used as a trigger for a land development application ('application') on which environmental considerations must be undertaken prior to decision-making to approve or refuse the proposal. The results indicate that the Environmental Planning and Climate Protection Department ('Environmental Department') plays a critical role in providing specialist technical advice in environmental subjects to complement the skills required for environment-considerate planning and decision-making. The Environmental Department screens applications and advise planners who process such applications for final recommendations on decision-making on applications regarding environmental concerns.<sup>3</sup>

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<sup>1</sup> In terms of eThekweni Municipality: Spatial Planning and Land Use Management By-law 2016, Municipal Notice 114 of 2017, Provincial Gazette No. 1871 of 31 August 2017 (Planning By-law).

<sup>2</sup> Definition of D'MOSS Controlled area in Reg 2 of Central Scheme of eThekweni Municipality, July 2019 (Central Scheme), Inner-West (May 2019) (Inner-West Scheme), Outer-West (July 2019) (Outer-West Scheme), South (Review Date: not stated but Effective Date: October 2012) (South Scheme) and North Scheme (May 2019) (North Scheme) (altogether hereafter Schemes) read with Regulations 9.5(b) of Central, 9.4.1 (b) of Inner-West, Outer-West & South, and 9.5.2 of North, Schemes.

<sup>3</sup> Regulations 9.5 (d) of Central, 9.4.1 (b) of Inner-West, 9.5.2 of North, 9.4.1(a) of Outer-West and 9.4.1(b) of South, Schemes.

eThekwini started on or about 2010 to pioneer the inclusion of the environment in municipal planning as part of the Schemes, which are subordinate law to the currently implemented Planning By-law for processing of applications.<sup>4</sup> Environmental consideration is undertaken to ensure that developments that are approved are sustainable.<sup>5</sup> The study of eThekwini's application processing and decision-making, including environmental screening, in terms of the eThekwini Municipality: Spatial Planning and Land Use Management By-law 2016<sup>6</sup> in a manner consistent with the Spatial Planning and Land Use Management Act<sup>7</sup> may show other municipalities how they may protect the environment as part of their planning processes.

The study has focused on environmental considerations undertaken as part of eThekwini's planning decision-making processes because these considerations have previously been argued as municipalities usurping the provincial or national environmental mandate when matters of concern are undertaken by the municipalities. Biodiversity, as part of the environment, is taken care of by Environmental Planning and the coastal protection matters are taken care of by the Project Executive: Coastal Policy.<sup>8</sup>

The literature reviewed from the desktop did not show many resources on consideration of social and economic factors in processing of applications, although there are many eThekwini line functions the core mandate of which includes promotion of the economy and job creation, which may fall under either economic or social factors as principles of sustainable development. There is also eThekwini's Environmental Health Services under Environmental Health ('EHS'), the core mandate of which includes environmental health matters that may impact on the social well-being of humans. The inclusion of line functions relevant for promoting the economy and job creation as well as health issues in the Planning Enquiry form for determination to comment on applications indicate that these factors are considered at eThekwini planning. It is the details of what they consider and how they are

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<sup>4</sup> As required in chapter 7 of Planning By-law read with s2(4) and 1 definition of 'sustainable development in terms of National Environmental Management Act 107 of 1998 (NEMA); *Le Sueur v eThekwini Municipality* 2013 SA 6 (ZAKZPHC) 6; and Municipal Spatial Development Framework 2019/2020 Final Draft Report (May 2019) at 116.

<sup>5</sup> Section 2(4) read with definition of 'sustainable development' is s1 of NEMA; and J de Visser and X Poswa 'Municipal Law Making under SPLUMA: A Survey of Fifteen "First Generation" GDT Municipal Planning By-Laws' PER (2019) 1 at 21–22.

<sup>6</sup> Municipal Notice 114 of 2017, Provincial Gazette No. 1871 of 31 August 2017 (Planning By-law).

<sup>7</sup> 16 of 2013 (SPLUMA).

<sup>8</sup> Reg 9.6.2 of Central Scheme.

considered that could not be found, that may need interviews of eThekweni's officials from relevant planning and/or other relevant line functions to provide such details.

(b) *Integration with Strategic Planning Tools*

The eThekweni first incorporated environmental considerations in the development of strategic planning tools, including the Spatial Development Framework ('eThekweni SDF') and the Schemes.<sup>9</sup> The eThekweni SDF was/is developed in terms of the Local Government: Municipal Systems Act<sup>10</sup> and the Planning By-law, while Schemes were/are developed and reviewed in terms of the Planning By-law.<sup>11</sup> The eThekweni SDF includes Schemes and D'MOSS and the role of these in planning. The areas within D'MOSS are considered to consist of rich or high value biodiversity.<sup>12</sup> This is why such areas need protection from irreparable damaging developments. The Schemes are more than just strategic tools. They are subordinate law to the Planning By-law (being principal law) as they are binding on developers and decision makers. It is therefore required for them to be complied with when decisions are made on applications.<sup>13</sup> These tools are both considered in the land development decision-making process.<sup>14</sup>

The reviewed literature indicated that land development *inter alia* needs to be carefully planned to ensure the development is appropriate because the impacts of development (negative or positive) are felt by the environment on an area on which development is taking place. Sometimes the environmental impacts are felt on land adjacent to land being developed, depending on the type of development being proposed on such adjacent land and the ecological resources (including water, vegetation and sand, among others) being protected on the adjacent property.

(c) *Integration with the Decision-Making Process*

Linked to the abovementioned conclusion regarding the incorporation of environmental considerations in municipal planning on proposals within D'MOSS, eThekweni has a process and procedures developed from the Planning By-law and led by Planning Officials at the

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<sup>9</sup> Municipal Spatial Development Framework 2019/2020 (n 4) at 116,

<sup>10</sup> 32 of 2000 (MSA).

<sup>11</sup> Section 25(1) & (2) of MSA read with s9 (1) & (5)(a) of Planning By-law; and DJN Keyser *The implications of recent planning and environmental reform for the South African planning profession* (Master of Art and Science in Urban and Regional Planning thesis, North-West University, 2018) at 47–48.

<sup>12</sup> Section 10 of Planning By-law; and Municipal Spatial Development Framework 2019/2020 (n 4) at 15, 106 and 116.

<sup>13</sup> Sections 16(1)(a) and 44(1)(h) of Planning By-law.

<sup>14</sup> Sections 44(1)(f) and (h) of Planning By-law.

Development Planning Department ('Planning Department').<sup>15</sup> The process and procedures are used to process applications proposed within its area.<sup>16</sup> The person proposing development ('prospective developer') is advised at the Planning Enquiry phase whether or not environmental screening and comments are required for submission of a formal application to eThekweni and on the details of line functions or authorities required to comment.<sup>17</sup> The prospective developer would then, outside the formal Planning By-law process, approach Environmental Department to make an environmental enquiry and obtain comments regarding the 'potential environmental impacts of' his/her proposal on the ecosystem-related goods and services such environment provides.<sup>18</sup>

The environmental enquiry process is generally undertaken prior to lodging a formal application, either as part of the initial Planning Enquiry or even before such enquiry. However, the Environmental Department also advises on environmental requirements and considerations throughout the application decision-making process. The Environmental Department's advice may support or not support the proposal, depending on whether or not it would cause irreparable harm to the environment within D'MOSS.<sup>19</sup> The development may be supported if it is needed and the harm or possible harm to environment may be minimised and mitigated, *inter alia* by imposing conditions to be met by the prospective developer.<sup>20</sup> Environmental Planning would recommend to eThekweni a decision to approve such development with relevant condition/s.<sup>21</sup>

The Planning By-law requires decision-makers to make decisions consistent with the abovementioned strategic planning tools, except the Municipal Planning Tribunal (MPT), which may decide on a Category 2 application contrary to SDF.<sup>22</sup> However, such decision must at least be consistent with the approved local area plan, that is not yet a Scheme,

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<sup>15</sup> By-Law Workflow accessed at [http://www.durban.gov.za/City\\_Services/development-planning-management/Documents/By-Law20%2c%20Appeal%20and%20Contravention%20Work%20Process.pdf](http://www.durban.gov.za/City_Services/development-planning-management/Documents/By-Law20%2c%20Appeal%20and%20Contravention%20Work%20Process.pdf) on 11 September 2019; and Application Procedures accessed at [http://www.durban.gov.za/City\\_Services/development\\_planning\\_management/Documents/Application%20Procedure%20for%20Land%20Development.pdf](http://www.durban.gov.za/City_Services/development_planning_management/Documents/Application%20Procedure%20for%20Land%20Development.pdf) on 11 September 2019).

<sup>16</sup> Planning By-law read with Land Use Management Available at [http://www.durban.gov.za/City\\_Services/development\\_planning\\_management/Pages/Land-use-Management-\(LUMs\)-2.aspx](http://www.durban.gov.za/City_Services/development_planning_management/Pages/Land-use-Management-(LUMs)-2.aspx) accessed on 16 April 2019; and By-law Workflow (n 15).

<sup>17</sup> By-Law Workflow (n 15) read with s22 of Planning By-law.

<sup>18</sup> Municipal Spatial Development Framework 2019/2020 (n 4) at 118–119.

<sup>19</sup> *Ibid.* 118.

<sup>20</sup> Regulations 9.5 (d) of Central, 9.4.1 (b) of Inner-West, 9.5.2 of North, 9.4.1(a) of Outer-West and 9.4.1(b) of South, Schemes.

<sup>21</sup> *Ibid.*

<sup>22</sup> Section 8(1) of Planning By-law.

or with a ‘pre-existing Scheme’ that has continued to be implemented for a period of more than 18 months, or any other ‘specific circumstance’ justifying inconsistency.<sup>23</sup>

(d) *Problem Areas*

The problem areas in environmental considerations as part of decision-making in planning applications are shown in chapter three. eThekweni ensures that prospective developers, its officials (who attend to applications) and decision-makers, where necessary, consider the environment as part of preparing applications, processing submitted applications and deciding on such applications. However, it is found under section IX of chapter three that environmental screening and approval processes in terms of Schemes and the planning approval process in terms of the Planning By-law lack synergy. There is also no link between the decision-making relating to D’MOSS activities by the assigned municipality and that relating to the decision-making relating to planning applications by the Municipal Council, the MPT, the Head-Development Planning, Environment and Management Unit, and the Deputy Head-Planning Department as designated decision-makers on any of four Categories of applications dealt with in detail in chapter two.<sup>24</sup> It is concluded that the eThekweni planning legislation must be aligned to create a synergy between the screening of environmental considerations and the decision-making process with the planning decision-making processes.

Furthermore, it is found in section VII(d) of chapter three of this study that a trigger for environmental screening proposals prior to decision-making is the presence of a D’MOSS layer on the site proposed for development in terms of Schemes.<sup>25</sup> This is the case even though there is no mention of D’MOSS as such a trigger in the Planning Enquiry, as guided by the By-law Workflow. The Schemes also do not provide that the presence of D’MOSS on a site must be used as a trigger or criterion for the determination of line functions that must comment on proposed development.

It is found in section IX(b) of chapter three of this study that the Development Assessment Guidelines (Development Guidelines), which provide some process for environmental screening and comment (‘advisory services’) by the Environmental Department, are not provided for under eThekweni’s law or policy to guide ‘submission and processing of

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<sup>23</sup> Section 8(1) and (2) of Planning By-law.

<sup>25</sup> See Regulations 9.5(a) of Central, 9.5.1 of North, Schemes; and 9.4.1(a) of other three Schemes, all read with a definition of ‘D’MOSS Controlled Area’ in Regulation 2 of, Schemes. The definition is dealt with in chapter 2.

applications'.<sup>26</sup> It is shown in chapter three of this study that the Planning By-law provides for making such policy guidelines.<sup>27</sup> Therefore, anything written in such guidelines (including the screening of development proposals on sites adjacent to D'MOSS or environmentally sensitive sites), but not provided for in Schemes, the Planning By-law or any applicable planning legislation, is not law or does not have a legal effect. It is concluded that there is no legal requirement for a decision-maker, when deciding on an application in terms of the Planning By-law, to consider if there is environmental approval for proposed activities within such areas unless developing on them would trigger a need for authorisations in terms of other environmental legislation.<sup>28</sup> The need for environmental authorisations would require decision-makers to consider clearance of authorities (submitted with an application from authorities that administer such relevant environmental legislation) and compliance with environmental legislation.<sup>29</sup> This problem may be resolved by eThekweni making such triggers planning legislative requirements/criteria in terms of the Schemes or the Planning By-law, as well as defining the term 'adjacent'.

The recommendations regarding review and amendment of eThekweni planning legislation (Planning By-law and Schemes) incorporating environmental considerations are made in order *inter alia* to provide alignment between the Schemes and the Planning By-law. Such alignment may improve the making of appropriate sustainable decision on land developments within the eThekweni area.<sup>30</sup>

## II RECOMMENDATIONS

Based on the abovementioned conclusions, eThekweni may consider the following recommendations on review of its planning legislation regime to improve environmental considerations:

- Review of the Planning By-law and Schemes' provisions (D'MOSS in particular) in order to align the approvals on applications/proposals.
- Review of the Schemes to include regulation of proposals on areas adjacent to D'MOSS and environmentally sensitive areas (not within D'MOSS) as additional

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<sup>26</sup> See s23(5) of Planning By-law.

<sup>27</sup> Section 23(5) of Planning By-law.

<sup>28</sup> Section 22(2) of Planning By-law.

<sup>29</sup> Sections 44(1)(t) of Planning By-law.

<sup>30</sup> See eThekweni Municipality Inner-West Scheme, Outer-West Scheme, Central Scheme, North Scheme and South Scheme (Land Use Management (n 16); and J de Visser and X Poswa (n 5).

legal triggers for screening of proposals on such land or areas, and defining the term ‘adjacent’, if regulation of activities on such land was intended.

- Review of the Planning By-law to define the term ‘Planning By-law’ to include Schemes to enable the municipality to delegate enforcement of contraventions regarding environmental legal requirements where it cannot undertake the enforcement itself. Alternatively, enforcement provisions in the Planning By-law may be amended to include provisions and conditions of approval in the Schemes which refer to the By-law in order to incorporate those that relate to the environment to enforce provisions that may be delegated or have been delegated to the LUM Inspectorate. This amendment would provide clarity on enforcement with regard to non-compliance with Schemes provisions relating to D’MOSS.
- Adoption of the Development Guidelines and By-law Workflow, which must include the criteria for determination of relevant eThekweni line functions and other government authorities which must comment in the development proposal and issue comments or clearance as policy in terms of Planning By-law. This will be a policy regarding submission, processing of land development applications and environmental/biodiversity enquiry processing, to guide ‘submission and processing’ of applications’.<sup>31</sup>

The abovementioned review of the Planning By-law and/or Schemes may be initiated by the Head-DPEM directing the DH-Planning Department to lead the process. The DH-Planning Department may need to instruct eThekweni’s legal department or process the appointment of a panel of Attorneys to undertake the abovementioned review. The Environmental Department would need to be part of the review team in order to ensure that all biodiversity matters are covered during such legislation review.

The abovementioned study’s findings, conclusions and recommendations may also assist other municipalities with regard to improving their planning legislation to incorporate the environment, where necessary.

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<sup>31</sup> See s 23(5) of Planning By-law.

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## THESIS

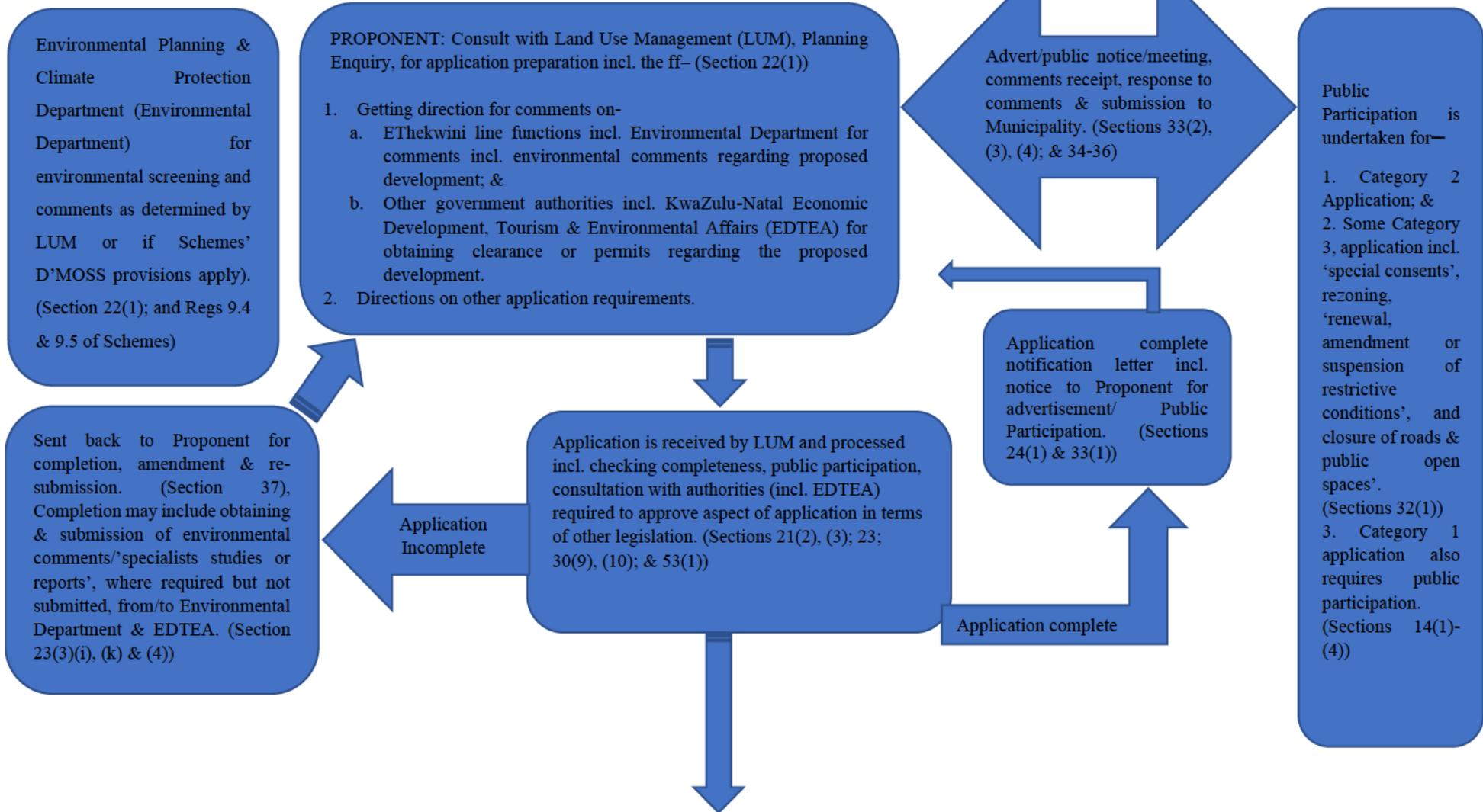
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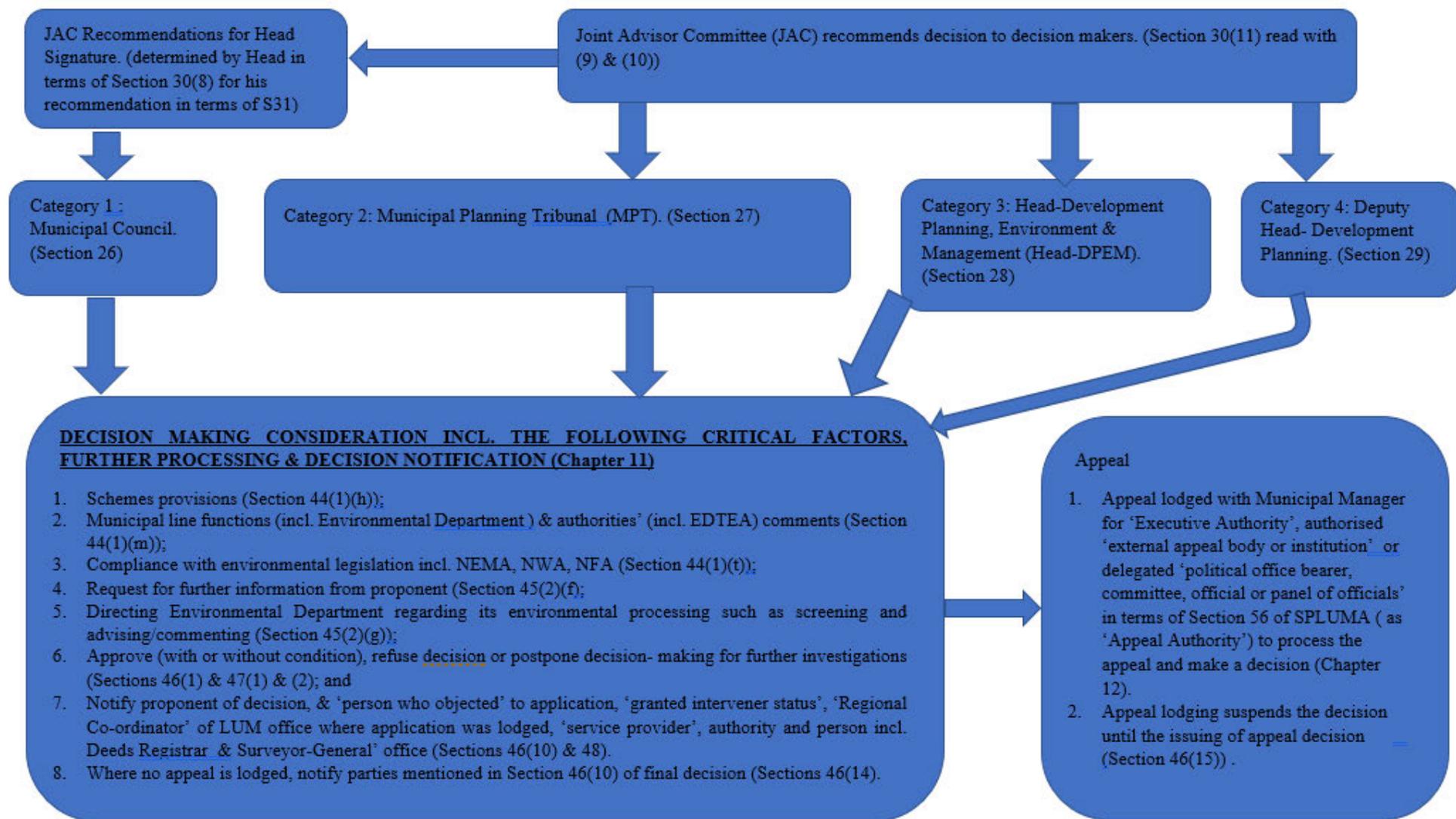
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### Appendix I - Planning By-law Application Flow-Chart







Miss Sibongile Patricia Dlamini (972134086)  
School Of Law  
Pietermaritzburg

Dear Miss Sibongile Patricia Dlamini,

**Protocol reference number:** 00003539

**Project title:** Integration of social, economic and environmental factors into land-use/town planning decisions in eThekweni Municipality.

### **Exemption from Ethics Review**

In response to your application received on 15 August 2020, your school has indicated that the protocol has been granted **EXEMPTION FROM ETHICS REVIEW**.

Any alteration/s to the exempted research protocol, e.g., Title of the Project, Location of the Study, Research Approach and Methods must be reviewed and approved through an amendment/modification prior to its implementation. The original exemption number must be cited.

For any changes that could result in potential risk, an ethics application including the proposed amendments must be submitted to the relevant UKZN Research Ethics Committee. The original exemption number must be cited.

In case you have further queries, please quote the above reference number.

**PLEASE NOTE:**

Research data should be securely stored in the discipline/department for a period of 5 years.

I take this opportunity of wishing you everything of the best with your study.

Yours sincerely,



Mr Simphiwe Peaceful Phungula  
Higher Degrees Committee  
School Of Law

UKZN Research Ethics Office  
Westville Campus, Govan Mbeki Building  
Postal Address: Private Bag X54001, Durban 4000  
Website: <http://research.ukzn.ac.za/Research-Ethics/>

Founding Campuses: Edgewood Howard College Medical School Pietermaritzburg Westville

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