

THE ROLE OF THE LOCAL AUTHORITY IN THE IMPLEMENTATION AND ENFORCEMENT OF ENVIRONMENTAL LEGISLATION

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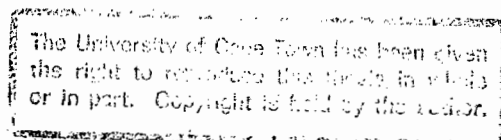
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A LIST OF ACRONYMS, ABBREVIATIONS OR DEFINITIONS USED IN THE TEXT

APPA	Atmospheric Pollution Prevention Act, 45 of 1965
CE	Council for the Environment
DFA	Development Facilitation Act, 67 of 1995
ECA	Environment Conservation Act, 73 of 1989
Fundamental Principles	Fundamental Principles and Objectives for a New Water Law in South Africa - Report to the Minister of Water Affairs and Forestry of the Water Law Review Panel, January 1996
HA	Health Act, 63 of 1977
HSA	Hazardous Substances Act, 15 of 1973
HWM	Hazardous Waste management
IEM	Integrated Environmental Management
LUPO	Land Use and Planning Ordinance, 15 of 1985(C)
Municipal Ordinance	Municipal Ordinance, 20 of 1974(C)
ORV	Off-road vehicle
PPA	Physical Planning Act, 124 of 1991

RDP	Reconstruction and Development Programme
SSA	Sea-shore Act, 21 of 1935
Steyn Report	Report of the board of investigation into the Saldanha Steel Project by Judge Jan Steyn
SWM	Solid waste management
The constitution	The Constitution of the Republic of South Africa, Act 200 of 1993
TLC	Greater Hermanus Transitional Local Council
Urban Development Strategy	Urban Development Strategy of the Government of National Unity
Water Act	Water Act, 54 of 1956
WDS	Waste disposal site

THE ROLE OF THE LOCAL AUTHORITY IN THE IMPLEMENTATION AND ENFORCEMENT OF ENVIRONMENTAL LEGISLATION

1. INTRODUCTION

This dissertation will initially look at the local authority's constitutional relationships with the national and provincial levels of government. It will then investigate in general the role of the local authority (the local level of government) in the implementation and enforcement of legislation affecting the environment. The various definitions of environment will be discussed indicating that this study will not be limited to the environment as defined in section 29 of the constitution¹. On the other hand it will not consider the built or cultural environment, but will confine the discussion to the natural environment² as such, although these matters are briefly referred to when dealing with land development. The legislation that will be dealt with concerns (a) resource utilization, (b) pollution control and waste management and (c) land development and environmental considerations. Resource utilization will not be a distinct topic, but will be considered under the Water Act, the Environmental Conservation Act, vehicle access to the coastal zone, pollution control and land development.

¹ The constitution of the Republic of South Africa, Act 200 of 1993, as amended, ("the constitution"). This study will limit itself to a discussion of the interim constitution in view of the fact that the constitutional court has not yet pronounced that the final constitution complies with the principles set out in the interim constitution

² André Rabie: "A new deal for environmental conservation: aspects of the Environment Conservation Act 73 of 1989" 1990(53)

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This study will further examine the decision making-process and the powers delegated or assigned to a local authority in so far as they concern the environment, which examination will be interwoven with the main discussion.

Two research case studies will be related: one as regards 1) land development³; and another as regards 2) vehicle access to the coastal zone. The Saldanha-Langebaan (West Coast Peninsula Transitional Local Council) and Hermanus (Greater Hermanus Transitional Local Council) local authorities will be the subject of these case studies.

The research is conducted within the framework and principles of the Reconstruction and Development Programme⁴ ("RDP"), being "a policy framework for integrated and coherent socio-economic progress"⁵. Its vision for a fundamental change of South Africa will be brought about by making sure that South Africa is a democratic society operating within democratic institutions, providing for public participation and "creating a sustainable and environmentally friendly growth and development path"⁶, with one of its key programmes being the meeting of the peoples' basic

³ This case study will form part of the discussion on land development

⁴ White Paper on Reconstruction and Development, Government Notice 1954 of 1994 published in Government Gazette 16085 dated 23 November 1994

⁵ RDP White Paper (n 4) p 7

⁶ RDP White Paper (n 4) p 7

needs eg land reform, housing, water, sanitation, the environment, social welfare and security⁷. It is noted that one of the 6 principles of the RDP is integration and sustainability, which provides for the implementation of the RDP at local government level⁸ and also assigns a role for it in the co-ordination of the development process⁹.

1.1 THE CONSTITUTIONAL RELATIONSHIP OF THE LOCAL AUTHORITY WITH THE NATIONAL AND PROVINCIAL LEVELS OF GOVERNMENT

The constitution does not spell out in so many words that the national level of government is the first level, the provincial government, the second level and local government, the third level. Section 4(2) does, however, use the expression "all levels of government", indicating in the first chapter that there is a hierarchy as regards the levels of government. In determining the relationship between the levels of government and establishing local government's place in this relationship, reference will be made to sections 174, 175, 126, 37, 144, 235 and schedule 6 of the constitution.

Section 174 of the constitution, in establishing the status of local government, states that:

"(1) Local government shall be established for the

⁷ RDP White Paper (n 4) p 9

⁸ RDP White Paper (n 4) p 8

⁹ RDP White Paper (n 4) p 18

residents of areas demarcated by law of a competent authority.

(3) A local government shall be autonomous and, within the limits prescribed by or under law, shall be entitled to regulate its affairs.

(4) Parliament or a provincial legislature shall not encroach on the powers, functions and structure of local government to such an extent as to compromise the fundamental status, purpose and character of local government."

Section 175 states that:

"(1) The power, functions and structures of local government shall be determined by law of a competent authority.

(2) A local government shall be assigned such powers and functions as may be necessary to provide services for the maintenance and promotion of the well-being of all persons within its area of jurisdiction.

(3) A local government shall, to the extent determined in any applicable law, make provision for access by all persons residing within its area of jurisdiction to water, sanitation, transportation facilities, electricity, primary health services, education, housing and security within a safe and healthy environment, provided that such services and amenities can be rendered in a sustainable manner and are financially and physically practicable.

(4) A local government shall have the power to make by-laws not inconsistent with this constitution or an act of parliament or an applicable provincial law."

Section 126(1) of the constitution stipulates that

"A provincial legislature shall be competent, subject to subsections (3) and (4) to make laws for the province with regard to all matters which fall within the functional areas specified in Schedule 6".

Schedule 6 enumerates amongst other matters: the environment, nature conservation, health services, local government, and urban and rural development¹⁰. The constitution initially provided for concurrent legislative competence by Parliament as far as these matters were concerned. The Constitution of the Republic of South Africa Amendment Act, 2 of 1994 ("Act 2 of 1994") amended Act 200 of 1993 by determining that provincial legislation shall prevail over Parliamentary legislation¹¹ except in so far as:

- "(a) the Act of Parliament deals with a matter that cannot be regulated effectively by provincial legislation;
- (b) the Act of Parliament deals with a matter that, to be performed effectively, requires to be regulated or co-

¹⁰ It is significant to note that schedule 6 does not refer to water, which is obviously to be regarded of such importance that it can only be controlled and regulated by the national government - see the discussion below

¹¹ Section 2(c) of Act 2 of 1994

ordinated by uniform norms or standards that apply generally throughout the Republic;

(c) the Act of Parliament is necessary to set minimum standards across the nation for the rendering of public services;

(d) the Act of Parliament is necessary for the maintenance of economic unity, the protection of the environment, the promotion of interprovincial commerce, the protection of the common market in respect of the mobility of goods, services, capital or labour, or the maintenance of national security;

(e) the provincial law materially prejudices the economic, health or security interests of another province or the country as a whole, or impedes the implementation of national economic policies."

According to section 37 of the constitution the legislative authority of the Republic of South Africa vests in Parliament, but it states that this power must be exercised in accordance with the constitution, thereby acknowledging and reiterating the provisions of sections 126, 174 and 175 dealing with the powers and competence of provincial and local government.

The powers and functions conferred by the constitution are acted upon by the functionary charged to do so. In terms of section 75 the executive authority vests in the President who has to perform his or her powers and functions subject to the provisions of the constitution. The executive authority of a province vests in the

premier¹² as regards -

*matters in respect of which the provincial legislature has made laws after the commencement of the constitution¹³ in connection with matters set out in schedule 6¹⁴. This power is derived from the constitution itself¹⁵;

*laws in respect of which the administration were assigned to the province¹⁶;

*matters delegated to the province¹⁷.

The executive authority of a local authority vests in an executive committee elected in terms of section 177.

It would be appropriate at this stage to note the difference between delegation of powers and assignment. There must always be authority for the exercise of power¹⁸, because public bodies

¹² Section 144(1) of the constitution

¹³ Section 144(2) of the constitution

¹⁴ Section 144(2) of the constitution

¹⁵ Section 126 of the constitution

¹⁶ Section 144(1) read with section 235(8) of the constitution

¹⁷ Section 144(2) of the constitution

¹⁸ Boule, Laurence, Harris, Bede & Hoexter, Cora: "Constitutional and Administrative Law Basic Principles" Cape Town Juta p 302

do not have inherent powers - they must be authorised¹⁹. When powers and functions are assigned, the authority concerned has a quality of finality in the sense that the authority is transferred in full and the assignor body no longer has control over the exercise of the powers and functions²⁰. The assignee body now has the power to exercise the authority as well as the responsibilities that go with them.

Delegation is where the assignor body authorises the assignee body (or an official) to act on its behalf²¹. The assignor body still retains control and responsibility in that it can revoke the delegation and exercise the powers and functions itself. The power to delegate must, however, be conferred by the enabling legislation, either expressly or by implication²².

Section 175 provides for powers, functions and structures of local government to "be determined by law of competent authority"²³ and for the assignment of powers and functions, which will enable local government to provide services²⁴.

If one takes into account that the constitution states that local

¹⁹ Boule et al (n 18) p 302

²⁰ L Baxter: "Administrative Law" p 432 and Rabie, André: "Mechanical roars over our shores: control over off-road vehicles" SAPLJ 1991(6) 189 at p 204

²¹ Baxter (n 20) p 432

²² Baxter (n 20) p 432

²³ Section 175(1) of the constitution

²⁴ Section 175(2) of the constitution

government must be autonomous²⁵ one realises that one is concerned with an entirely separate level of government²⁶. From the discussion above it can be seen that the constitution therefore distinguishes between the 3 levels of government and binds the legislative, executive and judicial organs of the state at all 3 levels of government²⁷.

It is clear that a local authority is a local government as envisaged by section 245 and by necessary implication an organ of the state at one of the levels of government and that is local government²⁸.

1.2 THE SCOPE OF THE TERM ENVIRONMENT

One has to distinguish between -

- 1 the scope of the term environment as defined in section 29 of the constitution;
- 2 the scope of the term environment as used elsewhere in the constitution; and
- 3 the scope of the term environment as used in other legislation eg the Environment Conservation Act, 73 of 1989 ("ECA").

²⁵ "within the limits prescribed by and under law" - section 174(3)

²⁶ The powers and functions of a local authority is investigated below

²⁷ Section 4(2) of the constitution

²⁸ Section 4(2) of the constitution

To take the last point first. One should look at the definitions clause of the particular act that one is dealing with.

The ECA has a wide definition and defines environment as "the aggregate of surrounding objects, conditions and influences that influence the life and habitats of man or any other organism or collection of organisms".

Section 29 of the constitution limits the scope of the term environment in 3 ways -

- 1 it firstly is anthropocentric in that it refers to every person's health or well-being;
- 2 it secondly only refers to an environment insofar as it concerns a person's health or well-being; and
- 3 thirdly it sets a standard as to the quality of the environment - the section states that the environment must not be detrimental to the individual's health or well-being, which is a negatively framed minimum standard.

The section does not refer to conservation or preservation of biodiversity, sustainable utilization of resources or the right of future generations.

Pollution control and waste management should be implicit in an

environment which is not detrimental to human health or well being, although it could be argued that the standard of pollution control and waste management need only meet a level which is not detrimental to human health or well-being. The same may, on the face of it, not necessarily be the case in respect of land use and planning, but, which activities may have a serious effect on the environment eg the rezoning of land for heavy industrial use, which may have the effect of polluting a water source.

The environment in so far as it affects human health, is concerned with the pollution of the land, air and water, noise pollution, sanitation and waste disposal and occupational health.

In order to achieve a healthy environment one must understand the way in which the environment influences human health. Professors Fuggle and Rabie²⁹ point out that "environmental health comprises those aspects of human health and disease that are determined by factors in the environment."

Almost every aspect of the environment may affect human health. A problem in this field is that there is not a great deal of certainty as to the extent of risks to human health caused by environmental factors³⁰.

To assess health risks caused by exposure to environmental

²⁹ R F Fuggle & M A Rabie "Environmental Management in South Africa" Cape Town Juta 1992 p 590

³⁰ Fuggle & Rabie (n 29) p 591

factors one has to make use of epidemiology and toxicology³¹. Environmental epidemiology deals with the health effects in humans which were caused by exposure to the environment³². Toxicology identifies the toxicity of chemicals³³. In the end the risk must be linked to causation³⁴. One must be able to prove that the environmental factor caused the damage or injury complained of³⁵.

Well-being is defined in Chambers dictionary as welfare and welfare as the state of faring or doing well, freedom of calamity, enjoyment of health and prosperity. This would apply to the work place and public places where the environment should be safe from diseases eg plant and machinery must be safe and public buildings must be structurally sound, safe and free from disease.

Where the term environment is used elsewhere in the constitution, one has to determine its meaning within the context of the section where it is used.

Section 175(3) refers to "a safe and healthy environment". Unlike

³¹ Fuggle & Rabie (n 29) p 594

³² Fuggle & Rabie (n 29) p 594

³³ Fuggle & Rabie (n 29) p 594

³⁴ Fuggle & Rabie (n 29) p 594

³⁵ Verstappen v The Town Board of Port Edward - case 4645/93 - Registrar of the Durban and Coast Local Division of the Supreme Court of South Africa's file copy p 12

in the case of section 29, the environment is positively qualified, although a proviso is added, stating that access will only be provided if it "can be rendered in a sustainable manner and is financially practicable". The subclause further specifically refers to access to water and sanitation, which should actually have been implicit in a safe and healthy environment. One can only infer that the reason for enumerating these aspects separately is their basic importance.

It must further be remembered that section 29 contains a fundamental right which can be enforced by an individual action (or a group³⁶), whereas section 175(3) places a functional duty on the local authority to do a number of things - hence the proviso as regards sustainability and financial practicability and the qualification as regards legislative empowerment³⁷.

Schedule 6 only refers to environment, which would mean environment in its widest sense (eg the definition of the ECA), because there is no suggestion of a limitation of the term. This would also be true where it is used in section 126(d) of the constitution.

As was pointed out in the introduction, this study will consider all legislation which confers a power or function on a local authority in relation to the environment other than the built or cultural environment. Legislation discussed will be in

³⁶ In terms of section 7(4) of the constitution

³⁷ "to the extent determined in any applicable law"

satisfaction of the requirements set by one or more of the following -

*section 29 of the constitution setting certain minimum requirements to which national, provincial and local legislation must conform;

*section 175(3) of the constitution, which obliges a local authority to provide access to water, sanitation and other services within a safe and healthy environment to the extent that national and provincial legislation enables it to do so;

*schedule 6 of the constitution, which would be the environment in its widest sense in terms of which the provinces would have legislative competence as regards the environment, which legislation, complying with national norms and standards will have to enable the local authority to fulfill its task.

One must bear in mind that these 3 areas may overlap, especially the first 2 categories.

2. THE LOCAL AUTHORITY'S POWERS AND FUNCTIONS

The purpose of this part is to examine the powers and functions accorded to a local authority as regards the environment in so far as they relate to the content of the definitions discussed

in the previous part. The nature of the powers and functions are investigated in general terms whereafter a discussion follows on specific powers and functions set out in the principal acts dealing with the topics under consideration viewed against the backdrop of the general discussion.

Section 175(3)³⁸ defines the range of the matters in which local government shall have jurisdiction, section 175(1) provides for enabling legislation which will determine its powers and functions and section 175(2) which powers will be assigned to local government. Although it would appear that a local authority derives its powers and functions from the constitution, it is stated that the powers, functions and structures "shall be determined by law of a competent authority"³⁹. This means that the local authority's powers do not directly stem from the constitution⁴⁰. The autonomy that a local authority possesses relates only to administrative autonomy in terms of the powers and functions conferred upon it by enabling legislation⁴¹.

Powers are the authority enabling a local authority to do things⁴² and the extent of powers are limited by the scope of the authority which is conferred by the enabling legislation

³⁸ Of the constitution

³⁹ Section 175(1) of the constitution

⁴⁰ Dion A Basson: "South Africa's Interim Constitution - Text and Notes" Cape Town Juta 1994 p 233

⁴¹ Basson (n 40) p 233

⁴² Boulle et al (n 18) p 300

(national or provincial), because powers are not unrestricted⁴³. Powers will, however, invariably include some degree of discretion, unless they are mechanical powers⁴⁴.

Functions also concern the doing of things, but it means that there is a duty involved and duties require things to be done⁴⁵: that is: there is an obligation. The exercise of a duty may also involve the application of a discretion, but the obligation to do it remains. In the case of a power, there is a discretion as to whether the power should be exercised or not. The legislation is enabling. The minister may..., but he or she is not obliged to.

An example: a local authority has the power to send a wreath on the death of somebody⁴⁶ or to decide not to do so, but one of its functions is to consider applications for subdivisions⁴⁷. There is a discretion involved in granting or refusing the application, but there is a duty on the local authority to consider the application. It may not decide not to do so.

It is clear from section 174 that local government must not be spurious, but that it must be autonomous within the limits set

⁴³ Baxter (n 20) p 404

⁴⁴ Boulle et al (n 18) p 301

⁴⁵ Boulle et al (n 18) p 300

⁴⁶ Section 186(11) of the Municipal Ordinance, 20 of 1974 (C)

⁴⁷ Sections 24 and 25 of the Land Use and Planning Ordinance, 15 of 1985 (C)

by or under law⁴⁸ as well as by section 175 and be able to fulfill the functions conferred upon it. Section 175(4) elaborates on the principle which is stated in section 175(3).

Section 174(4) protects the local authority's powers and functions against future legislation or the amendment of existing legislation that may encroach on the powers and functions of the local authority⁴⁹ to the extent that it compromises "the fundamental status, purpose and character of local government"⁵⁰. It would appear that there is an obligation on the other 2 levels of government to ensure that the legislation that they generate will respect this principle. The principle is obviously subject to provisos as regards general norms and standards such as the ones that apply in respect of the relationship between the national and provincial governments⁵¹.

The constitution, in section 235(6), arrogated the powers that provinces had in terms of law prior to the coming into operation of the constitution. It vested these powers in the national government until such time that these powers are assigned to the provincial governments in terms of section 235(8) by the President by proclamation in the Government Gazette.

⁴⁸ Section 174(3) of the constitution

⁴⁹ Basson (n 40) p 233

⁵⁰ Section 174(4) of the constitution

⁵¹ See section 126(3) paragraphs (b), (c) and (d) of the constitution

The administration of the ordinances of the Western Cape⁵² were assigned to it by proclamation R 115 which appeared in Government Gazette 15813 dated 17 June 1994.

The administration of certain sections of the ECA were assigned to the provinces under proclamation R 28 which appeared in Government Gazette 16346 dated 7 April 1995,

The administration of the whole of the Health Act, 63 of 1977 ("HA"), excluding a number of sections were assigned to the provinces by proclamation R 152 which appeared in Government Gazette 16049 dated 31 October 1995.

The main powers of administration by a local authority as regards legislation, subordinate legislation, delegated legislation and regulations, its functions and structures referred to in section 175 of the constitution are set out in the Municipal Ordinance, 20 of 1974(C) ("the Municipal Ordinance"), the Land Use and Planning Ordinance 15 of 1985(C) ("LUPO"), the HA and the ECA.

Although a local authority has constitutional authority for making by-laws⁵³ which are not inconsistent with the constitution, Parliamentary or provincial legislation⁵⁴ and

⁵² This study will restrict itself to provincial legislation of the Western Cape

⁵³ Section 175(4) of the constitution

⁵⁴ such powers having been conferred by section 188 of the Municipal Ordinance

therefore has legislative powers, the local authority's influence in the field of environmental law is more concerned with administrative acts, which implement and enforce national, provincial, subordinate and delegated legislation. In other words: legislation is not self executing and therefore needs an administrative act to put them into operation ⁵⁵.

The next 4 headings that follow will refer to the principal acts and laws mentioned above containing provisions as regards the local authority's functions and powers in respect of the environment as explained above.

2.1 THE HEALTH ACT

It may be said that the HA attempts to create an environment which would comply with sections 29 and 175(3) of the constitution and in so doing grants certain duties and powers to local authorities. The HA does, of course, not dovetail satisfactorily with the constitution, because it was passed 2 decades ago when an integrated approach to environmental issues was not yet envisaged.

The HA further makes provision for regulations as regards communicable diseases (section 33), conditions that are dangerous to health (section 34) (control of new buildings, sewerage etc), food and milk, mollusc farming, fish farming (section 36), edible products originating from polluted water (section 36A), water

⁵⁵ Boulle et al (n 18) p 88

intended for human use and food processing (section 37), rubbish, night soil, sewage or other waste and reclaimed products (section 38) (it specifically refers to the prevention of water pollution which may be dangerous or detrimental to health) and nuisances⁵⁶ in section 38(1) (h) .

The HA in section 14(1) (c) (the administration of which section has not been assigned to the provinces) states that one of the functions of the Department of Health is "to take steps for the promotion of a safe and healthy environment"⁵⁷. Section 20 (the administration of which has been assigned to the provinces), setting out the duties and powers of local authorities, states that:

"(1) Every local authority shall take all lawful, necessary and reasonably practicable measures -

- (a) to maintain its districts at all times in a hygienic and clean condition;
- (b) to prevent the occurrence within its district of
 - (i) any nuisance;
 - (ii) any unhygienic condition
 - (iii) any offensive condition; or
 - (iv) any other condition which could or would be

⁵⁶ Nuisance as defined, means many things which are unsafe, injurious or dangerous to health. What is interesting is that "any occupied dwelling for which no proper and sufficient supply of pure water is available within a reasonable distance," is a nuisance.

⁵⁷ Section 14(1) (c) of the HA

harmful or dangerous to the health of any person within its district or the district of any other local authority...

- (c) to prevent the pollution of any water intended for the use of the inhabitants of its district..."

The HA does not bind the state (or provincial administration or local authority) or any of its officials for anything done in good faith under the act⁵⁸.

The Minister of Health may direct a local authority to perform the functions set out in section 14(1) of the HA after he or she has consulted with the local authority and satisfied him- or herself that it is able to perform those functions⁵⁹. The local authority may also request the minister to delegate these functions to it⁶⁰. Such delegation will be made subject to the regulations the minister may make in connection with the matters set out above. The provincial government is under an obligation to relieve a local authority of its duties to perform the functions under section 14(1), owing to a lack of resources⁶¹.

Section 181 of the Municipal Ordinance compels the local authority (the council of a municipality) to maintain "its municipal area in a clean and sanitary condition" and for

⁵⁸ Section 58 of the HA

⁵⁹ Section 20(2) of the HA

⁶⁰ Section 20(3) of the HA

⁶¹ Section 20(5) (a) of the HA

preventing or abating a public nuisance.

2.2 THE ENVIRONMENT CONSERVATION ACT

The ECA may in some measure satisfy the requirements of section 29 and section 175(1) of the constitution, but neither comprehensively nor adequately. It further provides for a certain degree of protection and conservation of the natural environment.

It is not the purpose of this paper to give a general discussion of the ECA, but to concentrate on its relevance to the local authority. Despite the wide definition of environment in the ECA it does not have a continuous thread running through it, as will be noted from the discussion that follows, with the additional disadvantage that it disrupts the coherency of the discussion.

The ECA has broadly stated objectives set out in section 2(1) as regards matters to which general policy may be applied and it creates a framework for environmental management, but the exercise of most of the powers set out in it are discretionary. The legal powers available to the minister to achieve certain goals are therefore not obligatory. The policies that may be determined by the minister are not embodied in the ECA and they do not have the character of law in the sense that they can be amended by an administrative act. The heart and soul of the ECA lies in section 3 which states that ministers, administrators and local authorities shall exercise powers and duties "which may have an influence on the environment...in accordance with the

policy referred to in section 2". The general policy which was eventually published⁶² is therefore binding and enforceable⁶³. This is confirmed by Farlam J in the matter of Van Huyssteen v The Minister of Environmental Affairs and Tourism⁶⁴ where he discussed the binding nature of the general policy. He states that it might not have been necessary before the publication of the general policy for a functionary (eg a local authority) making a decision affecting the environment "to take into account findings and recommendations made by boards appointed under other legislation, but that the ECA and the general policy have changed the situation. Farlam J further decided that the administrative process of exercising a power or duty must be procedurally fair in so far as it affects the rights of individuals⁶⁵. The judge found that a decision to rezone land on which Iscor and Saldanha Steel intend to build and operate a steel mill will without a doubt affect Van Huyssteen's (and the other applicants') rights if the operation of the steel mill will have the effect of polluting or otherwise detrimentally affecting the lagoon and that it follows "that the applicants have the right to procedural fairness in respect of the rezoning decision"⁶⁶.

⁶² Notice 51 of 1994: Government Gazette 15428 dated 21 January 1994

⁶³ Rabie (n 20) p 204

⁶⁴ Van Huyssteen & Others v The Minister of Environment Affairs and Tourism & Others - case 6570/1995 - Registrar of the Cape of Good Hope Division of the Supreme Court of South Africa's file copy

⁶⁵ Section 24(b) of the constitution - the Van Huyssteen case (n 64) p 30

⁶⁶ The Van Huyssteen case (n 64) p 30

The general policy gives very broad guidelines. It determines inter alia that although the national government must accept responsibility for environmental matters, the executive responsibilities (that is the duty to do the things set out above) must be devolved upon regional, provincial and local authorities "according to national norms, standards and guidelines established by the Central Government"⁶⁷, which will mostly be found in the ECA. This is in line with section 126(3) of the constitution.

The draft policy on Hazardous Waste Management published on 30 September 1994 sets norms and standards⁶⁸ and recommends that local authorities should assume functional⁶⁹ responsibilities within the framework of regulating the industry.

Part IV of the ECA⁷⁰ entitled "control of environmental pollution" only deals with 2 aspects of the problem namely littering⁷¹ and waste disposal sites - despite the heading of section 20 being given as "waste management", it only deals with one facet of the topic, namely, waste disposal sites. The management of waste disposal sites is controlled by final

⁶⁷ (n 62) p 37

⁶⁸ Discussed below

⁶⁹ Functional responsibilities will only be duties and not any powers

⁷⁰ Sections 19 and 20 of the ECA

⁷¹ being defined as any object or matter discarded or left behind by the person in whose possession or control it was

regulations published on 8 July 1994⁷². The general policy briefly refers to integrated waste management and integrated pollution control.

Section 19(2) obliges a local authority, to provide containers for the disposal of litter at public places under its control and section 19A to remove the litter within a reasonable time.

No regulations in terms of section 24A as regards the control of littering have been drafted. These regulations are supposed to set out the powers of a local authority "to control and protect the dumping of litter"⁷³.

Section 24, set out in part VI of the ECA, empowers the minister to make regulations dealing with waste management⁷⁴, vibrations and shock⁷⁵. The minister has published draft regulations on 14 January 1994 granting many powers to local authorities to control noise pollution⁷⁶.

Sections 19, 19A, 20 and 24 all have a bearing on waste management by a local authority, but there is no coherent integrative approach to the subject. They do, however, together with the draft policy on hazardous waste management create a

⁷² Discussed below

⁷³ Section 24A(e) of the ECA

⁷⁴ Section 24 of the ECA

⁷⁵ Section 25 of the ECA

⁷⁶ Discussed below

basis for the right set out in section 29 of the constitution. The general policy, the policy on terrestrial and marine protected areas, the policy on the control of vehicles in the coastal zone, section 16⁷⁷, section 17⁷⁸ and section 23⁷⁹ are the mechanisms provided by the ECA to protect and conserve the natural environment.

The policy on terrestrial and marine protected areas published on 9 May 1994 is more specific than the general policy, but remains fairly vague. The local authority should be aware of this policy, because habitat and wildlife management areas⁸⁰ as well as protected land or seascapes⁸¹ could fall within its area of jurisdiction and the objectives and criteria for selection and management must be applied.

The policy on the control of vehicles in the coastal zone published on 29 April 1994 has very specific control measures⁸².

In terms of section 23 the administrator may declare an area as a limited development area and a local authority designated by the administrator may be the controlling body authorising a

⁷⁷ Of the ECA

⁷⁸ Of the ECA

⁷⁹ Of the ECA

⁸⁰ Notice 499 of 1994: Government Gazette 15726 dated 9 May 1994 category IV at p 10

⁸¹ (n 80) category V at p 10

⁸² Discussed below

person who wishes to undertake a development or activity prohibited by the administrator, to do so⁸³.

Section 16 empowers the administrator to declare any area as a protected natural environment, to give it a name⁸⁴ and to "assign the control and management" of the area to a local authority⁸⁵. Provision is also made for the withdrawal of such assignment⁸⁶ to a local authority. Section 17 provides for a management advisory committee to advise the administrator as to the control and management of the area⁸⁷. The members of the committee are appointed by the administrator⁸⁸ and if the area falls within the jurisdiction of the local authority, the administrator shall ensure that the local authority is represented on the management committee⁸⁹. If the control and management of the area has been assigned to a local authority, the administrator must obtain the local authority's concurrence in respect of every appointee⁹⁰. The local authority shall further make available employees to assist the management advisory committee⁹¹.

⁸³ Section 23(2) of the ECA

⁸⁴ Section 16(1) of the ECA

⁸⁵ Section 16(6)(a) of the ECA

⁸⁶ Section 16(6)(b) of the ECA

⁸⁷ Section 17(1) of the ECA

⁸⁸ Section 17(3)(a) of the ECA

⁸⁹ Section 17(3)(a)(iii) of the ECA

⁹⁰ Section 17(4) of the ECA

⁹¹ Section 17(7) of the ECA

The Minister of Environment Affairs (not the administrator) may declare an area a special nature reserve⁹² and assign the control of it to a local authority⁹³ (with its consent⁹⁴) in accordance with a management plan⁹⁵, which plan may only be amended with the minister's approval⁹⁶.

2.3 THE WATER ACT⁹⁷

The constitution⁹⁸ places an obligation on a local authority to provide access to water within a safe and healthy environment.

There are 4 provisos⁹⁹ -

- 1 to the extent determined in any applicable law;
- 2 that the service must be capable of being rendered in a sustainable manner;
- 3 that the local authority can afford it; and
- 4 that it is physically possible.

The existing legislation which must fulfill these obligations are

⁹² Section 18(1) of the ECA

⁹³ Section 18(4) of the ECA

⁹⁴ Section 18(4) (a) of the ECA

⁹⁵ Section 18(4) (b) of the ECA

⁹⁶ Section 18(5) of the ECA

⁹⁷ Water Act, 54 of 1956 ("Water Act")

⁹⁸ Section 175(3) of the constitution

⁹⁹ Section 175(3) of the constitution

the Municipal Ordinance and the Water Act.

Section 139(1) of the Municipal Ordinance states that a municipal council may "provide, establish and maintain municipal services". This power must be exercised in accordance with any other law. Section 139(4) stipulates that only a council shall have the power to "supply or contract for the supply of... water within a municipal area". Other persons may do so only with the permission of the local authority or the administrator¹⁰⁰.

In terms of the Water Act the Minister of Water Affairs and Forestry has the power to supply or deliver water to any person¹⁰¹ and to control water works¹⁰² and to advise local authorities on many aspects as regards the use of water and water works¹⁰³. The minister has the ultimate control in so far as it concerns the control of water¹⁰⁴. The local authority will, with the permission and cooperation of the minister, be able to fulfill its obligations in terms of section 175(3) of the constitution by gaining access to water which it would in turn make available to persons residing within its jurisdiction.

It is not the purpose of this section of the dissertation to set out the aims, principles, structures and mechanisms of water law,

¹⁰⁰ Section 139(4) of the Municipal Ordinance

¹⁰¹ section 2(b) of the Water Act

¹⁰² section 2(a) of the Water Act

¹⁰³ Section 2(i) of the Water Act

¹⁰⁴ Section 2(m) of the Water Act

but merely to point out the local authority's role in making water available so as to comply with its obligations in terms of sections 29 and 175(3) of the constitution.

Local authorities which are riparian owners are entitled to the use of water for urban purposes as regards the normal flow¹⁰⁵ and surplus water¹⁰⁶ of a public stream.

Where local authorities were not entitled to the use of the water as riparian owners, special legislation for each specific case was enacted to authorise the local authority to take a determined quantity of water from a prescribed public stream¹⁰⁷.

A local authority which has the right to control and supply either public or private water within its area of jurisdiction does not need the water court's permission to use public water for industrial purposes¹⁰⁸.

A local authority which is not a riparian owner, and therefore not entitled to the use of public water, may now obtain a grant from the water court to take water from a public stream for the use of urban (or industrial) purposes¹⁰⁹ if the court is of the

¹⁰⁵ Section 9 of the Water Act

¹⁰⁶ Section 10

¹⁰⁷ Management of Water Resources of the Republic of South Africa, Department of Water Affairs, 1986 8.12.

¹⁰⁸ Section 11(1)(i) of the Water Act

¹⁰⁹ Section 11(2)(b) of the Water Act

opinion that it will be in the public interest¹¹⁰. The water court may make a similar grant if it is satisfied that the water (whether normal flow or surplus water) will not be used on riparian land¹¹¹. A permit from the minister in terms of section 11(3) is not necessary if the local authority uses public water for industrial purposes, because the local authority does not need the water court's permission in terms of section 11(1)(i).

The definition of "use for urban purposes" in a local authority's jurisdiction includes "for industrial purposes". The minister's permission would therefore not be needed if the water is used for urban purposes excluding industrial purposes, but would be needed if the water is used solely for industrial purposes as contemplated in section 11(3). On the other hand, if the application falls within the ambit of section 13(3), a permit from the minister will be necessary - that is increasing its use of water beyond a stated quantity.

In terms of section 13(1) a local authority which is in possession of a permit from the minister¹¹², may, with the consent of the administrator and the minister, take water from a public stream if such water is required for urban purposes even though the rights to such water vests in a riparian owner. The riparian owner's land must, however, fall within the area of jurisdiction of the local authority. Section 13(3)(c) obliges the water court

¹¹⁰ Section 11(2)(b)(i) of the Water Act

¹¹¹ Section 11(2)(b)(ii) of the Water Act

¹¹² Section 13(3)(9) of the Water Act

not to consider the application if the local authority is not in possession of a permit, the rationale behind this permit being that the minister can better plan and coordinate the use of public water and perhaps suggest alternative water sources to the local authority¹¹³.

The minister may make regulations in terms of section 26 relating to the supply of water to any person¹¹⁴.

Chapter 11A of the Water Act, inserted by section 7 of the Water Laws Rationalisation and Amendment Act, 32 of 1994, provides for the rendering of a water supply and sanitation service to inter alia residential communities within the jurisdiction of a local authority, where the local authority in question is not able to render the service¹¹⁵ or a local authority does not exist¹¹⁶. Section 110C, in dealing with water boards has a similar stipulation. It is interesting that this chapter of the Water Act specifically refers to the State's obligation in terms of section 29 of the constitution¹¹⁷.

The main act does not state that one of its aims is to provide drinking water of a certain quality to the inhabitants of South Africa. The act is more concerned with the regulation of the

¹¹³ Water Resources (n 107) 8.12

¹¹⁴ Section 13(4) of the Water Act

¹¹⁵ Section 26B(1) of the Water Act

¹¹⁶ Section 26B(1) of the Water Act

¹¹⁷ Sections 26B(1) and 110C(1) of the Water Act

rights of stakeholders in the water industry, the control of waterworks and pollution.

The Water Act is a haphazard piece of legislation without a clearly stated philosophy which is carried through the act. A new Water Act should set out the basic concept (and indeed, obligation) contained in section 26B, with a hierarchical structure devolving certain powers to local government. From there it should develop the other water uses eg, industrial, agricultural, recreational, environmental (conservation) and mining, as well as pollution control.

It is therefore encouraging to note the Minister of Water Affairs and Forestry's media release entitled "Water law review supported by all"¹¹⁸. The objective of this review is stated to be equity in access to water¹¹⁹. The report which was released by the minister¹²⁰ envisages an integrative approach to the management of water acknowledging that "[h]uman populations and the result of their activities are an integral part of the environment"¹²¹ and that "[b]asic human need, to maintain a minimum standard of health, should have priority of use"¹²².

¹¹⁸ Media release dated 6 February 1996: "Water: the key to life" by the Communication Services - Ministry of Water Affairs and Forestry

¹¹⁹ Media release (n 118) p 1

¹²⁰ Fundamental Principles and Objectives for a New Water Law in South Africa - Report to the Minister of Water Affairs and Forestry of the Water Law Review Panel, January 1996

¹²¹ Fundamental Principles (n 120) p 13

¹²² Fundamental Principles (n 120) p 17

It is further stated that all water is common to all, to be controlled by the national government and that there "shall be no ownership of water, but only a right to use" water¹²³. The report foresees an administrative system whereby the state would administer the rights to use water in the public interest¹²⁴ where local authorities would supply and reticulate water in terms of national norms and standards¹²⁵. The Department of Water Affairs and Forestry would support a local authority on a temporary basis if the local authority is not able to fulfill this function properly¹²⁶.

The report specifically recognizes the State's responsibility in terms of section 29 of the constitution to provide access to basic water services¹²⁷ in order to afford every person a healthy environment. Although the primary duty is on the national government to ensure the supply of water and sanitation as well as setting norms and standards, it will be the local authority's function to actually provide the local services¹²⁸, which would comply with section 175(3) of the constitution.

¹²³ Fundamental Principles (n 120) p 15

¹²⁴ Fundamental Principles (n 120) p 16

¹²⁵ Fundamental Principles (n 120) p 30

¹²⁶ Fundamental Principles (n 120) p 30

¹²⁷ "the provision of potable water supply and the removal and disposal of human excreta and waste water" - Fundamental Principles (n 120) p 32

¹²⁸ Fundamental Principles (n 120) p 32

2.4 THE LOCAL AUTHORITY'S ROLE AS REGARDS VEHICLE ACCESS TO THE COASTAL ZONE - A CASE STUDY

2.4.1 INTRODUCTION

The subject matter of this study is that area¹²⁹ of the coastal zone where the Klein River flows into the Atlantic Ocean as well as the coastal zone to the west¹³⁰ of the Klein River mouth within the jurisdiction of the Greater Hermanus Transitional Local Council ("TLC")¹³¹. The area to the east of the river mouth falls under the jurisdiction of the Overberg Regional Services Council ("RSC"). The TLC is assisted in its task of managing the Klein River Lagoon and adjacent areas by the Klein River Management Advisory Committee.

2.4.2 BACKGROUND HISTORY CONCERNING THE REGULATION OF VEHICLE ACCESS TO THE COASTAL ZONE.

The history of the legislation (or rather the absence of such legislation at the time) controlling off-road vehicles ("ORV") in the coastal zone is set out in Prof André Rabie's seminal article "Mechanical roars on our shores : control over off-road

¹²⁹ An aerial photograph marked "A" and a number of diagrams marked "A2", "A3", and "A4" are attached

¹³⁰ Commonly known as Grotto beach

¹³¹ An extract of the minutes of a meeting of the TLC dated 23 February 1995 is annexed marked "B1" as well as a copy of a letter by the chief executive officer of the Overberg Regional Services Council dated 21 August 1995 marked "B2"

vehicles on the sea-shore"¹³². Prof Rabie describes an ORV as "a vehicle which is designed or suitable for use on roadless or trackless terrain. Well known examples include standard fourwheel drive vehicles, beach buggies and trail bikes"¹³³.

It is pointed out in the article that control by a local authority may be achieved by regulations in terms of the Sea-shore Act, 21 of 1935 ("SSA"), but that there is an "unwillingness or inability of the minister and of several coastal local authorities" to produce regulations¹³⁴. Prof Rabie strongly advocates the use of the declaration of a policy for the control of vehicles in the coastal zone in terms of section 2 of the ECA, which would oblige "every administrative body which exercises functions in respect of the environment" to comply with the policy and if such a body fails to do so it would be subjected to the remedy of judicial review in which case a court would establish if the administrative body had complied with the policy.¹³⁵

Control of ORVs may also be achieved through the preparation and approval of structure plans in terms of the LUPO, which could set out and "release the potential conflict between urbanisation, recreation and conservation"¹³⁶. Such control would presently be

¹³² Rabie (n 20) p 189

¹³³ Rabie (n 20) p 190

¹³⁴ Rabie (n 20) p 201

¹³⁵ Rabie (n 20) p 198

¹³⁶ Rabie (n 20) p 198

possible in terms of land development objectives in terms of section 28 of the Development Facilitation Act, 67 of 1995 ("DFA")¹³⁷.

2.4.3 ACTIONS TAKEN BY THE MUNICIPALITY OF GREATER HERMANUS

It is interesting to note that the municipality of Greater Hermanus¹³⁸ adopted regulations for the control of the sea-shore and the sea in terms of section 10(3)(d) of the SSA¹³⁹.

Regulation 12(a) states that "... no person shall introduce any motor vehicle, animal drawn vehicle or bicycle into the bathing area or use such vehicle or bicycle within that area". The "bathing area" is strictly defined as the sea-shore (the area between the high water and low water mark) and the sea within 200 yards seaward from the low water mark. No evidence could be found that this regulation has ever been repealed and it therefore still applies, which means that a vehicle may not enter the area between the high water and low water mark within the area in which the Hermanus local authority has jurisdiction. It must be conceded that the prohibition is qualified as follows: "Except on such portion of the bathing area is (sic) indicated by a

¹³⁷ Discussed below

¹³⁸ The subject matter of this discussion was, before the formation of the Greater Hermanus Transitional Local Council, the sole responsibility of the now defunct municipality of Hermanus

¹³⁹ which regulations were published in government gazette 1514 dated 19 August 1966 and the minister's approval published in government gazette 1611 dated 15 December 1966 - an extract of the regulations for the control of the sea-shore and the sea by the TLC is annexed marked "C"

notice on the spot".

The CSIR published a report on the Kleinriviersvlei¹⁴⁰ which recommended the compilation of a structure plan for the Kleinriviersvlei. The compiler of the report was glad to learn that the drawing of such a plan has already begun¹⁴¹. A further recommendation of the report was that:

"all vehicles should be banned from Die Plaat¹⁴², since by compacting the sand there, they destroy the faunal communities and possibly reduce the amount of sand that is removed during mouth breachings, thereby exacerbating the import of sand into the estuary"¹⁴³

The structure plan for Hermanus compiled for the Municipality by the Dennis Moss Partnership was published in October 1990. It has not yet been approved by the administrator. Volume 1 contains the research and analysis and volume 2 the structure plan proposals.

The structure plan recommends that the "coastline of Hermanus ...

¹⁴⁰ CSIR Research report 439 (1989): "Estuaries of the Cape: Synopsis of available information of individual systems" AEF Heydorn and P D Morant (Eds) by H P De Decker

¹⁴¹ Heydorn and Morant (n 140) p 60. It is believed that no such structure plan has as yet been drawn

¹⁴² Die Plaat, which is to the east of the estuary, actually falls under the jurisdiction of the RSC. What the compiler meant was probably the "hard sand" area in the estuary itself, being the result of compacting by vehicles

¹⁴³ Heydorn and Morant (n 140) p 62 - an extract of the report is annexed marked "D"

be planned and developed as a unit¹⁴⁴. Specific problems along the coastline should be identified and addressed in the development plan¹⁴⁵. The structure plan in addition recommends that "[t]he planning and incorporation¹⁴⁶ of the Klein River Lagoon into Hermanus and its activities is important"¹⁴⁷.

A planning report entitled "Hermanus Beplanningsverslag: Oorhoofse Ondersoek na potensiaal van totale kuslyn, verslag 1" was once again compiled by the Dennis Moss Partnership and published in August 1990. In figure 11 of the heading "Estuary and Rivermouth Landforms - Vlei Coast Type" it recommends land uses in this area and states:

"controlled access to vehicle numbers on the beach should be strictly enforced or not allowed at all, as compaction of the sand destroys animal habitats"¹⁴⁸.

In a specialised report as regards the Grotto section of the coastline, entitled "Hermanus Beplanningsverslag: Grottostrandgebied, Verslag 3", compiled by the Dennis Moss Partnership it is confirmed that vehicles should not be permitted

¹⁴⁴ See below as regards fragmentation of jurisdiction

¹⁴⁵ Structure plan Vol 2 p 22 para 3.7 2 - an extract of the structure plan is annexed marked "E"

¹⁴⁶ This has been done - see (n 25) above

¹⁴⁷ Structure plan Vol 2 (n 140) p 23 para 3.7 10

¹⁴⁸ Verslag 1 - an extract of the report is annexed marked "F"

on the beach. The report¹⁴⁹ states that:

"The practise of allowing vehicles onto the beach to gain access to the Kleinriviersvlei mouth area and various fishing spots along the Walker Bay coastline should ideally be stopped"¹⁵⁰.

The report then goes on to say:

"However, because this 'right' has been in existence for so many decades, a sudden and complete change in policy is unlikely to be well received by the population of Hermanus. For this reason limited access should still be allowed"¹⁵¹ (emphasis added).

These recommendations of the Dennis Moss Partnership should be read against their credo set out in the first page of their report: "Hermanus environmental planning along the Hermanus coastline, Report 4":

"The South African coastline should therefore be looked upon as a limited natural resource that deserves sensitive planning if it is to be used in a sustainable way for

¹⁴⁹ Verslag 3 p 11 - an extract of the report is annexed marked "G"

¹⁵⁰ Verslag 3 (n 149) p 11

¹⁵¹ Verslag 3 (n 149) p 11

generations to come"¹⁵².

It is clear that the Dennis Moss Partnership advised against access to vehicles on the beach and only recommended limited access, because they were not sure of the nature of the so called "right to access".

2.4.4 THE PRESENT POSITION

The President's Council recommended in 1984 that a policy on the control of ORVs in the coastal area was necessary¹⁵³, during 1986 the Council for the Environment ("CE") approved a policy on ORVs in the coastal zone, it was referred to the minister and in 1987 the Department of Environment Affairs had a meeting with the representatives of the provinces of the Cape¹⁵⁴ and Natal which meeting accepted most of the CE's recommendations¹⁵⁵.

On 29 April 1994 the minister of Environment Affairs published a General Policy in terms of the Environment Conservation Act, 1989 (Act no 73 of 1989): Control of Vehicles in the Coastal Zone¹⁵⁶.

¹⁵² Report 4 - an extract of the report is annexed marked "H"

¹⁵³ Rabie (n 20) p 199

¹⁵⁴ As it then was

¹⁵⁵ Rabie (n 20) p 199

¹⁵⁶ Notice 858 in government gazette 15655 dated 29 April 1994

The "coastal zone" is defined in the policy as "the area characterised by coastal land-forms, including beaches, dunes and estuaries and their associated wetlands"¹⁵⁷ and "vehicle" as "any conveyance which is capable of transporting one or more persons"¹⁵⁸.

The policy¹⁵⁹ states that "the use of vehicles in the coastal zone must be controlled on a national basis"¹⁶⁰. This will "control and protect coastal ecosystems and historical and palaeontological sites, and promote the safety and well-being¹⁶¹ of other beach users"¹⁶².

Two of the corner stones of the policy are -

- "2.2 the exclusion in principle of vehicles from the coastal zone, subject to the introduction of a permit system to allow vehicles as an exception in specific demarcated areas; and
- 2.3 the strict enforcement of the ... control measures" (emphasis added).

¹⁵⁷ (n 156) - Section 4(iv) of the policy

¹⁵⁸ (n 156) - Section 4(xi) of the policy

¹⁵⁹ (n 156) - Section 2 of the policy

¹⁶⁰ Complying with the provisions of section 126(3) 1. as regards the protection of the environment; and 2. as regards national norms and standards

¹⁶¹ Complying with section 29 of the constitution

¹⁶² (n 156) - Section 2 of the policy

Section 2.3 elaborates: "The main reason for authorising vehicle access is to facilitate access to areas which are otherwise inaccessible" (emphasis added). When reading sections 2.2 and 3.2.1 together it is plain that the policy does not grant access to everybody who wishes to gain access (a free for all).

Section 2.2 provides for a permit system to be introduced. If permits are issued on demand purely against payment of a prescribed fee, it defeats the objects of the policy. It would violate the "exclusion principle" as well as the "exception principle" set out in section 2.2. The policy unfortunately does not provide guidelines as regards the issue of permits. Valid reasons which should be in harmony with the policy ought to be disclosed in order to gain access eg a bona fide angler who wants to catch fish at Mierkom or on Die Plaat. If the prospective entrant arrives with no fishing tackle it would be quite obvious that he or she has no such intention. The ideal situation would be for the prospective entrant to be a member of an angling/conservation association, who would be able to affirm the person's bona fides.

Another aspect of the policy is that the local community must be consulted "before vehicle access to a beach area is permitted"¹⁶³. The access permitted in terms of this section must not be viewed in isolation, but should be considered against the basic principles of the policy set out in section 2.2 namely the "exclusion" and "exception" principles. The policy unfortunately

¹⁶³ (n 156) - Section 3.2.3 of the policy

does not provide guidelines as to how the local community should be consulted - eg market research, referendum (who would be eligible to vote, who constitutes the local community), questionnaires etcetera. It is common knowledge that prior¹⁶⁴ to the decision¹⁶⁵ of the TLC¹⁶⁶ on 31 August 1995 (that the beach area at the Kleinriviersvlei and mouth be closed) that the local authority has not seriously attempted to implement control measures as regards vehicles in the beach area. In an attempt to ensure compliance with the policy the director-general of Environment Affairs in a letter¹⁶⁷ dated 23 June 1995 addressed to the town clerk of Greater Hermanus suggested that a referendum be held "to ascertain whether the majority of Hermanus's ratepayers (sic) wanted the beach to be opened or closed to vehicles". This suggestion gave the false impression that a referendum would be the only input that the TLC should take into account when deciding on the matter as well as creating the impression that the referendum is a winner takes all affair and that it is the only mechanism to be used in consulting the "local community". The director-general referred to the ratepayers that must be consulted - why only the ratepayers: they are not the only residents or indeed registered voters, who make a

¹⁶⁴ The Hermanus Times 11 August 1995 - an extract is annexed marked "I"

¹⁶⁵ An extract of the minutes of the TLC's meeting dated 31 August 1995 is annexed marked "J"

¹⁶⁶ On the recommendation of the Klein River Management Committee - an extract of the minutes of a meeting of the Klein River Management Committee dated 10 August 1995 is annexed marked "K"

¹⁶⁷ A copy of the letter is annexed marked "L"

contribution to civil society in the local community.

The Klein River Management Advisory Committee recommended¹⁶⁸ to the TLC that a referendum be held¹⁶⁹ as was suggested by the director-general of Environment Affairs. The question was: "Are you in favour of strictly controlled vehicular access on the hard sand area to the Klein River Lagoon mouth?" The very controversial¹⁷⁰ referendum was subsequently held on 30 November 1995 and an overwhelming majority¹⁷¹ of the persons who voted, voted in favour of the question put to them, namely "yes"¹⁷².

It can be argued that the result of the referendum favours very strict control indeed and not a free for all (as is the case presently). The minority in favour of no access at all should, however, not necessarily be ignored. The absence of legal provisions governing the procedure for consultation with the local community¹⁷³, would make it very hard to maintain that the referendum was ultra vires, as was suggested by Mr Shaun Schneier

¹⁶⁸ See (n 166) - annex "K"

¹⁶⁹ Hermanus Times 20 October 1995 - an extract is annexed marked "M"

¹⁷⁰ Hermanus Times 15 December 1995 - an extract is annexed marked "N"

¹⁷¹ Minutes of a meeting of the Klein River Management Advisory Committee dated 12 February 1996 p 2 - an extract is annexed marked "O"

¹⁷² Hermanus Times 8 December 1995 - an extract is annexed marked "P"

¹⁷³ Let alone procedures as regards a referendum

of the Department of Environment Affairs¹⁷⁴. It is true that section 3(2)(a) of the ECA empowers the director-general to take such steps as he or she may deem necessary and that the directive as regards the referendum contained in the letter dated 23 June 1995 may be regarded as taking such steps. If the director-general wished for the referendum to comply with certain requirements, he should have been more prescriptive with his directive.

The point to be made is that consulting the "local community" - whatever that may mean and in whichever way it is done - it is only one of a number of factors that must be taken into account by the TLC.

Other criteria that must be considered by the TLC are -

- 1 the access set out in section 3.1 of the policy;
- 2 the reports and recommendations of the CSIR and Dennis Moss set out above;
- 3 the "exclusion" and "exception" principles set out in section 2.2 of the policy;
- 4 the principle set out in section 3.2.1 of the policy namely that "[t]he main reason for authorising vehicle access is to facilitate access to areas which are otherwise

¹⁷⁴ Hermanus Times (n 170)

inaccessible";

- 5 the matters set out in Prof Rabie's article¹⁷⁵, namely -
- 5.1 the threat which ORVs present to other users of the sea-shore;
 - 5.2 the "destruction of delicate plant life, especially on dunes, leading to their erosion";
 - 5.3 the disruption, harassment and destruction of the habitat "as well as a variety of forms of life in and on the intertidal zone and adjacent area";
 - 5.4 the threat that ORVs present to pedestrians and other users of the sea-shore due to the fact that there are no traffic rules which apply to this area.

If one evaluates the TLC's decision¹⁷⁶ on 12 December 1995 against the 5 criteria set out above it does not appear that the control mechanism that the TLC decided upon complies with the policy.

Although the decision takes account of the matters set out in section 3.1 it does not give consideration to the fact that ecologically sensitive areas¹⁷⁷ include estuaries and estuarine inter-tidal sand and that such areas must be completely closed to vehicles. The area to which vehicles have access in terms of the TLC's decision includes the estuary and estuarine inter-

¹⁷⁵ Rabie (n 20) p 190

¹⁷⁶ A copy of the TLC's resolution is set out in the minutes of a meeting of the Klein River Advisory Committee dated 12 February 1996 (n 171) p 2

¹⁷⁷ (n 156) - Section 3.1.3 of the policy

tidal sand.

It would not appear that the CSIR and Dennis Moss's recommendations were examined.

It would further appear that the following principles were also not debated -

- * the "exclusion" and "exception" principles set out in section 2.2;
- * the principle set out in section 3.2.1 - the main reason for vehicle access being to facilitate access to inaccessible areas;
- * other relevant matters.

The only considerations that seem to have played a part in shaping the TLC's discretion in coming to its decision are the outcome of the referendum and a few other matters raised by the director-general in his letter. There is no mechanism that would limit the number of vehicles.

An entrance fee of R 5,00 (which is the price of an ice cream) per vehicle per day will not act as a deterrent and it did not, as was evident from a complaint by the Hermanus Ratepayers' Association¹⁷⁸. There are no guidelines to the issuing official to evaluate the proposed entrant's reasons for wanting to enter.

¹⁷⁸ See minutes of the meeting of the Klein River Management Committee dated 12 February 1996 (n 171) p 2 item 4.2 and p 3 item 4.3

It is a purely mechanical power¹⁷⁹. This is not strict control. The existence of a permit system does not necessarily mean that there is control - let alone strict control. Measures should be introduced to empower and enforce strict control.

Finally, the decision reached by the TLC does not abide by the spirit of the policy on vehicle access to the coastal zone or the general environmental policy ¹⁸⁰ which states:

"All responsible government institutions must apply appropriate measures, based on sound scientific knowledge, to ensure the protection of designated ecologically sensitive and unique areas, for example wilderness areas, fynbos, grasslands, wetlands, islands, mountain catchment areas, indigenous forests, deserts, Antarctica and the coastal zone."

It is therefore submitted that the TLC did not implement the policy correctly, because it only considered one criterion and (conveniently) disregarded the other important norms set by the policy. The TLC has not even complied with the minimum requirements set by the director-general in his letter dated 23 June 1995.

¹⁷⁹ Boulle et al (n 18) p 300

¹⁸⁰ (n 62) p 38

The director-general therefore addressed another letter¹⁸¹ dated 22 May 1996 to the town clerk pointing out that the TLC is not adhering to the policy and made further recommendations as regards the management of the area.

Vehicle access to the Klein River mouth area was temporarily closed on 16 July 1996 due to the fact that the rise in the water level in the lagoon submerged the "hard sand" area, which was used by vehicles to cross the lagoon¹⁸². This, the report says, was done in order to comply with the result of the referendum.

On an inspection in loco the writer observed that municipal officials were erecting a gate, which, so he was told, is to ensure access to the area under consideration for fishermen¹⁸³ to go to Mierkom and Die Plaat. This was not reported in the press and it would seem to be a private arrangement between the fishermen and the sub-committee of the Klein River Management Advisory Committee, whose members have delegated powers¹⁸⁴. If this is done in an open, democratic and transparent manner¹⁸⁵ there would be nothing wrong with it - in fact this is perhaps what is meant by strictly controlled access in terms of the

¹⁸¹ A copy of the letter dated 22 May 1996 is annexed marked "Q"

¹⁸² Hermanus Times 19 July 1996 - an extract is annexed marked "R"

¹⁸³ Who would be handed a key to the gate - they are members of the Walker Bay Fishing and Angling Association

¹⁸⁴ See minutes of a meeting of the Klein River Management Advisory Committee dated 12 February 1996 (n 171) p 2

¹⁸⁵ And a permit issued for this purpose

policy and not a free for all permit system on demand.

It is important to reiterate (as pointed out by Prof Rabie) that there is an obligation in terms of section 3(1) of the ECA to implement the policy on vehicle access to the coastal zone. The ECA further compels the director-general of the Department of Environment Affairs to ensure that a local authority complies with the policy¹⁸⁶ and to "take such steps as he deems fit in order to ensure that the policy is complied with by ... the local authority"¹⁸⁷. This was explained to the TLC by the director-general in his letter dated 22 May 1996¹⁸⁸. The minister will also be able to take the TLC's decision on review by the supreme court¹⁸⁹.

Another enforcement mechanism is contained in section 31 of the ECA. In terms of this section the administrator has the power to direct a local authority to perform a function assigned to it by or under the ECA. A function assigned to the local authority in terms of a policy issued under section 2(1) of the ECA will be a function assigned to the TLC under the ECA. It is submitted that the verb "assigned" is used loosely and that the legislature probably meant "conferred". If the local authority fails to comply with the administrator's directive, the administrator may

¹⁸⁶ Section 3(2) of the ECA

¹⁸⁷ Section 3(2)(b) of the ECA

¹⁸⁸ (n 181) above

¹⁸⁹ André Rabie (n 20) p 198

perform the function or may authorise any person to take the necessary steps to do so¹⁹⁰. If the minister is of the opinion that the local authority has failed to perform a function assigned to it by or under the ECA, he or she may request the administrator to act within 90 days and if the administrator fails to do so, the minister may act himself (herself) and will be able to do anything that the administrator would have been able to do¹⁹¹.

The question of the ordinary ratepayer or resident's position in the monitoring of the local authority's actions as regards the implementation of the policy on vehicle access will be discussed below in the conclusion¹⁹², which deals with the problems of standing and possible solutions.

This case study further serves as an example of how fragmentation of jurisdiction complicates the conservation and management of a specific area. The RSC has jurisdiction in respect of the coastal zone to the east of the Klein River mouth, which includes Die Plaat and to which access could be obtained by permit which is "issued on demand" by the RSC. The only obstacle then is to obtain the right of thoroughfare through the Klein River mouth, from the TLC. This is achieved by merely applying for a permit which is issued against payment of a fee of R 5,00.

¹⁹⁰ Section 31(1) of the ECA

¹⁹¹ Section 31(3) of the ECA

¹⁹² Discussed below

What is the use of the director-general taking steps against the TLC to comply with the policy if the policy is not strictly enforced by the RSC. There should be one permit system for the Klein River mouth area and Die Plaat.

2.5 THE LAND USE AND PLANNING ORDINANCE AND THE DEVELOPMENT AND FACILITATION ACT

The local authority's powers and functions in respect of land use and development will be discussed in detail below.

3. POLLUTION CONTROL

The control of pollution and waste management must be the essence of the right set out in section 29. There is, of course, always an overlapping with the obligations enumerated in section 175(3) : in other words : section 175(3) places the functional duties on the local authority to make the fundamental right possible, although the definition of environment in section 175(3) is wider than in section 29.

3.1 WATER POLLUTION

Water pollution and purification is mainly controlled in terms of the principal acts namely the Water Act, the HA and the ECA¹⁹³.

The HA once again, places an obligation on the local authority

¹⁹³ Water Resources (n 107) 4.17.

"to prevent the pollution of any water intended for the use of the inhabitants of its district, irrespective of whether such water is obtained from sources within or outside its districts, or to purify such water which has become so polluted"¹⁹⁴.

The subsection is somewhat loosely drafted, because it is difficult to see how the local authority can prevent pollution of water outside its district¹⁹⁵ (if it does not have jurisdiction in respect of the particular source). The second part of the subsection covers this situation by requiring purification. It must be noted that the obligations are in respect of water intended for the use of the inhabitants. It does not state whether it is only intended for "domestic" purposes.

If one consults the Water Act¹⁹⁶ it helps to clarify the meaning of use. The definition of use for urban purposes, in relation to water, means -

"(a) use in any area under the jurisdiction of a local authority;

.....

¹⁹⁴ Section 20(i)(c) of the Water Act

¹⁹⁵ "'district', in relation to a local authority, means the area which is under the jurisdiction of that local authority" (section 1 of the HA).

¹⁹⁶ Section 1 on definitions and see Steyn L C "Uitleg van Wette" 3rd ed revised by S I J Van Tonder Juta 1963 p 143: "Foster beweer dat wette uit hoofde van vorige wette nie alleen verklaar kan word nie, maar ook 'n gewysigde betekenis kan verkry" - Foster states that not only may laws be interpreted in accordance with prior laws, but they may also acquire a different meaning (my translation)

for purposes for which water is ordinarily used by a local authority or by the inhabitants of such an area, including use for domestic purposes or for the purpose of water-borne sanitation or for the watering of gardens, watering or cleaning of streets or for industrial purposes".

From what is stated above, it is clear that the obligations placed on the local authority is wide enough to satisfy the provisions as regards sections 29 and 175(3) of the constitution in so far as it concerns the prevention of pollution or the purification of polluted water.

The mechanism available to the national government to ensure that the local authority complies with its obligation set out in the HA, would be for the Minister of Water Affairs to invoke the provisions of section 21 of the Water Act. Section 55(2)(a) of the HA states that the provisions of the HA "shall be in addition to and not in substitution of the Water Act"¹⁹⁷.

Section 21(1) of the Water Act obliges a person who uses water, including sea water, to purify the water or effluent resulting from the use of water¹⁹⁸ according to standards prescribed by the

¹⁹⁷ "a reference to the Water Act 54 of 1956 was inadvertently omitted when subsection (2)(a) was substituted by Act 121 of 1992. It was retained in the Afrikaans text" - Juta Statutes Vol 3 1-330

¹⁹⁸ Section 21(1)(a) of the Water Act

minister¹⁹⁹ and after the person has done so, to discharge the purified or treated water or effluent into a public stream at the place where such water was extracted from such a stream²⁰⁰, or if in the case of sea water, at the place where it was extracted from the sea²⁰¹. The discharge into the public stream or the sea must be in accordance with any regulations made in terms of section 26²⁰². The person shall further furnish particulars required in terms of the regulations to the director-general of Water Affairs²⁰³.

In terms of section 21(2) (b) a person may have an agreement with the local authority to discharge water used for industrial purposes or effluent resulting from such use into a municipal canal, sewer or other conduit for purification, treatment or disposal by the local authority in which case such person will be exempted by the Minister of Water Affairs from purifying or treating such water or effluent²⁰⁴ - in other words : the provisions of the Water Act do not apply.

Section 21(3) (a) determines that "water used for

¹⁹⁹ Requirements for the purification of waste water or effluent was published by the Minister of Water Affairs under Notice 991 in Government Gazette 9225 dated 18 May 1984.

²⁰⁰ Section 21(1) (b) (i) of the Water Act

²⁰¹ Section 21(1) (b) (ii) of the Water Act

²⁰² Section 21(1) (b) of the Water Act

²⁰³ Section 21(1) (c) of the Water Act

²⁰⁴ Section 21(1) (c) of the Water Act

- * industrial;
- * urban; or
- * domestic

purposes and which is discharged for purposes of the purification, treatment or disposal thereof into

- * a canal
- * sewer; or
- * other conduit

controlled by a local authority...shall be deemed to be effluent produced or which resulted from the use of that local authority...for industrial purposes."

Section 21(3), therefore, places an obligation on the local authority to comply with the provisions of section 21(1) set out above as regards the purification of water or effluent discharged into its canals, sewers or other conduits - therefore : its sewage and drainage system.

The local authority also takes on the responsibility of purification, treatment and disposal of water and effluent which it has received from the industrialist in terms of an agreement²⁰⁵.

Local authorities may be held responsible for pollution which was

²⁰⁵ Referred to in section 21(2) (b) of the Water Act

caused by the illegal discharge of effluent into a storm water drainage system²⁰⁶.

In the matter of *Rainbow Chicken Farm v Mediterranean Woollen Mills*²⁰⁷ Millar J said that if the applicant had a remedy against the Department of Water Affairs in terms of section 21(2) "its remedy would of necessity be limited to an order for a mandamus on the Department to perform its statutory duty or an action for damages against the Department." This would mean that where a local authority has a statutory duty in terms of section 21(2) to receive an industrialist's polluted water and effluent and it fails to provide the facilities to receive such water, that it could, on application be ordered to do so and that there would be a claim for damages against the local authority in addition to the sanctions provided by the Water Act. The order for a mandamus could presumably be extended to ordering the local authority to purify and treat the water and effluent received by it in a case when it neglects to do so.

3.2 AIR POLLUTION

The Atmospheric Pollution Prevention Act 45 of 1965 ("APPA") controls the following categories of air pollution: noxious and offensive gases, smoke, dust and vehicle emissions.

The APPA is administered centrally by the Minister of Environment

²⁰⁶ Water Resources (n 107) 4.19

²⁰⁷ 1963(1) SA 201 at 205

and Tourism who appoints a chief air pollution control officer to exercise the powers and functions assigned to him or her by the APPA²⁰⁸. The chief officer may with the minister's consent after consultation with a local authority appoint a municipal official to fulfill his or her duties within the area of jurisdiction of the local authority²⁰⁹, which authority (delegation) may also be withdrawn²¹⁰. The local authority's functions are derived directly from the central government. It must be noted that only functions and not powers are delegated in terms of section 6(5).

The APPA provides for control of air pollution at source as well as the emission itself²¹¹. Local authorities are mainly involved in combatting -

- 1 air pollution by smoke by regulating it in terms of smokeless zones and controlling the type of fuel burning appliance which may be used; and
- 2 air pollution by fumes emitted from vehicles.

²⁰⁸ Section 6 (1) (a) of the APPA

²⁰⁹ Section 6(5) of the APPA

²¹⁰ Section 6(7) of the APPA

²¹¹ Fuggle & Rabie (n 29) p 436

3.2.1 CONTROL OF NOXIOUS AND OFFENSIVE GASES

Noxious and offensive gases²¹² are controlled by the chief officer as regards premises²¹³ in a controlled area²¹⁴ in respect of scheduled processes²¹⁵ by way of a registration certificate²¹⁶, using the best practicable means test as a yardstick for granting the certificate to an applicant²¹⁷. The position of a chief officer and inspectors as regards this type of air pollution mostly concerns industry and is of a highly technical nature requiring advanced skills²¹⁸ and it would appear that the average local authority would not have the qualified staff to assist the chief officer in this field of pollution.

What is of concern to the local authority is that section 10(5) requires the chief officer to consult the local authority if an industrialist wishes to erect or alter a building or plant to be used for a scheduled process²¹⁹ -

1 if the scheduled process will take place within the
area of jurisdiction of the particular local

²¹² Section 9 of the APPA

²¹³ Section 9 of the APPA

²¹⁴ Section 8 of the APPA

²¹⁵ Section 9 of the APPA

²¹⁶ Section 9(1) of the APPA

²¹⁷ Section 10 of the APPA

²¹⁸ Fuggle & Rabie (n 29) p 437

²¹⁹ Section 9(1)(b) of the APPA

authority; and

- 2 if there may, in the opinion of the chief officer, be residents in the area of jurisdiction of the local authority who may be effected by the scheduled process.

The residents referred to in 2 may be in the area of a different local authority from the one where the scheduled process is proposed to be carried on.

It is regretted that the chief officer is given such a wide and open discretion as to whether there may be residents who may be affected. The section attempts to make provision for some sort of "public participation" by requiring the chief officer to consult with local authorities, but in the case where residents may be affected, it is left entirely in the chief officer's discretion to determine if they should be consulted, albeit in a very indirect way. It would have been more satisfactory if legally binding guidelines were set assisting the chief officer in exercising his discretion and if the section provided for direct public participation by advertising and contacting ratepayers and civic associations. Ogle²²⁰ also refers to this lack of public participation.

²²⁰ Fiona Ogle: "Air Pollution" unpublished essay, University of Cape Town 1993 p 14

3.2.2 AIR POLLUTION BY SMOKE

The control of air pollution by smoke does not in the main apply to a dwelling house, being accommodation for a single family²²¹, which means that this part of the APPA only applies to industry. This is further supported by the fact that the definition of smoke includes "soot, grit and gritty particles emitted in smoke", which definition, as pointed out by Ogle²²², excludes small industry eg restaurants. The state is not bound by this part of the APPA²²³, which exemption would, in terms of section 4(2) of the constitution also apply to a local authority. A local authority, having powers to exercise in terms of this part of the APPA²²⁴, is, together with the chief officer, the major role player in the control of pollution by smoke²²⁵.

This part of the APPA shall only apply to areas which the minister has declared the APPA to be applicable to²²⁶ and in the case of an area falling within the jurisdiction of a local authority, such a local authority must consent to it²²⁷.

If the minister decides, after having considered a report from

²²¹ Section 15(3)(a) read with section 1 of the APPA

²²² Ogle (n 220) pp 17 and 18

²²³ Section 47(1) of the APPA

²²⁴ Section 14(4) of the APPA

²²⁵ Section 14(3) of the APPA

²²⁶ Section 14(1) of the APPA

²²⁷ Section 14(2) of the APPA

the National Air Pollution Advisory Committee, that smoke caused a nuisance in a controlled area under the jurisdiction of a local authority in terms of section 14(3) and the local authority has done nothing about it, the minister may direct that the chief officer shall attend to the matter²²⁸.

Should the nuisance referred to above occur in a non-controlled area, the minister may make the provisions of this part of the APPA applicable to the area in question²²⁹ and order the chief officer to attend to the matter²³⁰.

This part of the APPA controls the -

- 1 installation²³¹ and siting²³² of fuel burning appliances; and the
- 2 construction of chimneys²³³.

One may not install a fuel burning appliance -

- 1 unless the appliance is reasonably "capable of being operated continuously without emitting dark smoke or smoke

²²⁸ Section 14(6) (a) of the APPA

²²⁹ Section 14(6) (b) of the APPA

²³⁰ Section 14(6) (c) of the APPA

²³¹ Section 15 of the APPA

²³² Section 16 of the APPA

²³³ Section 16 of the APPA

of a colour darker than may be prescribed by regulation"²³⁴;
and

- 2 unless the appliance is capable of limiting the emission of grit and dust to the satisfaction of the local authority²³⁵. If the fuel burning appliance is designed to burn solid fuel, only the second condition need to be complied with²³⁶. Notice in writing must be given to the local authority prior to installing a fuel burning appliance²³⁷.

When approving a building plan for the construction of a chimney intended for carrying smoke, a local authority shall ensure that the chimney is high enough to prevent the smoke "from becoming prejudicial to health or a nuisance to the occupiers of premises in the surrounding areas"²³⁸ (emphasis added). In the case of approving building plans for the installation of a fuel burning appliance, the local authority shall satisfy itself that the appliance is properly "sited in relation to other premises in the surrounding areas"²³⁹ (emphasis added).

The APPA stipulates guidelines to which the local authority may have regard to in reaching its decision concerning the approval

²³⁴ Section 15(1) (a) of the APPA

²³⁵ Section 15(1) of the APPA

²³⁶ Section 15(1) (b) of the APPA

²³⁷ Section 15(2) of the APPA

²³⁸ Section 16(1) (a) of the APPA

²³⁹ Section 16(1) (b) of the APPA

of a building plan²⁴⁰ eg the purpose for which the chimney is intended, the provisions of "any approved draft town-planning scheme", any other legal requirement as regards the land use in question, the levels of the "land in the surrounding areas" and "any other matter which in the opinion of the local authority should be considered". This is the only section which gives some form of structure to the wide discretion which is vested in the chief officer or local authority in terms of the APPA.

The local authority has wide powers to make regulations in respect of matters set out in this part of the APPA²⁴¹ and there are detailed procedures -

- 1 where smoke causes a nuisance²⁴²; and
- 2 when the regulations are contravened²⁴³.

3.2.3 AIR POLLUTION BY FUMES EMITTED BY VEHICLES

The regulation of vehicle smoke in terms of the APPA only applies to vehicles using diesel and not petrol²⁴⁴.

An official of the local authority may stop the driver of any

²⁴⁰ Section 16(2) of the APPA

²⁴¹ Section 18 of the APPA

²⁴² Section 17 of the APPA

²⁴³ Section 19 of the APPA

²⁴⁴ "Air Pollution in South Africa", Pamphlet 425, The Department of Environment Affairs, April 1990 p 32

vehicle on a public road in the area of jurisdiction of a local authority, search the vehicle and require the owner by notice in writing to make the vehicle available for examination²⁴⁵. If the emissions of the vehicle do not comply with the provisions of the regulations in terms of section 39, the owner shall be directed in writing to have the problem rectified and make the vehicle available for re-examination²⁴⁶. The owner who fails to comply with a direction of the local authority is guilty of an offence²⁴⁷.

This procedure is only implemented in the area of jurisdiction of a local authority to which the provisions of this part of the APPA have been made applicable to by the minister after consultation with the administrator²⁴⁸ and with the consent of the local authority concerned²⁴⁹, which local authority shall exercise the powers given to it by the APPA²⁵⁰.

In terms of the Road Traffic Act, 29 of 1989, a traffic officer in the employ of a local authority may stop the owner of a vehicle to ascertain if the engine "emits smoke or fumes which would not be emitted if the engine were in a good condition or

²⁴⁵ Section 37(1) of the APPA

²⁴⁶ Section 37(2) of the APPA

²⁴⁷ Section 37(4) of the APPA

²⁴⁸ Section 36(1) of the APPA

²⁴⁹ Section 36(2) of the APPA

²⁵⁰ Section 36(3) of the APPA

ran in an efficient manner"²⁵¹. The problem is, however, that no tests are available in respect of petrol driven vehicles and regulations have not been framed in terms of the act²⁵².

3.2.4 AIR POLLUTION BY DUST

Air pollution by dust is not investigated in this paper, because the local authority's role is very limited. The APPA deals with 2 sources of dust pollution - mine dumps, which are controlled by the government mining engineer and processes not listed as scheduled processes in the second schedule of the APPA (such as sandblasting, dry powder spray-painting, woodworking, carpentry etcetera) which are controlled by the chief officer²⁵³.

It must be pointed out that the APPA as a whole attempts to cooperate with the local authority. The provisions of the APPA may be made applicable to the area of a local authority only with its consent²⁵⁴. The minister may, however, withdraw powers given to local authorities under certain circumstances²⁵⁵ referred to in section 14 or where the local authority does not exercise its powers satisfactorily²⁵⁶. Where the local authority does not

²⁵¹ Section 101(1)(k) read with sections 11(b) and (c) as well as section 3(1)(d) and the definition of a traffic officer in section 1 of the APPA

²⁵² Fuggle & Rabie (n 29) p 449

²⁵³ Fuggle & Rabie (n 29) p 446

²⁵⁴ Sections 14(2) and 36(2) of the APPA

²⁵⁵ Section 14(8) of the APPA

²⁵⁶ Section 36(4) of the APPA

perform a function which was delegated to it and the chief officer has to perform the function, the minister may recover the costs from the local authority²⁵⁷.

3.3 NOISE POLLUTION

It would appear that noise pollution cannot be controlled by private law remedies²⁵⁸ and that control was usually by local authorities in the form of by-laws which were part of a subject dealing with other matters eg parks or traffic²⁵⁹ and never a subject problem addressed in its own right.

These by-laws were difficult to enforce, because they did not set an objective standard in respect of noise pollution, but relied on subjective considerations like 'shrieking', 'raucous' or 'offensive'²⁶⁰.

The Pretoria and Johannesburg municipalities developed by-laws in terms of empowering legislation, the Transvaal Local Government Ordinance 22 of 1977, attempting to set an objective standard to measure a 'disturbing noise'²⁶¹.

²⁵⁷ Sections 14(6) (d) and 36(4) of the APPA

²⁵⁸ F R Fuggle & M A Rabie: "Environmental Concerns in South Africa - Technical and Legal Perspectives" Juta 1983 p 380

²⁵⁹ Fuggle & Rabie (n 258) p 379

²⁶⁰ Fuggle & Rabie (n 258) p 379

²⁶¹ Fuggle & Rabie (n 258) p 379

These by-laws appear to have been the model which the Council for the Environment used to frame the national regulations²⁶² as regards noise pollution in terms of the ECA²⁶³. Fuggle & Rabie²⁶⁴ point out that this is not a satisfactory mechanism to control noise pollution. The basic principles should have been contained in an act, which can not be amended administratively and the particulars set out in regulations. These regulations have to be promulgated by a specific local authority in order to apply in its area of jurisdiction.

The director-general: Environmental Affairs published²⁶⁵ draft regulations in terms of the ECA in respect of all local authorities for comment by interested parties, which draft regulations are exactly the same as the "national regulations" referred to above.

A difficulty that could be experienced is that the regulations may be too complex for the smaller local authorities²⁶⁶ as well as too expensive to enforce in that smaller local authorities do not have the expertise in so far as staff are concerned or the financial resources as regards the purchase of equipment and appointment of additional staff.

²⁶² Government notice R 2544 dated 2 November 1990

²⁶³ Section 25 of the ECA

²⁶⁴ Fuggle & Rabie (n 258) p 380

²⁶⁵ Government notice R 55 Government Gazette 15423 dated 14 January 1994

²⁶⁶ Fuggle & Rabie (n 258) p 379

The regulations give powers to the local authority to control noise pollution at its source in relation to its environment²⁶⁷. The powers set out in regulation 2 relate to zoning of controlled areas²⁶⁸, noise impact assessment studies prior to changes in respect of existing land uses, facilities or buildings or prior to new buildings being erected²⁶⁹, town planning as regards the noise levels of vehicles²⁷⁰ and proof that a plant "shall not cause a disturbing noise"²⁷¹. The local authority may serve abatement notices on the creator of the noise, the owner or tenant requiring the noise levels to comply with the objective standards set by the regulations²⁷².

Regulation 3 makes it an offence -

- 1 to "establish a new township unless the lay-out plan...indicates...the existing and future sources of noise...which are foreseen in the township for a period of 15 years" from the date on which building operations start in the township²⁷³. It is required that the applicant must

²⁶⁷ Fuggle & Rabie (n 258) p 381

²⁶⁸ Regulation 2(f) read with regulation 2(m) and the definition of controlled area in regulation 1

²⁶⁹ Regulation 2(d)

²⁷⁰ Regulation 2(h)

²⁷¹ Regulation 2(i)

²⁷² Regulation 2(c) and (e)

²⁷³ Regulation 3(a)

indicate the dBA values (the value of the sound pressure level in decibels²⁷⁴). This is an objective standard.

- 2 to "erect educational, residential, flat, hospital, church or office buildings in an existing township within a controlled area, unless acoustic screening measures have been provided in the building" to limit the sound pressure level to 40 dBA²⁷⁵. Once again the regulations set an objective standard.
- 3 to "make changes to existing facilities or existing uses of land or buildings or erect new buildings, if it shall in the opinion of the local authority house or cause activities which shall, after such change or erection, cause a disturbing noise"²⁷⁶ (emphasis added).
- 4 to "build a road or change an existing road, or alter the speed limit on a road, if it shall in the opinion of the local authority concerned cause an increase in noise in or near residential areas, or office, church, hospital or educational buildings"²⁷⁷ (emphasis added).

It is interesting to note that regulations 3(c) and 3(d) both make provision for the exercise of a discretionary power by the local authority. In the case of regulation 3(d) it is a real discretion to be exercised, because the local authority has to judge whether there is an increase in noise. The power in

²⁷⁴ Section 1 - definitions

²⁷⁵ Regulation 3(b)

²⁷⁶ Regulation 3(c)

²⁷⁷ Regulation 3(d)

regulation 3(c) appears to be a discretion, but it is not, because the local authority has to decide if there is a disturbing noise. Disturbing noise is objectively defined as "a noise level which exceeds the zone sound level" or "a noise level which exceeds the ambient sound level at the same measuring point by 7 dBA or more"²⁷⁸.

5 . to situate "educational, residential, hospital or church
erven within a controlled area in a new township" or a
rezoned area, unless screening has been provided²⁷⁹.

6 to "stage an organised open-air musical festival or similar
gathering" without the local authority's consent. The word
organised seems rather peculiar. Would it be in order if
the festival is not organised? Surely, even if it is
possible that a gathering may be spontaneous, if it creates
a noise disturbance, it should be an offence and then it
would be covered by regulation 5 (a). The word seems to be
superfluous.

7 to operate certain sound equipment or musical instruments
in a public place if it exceeds 95 dBA unless a warning is
prominently displayed²⁸⁰.

8 to use certain power equipment outside certain hours and on
certain days²⁸¹.

9 to drive a vehicle on a public road and the sound level of

²⁷⁸ Regulation 1

²⁷⁹ Regulation 3(e)

²⁸⁰ Regulation 3(i)

²⁸¹ Regulation 3(i)

the noise it creates, exceeds a certain objectively stated sound level²⁸².

Regulation 5 seems to be a catch all prohibition. It forbids a number of activities if these would cause a noise nuisance. A noise nuisance is not an objective standard by which one measures sound. It "means any sound which disturbs or impairs or may disturb or impair the convenience or peace of any person"²⁸³, which would appear to be a subjective norm. The impression is that if a noise causes a disturbance and such disturbance can not be brought within the ambit of the objective criteria of regulation 3 it may qualify as one of the noise nuisances created by regulation 5.

Regulation 4 is also a catch all prohibition, but it sets an objective standard by referring to a disturbing noise, being a noise level which exceeds a specific zone or ambient sound level²⁸⁴.

Exemptions²⁸⁵ and penalties²⁸⁶ are provided for.

The regulations take note of the fact that not all local authorities will be able to afford a noise control officer or the

²⁸² Regulation 3(j)

²⁸³ Regulation 1

²⁸⁴ Regulation 1

²⁸⁵ Regulation 7

²⁸⁶ Regulation 9

equipment which the noise control officer would need to perform his or her duties. Local authorities which have noise control officers in their employ must apply the regulations in their entirety²⁸⁷. All other local authorities are exempted from applying regulations 3(a) to (e)²⁸⁸. It is a pity that the regulations do not state that if a local authority does not have a noise control officer that it should make use of a consultant as regards the application of especially regulations 3(a) to (d), because a mechanism to recover the costs from the developer of a township or the owner who intends to erect buildings could be established. Should the local authority itself be the developer or builder, the costs of the consultant will be part of the developing or building costs. Regulation of such crucial matters as set out in regulations 3(a) to (d) are so important that not the smallest of local authorities should be exempted from applying them. Small local authorities may develop into big ones. It is then difficult to rectify the mistakes of the past.

3.4 INTEGRATED WASTE MANAGEMENT

Solid waste management ("SWM") in South Africa has traditionally been regarded as a function of local government, basically with the object of protecting public health and the preventing or combatting of nuisances. The facilitation of waste management was not a consideration²⁸⁹. The impression is that other branches of

²⁸⁷ Regulation 10(1)(a)

²⁸⁸ Regulation 10(1)(b)

²⁸⁹ Fuggle & Rabie (n 29) p 514

waste management eg hazardous waste were not in a better position and it is doubtful if any policy considerations existed as regards (or appraised) the role of the local authority in these matters.

The general policy in terms of the ECA²⁹⁰ states that "[a] national strategy for integrated waste management...will be developed"²⁹¹.

Waste is defined as

"Any matter, whether gaseous, liquid or solid or any combination thereof, which is from time to time designated by the minister by notice in the Gazette as an undesirable or superfluous by-product, emission, residue or remainder of any process or activity."²⁹²

In South Africa waste has been controlled in a haphazard and uncoordinated manner. There are a number of acts eg the Hazardous Substances Act, 15 of 1973 ("HSA"), the HA, the ECA and the SSA, ordinances, by-laws and regulations which form part of the body of legislation regulating various features of waste²⁹³.

²⁹⁰ (n 62)

²⁹¹ (n 62)

²⁹² Definitions - section 1 of the ECA

²⁹³ L Botha: "South African Urban Solid Waste Legislation and its application: Proposals towards reform" University of Cape Town, MA thesis, 1988 - Botha does, however, only refer to solid waste

3.4.1 HAZARDOUS WASTE

Before referring to the local authority's role as regards hazardous waste, reference must be made to the national and international position.

South Africa has no national policy on waste management and pollution control. Because South Africa adopted the Basel Convention on the Control of Transboundary Movement of Hazardous Waste and their Disposal, it has to ensure that its domestic legislation conforms with its international law obligations. A draft policy on Hazardous Waste Management was therefore published on 30 September 1994²⁹⁴ which states that the main aim of Hazardous Waste Management ("HWM") "is the protection of human health and safety as well as the environment"²⁹⁵. This depends on the achievement of "acceptable standards of management, practice and technology in relation to 1) generation, 2) transportation, 3) treatment and 4) disposal of hazardous waste" ("HW")²⁹⁶. The policy gives definite norms and standards²⁹⁷, but stresses that it should not be viewed in isolation. It must form part of integrated waste management²⁹⁸.

²⁹⁴ Notice 106 of 1994: Government Gazette 15987 dated 30 September 1994

²⁹⁵ Introduction of the schedule to the policy, which is in compliance with section 29 of the constitution

²⁹⁶ Introduction to the schedule of the policy

²⁹⁷ Complying with section 126(3) of the constitution

²⁹⁸ Introduction to the schedule of the policy

As mentioned above, the policy suggests that local authorities, together with provincial government, should accept the functional responsibilities for the process of regulating the hazardous waste industry. It does qualify this role by stating "where appropriate"²⁹⁹. The policy says³⁰⁰ that the regulatory structure may include self regulation, command and control regulation (involving the enforcement of minimum standards) and pro-active regulation (which makes it possible for the regulating authority to impose conditions). The document admits that the pro-active control system needs more staff to administer than a command and control system. The question is: would a local authority have suitably qualified manpower and/or financial resources to operate any one of the 2 systems. The suggestion would once again be for the local authority to use consultants in a specialised field. It is done in other fields eg the drafting of structure plans and engineering projects.

Although the draft policy is published by the director-general of the Department of Environment Affairs in terms of section 2 of the ECA and therefore must be applied by a local authority, it states that, as regards processes in respect of the destruction and treatment of waste, these processes will continue to be regulated by the relevant provisions of

1 the Occupational Health and Safety Act, 85 of 1993;

²⁹⁹ Section 2.2 of the policy

³⁰⁰ Section 4.1 of the policy

2 the Hazardous Substances Act, 15 of 1993, or other
applicable acts which include;
3 the Water Act, 54 of 1956; and
4 the APPA, 45 of 1965,

but in the longer term, control over these processes will be administered by suitable fresh legislation setting minimum standards³⁰¹. The existing legislation does provide for an important role by the local authority as has been pointed out above and will be done below.

The Hazardous Substances Act

The salient features of the HSA will be pointed out whereafter the local authority's involvement will be discussed. The HSA provides for regulations as regards the manufacture³⁰², modification³⁰³ importation³⁰⁴, storage³⁰⁵, transportation³⁰⁶, dumping or other disposal³⁰⁷ of any class or group of hazardous substance³⁰⁸. The HSA also provides for regulations as regards

³⁰¹ Section 4.2 of the policy

³⁰² Section 29(1)(a)(i) of the HSA

³⁰³ Section 29(1)() of the HSA

³⁰⁴ Section 29(1)(a)(iii) of the HSA

³⁰⁵ Section 29(1)(a)(iv) of the HSA

³⁰⁶ Section 29(1)(a)(v) of the HSA

³⁰⁷ Section 29(1)(a)(vi) of the HSA

³⁰⁸ Section 29(1)(a) of the HSA

the description of a product, the name and manner under which it is marketed³⁰⁹, safety precautions as regards employees and persons likely to be exposed to hazardous substances and which may cause injury, ill-health or death³¹⁰ and control in respect of dumping and disposal of radio-active waste, although actual control of radio-active waste is by way of regulations in terms of the Atomic Energy Act - now the Nuclear Energy Act³¹¹.

According to section 2 groups I and II deal with toxic, corrosive and irritant substances, group III with electronic products and group IV with radio active material³¹².

Groups I and II will include pesticides and group III diagnostic and therapeutic X-ray units, sunlamps for suntanning, microwave ovens, citizen band radios, walkie-talkies etcetera³¹³.

The Minister of Health may authorise a local authority to enforce in its area of jurisdiction such provisions of the HSA as he or she may determine, which enforcement measures will be carried out by the officials authorised by the local authority³¹⁴. The local authority's authority may be subject to certain conditions, it

³⁰⁹ Section 29(1)(c) of the HSA

³¹⁰ Section 29(1)(e) of the HSA

³¹¹ Fuggle & Rabie (n 29) p 517

³¹² Fuggle & Rabie (n 29) p 564

³¹³ Fuggle & Rabie (n 29) p 565

³¹⁴ Section 24(1) of the HSA

may only apply to certain classes of substances³¹⁵ and it may be amended or withdrawn³¹⁶.

The local authority may obtain written permission from the minister to have samples analysed or examined free of charge³¹⁷ and it has authority to prosecute transgressions of the provisions of the HSA³¹⁸ and fines collected in the process will go into the local authority's coffers³¹⁹.

The authority given to a local authority in terms of section 24 is a delegation of powers. The act does not give an indication of the nature of the powers which may be delegated. It is not as wide as the heading³²⁰ of the section may lead one to believe, because section 24(1) states that the authority may relate to such provisions of the act "as the minister may specify in the notice". Although the possible powers which may be delegated could pertain to licensing, the monitoring functions of the act's provisions, reflected in the powers of the inspector³²¹ would be the obvious ones to delegate to the local authority.

³¹⁵ Section 24(2) of the HSA

³¹⁶ Section 24(3) of the HSA

³¹⁷ Section 24(4) of the HSA

³¹⁸ Section 25(1) of the HSA

³¹⁹ Section 25(2) of the HSA

³²⁰ Administration of the act by an authorised local authority

³²¹ Set out in section 9 of the HSA

The powers of the inspector concerns access to premises for purposes which may touch on the inspection and search of the premises or examination, extraction, taking or removal of samples of any substance (other than a group III or IV substance) found on the premises³²², inspection of a group III or IV substance³²³, a demand for information³²⁴, examination, making of copies and taking of extracts from documents³²⁵, inspection of any operation, process or activity carried on on the premises³²⁶ and the seizure of any substance, appliance, book, statement, document or object³²⁷.

3.4.2 WASTE DISPOSAL SITE IN TERMS OF SECTION 20 OF THE ECA

The most important waste management legislation from a local authority's point of view is found in section 20 of the ECA dealing with the operation of a WDS. The local authority is obliged not to "establish, provide or operate" a WDS without a permit³²⁸ from the Minister of Water Affairs and Forestry, which permit may be issued subject to conditions³²⁹.

³²² Section 9(1)(a) of the HSA

³²³ Section 9(1)(b) of the HSA

³²⁴ Section 9(1)(c) and (h) of the HSA

³²⁵ Section 9(1)(e) of the HSA

³²⁶ Section 9(1)(g) of the HSA

³²⁷ Section 9(1)(i) of the HSA

³²⁸ Section 20(1) of the ECA

³²⁹ Section 20(1)(a) of the ECA

The application for the permit must be in the prescribed form³³⁰, and the minister may call for further information if he or she so wishes³³¹.

Part VI of the ECA makes provision for regulations in terms of section 24 as regards waste management especially a WDS³³².

The minister issued regulations³³³ in terms of this section concerning an application³³⁴ for a disposal site permit providing for a form in schedule "A" in terms of which the application must be made. The schedule requires information as to the location of the site, the distance from a water course, source of surface water, wetland, residential area, the prevailing wind direction, the types of wastes, how the wastes will be disposed of, and so on.

The local authority is not specifically empowered by the Municipal Ordinance to apply for a disposal site permit, but states that a council may, and shall, if the administrator so directs "establish, provide, maintain and improve...a system for the collection, removal and disposal of...household and other refuse³³⁵, which would by implication give the power of

³³⁰ Section 20(2) of the ECA

³³¹ Section 20(3) of the ECA

³³² Section 24(1)(a) of the ECA

³³³ Government Gazette 15832 dated 8 July 1994 No R1196

³³⁴ Regulation 2

³³⁵ Section 186(22)(h)

application to the local authority.

In the Verstappen³³⁶ case the court confirmed that the town board of Port Edward was obliged to obtain a permit to operate its WDS and to do so without a permit constituted unlawful conduct even though regulations in terms of the ECA had not yet been promulgated. The court said that the requirement for a permit is plainly couched in the most peremptory of language, "which can not be overridden by the Minister's failure, whether inadvertent or intentional, to make the appropriate regulations". This is an illustration of how the national legislation sets the norms and standards which have to be followed by the local government.

Local authorities may have a responsibility to the poor in the management of a WDS, because "poverty, health and environmental issues are enmeshed"³³⁷. By integrating waste picking into the management of a WDS and therefore the formal waste management process, the plight of the impoverished may be relieved³³⁸. This would obviously have to be on a properly monitored basis to prevent any danger to the pickers' health or well-being by protecting them from dangerous/unhealthy substances or objects by issuing gloves or taking other precautionary measures. If the national legislature is not prepared to provide such a mechanism, a local authority may regulate such a venture in terms

³³⁶ Verstappen case (n 35)

³³⁷ Farieda Kahn: "Recycling as a matter of Survival" Conserva Jan/Feb/March 1996 A publication of the Department of Environmental Affairs and Tourism

³³⁸ Kahn (n 337) p 17

of by-laws.

An environmental impact study may be required if formal waste disposal is declared an activity that may have a substantial detrimental effect on the environment³³⁹.

3.4.3 THE HEALTH ACT

Section 38 of the HA empowers the Minister of Health, in consultation with the Minister of Environment Affairs to make regulations regarding the removal of night soil, rubbish removal, sewerage, the treatment and disposal of night-soil, rubbish, sewerage or other solid or liquid waste. The executive functions to administer these are delegated to the local authority.

3.4.4 THE SEA-SHORE ACT

The administration of the SSA has been assigned to a competent authority within the jurisdiction of the government of the Western Cape³⁴⁰.

The competent authority in the provincial government designated by the premier may delegate any of the powers that he or she has

³³⁹ as envisaged in terms of Government Notice 172 in Government Gazette 15529 dated 4 March 1994 issued under section 21 of the ECA - see section 14 of the schedule

³⁴⁰ Government Notice R27 in Government Gazette 16346 dated 7 April 1995 - the assignment is not as regards the whole act - sections 2, 6, 7(1)(b) and (2), 8, 9, 11(2) 12, and 13(b) and (c) are excluded

in terms of the SSA to a local authority on such conditions as he or she may deem fit, which delegation may also be withdrawn³⁴¹.

The competent authority in the provincial government may authorise a local authority to make regulations not inconsistent with the act and subject to his or her approval as regards the sea-shore falling within or adjoining its area of jurisdiction in connection with the use of the sea-shore³⁴² and "for the prevention or the regulation of the depositing or the discharging upon the sea-shore or in the sea of offal, rubbish or anything liable to be a nuisance or a danger to health"³⁴³, which regulations may provide for offences in respect of a failure to observe them³⁴⁴.

The local authority may also make regulations with the approval of the competent authority in the provincial government in connection with the sea-shore that is owned by it³⁴⁵. When making regulations, either in terms of section 10(1) or section 10(6), the local authority has to publish its intention to do so in the provincial gazette and call for objections, which procedure provides for some form of public participation in the shaping of the local authority's discretion³⁴⁶.

³⁴¹ Section 3(3) of the SSA

³⁴² Section 10(1)(b) of the SSA

³⁴³ Section 10(1) of the SSA

³⁴⁴ Section 10(2) of the SSA

³⁴⁵ Section 10(6) of the SSA

³⁴⁶ Section 10(3)(d) of the SSA

The competent authority in the provincial government primarily has the power to make regulations and when he or she does so eg in terms of section 10(1)(d), he or she must consult with the local authority³⁴⁷.

3.4.5 PROVINCIAL LAW

Section 186(22)(h) of the Municipal Ordinance says that a council may, and shall, if directed by the administrator, "establish...a system for the collection, removal and disposal of night-soil, slop water or household or other refuse from premises within its municipal area".

Section 188(26) of the Municipal Ordinance empowers the local authority to make by-laws concerning the removal or disposal of (a) night-soil, (b) domestic refuse, (c) kitchen and bedroom slopwater, (d) garden and stable litter and (e) other offensive or unhealthy matter, section 188(27) concerning the type of containers to be used in the process of removal of domestic waste, section 188(36) as regards the disposal of waste generated from the slaughtering of animals, section 188(44) as regards the waste generated at fish markets and section 188(64)(a) as regards "the cleansing...and good order of streets"; and (b) "the throwing or depositing of any material, substance, matter or thing in or onto streets".

³⁴⁷ Section 10(3)(e) of the SSA

The second schedule of the Financial Relations Consolidation and Amendment Act 38, of 1945, which assigned legislative powers to the provinces if transferred by the State President, was repealed by the constitution. Provincial powers as regards environmental pollution and environmental defacement, which was provided for in paragraph 24 will now be regulated in terms of the division of competencies provided for in the constitution.

3.4.6 CONCLUSION AS REGARDS WASTE MANAGEMENT

Provincial legislation on waste management is unmethodical and outdated in the sense that the subject matter that is addressed does not take note of the twenty first century "urban environment" and that there is no logical philosophy or train of thought in addressing the subject matter.

The best solution would be if there were a national law regulating integrated waste management and pollution control setting national norms and standards and functional duties to be followed by provincial and local government. In the absence of such legislation a national policy on integrated waste management and pollution control in terms of section 2 of the ECA as envisaged by the general policy³⁴⁸ would be a starting point.

³⁴⁸ (n 62)

4 LAND DEVELOPMENT

Although national and provincial legislation may control and provide a framework for land development, the process is usually initiated by a developer by making application to a local authority for permission to develop land in terms of the relevant legislation. A brief historical background of a local authority's role in traditional town planning legislation will be given, after which the new approach of land development will be introduced. The applicable legislation, its mechanisms and the role accorded to the local authority will be investigated and discussed within the context of the greater planning process. A land development charter, which may be deduced from the new legislation to which a local authority must adhere, will be examined. This part will further review the general principles for decision-making and conflict resolution which must be applied by a local authority as regards land development. Finally, the local authority's obligations relating to land development objectives will be set out.

4.1 HISTORICAL BACKGROUND

Traditional town planning legislation in South Africa is based on the British mechanisms of dealing with environmental health hazards which were created in cities by the industrial revolution³⁴⁹ and the influence of socialism which directed the

³⁴⁹ Fuggle & Rabie (n 29) p 716

development³⁵⁰.

Land use planning was based on concepts introduced in the United States, which are also the origins of our regional planning system³⁵¹. The planning process is managed on national, provincial (regional) and local levels³⁵², with the local authority concentrating on physical planning and control by zoning/town planning schemes³⁵³ and long term planning in the form of urban structure/guide plans, which in the old Cape Province were viewed as directory principles (guidelines) for development³⁵⁴. Regional planning provided an integrating role and the national level concerned itself with socio-economic development³⁵⁵.

Town planning/zoning schemes for the areas under jurisdiction of local authorities also regulated the use to which a specific land area could be put eg residential, business or industrial³⁵⁶, the control over such use rights³⁵⁷, departures from such a scheme on application eg an alteration of the land use restrictions³⁵⁸ and

³⁵⁰ Fuggle & Rabie (n 29) p 716

³⁵¹ Fuggle & Rabie (n 29) p 716

³⁵² Fuggle & Rabie (n 29) p 717

³⁵³ Fuggle & Rabie (n 29) p 717

³⁵⁴ Fuggle & Rabie (n 29) p 721 and section 24(1) of the Physical Planning Act, 124 of 1991 ("PPA")

³⁵⁵ Fuggle & Rabie (n 29) p 717

³⁵⁶ Section 9 of LUPO

³⁵⁷ Section 14 of LUPO

³⁵⁸ Section 15(1) of LUPO

rezoning³⁵⁹. There is limited public participation in that a substitution of a zoning scheme³⁶⁰, a rezoning³⁶¹ or a departure³⁶² must be advertised by the town clerk of the local authority, which advertisement calls for objections which must be taken into consideration when the local authority decides on the matter.

An application for land development (eg subdivision) in terms of conventional (existing) legislation eg LUPO is made to the chief administrative officer (town clerk) of the local authority³⁶³. The application is advertised in order to receive objections³⁶⁴ and obtain comments from interested parties. The local authority's officials investigate all the aspects of the application, compare it with the guidelines set out in the structure plan, which may include guidelines as to "the preservation of the natural and developed environment"³⁶⁵, consider the objections and comments that were received and draft a report which forms the basis for the council in making its decision on the application³⁶⁶. There is an appeal procedure to the administrator³⁶⁷. The most

³⁵⁹ Section 16 of LUPO

³⁶⁰ Section 14(4)(c) of LUPO

³⁶¹ Section 17(2) of LUPO

³⁶² Section 15(2) of LUPO

³⁶³ Section 24 of LUPO

³⁶⁴ Section 24(2)(b) of LUPO

³⁶⁵ Section 4(9) of LUPO

³⁶⁶ Section 24(1)(d)(i) of LUPO

³⁶⁷ Section 44 of LUPO

important guideline set by LUPO for the refusal of an application by a local authority is the "lack of desirability"³⁶⁸, but if the application is not refused for this reason it may be refused only on the basis of "the safety and welfare of the community concerned, the preservation of the natural or developed environment" or the effect that the application may have on existing rights³⁶⁹. This limited number of considerations are the only ones in terms of which the application may be refused. There are no principles or pointers as regards the natural or developed environment, apart from its preservation. This problem was identified by Cathrine O'Regan where she states that "[a] decision-maker is generally instructed to take into account environmental factors, and there is no process prescribed whereby particular environmental factors, and the relative weight which they should be given, can be identified"³⁷⁰.

Applications for zoning and rezoning in terms of chapter II of LUPO are processed in a similar way to subdivisions. The importance of a rezoning application from an environmental law perspective is that it changes the land use rights, which change can have a detrimental effect on the environment. The application for the rezoning of a piece of land zoned for agricultural purposes (although "designated for heavy industrial development" in the structure plan) to heavy-industrial purposes 2 kilometres

³⁶⁸ Section 36(1) of LUPO

³⁶⁹ Section 36(2) of LUPO

³⁷⁰ Cathrine O'Regan: "Informal housing, crisis management and the environment" SAPL 8(2) 1993 p 195

from the Saldanha-Langebaan Lagoon³⁷¹ being a wetland area of international importance, is a good example.

There was a realisation in the recent past that there should be a move away from 'control orientated processes' to development directed approaches - therefore a move towards pro-active processes and procedures which facilitate development especially socio-economic development³⁷². At the same time conservationists advanced environmental issues which were aimed at regulating development. The resolution of the conflicting demands of development and environmental/conservation issues was the origin of sustainable development³⁷³.

4.2 INTRODUCTION TO THE NEW APPROACH

The RDP wishes to restructure the socio-economic environment in South Africa within a framework of sustainable development.

Land reform, housing, the environment and social welfare and security are some of the basic needs of the people of South Africa postulated by the RDP³⁷⁴. It is an objective of a key programme of the RDP to meet these basic needs³⁷⁵. Local

³⁷¹ Report of the board of investigation into the Saldanha Steel Project by Judge J H Steyn ("the Steyn report") p 27 and p 39

³⁷² Fuggle & Rabie (n 29) p 716

³⁷³ Fuggle & Rabie (n 29) p 717

³⁷⁴ RDP White paper (n 4) p 9

³⁷⁵ RDP White paper (n 4) p 9

government is singled out as a vital role player in the formulation as well as the implementation of the planning process and to provide for capacity building to permit community based structures to take part in both stages of the process³⁷⁶.

In order to give effect to the objectives of the RDP, the departments of National Housing, Regional Affairs, Agriculture and the RDP Ministry (as it then was) collaborated in the formulation of the DFA³⁷⁷.

4.3 THE DEVELOPMENT FACILITATION ACT, 67 OF 1995

The long title of the DFA states that it introduces sweeping mechanisms to hasten the implementation of the RDP in so far as it concerns land matters. The DFA does not, however, deal with RDP related projects. It enacts a land development charter, providing general principles, which will be national norms regulating land development. The long title further suggests that the act simplifies "the formulation and implementation of land development objectives by reference to which the performance of local government bodies in achieving such objectives may be

³⁷⁶ RDP White paper (n 4) p 19 para 2.7.5

³⁷⁷ "Urban Development Strategy of the Government of National Unity" Government Notice 1111 of 1995 published in Government Gazette 16679 dated 3 November 1995 p 25 para 6.1. - the strategy is a discussion document, which together with public comment will form the basis for a white paper on urban development.

measured."³⁷⁸. The general principles will serve as an integrating and co-ordinating frame-work according to which and within which all levels of government will have to manage future land developments³⁷⁹.

The general principles (which may be referred to as the guiding principles) are set out in section 3 of the DFA and section 2 determines the application of these principles. There are additional general principles (which may be referred to as principles for decision-making) contained in section 4(2), which a local authority would be compelled to follow when it makes a decision in respect of any land development in terms of section 4(1).

The DFA defines³⁸⁰ land development as "any procedure aimed at changing the use of land for the purpose of using the land mainly for residential, industrial, business, small-scale farming, community or similar purposes". The definition includes land development procedures which excludes small-scale farming (chapter V) and which includes small-scale farming (chapter VI). These procedures are the expedited models of what is conventionally referred to as townplanning or subdivisional procedures. In the Western Cape the conventional procedures are administered in terms of LUPO.

³⁷⁸ Long title of the DFA

³⁷⁹ Urban Development Strategy (n 377) p 25 para 6.1.1

³⁸⁰ Section 1(xiii) of the DFA

Unlike the guiding principles and the principles for decision-making, which must be applied by the state³⁸¹ and a local government body in the case of the former and a competent authority (which will include a local authority) in the case of the latter, applications for land development need not be processed in terms of the DFA. Each province may enact its own legislation in this regard³⁸² or land development may be processed in terms of any other existing law eg LUPO. It is not the purpose of this paper to set out in detail the different procedures of land development - but rather to elaborate on the process as it affects the environment and the local authority's part in the process, although a brief description of a standard procedure will be given.

4.4 LAND DEVELOPMENT MECHANISMS

An application for land development in terms of the DFA, including in its definition discussed above, any change in land use including subdivisions and rezoning, is made to a development tribunal in terms of sections 31 and 49 and regulation 9 of the draft regulations³⁸³.

³⁸¹ The definition includes a province

³⁸² Urban Development Strategy (n 377) p 25 para 6.1.1 It is rumoured that the Western Cape intends to enact legislation in this regard

³⁸³ Published for comment : Government Notice 309 of 1966 : Government Gazette 17042 dated 22 March 1966 - in terms of section 46 of the DFA

Section 31(3), (4) and (5) amplified by draft regulation 17(6) provides that notice of the application must be given to all interested parties³⁸⁴ and every relevant local authority³⁸⁵ as well as publication in the press³⁸⁶. The notice to the local authority will be served on it by handing a copy of it to the town clerk³⁸⁷.

The notice to the local authority, which has the legal force of a subpoena³⁸⁸, obliges the town clerk to forward to the designated officer of the development tribunal a written report with comments within a prescribed period³⁸⁹, failing which the town clerk must appear in person before the tribunal on the specified date³⁹⁰ when he or she may be questioned by the members of the tribunal. The matters that he or she could be questioned about would presumably be the ones set out in section 33(2) eg engineering services³⁹¹, provision of streets and parks³⁹², the use of land³⁹³, the environment or environmental evaluations³⁹⁴, viewed against the back drop of the land development objectives that the

³⁸⁴ Draft regulation 17(6) (d)

³⁸⁵ Draft regulation 17(6) (c)

³⁸⁶ Draft regulation 17(9)

³⁸⁷ Draft regulation 5(1) (b)

³⁸⁸ Section 31(5) of the DFA

³⁸⁹ Section 31(4) (a) of the DFA

³⁹⁰ Section 31(4) (b) of the DFA

³⁹¹ Section 33(2) (a) of the DFA

³⁹² Section 33(2) (b) of the DFA

³⁹³ Section 33(2) (h) of the DFA

³⁹⁴ Section 33(2) (n) of the DFA

local authority is obliged to formulate in terms of section 28(1) as well as the general guiding principles set out in section 3.

The tribunal shall, on the strength of the application, the comments, objections and representations that it has received as well as the applicant's reply to them, the considerations set out in section 33(2), the development objectives framed in terms of section 28(1) (if any) and the general guiding principles set out in section 3, consider the application, whereafter it will refuse or grant it with or without conditions imposed in terms of section 33(2). The tribunal's decision is final³⁹⁵, but a "party to a dispute relating to a matter referred to in section 16(a) or (b)(ii) may appeal to the development appeal tribunal against a decision of a tribunal³⁹⁶. Section 25 provides for judicial review by the supreme court of the decisions of a tribunal as well as a development appeal tribunal.

4.5 THE LAND DEVELOPMENT CHARTER

From the brief discussion set out above, it is evident that the existing provincial legislation in respect of land development is an inadequate vehicle for local authorities to manage land development. The Steyn Report³⁹⁷ echoes this opinion where it refers to the "shortcomings in the structure planning procedure generally..." and points out that "the need for detailed and

³⁹⁵ Section 23(1) of the DFA

³⁹⁶ Section 23(1) of the DFA

³⁹⁷ Steyn report (n 371) pp 173 to 175

amended legislation in this regard is evident". The judge was vaguely aware of the Development Facilitation Bill, although the DFA was published on the same day as his report - 4 October 1995.

The Urban Development Strategy³⁹⁸ draws attention to the fact that "Urban integration and the management of urban growth depend on effective land use planning incorporating the principles of Integrated Environmental Management ("IEM") and a well functioning urban and regional planning system. This requires drastic reform of the current planning system". The strategy offers the provisions of the DFA as an initial framework to address the most obvious deficiencies of the present land development system, but makes it clear that the DFA must not be seen as a replacement for "comprehensive and integrated development planning"³⁹⁹. The Urban Strategy does not, however, state that apart from its expedited land development procedures, the DFA contains a charter of land development principles which are national norms and standards⁴⁰⁰ which must be applied by all 3 tiers of government including a local authority⁴⁰¹. These matters are not of a temporary nature. They are the foundation of proper decision-making procedures especially as regards decisions made by local authorities.

³⁹⁸ Urban Development Strategy (n 377) p 25 para 6.1.1

³⁹⁹ Urban Development Strategy (n 377) p 26 para 6.1.1

⁴⁰⁰ Section 3 of the DFA

⁴⁰¹ Section 2(a) of the DFA

The untenable situation under existing provincial legislation can be illustrated by the argument put forward by Mr Van Schalkwyk, S.C.⁴⁰², in Van Huyssteen case⁴⁰³ that "there is nothing which legally requires the functionary charged with a rezoning decision to take into account the findings and/or recommendations of a board of investigation which has been appointed under other legislation for other purposes"⁴⁰⁴. The functionary referred to could be the local authority with whom the rezoning application has been lodged. Farlam J observed that the view put forward by Mr Van Schalkwyk might have been true when LUPO was enacted, but that the provisions of the ECA and the general environmental policy and the constitution have changed the situation. The judge states that "section 3 of Act 73 of 1989...clearly obliges second and third respondents to exercise the powers conferred by the Ordinance (which undoubtedly may have an influence on the environment) in accord and with the policy determined under section 2 of the Act".

The general environmental policy obliges a local authority (together with all other government institutions) to "plan all physical activities ...in such a way as to minimize the harmful impact on the environment...", to strike a balance "between environmental conservation and essential development", to require a "planned analysis" before "any large-scale or high impact

⁴⁰² Counsel for the Minister of Environmental Affairs and Tourism, the premier of the Western Cape Province and the Minister of Agriculture, Planning and Tourism (Western Cape)

⁴⁰³ Van Huyssteen case (n 64)

⁴⁰⁴ Van Huyssteen case (n 64) p 29

development is undertaken and to accept the "principles of integrated environmental management...as one of the management mechanisms"...in order to attain the sustainable utilisation of resources⁴⁰⁵.

The promulgation of the DFA has changed the situation even more dramatically. The general guiding principles aim to co-ordinate and integrate a multiplicity of diverse considerations and inputs into the decision-making process and to pro-actively involve the public in the process. The considerations range from social, economic, institutional and physical aspects to environmentally sustainable practises and the promotion of sustained protection of the environment. Should a land development application be brought in terms of any law other than the DFA, the local authority could be the co-ordinator.

These general principles "serve to guide the administration of any physical plan, transport plan, guide plan, structure plan, zoning scheme or any like plan or scheme" administered by a local authority in terms of any law⁴⁰⁶.

They further act as guidelines to which a local authority must make reference in the exercise of any discretion or the making of any decision in terms of the DFA or any other law relating to land development including subdivision, land use and planning⁴⁰⁷.

⁴⁰⁵ (n 62) p 37

⁴⁰⁶ Section 2(b) of the DFA

⁴⁰⁷ Section 2(c) of the DFA

The other laws referred to may include legislation enacted before the DFA came into operation.

The general guiding principles do not specifically refer to the IEM guidelines of the Department of Environment Affairs and Tourism. Section 3, read as a whole, does, however, cover the spirit of IEM - in fact it may go even further in that it places a duty on the local authority (or national or provincial government) to "co-ordinate the interests of various sectors involved in or affected by land development so as to minimise conflicting demands on scarce resources"⁴⁰⁸. Further compare section 3(1)(j) which states that when a local authority has to decide on a land development application, the application should be judged on its own merits and no particular use of land such as residential, commercial industrial, community facility, mining, agricultural, or public use, should in advance or in general be regarded as being less important or desirable than any other use of land".

The significance of the integrative approach is emphasized by requiring a local authority in its administrative practice to promote integrated land development⁴⁰⁹ in that it should promote "integration of the social, economic, institutional and physical aspects of land development"⁴¹⁰, to use to the optimum resources such as bulk infrastructure, roads, transportation and social

⁴⁰⁸ Section 3(1) of the DFA

⁴⁰⁹ Section 3(1)(c) of the DFA

⁴¹⁰ Section 3(1)(c)(i) of the DFA

facilities⁴¹¹, to correct "historically distorted spatial patterns of settlements"⁴¹² and to "encourage environmentally sustainable land development practises and processes"⁴¹³. Section 3(1)(c)(viii) does not explain what should be understood by "environmentally sustainable land development", whereas in section 3(1)(b) guidelines are given as to what should be done to promote sustainable land development. This inter alia includes the promotion of "sustained protection of the environment"⁴¹⁴, meeting "the basic needs of all citizens in an affordable way"⁴¹⁵ and to "ensure the safe utilisation of land by taking into consideration factors such as geological formations and hazardous undermined areas"⁴¹⁶. By adding the additional adjective "environmentally" in section 3(1)(c)(viii) the legislature must have intended something more than the guidelines for sustainable land development set out in section 3(1)(b). Because section 3(1)(c)(viii) refers to practises and processes and section 3(1)(b) only to land development as such, it is submitted that section 3(1)(c)(viii) indirectly alludes to IEM practises and processes, since these are the only environmentally sustainable land development practices and procedures known in South Africa. The legislation has, in formulating some of the general principles of the DFA, drawn on the IEM Guideline Series

⁴¹¹ Section 3(1)(iv) of the DFA

⁴¹² Section 3(1)(vii) of the DFA

⁴¹³ Section 3(1)(viii) of the DFA

⁴¹⁴ Section 3(1)(h)(iii) of the DFA

⁴¹⁵ Section 3(1)(h)(iv) of the DFA

⁴¹⁶ Section 3(1)(h)(v) of the DFA

published by the Department of Environment Affairs, some of its principles having been included in the draft regulations on impact reports as well⁴¹⁷.

The IEM though, differs from the general principles on the matter of information made available to the public. The guidelines for review⁴¹⁸ state that "[p]ublic access to information and draft reports is provided in good faith and organisations or individuals should not abuse this trust. There should also be public accountability and recourse to the courts in cases of misuse of information". This fascist approach has been set aside by section 23 of the constitution and a local authority is duty-bound to give access to information held by it which is required by a person "for the exercise or protection of his or her rights". Section 3 expands this principle by compelling a local authority to provide particulars of legislation relating to land development, the officials who will be administering them and where to locate such officials, to persons requiring information in this regard⁴¹⁹. The local authority must in addition ensure that its by-laws, procedures and administrative practices are clear and generally available⁴²⁰ and provide information⁴²¹ to the people affected by them. Moreover, these principles as regards

⁴¹⁷ Government Notice 171 of 1994 published in Government Gazette 15529 dated 4 March 1994

⁴¹⁸ Department of Environment Affairs, 1992. Guidelines for review p 7 para 2.3

⁴¹⁹ Section 3(1)(f)(i) of the DFA

⁴²⁰ Section 3(1)(g)(i) of the DFA

⁴²¹ Section 3(1)(g)(ii) of the DFA

laws, procedures and administrative practice set out in section 3(1)(g) are underpinned by a stipulation that they should "give further content to the fundamental rights set out in the Constitution"⁴²², which would include matters like human dignity⁴²³, freedom to choose one's place of residence⁴²⁴ access to a court of law or ... another independent and impartial forum"⁴²⁵, access to information⁴²⁶, administrative justice⁴²⁷, property⁴²⁸ and an environment which is not detrimental to a person's health or well-being⁴²⁹.

4.6 GENERAL PRINCIPLES FOR DECISION-MAKING AND CONFLICT RESOLUTION

Section 4 read with section 2(c) of the DFA is the best example in current legislation which addresses the problem of decision-making by adopting the solution posed by Cathrine O'Regan⁴³⁰ by providing for "the structuring of discretion and the decision-making process itself". In discussing the best way to reach a decision O'Regan points out that administrative law in South

⁴²² Section 3(1)(g)(iv) of the DFA

⁴²³ Section 10 of the constitution

⁴²⁴ Section 19 of the constitution

⁴²⁵ Section 22 of the constitution

⁴²⁶ Section 23 of the constitution

⁴²⁷ Section 24 of the constitution

⁴²⁸ Section 28 of the constitution

⁴²⁹ Section 29 of the constitution

⁴³⁰ O'Regan (n 370) p 200

Africa concentrates on controlling the decision after it has been made by judicial review. She further draws attention to the fact that discussion on future developments of administrative law remains focused on control after the event eg an ombud or administrative tribunals⁴³¹. The legislation has also taken note of O'Regan's justification for guiding discretion and the process itself by having enacted a mechanism for dispute resolution in the form of mediation⁴³² to "promote any possibilities for compromise between the conflicting interests" and a mechanism for making an informed decision⁴³³ thereby ensuring that "all relevant information is taken into account in reaching the decision"⁴³⁴.

Section 2(c) directs the exercise of a discretion or the making of a decision by a local authority by stating that the general principles set out in section 3 will "serve as guidelines by reference to which" a local authority "shall exercise any discretion or take any decision in terms of the DFA or any other law relating to land development".

Section 4 further structures the decision-making process of land development (in terms of the DFA or future law) by requiring that a local authority must, in considering land development applications and other related matters⁴³⁵, ensure that its

⁴³¹ O'Regan (n 370) p 200

⁴³² Section 4(2)(c) of the DFA

⁴³³ Section 4(2)(b) of the DFA

⁴³⁴ O'Regan (n 370) p 200

⁴³⁵ Section 4(1)(b) of the DFA

decision is not inconsistent with the principles or a policy set out under the general guiding principles of section 3⁴³⁶. The decision-making is furthermore removed from the political control of the council of the local authority and entrusted to a body which consists of one or more of the officers of the local authority and "experts in the field of agriculture, planning, engineering, geology, mining, environmental management, law, survey or such other field as may be determined by the Premier"⁴³⁷. In the event of a dispute between 2 or more parties in relation to the land development application, the local authority official(s) and experts may, if they deem it appropriate refer the dispute to mediation⁴³⁸. Should they consider mediation inappropriate or it has failed, the local authority official(s) and experts must consider⁴³⁹ the application in public⁴⁴⁰. The process takes the form of a hearing⁴⁴¹ and "any person entitled to appear at the hearing may be represented by any other person"⁴⁴². The decision of the local authority official(s) and experts bind the local authority and persons affected by it⁴⁴³. The local authority official(s) and experts must give written reasons for the decision that they have

⁴³⁶ Section 4(2)(a) of the DFA

⁴³⁷ Section 4(2)(b) of the DFA

⁴³⁸ Section 4(2)(c)(i) of the DFA

⁴³⁹ Section 4(2)(c)(ii) of the DFA

⁴⁴⁰ Section 4(2)(d) of the DFA

⁴⁴¹ Section 4(2)(c)(ii) of the DFA

⁴⁴² Section 4(2)(d) of the DFA

⁴⁴³ Section 4(2)(c)(ii) of the DFA

reached⁴⁴⁴, which reasons must be made available for inspection by the public⁴⁴⁵ and may be published with the permission of the director-general of a provincial administration⁴⁴⁶. The director-general must further keep a record of reasons given⁴⁴⁷ and the decision may be taken on review to the division of the supreme court having jurisdiction⁴⁴⁸.

Although this decision-making process and dispute resolution mechanism of section 4 will not be applied to decisions made in terms of the administration of existing laws (that is laws made before the commencement of the DFA), they will apply to decision-making processes in terms of provincial legislation made after the commencement of the DFA even if such legislation has different procedures from the expedited procedures set out in chapter III of the DFA⁴⁴⁹. Provincial legislators will therefore have to take note of the local authority official(s) and experts of section 4(2)(c) and draft fresh legislation accordingly. The stipulation that the general principles of section 3 serve as guidelines in terms of which a local authority must exercise a discretion or make a decision in terms of other law, is not limited to future law, but also applies to existing laws.

⁴⁴⁴ Section 4(2)(e) of the DFA

⁴⁴⁵ Section 4(2)(f) of the DFA

⁴⁴⁶ Section 4(2)(f) of the DFA

⁴⁴⁷ Section 4(2)(f) of the DFA

⁴⁴⁸ Section 4(2)(g) of the DFA

⁴⁴⁹ Section 4(1)(c) of the DFA

4.7 LAND DEVELOPMENT OBJECTIVES

Section 27 of the DFA places an obligation on every local authority⁴⁵⁰ to draft a document called land development objectives. This document will take the place of what used to be the urban structure plan.

The content, nature and process of the drafting of structure plans which were so comprehensively criticised by the Steyn Report⁴⁵¹ are addressed by the land development objectives of chapter V of the DFA⁴⁵².

Expert testimony before the Steyn Commission stated that the structure plan in the case of the Saldanha/Vredenburg/Langebaan region "was not drawn up in an environmentally-integrated manner ... " and that decision-makers should be prepared "to acknowledge that a decision can only be taken when based on a responsible planning process, responsible environmental evaluation and responsible custodianship of the unique attributes of this land"⁴⁵³.

Ms Murray, a professional planner, testified that "under LUPO too much discretion is left to officials, with the result that

⁴⁵⁰ Section 27(1) (a) of the DFA

⁴⁵¹ Steyn report (n 371) pp 162 to 177

⁴⁵² The DFA was, however, not enacted as a result of the Steyn report - the 2 documents were published on the same day

⁴⁵³ Steyn report (n 371) p 164 - Mark Callaghan, land use planner

greatly different structure plans can be drawn up which comply legally with LUPO, with the result that a particular structure plan, though legally correct, may be open to objection that it insufficiently takes account of impacts on the bio-physical environment"⁴⁵⁴. Ms Murray suggested that at least the basic considerations should be obligatory.

Ms Laros of the Wild Life Society of Southern Africa pointed out that "public participation in the plan was inadequate" and that "environmental considerations [were] almost non-existent"⁴⁵⁵.

Mr Visagie thought that the extent of the public's involvement and the procedure to be followed were not prescribed by legislation⁴⁵⁶. It is further evident that traditional legislation eg LUPO is not precise.

Mr Theunissen⁴⁵⁷ was of the opinion that "there is no clear specification as to what the environmental input should be. Section 49 [of LUPO] is merely a sentence that says 'Due regard shall be had of the environment' and it is left to the professional discretion and skill of those involved to explore the clause thoroughly"⁴⁵⁸. Mr Theunissen drew attention to the

⁴⁵⁴ Steyn report (n 371) p 165

⁴⁵⁵ Steyn report (n 371) p 166

⁴⁵⁶ Steyn report (n 371) p 169

⁴⁵⁷ A former Deputy Chief Planner of Town and Regional Planning in the Western Cape Provincial Administration - Steyn report (n 371) p 166

⁴⁵⁸ Steyn report (n 371) p 167

fact that IEM was not yet incorporated in legislation and that it was at the discretion of the professionals in the planning profession whether they should be applied. He then stated that "certain of the guidelines could be embodied in legislation", but that it should not be a requirement that an impact report be obligatory for every proposal submitted⁴⁵⁹.

The criticisms set out above, beg the question: what is the purpose of planning legislation to be applied by the local authority? Reference to a definition of planning law could prove useful. Prof A M A van Wyk defines planning law as follows:

"Planning law consists of the provision of comprehensive plans to regulate land use, with the purpose of ensuring the health, safety and welfare of society as a whole, taking into account environmental factors and having regard to social, transport and other issues"⁴⁶⁰.

Although Prof Van Wyk concedes that it is a tentative definition, the elements posed by her are to be found in the principles set forth in section 28 of the DFA as regards the formulation of land development objectives by a local authority. These objectives which must be considered by the local authority relate to land use control⁴⁶¹; "sustained utilisation of the environment"⁴⁶² and

⁴⁵⁹ Steyn report (n 371) p 168

⁴⁶⁰ A M A Van Wyk: "Into the 21st Century with Reform of Planning Law" in 'Land Reform and the Future of Landownership in South Africa', A J Van Der Walt (Ed) Cape Town Juta 1991

⁴⁶¹ Section 28(1)(b)(vii) of the DFA

"optimum utilisation of natural resources"⁴⁶³; health, safety and welfare issues eg access to standard services including water and health facilities⁴⁶⁴; "the provision of bulk infrastructure"⁴⁶⁵; planning of transportation⁴⁶⁶ and access to public transport⁴⁶⁷; and social issues eg "the integration of areas settled by low income communities into the relevant area as a whole"⁴⁶⁸ and access to education facilities⁴⁶⁹. Other issues that have to be considered are "demographic circumstances and spatial patterns relating to...growth and form"⁴⁷⁰ and "the overall density of settlements"⁴⁷¹.

There are, however, further matters which are raised by section 28, namely development strategies (which are alluded to by Prof Van Wyk) such as facilitation of the involvement of all sectors of the land development industry in land development⁴⁷²; "access to finance"⁴⁷³; administrative structures⁴⁷⁴; and "such other

⁴⁶² Section 28(1)(b)(ii) of the DFA

⁴⁶³ Section 28(1)(b)(viii) of the DFA

⁴⁶⁴ Section 28(1)(a) of the DFA

⁴⁶⁵ Section 28(1)(b)(iv) of the DFA

⁴⁶⁶ Section 28(1)(b)(iii) of the DFA

⁴⁶⁷ Section 28(1)(a) of the DFA

⁴⁶⁸ Section 28(1)(b)(i) of the DFA

⁴⁶⁹ Section 28(1)(a) of the DFA

⁴⁷⁰ Section 28(1)(b) of the DFA

⁴⁷¹ Section 28(1)(b)(v) of the DFA

⁴⁷² Section 28(1)(c)(i) of the DFA

⁴⁷³ Section 28(1)(c)(ii) of the DFA

matters as the MEC may determine by notice in the Provincial Gazette"⁴⁷⁵; as well as the extent of land development issues⁴⁷⁶.

The DFA addresses the shortcomings of the existing/previous dispensation by enumerating the subject matter of land development objectives in section 28, making their adoption obligatory⁴⁷⁷ and providing a structured process of decision-making and conflict resolution⁴⁷⁸.

The drafters of the DFA have heeded the caution of people like Mr Theunissen by not making an environmental impact assessment obligatory. It is entirely at the discretion of the local authority to decide if it wishes to call for an environmental evaluation to determine the possible impact that a land development objective may have upon the environment⁴⁷⁹, although it should be noted that the local authority must exercise its discretion in terms of the general guiding principles⁴⁸⁰. In fact, the provisions of section 3 must act as guidelines with which the formulation and implementation of the land development objectives set by the local authority, must be consistent⁴⁸¹.

⁴⁷⁴ Section 28(1)(c)(iii) of the DFA

⁴⁷⁵ Section 28(1)(c)(iv) of the DFA

⁴⁷⁶ Section 28(1)(d) of the DFA

⁴⁷⁷ Section 27(1) of the DFA

⁴⁷⁸ Section 4 of the DFA

⁴⁷⁹ Section 28(2) of the DFA

⁴⁸⁰ Section 2(a) of the DFA

⁴⁸¹ Section 2(d)(iii) of the DFA

The land development objectives are binding on the local authority, because it "shall not approve a land development application in terms of [the DFA] or any other law...if such application is inconsistent with any land development objective"⁴⁸². Where land development objectives are not set, this fact may not be used to delay any land development application⁴⁸³.

The land development objectives set by a local authority will have the effect of amending an existing urban structure plan drafted in terms of chapter III of the Physical Planning Act, 124 of 1991 ("PPA") in so far as the land development objectives are inconsistent or incompatible with the urban structure plan⁴⁸⁴.

The planning process lies at the heart of environmental protection within the area of jurisdiction of the local authority - whether it is the faulty operation of a small bore sewerage system which causes pollution of the sea in bathing areas, industrial effluent polluting a river, a rezoning of land use which permits heavy industry within 2 kilometres of an internationally recognised wetland or the delivery of basic needs such as housing, water and sanitation - all these actions have an administrative origin within the framework of a proper planning process.

⁴⁸² Section 29(1) of the DFA

⁴⁸³ Section 29(1) of the DFA

⁴⁸⁴ Section 29(2) of the DFA

5. CONCLUSION

The role of the local authority as regards environmental legislation comprises powers and functions given to it by national or provincial legislation to implement such legislation. The power to enforce - that is to ensure that the exercise of powers and duties are indeed carried out - vests in a functionary of the national or provincial government, or as will be indicated below, in a member or group of members of the public by way of judicial review or an application for an order of mandamus. The administrator and the Minister of Environment Affairs will have the enforcement mechanisms provided by section 31 of the ECA at their disposal to direct a local authority to perform a function if the local authority's failure to perform such a function could be related to a function assigned to it by or under the ECA⁴⁸⁵.

The local authority will, to the extent that national or provincial legislation may not provide for enforcement measures or if such legislative measures are not adequate, be subject to the catch all provision of section 3 of the ECA in terms of which the director-general of Environment Affairs must ensure that the exercise of powers and the performance of functions by a local authority, which may have an influence on the environment, shall be exercised and performed in accordance with the general environmental policy or any other policy determined in terms of section 2⁴⁸⁶ eg the policy on vehicle access to the coastal zone.

⁴⁸⁵ See discussion above

⁴⁸⁶ Of the ECA

Section 3(2) (b)⁴⁸⁷ is, however, weak in that it only authorises, and does not oblige, the director-general to take such steps as he or she deems fit to ensure compliance with the general environmental or other policy. It is submitted that the authority given to the director-general should include the initiation of judicial review or an application for an order of mandamus, because the section refers to **such steps as he or she deems necessary**, coupled with the duty already imposed by section 3(1) and the wording of the general policy.

The HA provides for specific⁴⁸⁸ control of the powers and duties conferred on a local authority in terms of section 20(1) by determining in section 20(5) (a) that the competent authority in the provincial government may, if in his or her opinion, the local authority is unable⁴⁸⁹ to exercise a power or perform a duty, to relieve such a local authority from the power or duty. The HSA, the SSA and the APPA likewise authorise a delegation of functions to a local authority to be withdrawn in terms of section 24(3)⁴⁹⁰, section 3(3)⁴⁹¹ and section 6(7)⁴⁹² respectively.

⁴⁸⁷ Of the ECA

⁴⁸⁸ Specific, in the sense that the control is in respect of specified powers and duties, but general, in the sense that the control does not relate to one single act

⁴⁸⁹ Owing to a lack of resources

⁴⁹⁰ Of the HSA

⁴⁹¹ Of the SSA

⁴⁹² Of the APPA

The Minister of Water Affairs and Forestry has even more clearly stated powers through which he or she controls the establishment and operation of a WDS by a permit issued by him or her in terms of section 20 of the ECA supported by regulations. The Fundamental Principles and Objectives for a New Water Law envisages that the local authority would be responsible for water supply and sanitation, subject to national norms and standards⁴⁹³.

The public also has the power to ensure that a local authority's powers and functions are exercised and performed in accordance with any policy(ies) determined in terms of section 2 of the ECA. The preamble of the general environmental policy states that one of its principles is that "every person...has a responsibility to consider all activities that may have an influence on the environment duly and to take all reasonable steps to promote the protection, maintenance and improvement of...the natural environment"⁴⁹⁴ and that a partnership be established between "the State and the community as a whole"⁴⁹⁵.

The inference is that public participation in the management of the environment is regarded as important, which would conform with the RDP's vision of fundamental change in South Africa, brought about inter alia by public participation⁴⁹⁶. Public participation ensures that the channels of communication between

⁴⁹³ Fundamental Principles (n 114) p 33

⁴⁹⁴ (n 62) p 36

⁴⁹⁵ (n 62) p 36

⁴⁹⁶ See (n 4)

the local authority and its ratepayers and residents (or indeed the public at large) remain open. Confirmation of this notion is to be found in one of the general principles⁴⁹⁷ for decision-making and conflict resolution in terms of the DFA. This principle provides that a dispute as regards a land development may be referred to mediation⁴⁹⁸.

The policy as regards vehicle access to the coastal zone also supports the principle of public participation by requiring consultation with the "local community concerned"⁴⁹⁹. It may further be pointed out that one of the general principles for land development is that "[m]embers of communities affected by land development should actively participate in the process of land development"⁵⁰⁰ and that the procedure for the setting of land development objectives⁵⁰¹ must include consultation with the public and interested bodies⁵⁰².

Legislation passed prior to 29 April 1994 did in some cases provide for a limited form of public participation⁵⁰³, but it was not really a principle on which a policy was based.

⁴⁹⁷ For decision-making and conflict resolution in terms of the DFA

⁴⁹⁸ Section 4(2)(c)

⁴⁹⁹ (n 156) p 31

⁵⁰⁰ Section 3(1)(d) of the DFA

⁵⁰¹ Section 27(3) of the DFA

⁵⁰² Section 27(4)(a) of the DFA

⁵⁰³ In terms of LUPO land developments have to be advertised to enable the public to object

Unfortunately an ordinary ratepayer or resident may not have the standing in law to approach the court in a matter where the local authority fails to implement environmental legislation, due to the fact that our courts have always insisted that certain very strict criteria be met in order to fulfill the requirements for legal standing⁵⁰⁴. In the case of an individual, the party must show that he or she is personally affected by the act complained of over and above that sustained by members of the general public⁵⁰⁵. An individual has no standing to represent the public's interests or the interests of a group of persons or an organisation in a matter like the case study⁵⁰⁶ as regards vehicle access discussed above⁵⁰⁷.

Section 7 of the constitution opened the doors of the court to individuals and groups as regards environmental matters that can be brought within the ambit of section 29. Unfortunately section 29 is so narrowly defined that it would in many cases not give an individual or group legal standing as regards the protection of the natural environment.

This problem may, interestingly enough, be overcome by relying on the provisions of section 24(b) of the constitution⁵⁰⁸ as was

⁵⁰⁴ Patz v. Green 1907 TS 427

⁵⁰⁵ Von Molke v. Costa Areosa (Pty) Ltd 1975(1) SA 255(C)

⁵⁰⁶ Discussed above

⁵⁰⁷ Baxter (n 20) pp 658-662, with a few minor exceptions that do not apply to this case.

⁵⁰⁸ giving every person the right to "procedurally fair administrative action where any of his or her rights or

done in the Van Huyssteen case⁵⁰⁹. In this case the subject matter of the rights under discussion was the value of the applicants' property situated next to the Langebaan lagoon and the possibility "that the erection and operation of a steel mill will detrimentally affect the lagoon and its sensitive eco-system...by industrial activity which pollutes or otherwise detrimentally affects the natural beauty and enjoyment associated with being near to the lagoon"⁵¹⁰ and the influence that these events may have on the value of the property.

Farlam J said that a "court can take judicial notice of the fact that the sites for holiday homes will be more valuable if they are in close proximity to beautiful unspoilt natural areas and that they will be much less valuable if such areas are polluted or otherwise detrimentally affected"⁵¹¹. The court was on this basis satisfied that the applicants had standing in law. No mention of a right to the environment was ever made, presumably, as was mentioned earlier, because section 29 is so narrow and restrictively worded and secondly, because the content of the right is uncertain.

Brassey points out that our courts have in the past been reluctant to grant orders of mandamus against subordinate legislatures and executive officers, that orders to compel

legitimate expectations is affected or threatened"

⁵⁰⁹ The Van Huyssteen case (n 64) p 27

⁵¹⁰ The Van Huyssteen case (n 64) p 27

⁵¹¹ The Van Huyssteen case (n 64) p 28

officials to perform their duties might have been controversial at one stage, "but their legitimacy came to be recognized before the turn of the century"⁵¹². It is his opinion that under the constitution, orders of mandamus would still be treated with circumspection⁵¹³. In fact it is his opinion that the courts will treat any imposition of a positive duty with caution⁵¹⁴. This fact does, however, not mean that a court should not grant such an order.

Although this study does not address the final constitution, mention may be made of the direction to which it points with regard to the problem of standing in environmental matters. Section 24⁵¹⁵ grants a much wider right to the environment, referring to the protection of the environment, the prevention of pollution and environmental degradation and the promotion of conservation. It has already been established by the Van Huissteen case that the right to procedurally fair administrative action⁵¹⁶ assists or complements the environmental right.

⁵¹² Martin Brassey: "Labour relations under the new South African Constitution" Southern African Labour Monographs 5/94 Labour Law Unit University of Cape Town p 13. Although Brassey's article deals with labour relations his opinion holds good for all administrative actions

⁵¹³ Brassey (n 512) p 13

⁵¹⁴ Brassey (n 512) p 14

⁵¹⁵ Of the final constitution adopted by the constitutional assembly on 8 May 1996

⁵¹⁶ Section 33(1) of the final constitution is the equivalent

Section 38 (c), (d) and (e)⁵¹⁷ provides for class actions and public interest actions, which concept is substantiated by working paper 57 of the South African Law Commission⁵¹⁸. The working paper proposes the introduction of class actions and public interest actions in matters not covered by section 7(4) of the constitution⁵¹⁹.

The local authority must, as regards the implementation of environmental legislation (that is in the exercise of its powers and performance of its functions), be aware of its interaction -

- * with the national and provincial governments on the one hand - where section 3 and section 31⁵²⁰, the withdrawal of a delegation, judicial review or an order of mandamus will be the monitoring mechanisms; and
- * with its ratepayers and residents on the other hand - who may monitor the enforcement of environmental legislation by application for judicial review or an order of mandamus by an individual, a class of persons or the public in their interest or the mechanism provided for in a specific act⁵²¹;

as well as its commitments in terms of the RDP.

⁵¹⁷ Of the final constitution - which is the equivalent of section 7(4)(b)(ii), (iv) and (v) of the constitution

⁵¹⁸ Notice 1126 of 1995 in Government Gazette 16779 dated 27 October 1995

⁵¹⁹ Section 38 of the final constitution

⁵²⁰ Of the ECA

⁵²¹ Eg section 27(4)(a) of the DFA



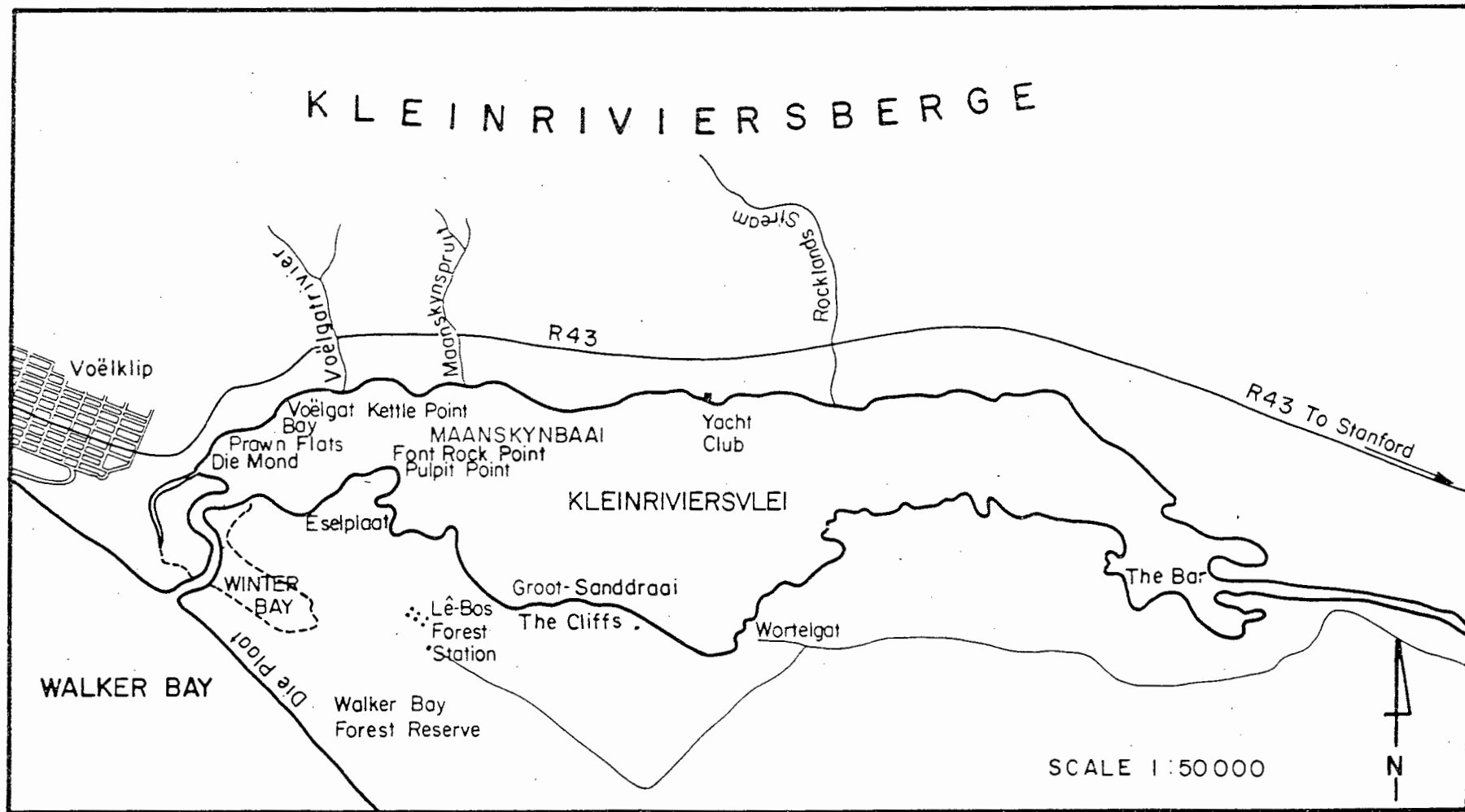


FIG 1: Kleinriviersvlei.

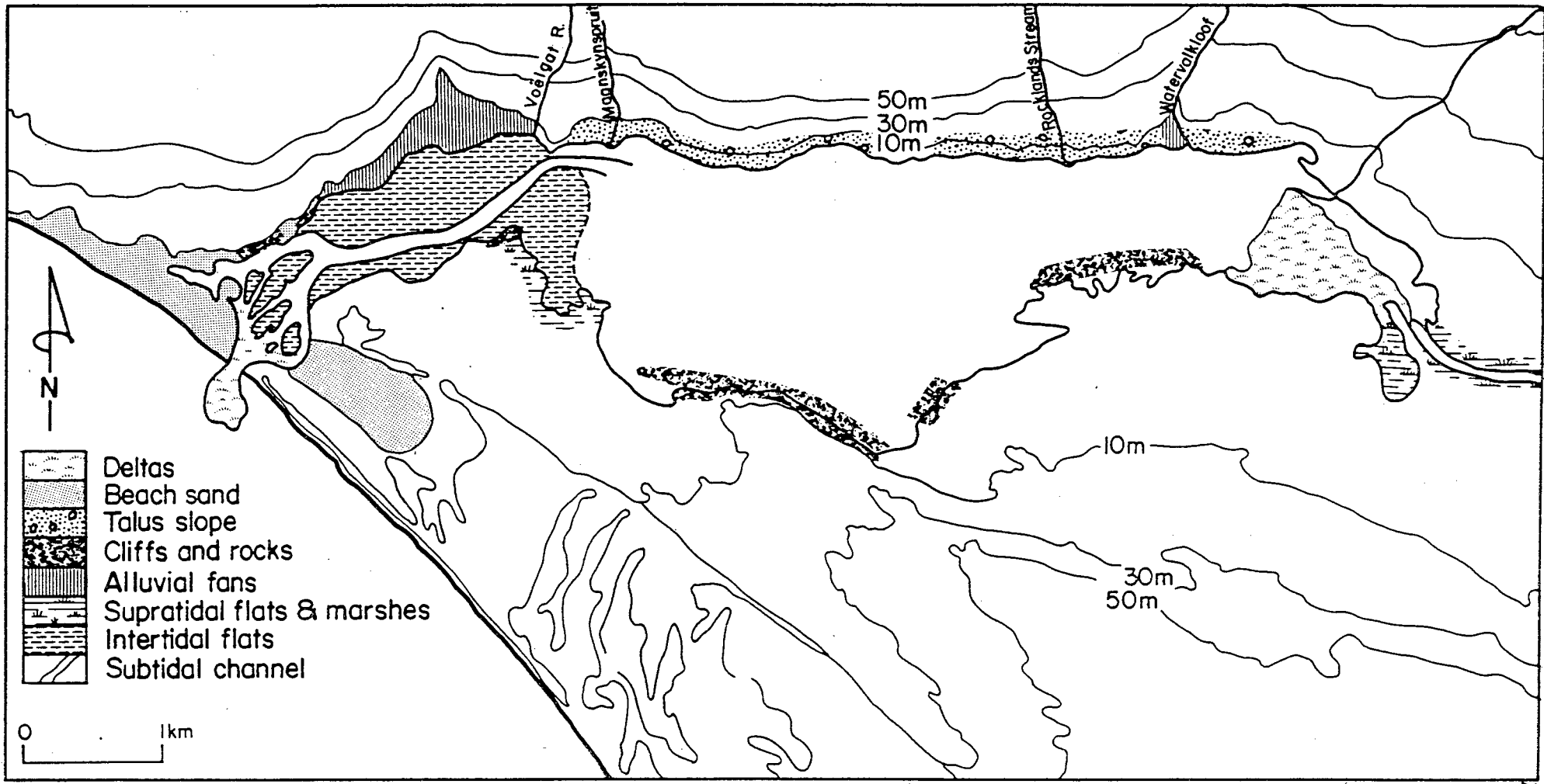


FIG.12 : Physiographic units of Kleinriviersvlei (after Sloman, 1983).

ANNEX "A3"

Developed area or modified environment

Sand and mudflats

Zostera capensis beds

Salt marsh

Artificially established Dune shrubland

Strandveld Shrubland

Acaciacyclops and Strandveld mosaic

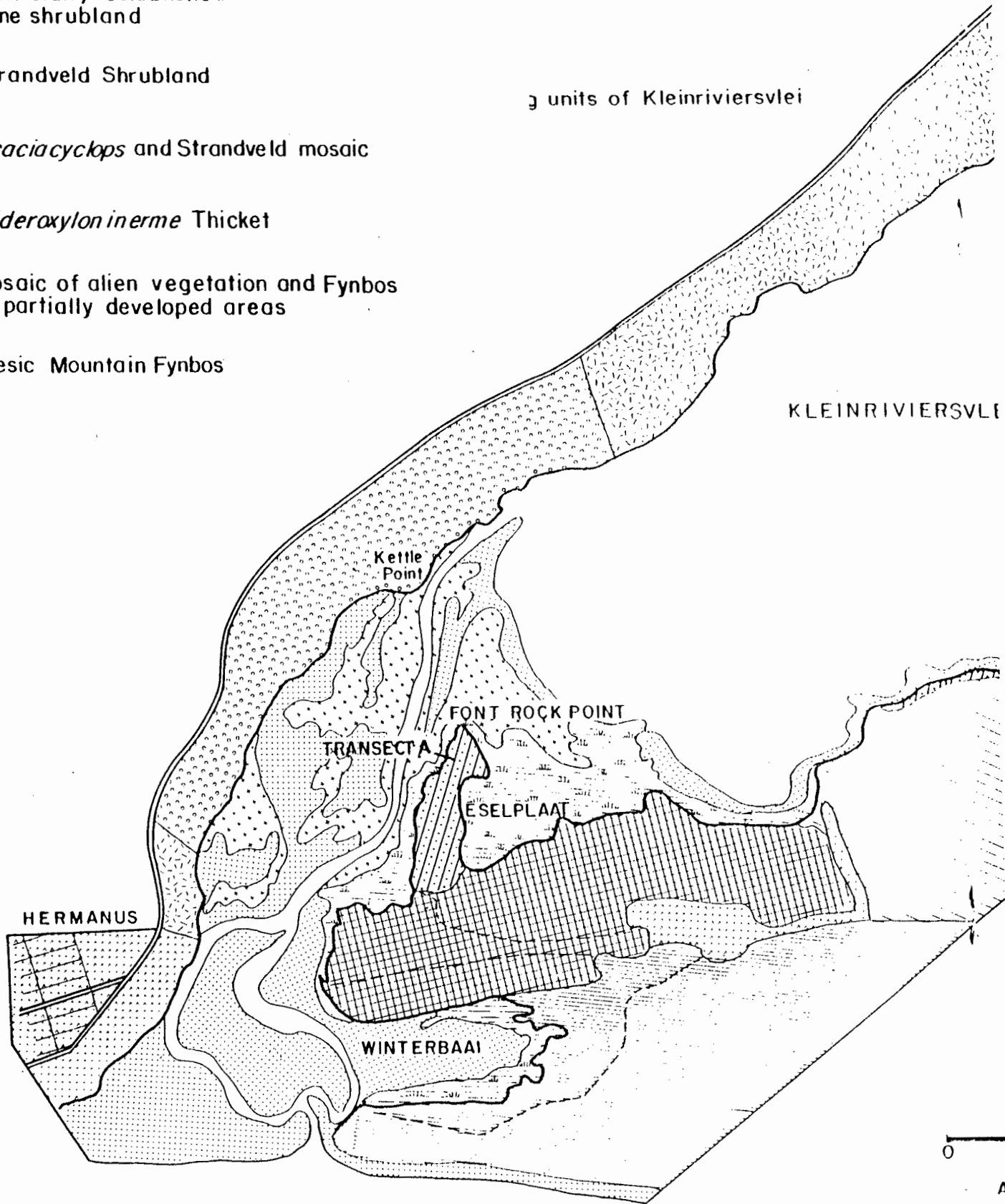
Sideroxylon inerme Thicket

Mosaic of alien vegetation and Fynbos or partially developed areas

Mesic Mountain Fynbos

3 units of Kleinriviersvlei

KLEINRIVIERSVLEI



GREATER HERMANUS MUNICIPALITY

MINUTES OF A MEETING OF THE TRANSITIONAL LOCAL COUNCIL HELD IN THE COUNCIL
CHAMBER ON THURSDAY, 23 FEBRUARY 1995 AT 15:00

- PRESENT:** The attendance register was circulated to all Councillors and is attached.
- ABSENT:** Councillor C H Fourie (leave granted see item 2.1 below)
Councillor J M Bishop (leave granted see item 2.2 below)
Councillor O Kamana (leave granted see item 2.3 below)
Councillor C Meyer (leave granted see item 2.4 below)
Councillor S Mcinjana (leave granted see item 2.5 below)
Councillor J P Pretorius (leave granted see item 2.6 below)
- IN ATTENDANCE:** Mr M M B Van Rooyen, Town Clerk
Mr N Barnard, Town Treasurer
Mrs C K Burman, Deputy Town Secretary (Admin.)
Mr C J Rust, Deputy Town Secretary (Personnel)
Mr J A Van der Linde, Town Engineer
Mr H le R Rossouw, Chief: Health Services
Mr M C Du T Heyns, Electrical Engineer
Mr J Kritzinger, Chief: Protection Services
Mr J Von Doring, Chief: Housing and Community Development
Mr J Matthee, Chief: Tourism and Public Relations
Mr J F Dynaard, Administrative Officer
Mev W F Kearney, Admin. Assistant

The meeting was opened with scripture reading and prayer by Rev. Kemp.

1. NOTICE CONVENING THE MEETING

The notice convening the meeting was read by the Town Clerk.

2. APPLICATIONS FOR LEAVE OF ABSENCE

- 2.1 Clr C H Fourie - leave of absence from all meetings from 10 February 1995 to 1 March 1995.
- 2.2 Clr J M Bishop - leave of absence from all meetings from 10 February 1995 to 3 March 1995.
- 2.3 Clr O Kamana - leave of absence from this meeting.
- 2.4 Clr C Meyer - leave of absence from this meeting
- 2.5 Clr S Mcinjana - leave of absence from this meeting.
- 2.6 Clr J P Pretorius - leave of absence from all meetings from 22 February 1995 to 31 March 1995.

RESOLVED that the applications be approved.

13. MARKETING AND COMMUNICATION

In accordance with the principle of sound administration and after consultation with the officials concerned, it has been suggested that a new section be created in the Town Clerk's department, namely Marketing and Communication.

The main task of this new section is to market and promote the Greater Hermanus area. The exact duties of the Marketing and Communication section are in a process of formulation and once the job description has been finalized, it will be submitted to Council for consideration.

NOTED.

14. CONTROL OVER DE MOND BEACH AREA

The eastern municipal boundary is situated just beyond the access control point to the De Mond area. (A plan of the area in question is available for inspection in the municipal offices). The Overberg R.S.C. thus has jurisdiction over the beach area, to the east of the boundary, but decided at the end of 1994 to hand over temporary control of the De Mond beach area to the Greater Hermanus Council until after Easter weekend.

The Overberg R.S.C. also decided that the Council must submit a full motivation before the permanent transfer of this area could be considered. By "permanent transfer" is meant the incorporation of ground in the municipal area of jurisdiction in contrast with "control" by which is meant a delegation of authority.

It is quite clear that it is important for the Greater Hermanus Council to have control over the area in question, because this tourist attraction cannot effectively be managed by a body situated 100 kilometers away and which is not directly responsible to the local community.

It is recommended that approval be granted for the extension of the municipal area of jurisdiction to the first dune on the eastern side of the Klein River Lagoon; and

Further recommended that if the Overberg R.S.C. does not wish to grant approval for the abovementioned, they be requested to delegate permanent control of the area to the Greater Hermanus Municipality.

RESOLVED accordingly.

OVERBERG STREEKSDIENSTERAAD REGIONAL SERVICES COUNCIL

MELD ASB./PLEASE QUOTE

Ons Verw./Our Ref.: R/10/16/2

Navrae/Enquiries: Mnr vd Westhuizen

Bylyn/Ext.: 139

Privaatsak: X22
Private Bag:
Tel.: (02841) 51157
Fax.: (02841) 51014
BREDASDORP
7280

21/08/95



Die Stadsklerk
Hermanus Munisipaliteit
HERMANUS
7200

056 43

17/6/3/3/2
TE

VIR AANDAG: MNR A MAY

Meneer


KUSBEHEER: HERMANUS MUNISIPALITEIT - OORNAME VAN KLEINRIVIERSMOND-GEBIED

Die Overberg Streeksdiensteraad het tydens sy vergadering van 19 Julie 1995 die aanbeveling van die Uitvoerende Komitee van die Raad goedgekeur dat Hermanus Munisipaliteit sy regsgebied tot by die Oostelike grens van die Kleinriviervlei uitbrei.

Alle kostes en prosedures vir die aansoek moet deur Hermanus Munisipaliteit onderneem word.

Hermanus Munisipaliteit moet die nodige wetstoepassing tot by die Oostelike grens uitoefen.

Die uwe


HOOF UITVOERENDE BEAMPTTE
AvdW/eg

These regulations appeared in both official languages in Government Gazette No. 1514 of the 19th August, 1966 and the approval by the Minister appeared in Government Gazette No. 1611 dated 15th December 1966, Notice No. 2017

MUNICIPALITY OF HERMANUS

REGULATIONS FOR THE CONTROL OF THE SEA-SHORE AND THE SEA

It is hereby notified that the Municipality of Hermanus duly authorised thereto by the Minister of Agricultural and Land Tenure by Government Notice No. 1628 dated 22nd October 1965, proposes after the expiration of a period of thirty days from the date of publication hereof, to make, with the approval of the Minister, the following regulations, which are hereby published in terms of paragraph (d) of sub-section (3) of Section 10 of the Sea-Shore Act, 1935, (Act No. 21 of 1935):

DEFINITIONS

1. In these regulations, unless the context indicates otherwise, any word to which a meaning has been assigned in the Sea-Shore Act, 1935 (Act No. 21 of 1935) shall bear the same meaning, and:

"local authority" means the Municipality of Hermanus;

"bathing area" means the sea-shore situate within or adjoining the area defined in Proclamation of the Cape Province No. 38 dated 16th March, 1948 as the area in which the local authority has jurisdiction, and the sea within 200 yards seaward from low-water mark adjoining such sea-shore;

"life-saver" means any person employed or appointed in that capacity by the local authority or any member of the Surf Life-Saving Association of South Africa or of any affiliated life-saving club or association of life-savers;

"notice" means and adequate notice in both official languages erected or posted in a prominent position and maintained in a legible state.

APPLICABILITY OF REGULATIONS

2. These regulations shall apply to the bathing area, excluding the Hermanus Fishing Harbour Area as defined in Government Notice No. 1353, published in Government Gazette No 5504 of the 1st July, 1955.

OFFENCES RELATING TO PUBLIC HEALTH, NUISANCES, INDECENT OR OFFENSIVE
BEHAVIOUR, ETC

3. No person shall:

- (a) throw, deposit or discharge in or upon the bathing area any offal, refuse, wood, material, glass, bottles, filth, metal, fish, fish offal, or anything of any kind whatsoever which may be a source or cause of injury to any person, or may tend either to injure the health or in any way affect the safety, comfort or rights of the inhabitants or other users of the bathing area;
- (b) whilst knowingly suffering from any infectious or contagious disease enter or remain in the bathing area; or
- (c) whilst in the bathing area:
 - (i) use any obscene, offensive or indecent language; or
 - (ii) behave in an offensive, improper or disorderly manner, or
 - (iii) wilfully or negligently do any act which causes discomfort to other users of the bathing area, or is likely to cause a breach of the peace, or obstruct or interfere with any officer, servant or other employee of the local authority in the proper execution of his duties.

PROHIBITION OF BATHING WITHIN AREAS CONSIDERED UNSAFE

4. (a) Bathing within any part of the bathing area may be prohibited by the local authority either as a permanent or as a temporary measure on the grounds that it is unsafe.

(b) Bathing within any part of the sea may be prohibited by a life-saver on duty, for so long as he may consider the condition of the sea unsafe.

(c) Any permanent prohibition under this regulation shall be indicated by notice on the spot and any temporary prohibition by recognisable and intelligible markers at both ends of the prohibited area.

3/....

OFFENCES RELATING TO BATHING

5. No person shall:

- (a) bathe in any part of the bathing area in which bathing has been prohibited in terms of regulation 4;
- (b) bathe or sun-bathe in the nude or clad indecently;
- (c) hang onto, sit upon or cause to sink any safety ropes provided for the protection of bathers, or in any way interfere with such safety ropes or other appliances provided for the assistance of bathers in distress;
- (d) enter or remain in the bathing area contrary to a reasonable prohibition by the person having authority over or placed in charge of such bathing area as evidenced by a notice on the spot.

LIFE-SAVING DEVICES

6. No person other than an employee of the local authority duly authorised thereto, or a member of an association of persons which may now or hereafter be established with the object of saving human life, or promoting public safety, shall, save in time of emergency, handle, touch or in any way make use of any lifeline, lifebuoy or other life-saving appliance or device which may now or hereafter be installed or maintained in the bathing area, nor, whilst any such lifesaving appliance or device by in-use, shall any person do any act which impairs or impeded or is likely in any manner to impair or impede the efficient operation thereof.

DAMAGE TO PROPERTY

7. No person shall interfere with, misuse or damage any building, closet, shelter, changing booth, or other amenity provided for the use of the public, or disregard, or, in contravention or directions as to the use to which the same may be put, fail to observe the terms of notices affixed to any such building, structure or amenity by the local authority or any person having authority to maintain such building, structure or amenity on the sea-shore.

4/....

ANIMALS

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8. (a) No person shall cause or allow any dog belonging to him or in his charge to enter or remain in any part of the bathing area wherein the local authority has by notice on the spot prohibited the presence of dogs.

(b) Any dog not under control or apparently not under control of a person may, if found in the bathing area referred to in paragraph (a), be impounded by any employee or servant of the local authority and may be removed to the local authority's pound, there to be dealt with in accordance with the by-laws or regulations relating to the keeping of dogs at such pound.

(c) No person shall cause or allow any horse, pony or other beast belonging to him or in his charge to enter or remain in the bathing area, except with permission given in writing and subject to such terms and conditions as the local authority may deem fit to impose.

FIREARMS

9. No person shall discharge a firearm in the bathing area, except:

- (i) an employee or servant of the local authority or a life-saver to kill or repel sharks;
- (ii) by a person who has erected a bathing amenity on the sea-shore, or his deputy, and then only in the vicinity of such amenity and in order to kill or repel sharks.
- (iii) for the firing of blank cartridges during competitions organised by lifesavers or during sport meetings in the bathing area.
- (iv) in connection with the collection of specimen of marine life or birds or animals for scientific purposes;
- (v) in an authorised hunt for whales, fish or birds, or
- (vi) to signal distress.

INTERFERENCE WITH NOTICE BOARDS, NOTICES AND MARKERS

10. No person, other than a lifesaver or a person authorised to do so by the local authority, shall move, deface or otherwise interfere with any notice board, notice or marker erected, posted or placed in the bathing area by the local authority, or by direction of the local authority or by any lifesaver, in terms of these regulations.

5/....

PROHIBITION OF ENTERTAINMENT AND TRADE

11. No person shall for reward or gain an entertainment or business or trade of any sort in the bathing area without the written permission given on such terms and conditions as in each case may be deemed fit by the local authority.

VEHICLES

12. (a) Except on such portion of the bathing area is indicated by a notice on the spot, no person shall introduce any motor vehicle, animal-drawn vehicle or bicycle into the bathing area or use such vehicle or bicycle within that area.

(b) No person shall engage in any method of sand skiing within the bathing area;

(c) Paragraph (a) of this regulation shall not apply in respect of any ambulance whilst lawfully in use as such, or in respect of any vehicle used in lieu of an ambulance in time of emergency, or in respect of any vehicle used by any employee or servant of the local authority in the discharge of his duties or in respect of any vehicle, the driver of which carries with him the written permission thereto of the local authority.

AIRCRAFT

13. No person shall introduce any aircraft into the bathing area or use such aircraft within that area without the prior written consent of the local authority and subject to such conditions as prescribed by it.

6/....

CONTROL OF BOATS

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14. (1) The local authority may within the bathing area:
- (a) set aside by notice on the spot, a place or places from the launching, landing, beaching, keeping, letting or hiring boats or craft;
 - (b) set aside by notice on the spot, a place or places for the exclusive use for different types of boats or craft or for the use only of boats or crafts belonging to members of boat clubs;
 - (c) prohibit the use or operation of any boat or craft or type thereof, from certain parts of the bathing area, and may differentiate between boats or craft belonging to or used by members of boat clubs and those belonging to or used by non-members of such clubs; and
 - (d) make the operation or use of boats or craft or certain types thereof, within or from any part of the bathing area, subject to its written permission granted on such terms and conditions as it may deem fit to impose.
- (2) Any person who launches, lands, beaches, keeps, lets or hires any boat or craft contrary to paragraph (1) of this regulation shall be guilty of an offence unless such act is done in an emergency.

CONTROL OF ANGLERS

15. (a) No person shall fish or angle from any part of the bathing area which the local authority may, by notice on the spot, declare to be an area in which fishing or angling is prohibited. Where fishing or angling is not so prohibited no person shall throw, cast or swing any line or gear in such manner as to cause danger or annoyance to any other person.
- (b) No person shall leave any bait, fish-hook or refuse in the bathing area.

CONTROL OF FIRES

16. No person shall kindle a fire in the bathing area without obtaining the prior permission of the local authority, which permission shall be subject to such terms and conditions as the local authority may deem fit to impose.

7/....

CONTROL OF TENTS, ETC

17. No person shall erect a tent or any form of temporary structure on the sea-shore without the prior written consent of the local authority and object to such condition as prescribed by it.

CONTROL OF INTOXICATING LIQUOR

18. No person shall abuse intoxicating liquor on the sea-shore.

APPOINTMENT OF OFFICIALS TO ENSURE OBSERVANCE OF REGULATIONS

19. (a) The local authority may entrust one or more of its employees or servants with the duty of ensuring that these regulations are duly observed and of reporting any convention thereof to the authorities charged with the prosecution of crime.

(b) Any person who obstructs or interferes with any such member, employee or servant of the local authority whilst lawfully engaged upon his duties in that behalf, shall be guilty of an offence.

FINES TO ACCRUE TO LOCAL AUTHORITY

20. Any fine recovered in respect of any offence committed under these regulations, shall accrue to the local authority.

PENALTY

21. Any person who contravenes any of these regulations or who fails to comply with any provision thereof shall be guilty of an offence and liable on conviction to a fine not exceeding Fifty Rand (R50,00).

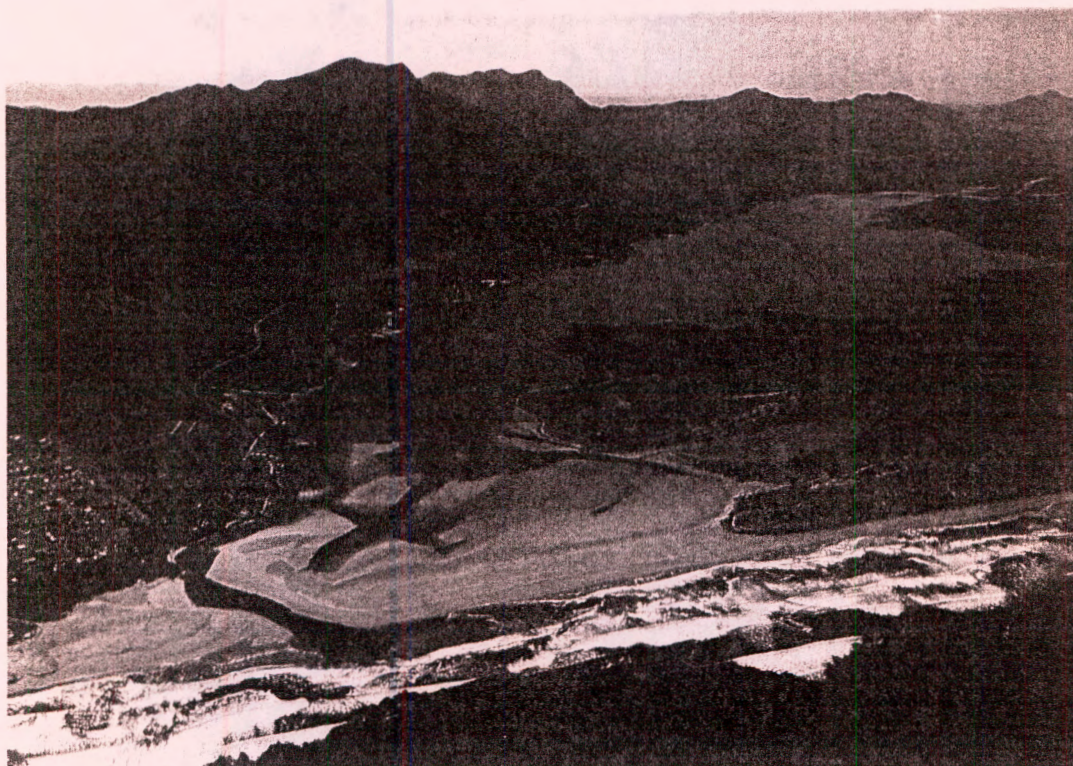
ESTUARIES OF THE CAPE ANNEX "D"

PART II: SYNOPSES OF AVAILABLE INFORMATION ON INDIVIDUAL SYSTEMS

EDITORS:

A E F HEYDORN and P D MORANT

Division of Earth, Marine and Atmospheric Science and Technology
CSIR, Stellenbosch



FRONTISPIECE: KLEINRIVIERSVLEI – 89-08-06

REPORT NO. 40: KLEIN (CSW 16)

(CSW 16 – CSIR Estuary Index Number)

BY: H P DE DECKER

Department of Zoology,
University of Cape Town

ESTUARINE AND COASTAL RESEARCH UNIT – ECRU
DIVISION OF EARTH, MARINE AND ATMOSPHERIC SCIENCE AND TECHNOLOGY
CSIR

- greater control must be exercised over the construction of new jetties, sandfill jetties being discouraged, while illegal and derelict jetties must be removed.
- the subsurface poles and the concrete blocks holding them in the main channel between the mouth and the lagoon must be removed, since they constitute a danger to boating.
- all vehicles should be banned from Die Plaat, since by compacting the sand there, they destroy the faunal communities and possibly reduce the amount of sand that is removed during mouth breachings, thereby exacerbating the import of sand into the estuary.
- the unsightly rubbish dump between Prawn Flats and Maanskyndaai must be removed and the site rehabilitated.

Despite major disruptions in its catchment and a long history of manipulation of its mouth, the Kleinrivier Estuary is still in a fairly sound ecological state. The estuary and its environs, however, are becoming increasingly popular as a holiday and retirement resort. Only a comprehensive management plan can guide future development in a way which will preserve the delicate estuarine ecosystem and maintain ecological stability. By having synthesized current information on the estuary and highlighting areas of insufficient knowledge, it is hoped that this report will be of assistance in the drawing up of a cohesive management plan for the Kleinriviersvlei.

6. ACKNOWLEDGMENTS

CPA Chief Directorate Nature and Environmental Conservation: Dr D J Coetzee and Messrs P H Lloyd, A L de Villiers, I Visagie (Onrus) and G van Wyk.

Department of Agriculture, Caledon: Mr S van Rooyen.

University of Cape Town: Percy FitzPatrick Institute of African Ornithology: Dr P A R Hockey and Mr P G Ryan. Zoology Department: Dr J King. Department of Applied Mathematics: Ms J B Pugh. Electron Microscope Unit: Mr D A Gerneke. Department of Environmental and Geographical Science: Prof J R Grindley.

South African Museum: Mr W J J van Ryssen

Hermanus Municipality: Mr M M B van Rooyen

Hermanus: Dr I Williams

Onrus: Dr L Roberts

Dennis Moss Partnership: Mr A Withers

CSIR, Stellenbosch: Dr I Ll van Heerden, Mrs H J Heydorn and Miss S Taljaard.

7. REFERENCES

Literature Cited

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ASHTON, E M (1945). Notes on the birds of Hermanus. *The Ostrich* 16: 158-168.

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HERMANUS

LOCAL STRUCTURE PLAN

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ANNEX "E"

VOLUME 2 : STRUCTURE PLAN PROPOSALS



COV/001

- 22 -

- 12) Relocation of the Autonet bus depot to the industrial area is proposed.
- 13) One new hotel site is proposed within the central area. A new tourist hotel/inn is proposed on the existing Hermanus Nissan premises and surrounding properties.
- 14) A zone for offices (professional use) is proposed west of the N G Church parking area. All applications will be evaluated on an ad-hoc basis, and must comply with parking regulations.
- 15) It is proposed that certain streets, as shown on Drw. No 1736/13 be developed as pedestrian preference areas.
- 16) The special conservation area, as shown on Drw. No. 1736/21, must be supported to develop the tourist character of the town.

RECOMMENDATIONS

- That the drafting of a Tourist Management and Implementation Plan for the central area be supported.
- That the individual development plans in respect of the market square, street closures and malls, civic centre, etc. be accepted and submitted to the Council for consideration by means of individual reports and estimates.
- That the broader financing methods for development of the central area and the development of tourist facilities be further investigated by the consultants.

3.7 TOURISM AND RECREATION

The most important proposals for the development of tourism and recreational facilities within Hermanus are briefly discussed below. The contribution of the central area towards tourism and recreation is discussed in greater detail, for example at the Old Harbour area.

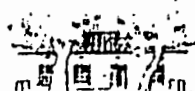
- 1) Provision is made for various forms of recreational activities along the coastline for all communities of Hermanus. This issue has already been referred to the Provincial Administration, who will grant funds for detail planning, as indicated on Drw. No. 1736/22, as well as for development of certain areas.
- 2) The coastline of Hermanus will be planned and developed as a unit. Specific problems along the coastline should be identified and addressed in a development plan. The objective of the development plan is to distribute the pressure on the beaches of Hermanus more proportionately. Excess pressure on certain beaches will be relieved, and new nodes will be developed.

- 3) The element which unifies the coastline, is the cliff path. Along this trail emphasis is moved from passive recreation such as nature appreciation at the new harbour, to active functions such as swimming, horseriding and barbequeing at Grotto Beach and surrounding areas. In developing activity nodes along other parts of the coast, existing and future visitors will be better accommodated in Hermanus. Drw. No. 1736/23 shows the provisional development plan for the Grotto Beach area.
- 4) The development of the new harbour for tourism/housing as well as a limited small craft harbour forms an important part of the structure plan. Drw. No. 1736/24 shows the general development guidelines for the new harbour.
- 5) It is proposed that the existing refuse dump should be used to create recreation facilities such as a swimming pool, additional caravan park and camping site, and other sports facilities. In this respect it will become necessary to draft a development plan to ensure that present dumping and filling of refuse be handled in the most effective way.
- 6) As indicated on the structure plan, several areas are provided for swimming, barbeque activities etc., of which the most important development will be in the Grotto Beach area. This area is outlined in red on the structure plan and possesses great potential for further recreational development. The Council has already commissioned the redevelopment of this area.
- 7) Specific businesses in the form of a boat shop and restaurant/tea garden are also provided at the launching ramp east of the existing caravan park.
- 8) The development of a youth and family recreation area east of the existing caravan park is also planned in the future.
- 9) The existing area at Lake View possesses great potential for the development of a medium sized holiday resort. It is proposed that a site of approximately 7 ha on which 70 - 100 units can be provided be set aside. This resort will require a new entrance from the Gansbaai road in order to relieve traffic on the existing route.
- 10) The planning and incorporation of the Klein River Lagoon into Hermanus and its activities is important. Aspects such as capacity of the water area, future role of Maanschyndbaai, shore developments, etc, must be addressed.

HERMANUS

BEPLANNINGSVERSLAG : OORHOOFSE ONDERSOEKE NA POTENSIAAL VAN TOTALE KUSLYN

VERSLAG NR. 1



ESTUARY AND RIVERMOUTH LANDFORMS - VLBI COAST TYPE

FORM AND DYNAMICS

1. River channel. This is modified seasonally by floods and by artificial breaching. The migration of the channel is dependant on duration of mouth opening, scouring and sediment deposition.
2. Tidal sand and/or mudflats. These areas are inundated and exposed daily by tides if the mouth is open to the sea. Alternatively, if the mouth is closed to the sea, these areas may be inundated if lagoon is filled by inflowing river water, (winter period) or exposed during the dry summer months (zero inflow from river).
3. Floodplain. Seasonally flooded, usually during winter rainy period. The area of flood inundation is small due to steeply rising coastal plain and artificial breaching of estuary mouth when water levels exceed 2,1 m above mean sea level. Natural wetlands usually occur within this area.
4. Beach. Surfaces reworked daily by tides, waves and wind. Beaches and primary dunes are the major buffers of storm waves.
5. Sandspit/Berm. When the berm (or bar) has been breached (flooding or artificially), the resultant sandspits constantly change their form due to sediment transport by wave and tidal action, and river scouring.
6. Dunes. The sparsely vegetated hummocky dunes and primary dunes along the beach are liable to erosion by wind and storm seas. Erosion of these dunes is also initiated by human disturbance of the plant cover. The dunes along Grotto Beach have been artificially raised in height by erecting brushwood fences in order to curb sand movement across road that parallels the coastline.
7. Artificially stabilised dunes. These dunes have been artificially stabilised by dune shrubland by the Chief Directorate Nature and Environmental Conservation.
8. Rock promontaries. Resistant remnants of old land surface (originally cliff shoreline). Rock under constant erosion by waves and mass wasting processes.


RECOMMENDED LAND USE

- A Access roads. Access roads to the beaches should be at right angles and not parallel to the coastline. No roads should be constructed within the active littoral zone of the beach. Property access roads should be behind the first row of houses.
- B Permanent structures and resort facilities. Design criteria should allow for exceptional floods and storms (e.g. at 50 or 100 year intervals). Ideally, these facilities should be restricted to one side of the estuary in order to enhance the aesthetic appeal of the estuarine environment and give wildlife a respite from human pressure.
- C Temporary occupation, i.e. camp and caravan sites. Low lying areas may be used for temporary use, such as camping and caravan sites. These are normally grassed areas that cannot be damaged by flooding.
- D Intensive play-use zones. These areas can tolerate limited trampling, vehicle or boat use. However, to restrict trampling of dunes, access across dunes to beaches should be provided in the form of demarcated boardwalks. Controlled access to vehicle numbers on the beach should be strictly enforced or not allowed at all, as compaction of the sand destroys animal habitats. Motorised boats should be restricted to channel areas as propellers destroy aquatic vegetation and animal habitats.
- E Artificial mouth breaching. The premature breaching of the lagoon mouth should be strictly controlled, and should only be allowed once the water level has risen to 2,1 m above mean sea level. The natural point of exit should be determined so that the estuary is opened at the correct point.
- F Restricted development zones. Resorts or housing developments should not be developed along the shore of the lagoon where immediate access to deep water is not available. Such areas usually have sensitive salt marshes and intertidal mud or sandflats abutting their shores that will be degraded by motorboats (propellers) and trampling. Natural wetlands will also fall into this category and the same restrictions should apply.

HERMANUS

**BEPLANNINGSVERSLAG : GROTTOSTRANDGEBIED
VERSLAG NR. 3**

VERW. S1935
AUGUSTUS 1990

DENNIS MOSS  VENNOOTSKAP
MARKSTRAAT 17 62 371
STELLENSPOORT 7800

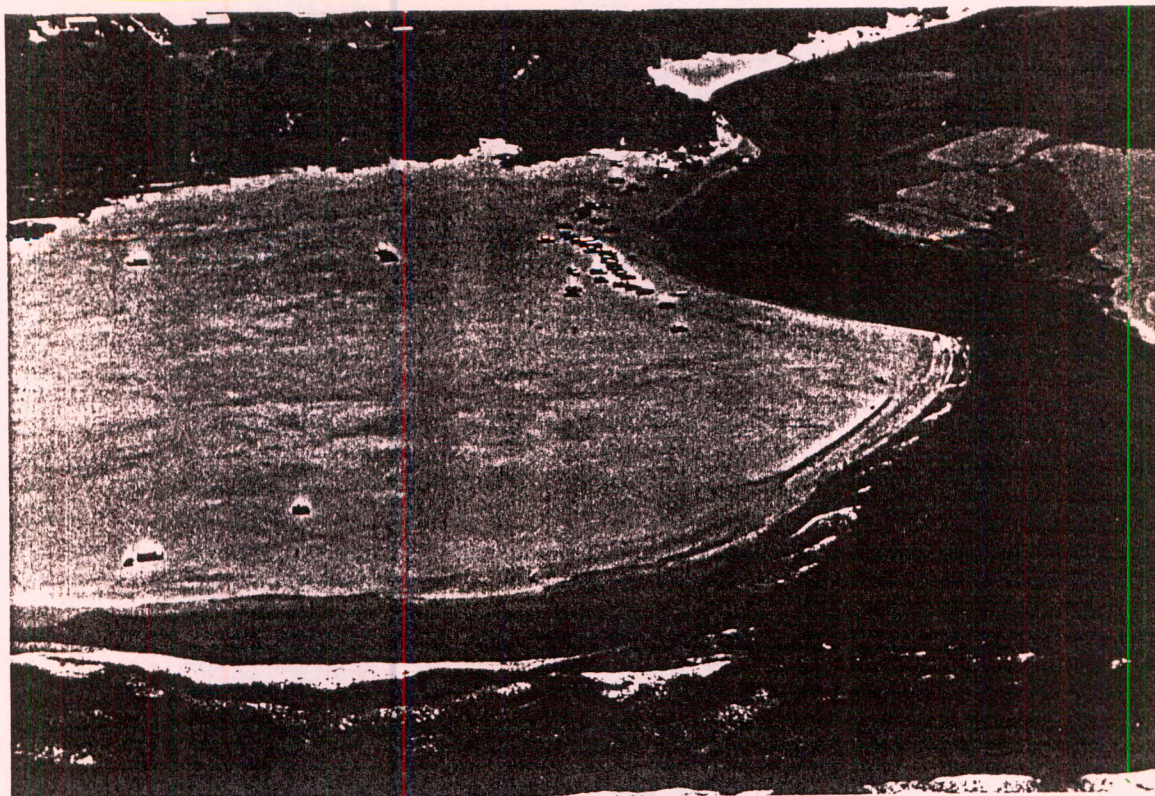
FA 02231 5383

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- 2.5.4 The informal parking area at the eastern end of Grotto¹⁴⁹ Beach should be upgraded by tarring or paving. The temporary toilets should be replaced with permanent ones that are aesthetically more pleasing. This toilet/ablution complex could be designed in such a way that it forms a natural feature, e.g. vegetated dune (Photograph 7(a) and (b)). A septic tank and soak-away system will probably be the cheapest method to dispose of effluent.

Primary dunes should be encouraged to develop in front of this parking area. Large primary dunes are already developing to the west of the present parking area, in an area where sand was removed by the Municipality in the past. These dunes play an important role in storing sand for later use in re-establishing the dynamic equilibrium of the beach environment, for example, during storm events.

- 2.5.5 The practice of allowing vehicles onto the beach to gain access to the Kleinriviersvlei mouth area (Photograph 8) and various fishing spots along the Walker Bay coastline should ideally be stopped (Refer to Report 1: Synopsis of the abiotic and biotic characteristics and the natural dynamic processes of the Hermanus coastline, Figure 11). However, because this "right" has been in existence for many decades, a sudden and complete change in policy is unlikely to be well received by the population of Hermanus. For this reason, limited access should still be allowed.



Photograph 8. Oblique aerial photograph of the Kleinriviersvlei mouth area showing the popularity of allowing vehicles onto the beach. Forty eight vehicles were parked on the beach when this photograph was taken (December 1988).



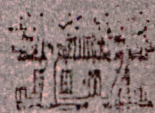
HERMANUS

ENVIRONMENTAL PLANNING ALONG THE HERMANUS COASTLINE

REPORT 4 : PLANNING ZONE 6 : HERMANUS LAGOON
SUB-ZONE (d) : DE MOND CARAVAN PARK,
PRAWN FLATS, AND LAKE
VIEW CHALET RESORT NODES

REF: R 1914
MAY 1991

DENNIS MOSS



PARTNERSHIP

STRAAT 111, 7011 STELLENBOSCH, S. A. TEL: 021 885 1111 FAX: 021 885 1111

"The Coastal Zone of South Africa should be seen as one of the Fastest disappearing natural resources left in South Africa" (CPA, 1988), while Huntley, et al. (1990) have written that "in an economically strong future South Africa, the demand for coastal recreational facilities is expected to double every 5 years."

The South African coastline should therefore be looked upon as a limited natural resource that deserves sensitive planning if it is to be used in a sustainable way for generations to come.

HERMANUS Times

Established since 1949

Tel (0203) 23717

FRIDAY, 11 AUGUST 1995

Manne van
elders span
saam teen
stropers
bl. 2

Lagoon
vehicles
should be
banned -
p. 3

Open letter
to Dr
Peter Best
p. 6

Nee vir
drankwinkel
bl. 11

will ensure that this is the most exciting September holi few weeks.

Ban on vehicles should be imposed, says top official

The department of Environment Affairs is "seriously concerned" that the ban of vehicles on the bank to the Klein River lagoon mouth is not imposed by local authorities.

The department's assistant director: coastal management, Mr Shaun Schriener, writes in a letter to the Greater Hermanus municipality that according to the *General Policy for the Control of Vehicles in the Coastal Zone* - which was promulgated last year in terms of the Environment Conservation Act - all vehicles are

banned on beaches countrywide. Mr Schriener also said if the municipality wished to allow controlled access to the beach it would first have to hold a referendum to ascertain whether the majority of ratepayers wanted the beach to be opened or closed to vehicles.

Mr Schriener said further that salt marshes, as those found at the entrance to the lagoon, are defined in the *General Policy* as "ecologically sensitive areas which must be closed to vehicles". Estuarine intertidal sand-flats are equally sensitive

areas on which vehicles should not be allowed to drive.

Mr Schriener also lamented the fact that law enforcement is "presently totally inadequate".

He said that because of the exceptional width of the beach some vehicle use could be accommodated. One of the conditions would be that the access route must be clearly demarcated by regularly spaced beacons from the lagoon entrance to a clearly demarcated parking area located outside the estuary and sea-side recreational areas.

• The Klein River Management Advisory

Committee will discuss the issue at a meeting later this month.

• A nature conservation official, Mr Leon Steyn, said at a meeting of the Walker Bay Conservation Forum earlier this year that Cape Nature Conservation was "very much against" vehicles on beach areas. He said the Klein River mouth is the only estuary in the country which is not closed to vehicles.

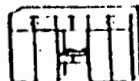
• The new tariff for entrance to the lagoon is R100 per year per car, and R50 at Maanskynbaai. Boat licences are R56 per year per boat for non-riparian owners and R13.50 for riparian owners.

WITH YOUR OLD TELEPHONE DIRECTORY DROP IT OFF AT OUR FACTORY OR DEPOSIT IT IN YOUR NEIGHBOURHOOD ISBOC.



WALKER BAY RECYCLING
11 SWARTDAM ROAD
INDUSTRIA, 0283 22035

R Sambo
BUILT-IN CUPBOARDS
KITCHEN UNITS



FINANCE ARRANGED
FROM R80 PER MONTH
NO DEPOSIT

Showroom 108B Main Rd
Hermanus 0283-22219
Factory 021-6913189

Biggest projects in

REWARD R200



MUNICIPALITY OF GREATER HERMANUS

153

ANNEX "J"

**MINUTES OF A MEETING OF THE TRANSITIONAL LOCAL COUNCIL HELD IN
THE COUNCIL CHAMBER ON THURSDAY, 31 AUGUST 1995, AT 15:00**

PRESENT: The attendance register was circulated to
all Councillors.

APOLOGY: Clr C M Hans (leave granted see item 2.1 below)

ABSENT: Clr N P Kamana

IN ATTENDANCE: Mr M M B Van Rooyen, Town Clerk
Mr N Barnard, Town Treasurer
Mrs C K Burman, Deputy Town Secretary (Admin)
Mr H le R Rossouw, Chief: Health Services
Mr P Burger, Electrical Department
Mr J A Van der Linde, Town Engineer
Mr J Kritzinger, Chief: Protection Services
Mr D I Kearney, Accountant
Mr J F Dynaard, Administration Officer

The meeting was opened with scripture reading and prayer by Rev. Barnard.

1. NOTICE CONVENING THE MEETING

The notice convening the meeting was read by the Town Clerk.

2. APPLICATIONS FOR LEAVE OF ABSENCE

2.1 Clr C M Hans - leave of absence from this meeting.

RESOLVED that the application be approved.

MEETING OF THE TRANSITIONAL LOCAL COUNCIL 31 AUGUST 1995¹⁵⁴

16. **REPORT ON THE FOUNDING CONGRESS OF THE WESTERN CAPE LOCAL GOVERNMENT ASSOCIATION HELD IN GEORGE ON 15 JUNE 1995**

A copy of a report regarding the abovementioned matter is attached per Annexure "E".

NOTED.

17. **KLEIN RIVER MANAGEMENT ADVISORY COMMITTEE MEETING: 10 AUGUST 1995**

A copy of the abovementioned minutes is attached per Annexure "F".

The recommendation that the beach area be closed and a referendum on the matter be held, sparked protracted, yet lively debate.

A counter proposal that the beach area remains open was put forward by Clr S P B Breunissen and seconded by Clr H J Henn.

The counter proposal was put to the vote and defeated by 17 votes to 15.

RESOLVED that the recommendation of the Klein River Advisory Committee be accepted.

18. **HERMANUS: ERF 321: ACCESS TO PROPERTY**

An application has been received from the owner of Erf 321 to allow access to his property from Cliff Road over commonage. A site plan showing the proposed access is attached per Annexure "G".

The property is also known as 85 Westcliff Drive. Due to the double-curve in Westcliff Road near the property, access from Westcliff Drive will be dangerous due to poor traffic visibility.

It is recommended that a 3 metre access be allowed from Cliff Road as per the attached sketchplan.

RESOLVED accordingly.



Plan 17
Annexure "F"

Department of the
Town Engineer,
HERMANUS

KLEIN RIVER MANAGEMENT ADVISORY COMMITTEE

MINUTES OF THE KLEIN RIVER MANAGEMENT ADVISORY COMMITTEE HELD IN THE COUNCIL CHAMBER, GREATER HERMANUS MUNICIPALITY ON MONDAY, 10 AUGUST 1995 AT 09:00

Present:	Mr J Bishop	Business Chamber, Hermanus
	Clr L Schwan	Greater Hermanus Municipality
	Clr WG Nel	Greater Hermanus Municipality
	Clr W Riekert	Greater Hermanus Municipality
	Mr N McCarthy	Hermanus Lagoon Property Owners Assoc.
	Mr DEK Green	Walker Bay Angling & Conservation Assoc.
	Mr E Lucas	Walker Bay Angling & Conservation Assoc.
	Dr F Jordaan	Walker Bay Angling & Conservation Assoc.
	Mr J W Sleigh	Greater Hermanus Association for Commerce & Tourism / Hermanus Rate Payers and Residents Association
	Mr A S Roux	Dept. of Water Affairs
	Mr B Clarke Brown	Windsor Hotel, Hermanus
	Mr A S de Villiers	Caledon Rural Council
	Dr D E Evans	Stanford Municipality
	Mr S Barlow	Resident, Hermanus
	Mr R M Scott	Cape Nature Conservation, Hermanus
	Ms J Carstens	Stanford Conservation Trust
Apologies:	Mr F J van Eeden	Department of Agriculture & Resource Conservation
	Mr S de Kock	Jongensklip Farmers Association
	Mr C Gilman	Stanford Farmers Association
	Mr A Withers	Messrs Dennis Moss & Partners
	Mr D Metcalf	Stanford Farmers Association
	Mr D W Abbott	Klein River Property Owners Association
	Mr E le Roux	South Coast Nett Fishers Association
Absent:	Mr P Huizenga	CSIR, Stellenbosch
	Mr W Appel	Stanford Municipality
	Mr J Martin	Klein River Waterfront Property Owners Association
	Mr P de Villiers	Stanford Conservation Trust
In Attendance:	Mr MMB van Rooyen	Town Clerk
	Mr JA van der Linde	Town Engineer
	Mr A May	Ass. Superintendent, Parks & Recreation
	Miss P van der Merwe	Engineers Department

1. ELECTION OF CHAIRMAN

The position of Chairman became vacant when Mr Bishop resigned from the

Greater Hermanus Council. The Hermanus Sakekamer had, however, requested for Mr Bishop to represent them on this Committee.

The members of the Committee reelected Mr Bishop, as Chairman, unanimously.

2. CONFIRMATION OF AGENDA

The Chairman confirmed the agenda with the Committee members. Only the sequence of the items was changed.

3. APPROVAL OF MINUTES OF MEETING HELD ON 8 MAY 1995

A copy of the Minutes of the Meeting held on 8 May 1995 was circulated to all Members of the Committee.

Mr Sleigh requested that it be noted that he represents the Greater Hermanus Association for Commerce and Tourism and the Hermanus Rate Payers and Residents Association.

The minutes of the meeting were **APPROVED**.

4. COASTAL ZONE: GENERAL POLICY CONTROLLING VEHICLES

The following Annexures are attached:

Annexure 1A A copy of the minutes of the Administration, Town Planning & Tourism Committee dated 20 July 1995

Annexure 1B A letter dated 23 June 1995 received from the Department of Environment Affairs

Mr Sleigh read out a motion from the Hermanus Rate Payers and Residents Association to the meeting, requesting the immediate closure of the coastal areas to vehicles. A copy of the motion is attached per Annexure 1C.

Mr Sleigh pointed out that the coastal areas have been declared closed by the General Policy for the Control of Vehicles in the Coastal Zone which was promulgated in terms of the Environment Conservation Act (No. 73 of 1989). He believed the Municipality and Rate Payers Association are creating a culture of lawlessness, by not enforcing the law as proclaimed.

7/2

The Environment Conservation Act (No. 73 of 1989) declared all beaches and related areas closed to vehicles. However, with special permission such areas may be used by vehicles. Problems are experienced in enforcing the necessary regulations. Councillor Riekert confirmed that the above act includes all coastal areas, such as beaches, dunes, lagoons, etc.

The motion was seconded by Councillor Riekert.

A lengthy discussion on the areas that should be accessible to vehicles and the procedures to be followed took place. It was concluded that the beach areas from the high water mark to the sea and Grotto Beach to Puntgat should be closed off completely.

The area exposed while the lagoon is open, could be used by vehicles as this area is termed "hard sand".

Mr van Rooyen told the meeting that the Municipality has applied to the Overberg Regional Services Council that the area between Grotto Beach and the dunes on the other side of the lagoon be incorporated into the Municipality's area of jurisdiction. Temporary management rights were granted, but a final answer is still awaited.

The Chairman pointed out that a survey was held during the 1994-95 season. Thirty-five residents voted for the closure of the beach areas to vehicles, while one hundred and thirty-five voted against it.

Mr Sleigh proposed that the beach areas be closed to all vehicles, before holding the referendum.

Another suggestion was that parts of the beach should remain open to vehicles. Markers can be placed to clearly identify these areas, together with the access route to Die Plaat.

Although the Committee voted to decide whether the closure should take place before the referendum or not, no consensus could be reached.

It is **RECOMMENDED** that the beach areas be closed and that a referendum be held.

5. KLEIN RIVER LAGOON TRUST: APPROVAL OF DRAFT DEED OF TRUST

The draft deed of trust for the Klein River Lagoon Trust was submitted and



*Department of the
Town Engineer,
HERMANUS*

KLEIN RIVER MANAGEMENT ADVISORY COMMITTEE

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	Mr B Clarke Brown	Windsor Hotel, Hermanus
	Mr A S de Villiers	Caledon Rural Council
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172

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DEPARTMENT VAN OMGEWINSARE / DEPARTMENT OF ENVIRONMENTAL AFFAIRS
ANNEX "L"

Telefoon/Telephone (021)4023024	Telegramme/Telegrams Omgewing	Faksno/Fax no (021)252920
Naam/Enquiries S.M. Schneier	Verwysing/Reference A25/7/8/3/2/2	



Chief Directorate:
Environmental Management
Private Bag X2
Roggebaai 8012

17/6/3/P
T/E

1995-06-23

The Town Clerk
Hermanus Municipality
P O Box 20
HERMANUS
7200

Dear Sir

GENERAL POLICY CONTROLLING VEHICLES IN THE COASTAL ZONE : HERMANUS

A meeting was held on 13 April 1995 to discuss the control of vehicles on Grotto Beach between the beach access point to the west of the Kleinrivier estuary mouth and the mouth itself. Your Council was represented at the meeting by Mr. Bishop, I represented this Department, Cape Nature Conservation was represented by Mr. M. Scott and the Overberg Regional Services Council was represented by messrs. A. van der Westhuizen and M. Carstens. The Minister of Environmental Affairs and Tourism, Dr. D.J. de Villiers, has also written to you about this matter.

Mr. Bishop informed the meeting that vehicles had been used on the beach concerned for a considerable period of time, and there was opposition to closing it. Mention was also made of the agreement between your Council, the Overberg Regional Services Council and Cape Nature Conservation to close this beach after the summer holiday season. I pointed out that the use of vehicles on this beach should be consistent with the *General Policy for the Control of Vehicles in the Coastal Zone*, which was promulgated in terms of the Environment Conservation Act (No. 73 of 1989). I also pointed out that if your Council wished to allow controlled access to this beach, it would first have to hold a referendum to ascertain whether the majority of Hermanus's ratepayers wanted the beach to be opened or closed to vehicles. The use of vehicles is an emotional as well as an environmental issue. In terms of section 3.2.3 of the *General Policy*, "the local community concerned must therefore be consulted before vehicle access to a beach area is permitted".

The second part of the meeting of 13 April consisted of a site inspection on Grotto Beach to discuss the ecological and public safety issues which would have to be addressed, assuming the majority of Hermanus's ratepayers are in favour of opening the beach to vehicles. After entering the beach from the access point, I pointed out a salt marsh high on the beach through which vehicle tracks are clearly visible. Salt marshes are defined in the *General Policy* as ecologically sensitive areas which must be closed to vehicles (section 3.1.3). In terms of the *General Policy*, recreational beaches

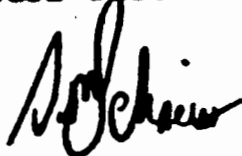
must also be closed to vehicles (sections 3.1.1 and 3.1.2). However, the beach concerned is exceptionally wide and some vehicle use could be accommodated subject to the following conditions:

- * The abovementioned salt marsh area must be closed to vehicles.
- * Recreational areas adjacent to the estuary and the sea must be closed to vehicles. These areas must be sufficiently wide to ensure that vehicles remain at least one hundred metres from the estuary's water edge and the high water mark on the sea side of the beach berm.
- * A vehicle access route must be clearly demarcated by means of regularly spaced beacons from the beach access point to a clearly demarcated parking area located outside the estuary and sea-side recreational areas. It must be possible to relocate these beacons in accordance with the periodic change of configuration of the estuary mouth area.
- * The beach access fee must be increased sufficiently to cover the costs associated with proper law enforcement which is presently totally inadequate.
- * An understanding would need to be reached between your Council and the Overberg Regional Services Council concerning controls over vehicle access from Grotto Beach to *Die Plaat*. At present vehicles are allowed on *Die Plaat* subject to a permit issued by the Regional Services Council. Uncontrolled access from Grotto Beach to *Die Plaat* would complicate law enforcement on *Die Plaat*.

The use of vehicles on Grotto Beach remains inconsistent with the General Policy and is therefore of serious concern to this Department. A vehicle was seen parked on the estuarine intertidal sand-flats, an ecologically sensitive area, during the abovementioned site inspection. During the course of the Easter week-end unsupervised youths raced up and down on motor-cycles and children drove motorized miniature vehicles on the dunes on the eastern side of the estuary mouth.

I would like to appeal to your Council to take the abovementioned steps as a matter of urgency to ensure that the use of vehicles on Grotto Beach is consistent with the General Policy.

Yours faithfully



ASSISTANT-DIRECTOR : COASTAL MANAGEMENT
(for) DIRECTOR-GENERAL

E.C. Cape Nature Conservation
Overberg Regional Services Council

HERMANUS Times

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ANNEX "M"

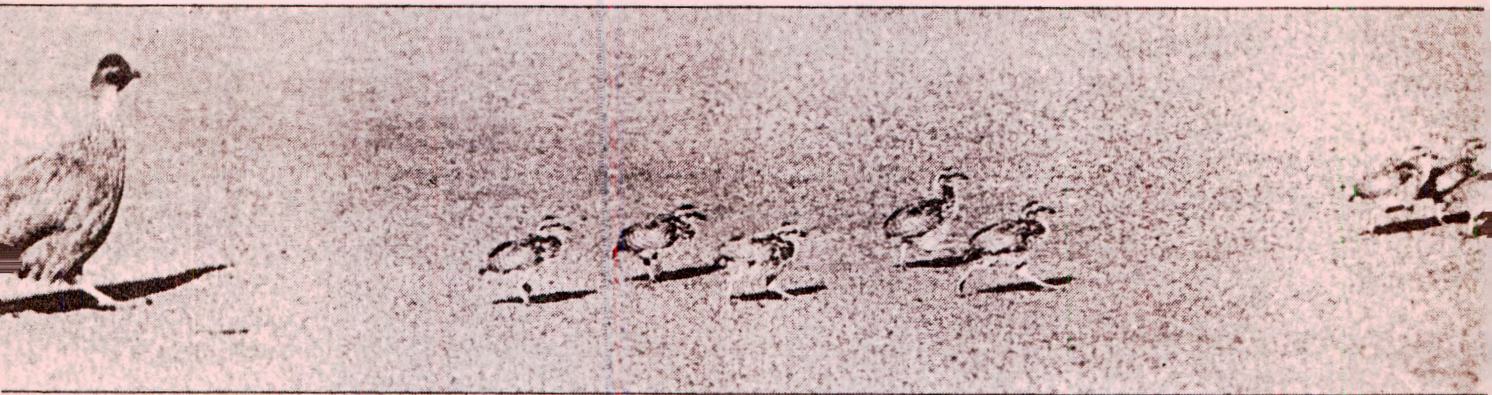
Published since 1949)

Tel (0283) 23717

FRIDAY, 20 OCTOBER 1995

80c collective

123 Main Road



Following the way... Eight francolin chicks show their mother the way to succulent morsels on the other side of King Street in Onrus River early on Tuesday.

Yes or no?

Referendum is going to be held about the issue of vehicular access to the Klein River lagoon mouth.

The Klein River Management Advisory Committee decided at a meeting this week that the referendum question will be put to voters in municipal servicer accounts this month. It reads: Are you in favour of strictly controlled vehicular access on the hard surface area to the Klein River lagoon mouth?

All ratepayers in Greater Hermanus who are 18 or over, even those who are not on the present voters' list, will be eligible. Com-

pleted forms must be received by the municipality by 12:00 on 30 November.

As each household will receive only one form, additional forms for other household members will be available at the municipal offices. Only original forms with an official stamp on them will be allowed, to prevent people from voting twice.

The "strictly controlled" access referred to in the referendum question means that vehicles will only be allowed in a demarcated area between the lagoon and the sea's high water mark. Four-wheel drive vehicles will not be

allowed to drive between the sand berm and the sea.

The speed restriction on the sand stretch to the mouth will be 25 km/h.

The chairman of the committee, Mr Jimmy Bishop, said at the outset of the meeting that if access to the lagoon mouth is closed to vehicles "the character of Hermanus will change".

There are also strong indications that even if a permanent ban is imposed, it will not be heeded by Hermanus fishermen who make use of Die Plaat for a living.

Vehicular access to the mouth has been prohibited

since earlier this month, but at the moment there is nobody to enforce the measure. Many drivers ignore the drums and chains at the entrance point and find access over the sand towards Grotto.

The closure follows a decision by the Department of Environmental Affairs and Tourism that vehicles should be banned from sand beach areas countrywide. However, the department has written to the municipality that controlled access can be permitted if "the local community" indicates in a referendum that this is their wish.

Plofstof oop aan see-rand

Daar is vandeeweek tevergeefs met plofstof probeer om die 20 m suidelike noordkapper walvis wat naby Hangklip uitgespoel het uit mekaar te skiet.

"Dit is soos 'n enorme jellievuis wat daar lê en die 18 ladings plofstof het net

gate in die net geskiet."

Só sê die mingsdiens van die Overberg se natuurraad, mnr. A. Westhuizen.

Die walvis is hoogwaterm

Kalf spoel

'n Pasgebore suidelike noordkapperwalvis is uitgespoel.

Volgens mnr. Gert Ehlers, mariene bewaarder op Gansbaai, het die 2 m lange walvis aan Mierkom se kant van Voorsteklip geloop en 'n koei of 'n bul het aanhouder agter die branders. Die kalf was reeds dood.

Mnr. Ehlers sê hy kon duidelik balleinpele sien, maar daar was geen sigbare merke op die kalf. Hy skat die dier se gewig op 950 kg.

Toe hy die volgende dag die plek besoek, het hy merke oor die sand aangedui dat iemand verwyder het.

Times benefits NSRI's Station 17

HERMANUS Times

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ANNEX "N"



since 1949)

Tel (0283) 23717

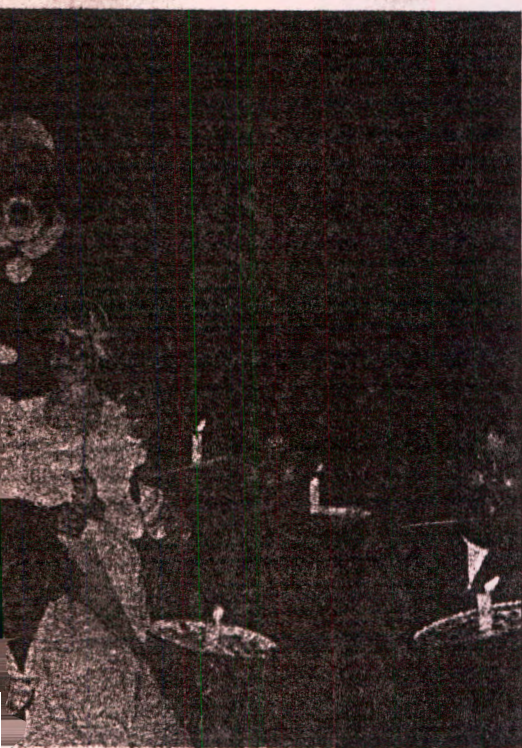
FRIDAY, 15 DECEMBER 1995

90c collective

**Hermanus
Info out**
- p 3

**Where to eat
and drink**
- pp 14-17

**Outdoor
guide**
- pp 24, 25



...lent Night under the brightly coloured Christmas...
...enjoyed the evening's singing and dancing...
...as and social workers distributed 300 packets of...
...rmanus Child and Family Welfare Society realised

Referendum 'not valid'

A high-ranking official from the department of Environment Affairs says that the referendum about vehicular access to the Klein River lagoon mouth is invalid.

Mr Shaun Schneier, assistant director: coastal management, writes in a letter to the municipality that the referendum question was not formulated correctly in terms of the *General Policy for the Control of Vehicles in the Coastal Zone*.

The letter, dated 22 November, concludes that "the result of the referendum will not be valid" - the area should therefore remain closed to vehicles pending the outcome of a valid referendum.

Asked to reply, the town clerk, Mr Thys van Rooyen, said the present closure of part of the beach area was an "interim measure" and he regarded the letter as "very arrogant".

"We will go to the minister himself about this is-

sue if it is necessary," he said.

• Mr Schneier was the first to draw to the municipality's attention earlier this year that allowing vehicles to the lagoon mouth was against new national policy regarding beaches.

• In the referendum 2 772 people voted 'yes' and 701 'no' to the question: "Are you in favour of strictly controlled vehicular access to the hard sand of the Klein River mouth area?"

Hoop op rustige Kerstyd

"Klipgooiery behoort tot die verlede - ons wil dit nie meer sien."

Só sê die voorsitter van die Hawston Gemeenskapsvereniging, mnr. Phillipus May, oor die voorvalle verlede week in Hawston.

Hy het ook die hoop uitgespreek dat Kerstyd rustig sal wees en dat verdere geweldpleging nie sal voorkom nie. Volgens hom was daar net agt mense wat aanleiding gegee het daartoe dat gebeure op Hawston hand uit geruk het.

"Mense kan demonstreer, maar hulle moet besef dat ander se eiendom gerespekteer word."

Mnr. May sê die onderhandelings tussen

stropers en kommersiële duikers het al ver gevorder. "Almal besef ons moet nou hande vat en saamwerk, en die gees van afbreek moet end kry."

'n Finale mondelinge voorlegging sou Woensdag voor die Kwotaraad gemaak word voordat die herverdeling aangekondig word. Die herverdeling moet volg nadat die Kwotaraad die 10% wat aanvanklik van kommersiële duikers weggeneem is, terugbesorg is.

Die Hawston Vissersgemeenskapstrust is ook laat weet dat 'n kwota nie aan 'n trust toegeken kan word nie. Dié duikers sal nou namens 'n maatskappy, die Hawston Abalone Association, aansoek doen.

erupts

"They said they were very unhappy about a newspaper report that hijackers and hijackers are same". Police discovered many bottles of liquor in the harbour. A while later the group moved into Hawston, shouting abuse at pedestrians and damaging parked cars.

Within an hour the crowd grew to about 300, amongst them children. Tires and tyres were burnt off the second Hawston

Unit in Paarl, arrived on the scene. There were nine police vehicles, including armoured Njals.

Police shot rubber bullets and teargas to keep the crowd at bay. Two people were injured. Fire engines which were called out to extinguish various fires that had broken out, had to turn back when fire-fighters' lives were threatened by the mob.

At the entrance gate to Plankhuis signs were broken, a radio mast destroyed

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HERMANUS • GANSBAAI • KLEINMOND

Well



Department of the
Town Engineer,
HERMANUS

Departement van die
Stadsingenieur,
HERMANUS

KLEIN RIVER MANAGEMENT ADVISORY COMMITTEE

MINUTES OF THE KLEIN RIVER MANAGEMENT ADVISORY COMMITTEE HELD IN THE COUNCIL CHAMBER, GREATER HERMANUS MUNICIPALITY ON MONDAY, 12 FEBRUARY 1996 AT 09:00

nt: The Attendance-Roll was circulated to all present at the meeting and is annexed.

gies: Clr A F Nqameni Greater Hermanus Transitional Local Council
Mr D Abbott Stanford Conservation Trust
Mr M Scott Dept. of Cape Nature Conservation
Mr E Lucas Walkerbay Fishing and Angling Association
Dr Jordaan Walkerbay Fishing and Angling Association

WELCOMING:

The Chairman welcomed all present at the meeting. A special word of welcome was extended to Clr Hamman, Mr Schneier from the Department of Environmental Affairs and Tourism and Mr A van Hoogstraten from the Hermanus Lagoon Property Owners Association.

CONFIRMATION OF AGENDA

The Chairman confirmed the agenda with the Committee members. Several additional items were listed under General.

APPROVAL OF MINUTES OF MEETING HELD ON 16 OCTOBER 1995

A copy of the Minutes of the Meeting held on 16 October 1995 was circulated to all Members of the Committee.

It was requested that the minutes be altered to read:

- That Mr Hamilton-Russell was present at the meeting;
- That it be noted under Item 5, Page 4, that Mr A Grant was attended the meeting on special invitation to address the meeting on the breaching of the mouth.

Mr Sleigh proposed that the minutes be accepted. His proposal was seconded by Mr Roux.

The minutes of the meeting were **APPROVED**.

4. COASTAL ZONE: CLOSURE OF COASTAL ZONE TO VEHICLE

4.1 REFERENDUM: RESULT

The Referendum was held on 30 November 1995.

A total of 3488 ballots were cast, resulting in

2 772 in favour of controlled vehicular access
 701 against controlled vehicular access
 15 spoilt ballots

Mr Schneier addressed the meeting and expressed his concern about the unacceptable vehicular access of the beaches and other recreational usages prior to the referendum. A lengthy debate arose around the legality and ecological sensitivity of the demarcated area and what is allowed in terms of the Environment Conservation Act, 1989 (Act No 73 of 1989).

The Chairman requested that Mr Schneier should put its objections in writing to the Town Clerk for referral to this Committee for further discussions.

Mr Heard proposed that a legal opinion be sought and that a special meeting with Council be held. In support of this proposal, Mr Hamilton-Russell proposed that a broader legal opinion be sought and stated that ecological conservation should be put before public opinion, wants and needs. Mr A van Hoogstraten seconded both the proposals.

Mr Schneier undertook to contact the Legal Representatives of the Dept. of Environmental Affairs and Tourism to clarify the legality of the Referendum and allowing of vehicles on the beach.

Mr Withers proposed that the legal opinion be applied and that a Sub-Committee be appointed to reassess the demarcated area before the Easter Weekend.

A Sub-Committee, consisting of Clr Bishop, Mr Hamilton-Russell, Mr Heard, Mr Schneier and Clr Hamman was appointed to meet at the mouth after the meeting. The minutes of this meeting are attached per **ANNEXURE 1**.

Clr Hamman summarised the debate, stating that the law must be obeyed, the ecology and tourism source be protected and that the public must be considered.

The result of the Referendum was **NOTED**.

4.2 CONTROLLED VEHICULAR ACCESS: LAW ENFORCEMENT

The Greater Hermanus Transitional Council resolved at a previous meeting that a sub-committee, with delegated authority, be nominated to evaluate the outcome of the referendum and to decide on further measures which may be required.



The sub-committee met on site on 4 December 1995 and decided to institute the following measures as an interim measure:

- (1) The salt marsh and the beach areas where vehicles are prohibited will be clearly demarcated with poles and signage.
- (2) An entrance fee of R5-00 per vehicle per day or R50-00 per vehicle per month will be charged.
- (3) A permit and a pamphlet setting out the rules, including a map, will be handed to everyone who enters the area or who buys a permit.
- (4) Officials of the Municipality will patrol the area as much as possible.

The interim measures as set out above were confirmed at the Greater Hermanus Transitional Council meeting held on 12 December 1995.

Mr Page reported that strict policing must be addressed. He explained the problems experienced whilst implementing the outcome of the referendum. Mr Botha enquired which control and policing methods will be followed during the Easter period.

Mr Hamilton-Russell felt that the discussions have addressed his proposed item on the Legal application of the General Policy in terms of the Environment Conservation Act, 1989 (Act No 73 of 1989): Control of Vehicles in the Coastal Zone.

The interim measures as set out above were **ACCEPTED**.

4.3 CONTROLLED VEHICULAR ACCESS: FUTURE LAW ENFORCEMENT

A letter, dated 13 December 1995, was received from the Hermanus Rate Payers Association. An extract from the letter follows below:

"The result of the referendum regarding admission to the Klein River Lagoon mouth.

We understand from an article in the Hermanus Times that an entrance fee of R 5-00 per vehicle per day or R 50-00 per vehicle per month will be charged. That a permanent law enforcement officer will be stationed at the entrance to see that motorists stay within the demarcated area.

Even during the time that entrance to the area was forbidden many vehicles gained access at points other than the old entrance and cruised freely along the beach.

We would like to be assured that a permanent full-time law enforcement officer will indeed be full time and that his hours of duty will not begin at 09:00 and cease at 17:00. We would also like to have a copy of his job description so that we can be assured that he has adequate powers to control illegal behaviour at all times."

Mr Ratcliff proposed that the pay gate be manned during all weekends with persons willing to do this type of work at a minimal tariff. The Chairman proposed that permission be sought from Council to place volunteers at the pay gate over weekends.

It is **RECOMMENDED** that permission be sought from Council to use volunteer workers to man the pay gate. It was further **RECOMMENDED** that the current law enforcement measures should remain in place.

5. THE KLEINRIVERSVLEI CONSERVATION TRUST: FINAL APPROVAL

Mr McCarthy informed the meeting that the Trust Deed has now been finally approved by the Master of the Supreme Court.

It was enquired whether an employee from the local Cape Nature Conservation Office could be co-opted onto the trust. Mr Heard confirmed that an employee from the Department of Cape Nature Conservation could be co-opted.

The Chairman stated that the Kleinriviersvlei Conservation Trust was founded to control and handle financial matters, such as fund raising for the conservation of the Klein Riviersvlei.

NOTED.

6. EASTERN BOUNDARY: MUNICIPAL ACCESS ROAD AND SLIPWAY

The Hermanus Lagoon Property Owners Association has been concerned about the municipal access road and slipway on the eastern boundary of the municipal area.

Concern was raised about the pollution of the Lagoon as a result of the access road and deteriorating slipway.

The Town Engineer was requested to investigate the possible closure of the road and slipway. He reported that the situation could be improved if the slipway and road were closed.

It is **RECOMMENDED** that the road and slipway be closed as soon as possible.

7. DATES OF MEETINGS TO BE HELD DURING 1996

The dates of the remaining Committee meetings to be held during 1996.

Mr McCarthy proposed that the meetings be held bi-monthly.

ANNEXURE 1 (Item 4.1)

POINTS DISCUSSED AT LAGOON SITE MEETING 11/2/96.**Present at meeting:**

Mr Jimmy Bishop. (councillor)
 Mr Norris Schneider. (DEA)
 Mr. Duncan Heard. (CNC)
 Mr Leon Stein. (CNC).
 Mr Malt Carstens. (RSC)
 MR Simon Barlow. (independant)
 Mr Shaun Page. (Municipality)

MR Schneider expressed his concern about the current demarcation of the vehicle access area, he insisted that a buffer zone be demarcated between the lagoon edge and the current demarcated line. He emphasised that according to legislation pertaining to the sea-shore act, areas directly adjacent to the lagoon edge that are used for recreational purposes must be protected from vehicle access.

The following recommendations were put forward:

1. The sensitive salt marsh area on the eastern side of the entrance be completely cordoned off to vehicles.
2. That a second line of poles be erected between the lagoon edge and the existing line of poles. This will facilitate a corridor for vehicle access, along which parking areas will be incorporated. This line of poles should also be extended further eastwards from the current parking area at the mouth of the lagoon up to the first dune where the RSC jurisdiction begins. This must be done in order to prevent access to the winter bay area which at the moment occurs within an uncontrolled "no-mans land".
3. It was suggested that the lagoon area be closed to vehicles at a certain time in the evening as this is when most of the reckless behaviour occurs. The actual opening and closing times must still be finalised as well as when these measures will come into operation.
4. That temporary labourers or students be employed during season time to control the pay gates.
5. An attempt must also be made to incorporate all the existing signboards into one or possibly two informatory signs indicating the reasons for the controlled access.
6. Mr Carstens said that they would be able to supply a caravan and manpower to control their entry point on the lagoon during the Easter holiday period.
7. The current info brochure that is handed out to the public upon entry, be upgraded and redesigned.

Telefoon/Telephone

(021)4023024

Telegramme/Telegrams

Omgewing

Faksno/Fax no

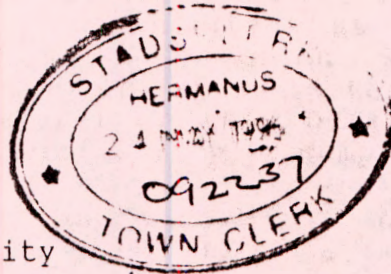
(021)252920

Navrae/Enquiries

S.M. Schneier

Verwysing/Reference

A25/7/8/3/2/2



Chief Directorate:
Environmental Management
Private Bag X2
Roggebaai 8012

1996-05-22

~~17/6/4/1/1/4~~ 17/6/3/4TC
ack.

The Town Clerk
Hermanus Municipality
P O Box 20
HERMANUS
7200

Dear Mr. van Rooyen

GENERAL POLICY CONTROLLING VEHICLES IN THE COASTAL ZONE : HERMANUS

Your letter dated 18 January 1996, reference 17/6/3/4, and the meeting of the Klein River Lagoon Advisory Committee held on 12 February 1996, have reference.

In my previous letter the opinion was expressed that the referendum was invalid due to the ambiguous wording of the question posed to ratepayers. As stated in your letter, your Council disagrees with this opinion. I stated at the abovementioned meeting that legal advice would be sought in order to clarify this issue. Although a legal expert has been approached, this legal opinion has unfortunately not yet been given.

In my letter dated 23 June 1995, it was pointed out that vehicle use in the vicinity of the Klein River estuary mouth could only be permitted subject to certain conditions. Mr. D. Heard of Cape Nature Conservation and I carried out a site visit prior to the abovementioned meeting to ascertain whether these conditions had been complied with. The closure of the salt marsh area near the vehicle access point in accordance with one of the stated conditions was noted. Another condition concerned the necessary closure of the entire area immediately adjacent to the estuary. It was noted during the site visit that the recreational area adjacent to the sea had been closed to vehicles by the erection of beacons on the sea side of the area open to vehicles. However, the area adjacent to the estuary remained open to vehicles. This area includes intertidal sand flats ("prawn-beds") which are particularly sensitive to vehicle traffic. This area is also a popular recreational area where children in particular are vulnerable to vehicle traffic. I expressed my concern during the meeting that this area had not been closed to vehicles. Mr. Heard and I revisited the site after the meeting with Mr. J. Bishop of your Council and Mr. S. Page, one of your conservation officers. These two gentlemen accepted the need for this area to be closed to vehicles. I revisited the site during the Easter week-end and noticed that the area had still not been closed.

As you know, the control of vehicles on the coast must be consistent with the *General Policy in terms of the Environment Conservation Act, 1989: Control of Vehicles in the Coastal Zone*. Permitting vehicle access to the area immediately adjacent to the estuary is inconsistent with sections 3.1.1 and 3.1.3 of the *General Policy*. The Policy binds all local authorities as well as other government institutions, in terms of section 3(1) of the Environment Conservation Act (No. 73 of 1989). In terms of section 3(2) of the Act, the Director-General of this Department is responsible for ensuring that the *General Policy* is complied with.

In terms of the provisions of the Act and the *General Policy* your Council is directed to close the area immediately adjacent to the estuary, to vehicles. The 100 metre wide strip referred to in my previous letter may be impractical as vehicles may be forced to drive on softer sand closer to the sea. The width of the vehicle-free strip, immediately adjacent to the water's edge of the estuary, may therefore be reduced to no less than 50 metres. The closure of this area by means of beacons must be effected no later than 1 July 1996, if this has not already been done. As mentioned in my previous letter, it must be possible to relocate these beacons in accordance with the periodic change of configuration of the estuary.

Section 3(2) of the Environment Conservation Act requires the Director-General to take further steps should your Council not comply with the abovementioned directive. Your co-operation in ensuring that the *General Policy* is complied with would be appreciated.

Yours sincerely



P.P. ASSISTANT-DIRECTOR : COASTAL MANAGEMENT
(for) DIRECTOR-GENERAL

c.c. Cape Nature Conservation

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