

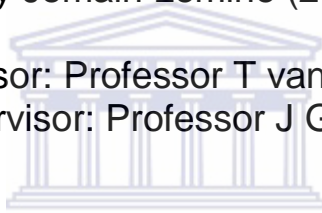
**University of the Western Cape
Law Faculty**

**The Role of Local Government in the effective
implementation of the National Environmental
Management: Integrated Coastal Management Act 2008- a
case of the Draft Cape Town Metropolitan Coastal
Protection Zone Management by-Law**

Mini-thesis submitted in partial fulfilment of the requirements for the
LLM: Environmental Law (Mode II)

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Submitted on 15 November 2012

WESTERN CAPE

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“Success means falling down 9 times and getting up 10”¹

¹ Coco Chanel

List of Abbreviations and Acronyms

- AIS- Alien and invasive species.
- CBO- Community Based Organisation.
- CMO- Coastal Management Objective(s).
- CMP-Coastal Management Programme.
- Constitution- the Constitution of the Republic of South Africa, 1996.
- CPP- Coastal Public Property.
- CPZ-Coastal Protection Zone.
- CSBL- Coastal set-back line.
- CZ- Coastal Zone.
- DMP- Disaster Risk Management Plan.
- EIA-Environmental Impact Assessment.
- EMCA- Environment Management Co-operation Agreement.
- EMI-Environmental Management Inspector.
- EMP- Estuarine Management Protocol.
- ICM By-Law-Draft City of Cape Town Integrated Coastal Management By-Law.
- ICM-Integrated Coastal Management.
- IDP-Integrated Development Plan.
- IEM-Integrated Environmental Management.
- IPCC- Intergovernmental Panel on Climate Change.
- LUPO- Land Use Planning Ordinances 15 of 1985.
- MEC- Member of the Executive Council.
- NBF- National Biodiversity Framework.
- NEMA -National Environmental Management Act 107 of 1998.
- NEMBA-National Environmental Management: Biodiversity Act 10 of 2004.

NEMICMAB- draft National Environmental Management: Integrated Coastal Management Act Amendment Bill, 2011.

NEMICMA-National Environmental Management: Integrated Coastal Management Act 24 of 2008.

NEMP- draft National Estuarine Management Protocol.

NEMWA-National Environmental Management: Waste Act 59 of 2008.

NPO- Non-Profit Organisation.

NWA-National Water Act 36 of 1998.

PIE-Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998.

SANBI- South African National Biodiversity Institute.

SDA- Service Delivery Agreement(s).

SDF- Spatial Development Framework.

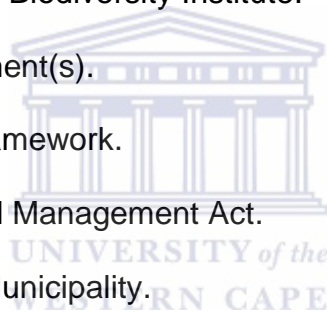
SEMA -Sectoral Environmental Management Act.

The City- Cape Metropolitan Municipality.

White Paper LG- White Paper on Local Government.

White Paper NCC- National Climate Change Response White Paper of 2011.

White Paper SCD- White Paper for Sustainable Coastal Development of April 2000.



Declaration

I Declare that *The Role of Local Government in the Effective Implementation of the National Environmental Management: Integrated Coastal Management Act (NEMICMA) 2008- a Case Study of the Draft City of Cape Town Integrated Coastal Management By-law* is my own work, that it has not been submitted for any degree or examination in any other university, and that all the sources that I have used for quoted have been indicated and acknowledged by complete references.

Signed:

Date:.....

This mini-thesis has been submitted for examination with my approval as the designated supervisor.



Signed.....

Professor Jacques de Ville

University of the Western Cape

Date.....

Keywords

Climate change

Development

Coastal zone management

Integrated coastal management

Law

Planning

Policy

Public interest

Sea-level rise

Sensitive environment



CHAPTER 1

INTRODUCTION

1.1 Problem statement

The Cape Metropolitan is home to over 2.5 million people, and urbanisation, amongst other factors, is exerting incredible pressure on its natural assets.² The City of Cape Town (the City) manages the longest stretch of seafront (extending 240 km) of any metropolitan in South Africa.³ This stretch of coast provides a range of direct and indirect benefits which include food, coastal tourism, and sustaining thousands of people spiritually, culturally and materially,⁴ and is home to a diversity of sensitive ecosystems.⁵



Coastal ecosystems, such as, estuaries and dune systems are susceptible to human induced disturbance,⁶ and the services these systems provide are being increasingly altered.⁷ It has been submitted that inappropriate planning and development have limited estuarine and dune dynamics.⁸ Dune systems have been restricted to narrow ribbons along the coast, and the service they provide, in the context of climate

² White Paper for Sustainable Coastal Development in South Africa of April 2000.

³ Colenbrander C *et al* 'Adaptation Strategies for the City of Cape Town: Finding the Balance Within Social-Ecological Complexity' in Otto-Zimmermann K (ed) *Resilient Cities: Cities and Adaptation to Climate Change* (2011) 312.

⁴ Glavovic BC and Cullinan C 'The coast' in Strydom HA and King ND (eds) *Environmental Management in South Africa 2ed* (2009) 868.

⁵ Colenbrander C *et al* 'Adaptation Strategies for the City of Cape Town: Finding the Balance Within Social-Ecological Complexity' in Otto-Zimmermann K (ed) *Resilient Cities: Cities and Adaptation to Climate Change* (2011) 312.

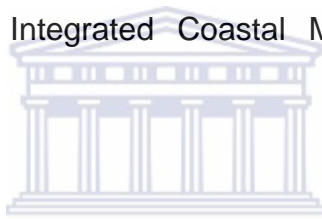
⁶ White Paper for Sustainable Coastal Development in South Africa of April 2000.

⁷ Colenbrander C *et al* 'Adaptation Strategies for the City of Cape Town: Finding the Balance Within Social-Ecological Complexity' in Otto-Zimmermann K (ed) *Resilient Cities: Cities and Adaptation to Climate Change* (2011) 312.

⁸ Colenbrander C *et al* 'Adaptation Strategies for the City of Cape Town: Finding the Balance Within Social-Ecological Complexity' in Otto-Zimmermann K (ed) *Resilient Cities: Cities and Adaptation to Climate Change* (2011) 312.

change, is vital: they act as a buffer against storm surges.⁹ Estuaries provide vital goods and services which largely benefit local communities.¹⁰

Due to the failure of sectoral and compartmentalised management to prevent the deterioration of the coastal environment, the concept of integrated coastal management (ICM) was introduced.¹¹ The White Paper for Sustainable Coastal Development¹² (White Paper SCD) stresses that co-ordinated ICM recognises the coast as a system and that diverse human uses of coastal resources are inter-reliant.¹³ As a result, the coast should be managed in a holistic manner and not 'as a range of distinct sectors'.¹⁴ Flowing from this was the enactment of the National Environmental Management: Integrated Coastal Management Act 24 of 2008 (NEMICMA).



Before venturing into the NEMICMA legal framework, it is equally important to briefly discuss other relevant legal frameworks that are incidental, and give rise, to municipal coastal management. At the top of the legal hierarchy is the Constitution of the Republic of South Africa, 1996 (the Constitution),¹⁵ which within its Bill of Rights, makes provision for the fundamental environmental right, and the duty of the state to take reasonable and other measures to protect it.¹⁶ In order to enforce this constitutionally entrenched right, the Constitution confers certain powers and

⁹ Colenbrander C *et al* 'Adaptation Strategies for the City of Cape Town: Finding the Balance Within Social-Ecological Complexity' in Otto-Zimmermann K (ed) *Resilient Cities: Cities and Adaptation to Climate Change* (2011) 313.

¹⁰ National Estuarine Management Plan GNR 336: Responsible Authority for developing estuarine management plans.

¹¹ Glavovic BC and Cullinan C 'The coast' in Strydom HA and King ND (eds) *Environmental Management in South Africa* 2ed (2009) 870.

¹² April 2000.

¹³ White Paper for Sustainable Coastal Development in South Africa of April 2000.

¹⁴ White Paper for Sustainable Coastal Development in South Africa of April 2000.

¹⁵ Act 108 of 1996.

¹⁶ See Chapter 2, para 2.4.1 below for full discussion.

functions on local government to perform these.¹⁷ A few components that are core to this study include by-law making, beaches and amusements, and municipal planning. The Local Government: Municipal Systems Act 32 of 2000 (MSA) is one of many key legal instrument, enacted to give effect to these municipal powers and functions.¹⁸

In terms of environmental law, the National Environmental Management Act 107 of 1998 (NEMA) is the national environmental framework, which was enacted to give effect to the constitutionally entrenched environmental right.¹⁹ The NEMA makes provision for a plethora of environmental management tools and governing principles, for instance.²⁰ These tools and principles may be useful to guiding decision-making at a local level, which would be vital to promoting ICM.

The NEMA makes provision for the enactment of specific environmental management Acts (SEMA), which relate to legislation and policy dealing with biodiversity, climate change, and the coastal environment, for instance. The Cape Metropolitan coastline is rich in biodiversity the definition for which includes terrestrial and marine ecosystems;²¹ and the importance of these ecosystems has been referred to above. In light of this, the key biodiversity legal framework is the National Environmental Management: Biodiversity Act 10 of 2004 (NEMBA). In order to protect sensitive ecosystems, the NEMBA regulates these by establishing planning

¹⁷ See Chapter 2, para 2.4.3 below for full discussion.

¹⁸ See Chapter 2, para 2.6 below for full discussion.

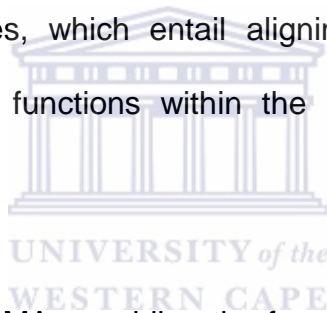
¹⁹ Section 2.

²⁰ See Chapter 2, para 2.4.4 below for full discussion.

²¹ NEMBA: Section 1.

mechanisms and decision-making powers (at a municipal level) to avoid, or minimise and remedy disturbance of ecosystems.²²

As stated above, human activities places immense pressure on coastal resources and the functioning thereof; however, climate change related issues (sea level rise and storms) exacerbate the pressure.²³ The National Climate Change Response White Paper²⁴ (White Paper NCC) addresses issues of ecosystem adaptation and coastal human settlement, for example.²⁵ It provides a framework for adapting and mitigating factors 'softening' the impact of climate change on the coastal environment. It sets out policy requirements to effect mitigating of and adapting to climate change related issues, which entail aligning planning mechanisms and decision-making powers and functions within the local governmental sphere to these.²⁶



Finally, the NEMICMA is a SEMA, providing the framework for ICM, which seeks to facilitate the implementation of the White Paper SCD. The NEMICMA entitles municipalities to administer by-laws for, amongst others, the implementation, administration and enforcement of its coastal management programme (CMP) and designation of strips of land as coastal access points.²⁷ The CMP thus serves as a single coastal management implementation tool, which covers miscellaneous

²² See Chapter 2, para 2.4 below for full discussion.

²³ See Chapter 2, para 2.5 below for full discussion.

²⁴ 2011.

²⁵ See Chapter 2, para 2.5 below for full discussion.

²⁶ See Chapter 2, para 2.5 below for full discussion.

²⁷ See Chapter 3 below for full discussion.

aspects for optimal coastal protection.²⁸ With respect to this, the Cape Metropolitan Municipality has published the Draft ICM By-law (the By-law).

Thus, it is important to assess whether the By-law gives effect to the legal instruments set out above, which are vital for optimum protection of the coastal environment.

1.2 Rationale for the study

The purpose of the study is to outline the relevant legislation and assess whether it is adequately applied to protect the 240 km coastline with its associated sensitive ecosystems; in particular, as assessment will be made of the By-law.

A plethora of laws regulated a wide variety of activities which occur in the coastal zone (CZ);²⁹ the NEMICMA is the framework to address and overcome this disjunction. The promotion of ICM requires that all three spheres of government should agree on common objectives and policies for the coast and harmonise their respective decision-making powers to achieve the outcomes.³⁰ This also encapsulates the constitutional principle of co-operative governance.

In light of the above, it is imperative that there is one legislative framework governing the CZ; hence the NEMICMA. The NEMICMA makes provision for duties and functions of national, provincial and local government. Against this background the NEMICMA entitles municipalities to prepare and adopt a coastal management

²⁸ See Chapter 3, para 3.6 below for full discussion.

²⁹ Glazewski J *Environmental Law in South Africa* 2ed (2005) 301.

³⁰ Glazewski J *Environmental Law in South Africa* 2ed (2005) 301.

programme (CMP) for the management of the coastal zone.³¹ The CMP must include, amongst other, a vision for the CZ.³² The NEMICMA establishes a new range of tools that improves the protection of the CZ, as discussed below.³³ The NEMICMA also allows municipalities to pass by-laws for the implementation of their CMP.³⁴

Taking into consideration all of the above mentioned, it is clear that the local tools that have been provided for by the NEMICMA must be utilised within the municipal CMP. Therefore if the By-law is based on the implementation of the CMP, then it must be investigated whether the local tools/provisions, within the By-law, are in line with that required by the NEMICMA.



1.3 Theoretical assumptions

It is accepted in theory that government (which includes municipalities) ought to act in the public interest.³⁵ The promotion of the public interest is imperative in that the State has to establish a public legal order which entails the function of protecting and promoting the public interest.³⁶ The whole spirit of modern environmental law is to opt for solutions capable of improving the safeguarding of the environment.³⁷

Section 24(b) of the Constitution mandates the State to take action to protect the environment through legislative and other measures. In addition to this, the

³¹ See Chapter 3, para 3.7.1 below for full discussion.

³² See Chapter 3, para 3.7.1 below for full discussion.

³³ See Chapter 3 below for full discussion.

³⁴ Section 50.

³⁵ Kidd M *Environmental Law* (2008) 223.

³⁶ Du Plessis A *Fulfilment of South Africa's Constitutional Environmental Right in the Local Government Sphere* (2008) 47.

³⁷ Cassesse A *International Law* (2001) 390.

Constitution provides various Schedules of competencies of local government. For purpose of this study, they include municipal planning³⁸, and beaches and amusement facilities.³⁹ The Constitution bestows on municipalities with executive authority to administer by-laws which give effect to the matters so provided within the Schedules.⁴⁰ In light of environmental law, the Constitution obliges municipalities to achieve the objective of promoting a safe and healthy environment,⁴¹ amongst others. More environmental (coastal) powers may also be assigned to municipalities, as provided by the Constitution.⁴²

The MSA further provides municipalities with certain legislative and executive powers and functions, in line with the Constitution. Discussed above was the requirement of implementing national legislation through planning and by-law making, which enhances the meaning of local governance.⁴³ Having said this, the MSA makes provision for the establishment of an integrated development plan (IDP), which is 'a single, inclusive and strategic plan for the development of the municipality'.⁴⁴ An IDP declares that co-ordination and integration between the three spheres of government are key aspects in achieving successful planning.⁴⁵ Thus, it is pivotal that the content of the IDP gives effect to national legislation governing the coastal environment. The importance of the IDP (with the inclusion of the spatial development framework) for implementing municipal coastal efforts will be discussed below.⁴⁶ Another vital municipal tool for coastal service delivery is a service delivery

³⁸ Schedule 4B.

³⁹ Schedule 5B.

⁴⁰ Section 156(2).

⁴¹ Section 152(d).

⁴² See Chapter 2, para 2.2.2 below for full discussion.

⁴³ See Chapter 2, para 2.4.3 below for full discussion.

⁴⁴ Section 26(e).

⁴⁵ De Visser J *Developmental local government: a case study of South Africa* (2005) 219.

⁴⁶ See Chapter 2, para 2.3.4 below for full discussion.

agreement (SDA) that assists with environment related service delivery in terms of the MSA, which is elaborated on below.⁴⁷

Furthermore, the NEMA sets out a set of fundamental management principles that apply throughout the Republic and bind all organs of state. The principles relating to the protection of the coastal environment is discussed in great detail below in the study.⁴⁸ These constitutes guiding principles, which must be incorporated when municipalities exercises their powers and functions. The NEMA also makes provision for environmental management tools and governance which include: environmental impact assessments, which are tools guiding decision-making;⁴⁹ compliance notices, which serve as important tools for environmental management;⁵⁰ environmental management inspectors,⁵¹ environmental management co-operation agreements,⁵² and the delegation of power and duties to the municipality.⁵³ These tools are pivotal to the promotion of ICM, as will be discussed below, and its application at a municipal level. Based on the inter-relatedness of these tools and promoting ICM, it is imperative that the By-law makes provision for them.

In addition to the NEMA, the NEMBA establishes tools for the protection of sensitive ecosystems and maintaining natural habitats, amongst others. It has been submitted that inappropriate land use planning exacerbates negative consequences for ecosystem functioning.⁵⁴ The tools pertinent to biodiversity protection are the

⁴⁷ See Chapter 2, para 2.4.4.3 below for full discussion.

⁴⁸ See Chapter 2, para 2.4.3 below for full discussion.

⁴⁹ See Chapter 2, para 2.4.4.1 below for full discussion.

⁵⁰ See Chapter 2, para 2.4.4.2 below for full discussion.

⁵¹ See Chapter 2, para 2.4.4.2 below for full discussion.

⁵² See Chapter 2, para 2.4.4.3 below for full discussion.

⁵³ See Chapter 2, para 2.4.4.4 below for full discussion.

⁵⁴ NBF: GN 813 in GG 32474 of 3 August 2009.

national biodiversity framework (NBF) and bioregional planning.⁵⁵ The NBF makes provision for the approach municipalities should follow to promote biodiversity management through spatial planning and land use planning by way of encouraging nodal development on CPP, amongst others discussed later in detail.⁵⁶ The inclusion of these considerations within the By-law will bolster the protection of coastal biodiversity and resources.

A further important consideration is the effect of climate change on the City's ecosystems and coastal human settlement. The White Paper NCC sets out various objectives in support of protecting these. The role of local government is not clear in terms of the White Paper NCC;⁵⁷ however, some of these objectives fall into the scope of municipal duties (in terms of the NEMBA, NEMICMA, NEMA and MSA). To mention a few of these objectives: protecting natural systems that improve resilience to climate change;⁵⁸ combating the spread of terrestrial and marine alien and invasive species worsening the impact of climate change;⁵⁹ establishment of disaster risk management plans;⁶⁰ and how appropriate municipal coastal management planning could mitigate climate change impacts.⁶¹ Thus, coastal management efforts should include these objectives, and should be provided for in the By-law.

The White Paper SCD encourages the promotion of ICM, and for the purposes of this study it is vital to ascertain the functions of coastal management institutions

⁵⁵ See Chapter 2, para 2.6 below for full discussion.

⁵⁶ See Chapter 2, para 2.6 below for full discussion.

⁵⁷ White Paper NCC, Objective 10.2.

⁵⁸ See Chapter 2, para 2.5 below for full discussion.

⁵⁹ See Chapter 2, para 2.5 below for full discussion.

⁶⁰ See Chapter 2, para 2.5 below for full discussion.

⁶¹ See Chapter 2, para 2.5 below for full discussion.

specifically municipalities. The White Paper SCD makes provision for short,⁶² medium,⁶³ and long term⁶⁴ objectives, and based on the time period, we have reached the long term period, which requires municipalities to be 'self-sustaining'. The long term objectives include: devolution of sectoral executive responsibility, e.g. estuarine management; local coastal forums; and co-management initiatives.⁶⁵ It is pivotal that these self-sustaining objectives are being realised, due to time frames and the notion of sustainability. Thus, it is similarly important that the By-law makes provision for this.

The NEMICMA mandates coastal municipalities to pass by-laws for the implementation, administration and enforcement of its CMP⁶⁶ and to designate strips of land as coastal access land.⁶⁷ The CMP, which is a policy directive, is a primary tool for municipal coastal management and deals with miscellaneous matters (climate change issues, biodiversity etc...) that will be discussed in greater detail in a subsequent chapter.⁶⁸ It is important to note the recommendation made by the Intergovernmental Panel on Climate Change (IPCC) indicating that ICM is 'an appropriate framework to reduce vulnerability to accelerated sea level rise'.⁶⁹ In light of this, the NEMICMA provides various municipal coastal management tools for adapting and mitigating effects of climate change that are highlighted extensively later in this study.⁷⁰ Thus, by giving effect to the 'evolution' of ICM, it is vital that these tools are legislated on by means of the By-law.

⁶² 2000-2001.

⁶³ 2002-2005.

⁶⁴ 2006-2020.

⁶⁵ See Chapter 3, para 3.6 below for full discussion.

⁶⁶ Section 50.

⁶⁷ Section 18(1).

⁶⁸ See Chapter 3, para 3.6 below for full discussion.

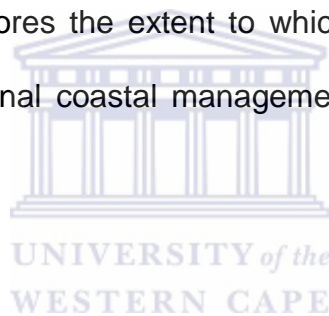
⁶⁹ Sinha PC *Marine Pollution* (1998) 159.

⁷⁰ See Chapter 3.

It has been submitted that the better a State complies with its constitutional and legislative duties, the better it will be able to fulfil and perform its duties.⁷¹ Based on this assumption, it is important that the By-law incorporates the abovementioned legislative and policy requirements to optimise the City's performance of its duties. The By-law is the first step to implementing coastal management efforts, but it requires the incorporation of the abovementioned legal frameworks and more.

1.4 Research question

The research, therefore, explores the extent to which the By-law complies with or makes provision for the national coastal management law duties and functions of local government.



1.5 Hypothesis

The duties of the State have to be achieved in line with its nature, function, and purpose, and its obligation to act in the public interest.⁷² In light of this, ICM necessitates the State's sectoral organisations to be aligned, and coastal management issues highlight the need for a cross sectoral approach/ cooperative governance.⁷³ Thus the State (municipality) must have promulgated by-laws for the promotion of ICM, which is in line with the NEMICMA, the White Paper SCD and other legislation and policies incidental to the protection of the coastal environment.

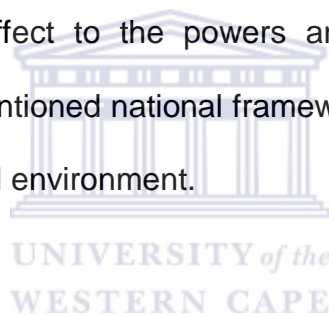
⁷¹ Du Plessis A *Fulfilment of South Africa's Constitutional Environmental Right in the Local Government Sphere* (2008) 45.

⁷² Cassese A *International Law* (2001) 4.

⁷³ See Chapter 1, para 1.6 below for full discussion.

The whole intention of ICM, as stipulated in the White Paper SCD, apart from overcoming various fragmentations, is to promote the sustainable use and development of coastal resources.⁷⁴ As discussed, the NEMICMA imposes numerous coastal management duties to municipalities, which are extensively discussed in a chapter below.⁷⁵ In addition to the NEMICMA, it is important to assess coastal municipalities' duties in terms of legislation (the NEMBA, the NEMA, the MSA) and policies (the White Paper SCD, the White Paper NCC) incidental to coastal management.

Thus, if the By-law gives effect to the powers and functions stipulated in the Constitution and the abovementioned national framework, then the City can, through this By-law, protect the coastal environment.



1.6 The concept of Integrated Coastal Management

According to leading ICM authors Cicin-Sain and Knecht, the notion of ICM encompasses the following:

- 'Intersectoral integration: this entails the integration between different marine and coastal sectors (oil, gas exploitation, fisheries and agriculture).
- Intergovernmental integration: this entails the 'integration among different levels of government' (local, provincial and national).
- Spatial integration: this involves recognising the interrelatedness between land and sea.

⁷⁴ White Paper SCD of April 2000.

⁷⁵ See Chapter 3 below for full discussion.

- Science management integration: this entails the ‘integration of various scientific disciplines involved in the coast.’
- International integration: this entails the co-operation of states in terms of treaties and agreements.⁷⁶

In light of the above, the legal framework (including constitutional and policy documents) as well as the By-law must incorporate these elements in order to give effect to the progression of ICM.

It has been submitted that ICM is rarely practicable in the presence of ‘top-down’ or ‘command and control’ prescriptive government,⁷⁷ and the White Paper SCD stresses the need for ‘command and control’ deviating mechanisms.⁷⁸

The ‘evolution’ of ICM has been given legal force by the enactment of the NEMICMA, which seeks to facilitate the implementation of the White Paper SCD, amongst others.⁷⁹ Having said this, it is clear that the better the By-law is aligned with the NEMICMA, the better it will promote ICM.

1.7 Research method

The research method employed for the study is ‘desk top study’. This method of research does not require the researcher to go outdoors for primary research. Also known as secondary data analysis, this method of research saves time and cost

⁷⁶ Cicin-Sain B and Knecht RW *Integrated Coastal and Ocean Management Concepts and Practices* (1998) 87.

⁷⁷ A User-friendly Guide to the Integrated Coastal Management Act of South Africa 2.

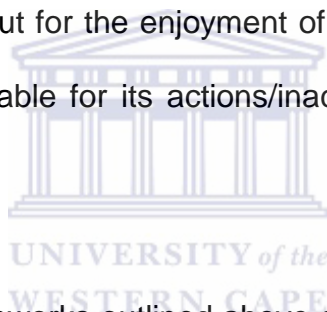
⁷⁸ See Chapter 3, para 3.10 below for full discussion.

⁷⁹ A User-friendly Guide to the Integrated Coastal Management Act of South Africa 3.

because the data is already available and provides for the possibility of 'reanalysing previous findings'.⁸⁰

1.8 Significance of the research

The research is significant as it justifies the need (nationally, provincially and locally) for ICM as a holistic approach to protecting the coastal environment; thus enshrining the constitutional imperative of co-operative governance. In order to protect the coastal environment, it is vital that laws (by-laws) and policies relating to the coast be enacted and implemented. The coast is viewed as the common heritage of all; it is an area owned by the State but for the enjoyment of all.⁸¹ Thus it is pivotal that the public hold the State accountable for its actions/inactions in protecting the coastal environment.



To reiterate, the national frameworks outlined above enable, and make provision, for tools for enforcing environmental (coastal) law at a local level. Thus it is vital that the City exercises its powers and functions in a manner that gives effect to these tools within the By-law, which would deter the hampering of implementing local coastal management efforts.

1.9 Structure of the dissertation

In light of the above, this dissertation is structured as follows:

⁸⁰ Babbie E and Mouton J *The Practice of Social Research* (2007) at 265.

⁸¹ Glazewski J *Environmental Law in South Africa* (2000) 346.

1. In Chapter 2 the powers and functions of local government in a national context and perspective are outlined. Against this background, this chapter explores the powers and functions of the City in terms of national legislation and policy incidental to coastal management, and the tools that are available, at a municipal level, to effect implementation of the NEMICMA.

2. Chapter 3 proceeds with an overview of the NEMICMA. This chapter focuses specifically on the duties of the City in terms of the NEMICMA; the tools within this Act that assists implementation.

3. Chapter 4 provides an analysis and assessment of the Draft City of Cape Town Integrated Coastal Management By-Law. This chapter analyses and assesses the By-law in respect of the tools and mandates in terms of the law relating to the coastal environment.

4. In the final chapter, based on the findings, certain conclusions are drawn and recommendations made.

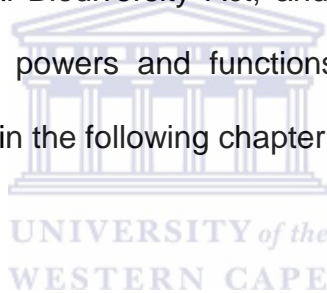


CHAPTER 2

THE POWERS AND FUNCTIONS OF LOCAL GOVERNMENT IN A NATIONAL CONTEXT AND PERSPECTIVE

2.1 Introduction

Central to the topic is to provide the legal basis for the powers and functions of local government in terms of highlighting its duties stipulated by laws and policies that are incidental to coastal management. Thus, this chapter explores the powers and functions of local government in terms of the Constitution, the Municipal Systems Act, the White Paper on Local Government, the National Environmental Management Act, the National Biodiversity Act, and the National Climate Change Response White Paper. The powers and functions of the City in terms of the NEMICMA are fully discussed in the following chapter.⁸²



2.2 Constitutional powers and functions of local government

2.2.1 Section 24 (Bill of Rights)

As a point of departure, it is important to note that the term 'environment' is constantly highlighted throughout this study. However, for purposes of this study, and based on its disposition in terms of the NEMICMA, 'environment' must be read to include the coastal environment.⁸³ However, it is vital to note that 'environment' is a shared national and provincial competence in terms of the Constitution⁸⁴ and municipalities are required to perform pivotal duties in light of these as will be highlighted throughout this study.

⁸² See Chapter 3 below for full discussion.

⁸³ See Chapter 3, para 3.8 below for full discussion.

⁸⁴ Schedule 4A.

Section 24 of the Constitution creates an enforceable right to an environment that is not harmful to any person's health or well-being;⁸⁵ and places an obligation upon the State (which includes municipalities), through reasonable legislative and other measures, to protect the environment for the benefit of present and future generations.⁸⁶ If the State fails to fulfil its constitutional mandate in terms of section 24, then it has the effect of infringing other fundamental rights (e.g. socio-economic).⁸⁷ In light of this, if there are no reasonable and legislative measures to promote ICM, then it will exacerbate 'negative impacts on coastal communities dependent upon coastal resources for their livelihoods, increasing exposure of infrastructure to storm surges, and loss of aesthetic appeal'.⁸⁸ Kidd links well-being, in terms of section 24(a), to concern for the aesthetic dimension of the natural environment,⁸⁹ which is an important consideration for the coastal environment. Thus, the State must through its legislative and executive powers progressively realise section 24. To 'progressively realise' encompasses that policies formulated by the state 'will need to be reviewed and revised to ensure that realisation of ... rights is progressively achieved'.⁹⁰

⁸⁵ Subsection (a).

⁸⁶ Subsection (b). Also see *HTF Developers (Pty) Ltd v The Minister of Environmental Affairs and Tourism and Others* 2007 (5) SA 438 (SCA). Par [17] of the judgement.

⁸⁷ Kidd M *Environmental Law* (2008) 19.

⁸⁸ Colenbrander C *et al* 'Adaptation Strategies for the City of Cape Town: Finding the Balance Within Social-Ecological Complexity' in Otto-Zimmermann K (ed) *Resilient Cities: Cities and Adaptation to Climate Change* (2011) 313.

⁸⁹ Kidd M *Environmental Law* (2008) 21.

⁹⁰ *Mazibuko and Others v City of Johannesburg and Others CCT 39/09 [2009] ZACC 28*. Par [40] of the judgement.

2.2.2 Municipal powers and functions: the Constitution

The Constitution states that municipalities are required to, through its financial and administrative capacity,⁹¹ promote a safe and healthy environment.⁹² The other objectives include: providing services to communities in a sustainable manner;⁹³ promoting social and economic development;⁹⁴ and encouraging the involvement of communities and community organisations in matters of local government.⁹⁵ These objectives further re-emphasise the mandatory nature of municipalities realising the ancillary fundamental rights to which their communities are entitled to, through promoting a safe and healthy environment. These constitutional objectives, in relation to local ICM, will become increasingly relevant later in this study and will be highlighted.



Furthermore, the Constitution imposes developmental duties upon municipalities in that they should arrange and control their administration and budgeting and planning processes to serve the basic needs of the community.⁹⁶ It is asserted that 'basic needs' function as a catalyst which creates a 'legally valid and enforceable environmentally relevant expectation on the part of rights holders'.⁹⁷ Thus, based on the concept of basic needs, the City is obliged to arrange its budget, administration and planning processes to implement municipal coastal management efforts which must be in line with promoting ICM.

⁹¹ Section 152(2).

⁹² Section 152(2)(c).

⁹³ Subsection (b).

⁹⁴ Subsection (c).

⁹⁵ Subsection (e).

⁹⁶ Section 153(a).

⁹⁷ Du Plessis A "Local environmental governance" and the role of local government in realising Section 24 of the South African Constitution' (2010) 21 *Stell LR* 268.

The Cape metropolitan is a Category A municipality, which indicates that it has exclusive municipal legislative and executive authority in its area.⁹⁸ The Constitution bestows upon municipalities, the power to make by-laws.⁹⁹ By-laws so adopted must not be in conflict with national or provincial legislation, as this would render them invalid.¹⁰⁰ Thus, if the City's ICM By-law is found to be in conflict with national legislation and policies relating to this study, then it will be invalid.

A municipality's executive authority possesses the right to administer matters listed in Parts B of Schedules 4 and 5 of the Constitution.¹⁰¹ National and provincial governments have legislative and executive authority to ensure that these functions (Parts B of Schedules 4 and 5) are effectively performed by municipalities.¹⁰²

Parts B of Schedules 4 and 5, over which municipalities have legislative and executive authority, includes municipal planning,¹⁰³ and beaches and amusement facilities¹⁰⁴-amongst other. These competencies and their relevance in light of ICM will be highlighted throughout the study. However, the Constitution provides that municipalities may be assigned more coastal duties from national government and provincial governments,¹⁰⁵ if that specific issue would most effectively be managed locally;¹⁰⁶ and the municipality has the necessary capacity to manage it.¹⁰⁷ The

⁹⁸ Section 155(1)(a).

⁹⁹ Section 156(2).

¹⁰⁰ Section 156(3).

¹⁰¹ Section 156(1)(a).

¹⁰² Section 155(7).

¹⁰³ Schedule 4B.

¹⁰⁴ Schedule 5B.

¹⁰⁵ Section 156(4).

¹⁰⁶ Section 156(4)(a).

¹⁰⁷ Section 156(4)(b).

assignment of additional coastal management powers and functions is set out in this and subsequent chapters of this study.

In order for coastal municipalities to exercise their powers and functions in terms of the Constitution, national and provincial governments are required to support and strengthen the capacity of municipalities to manage their own affairs through legislative and other measures.¹⁰⁸ Capacity in terms of the Local Government Municipal Structures Act 117 of 1998 includes

‘the administrative and financial management capacity and infrastructure that enables a municipality to collect revenue and govern on its own initiative the local government affairs of its community’.¹⁰⁹

It is expected that the NEMICMA must, where provision falls within a municipal competency, allow municipalities to exercise such power and functions. This notion enshrines the principle of co-operative governance which is also highlighted in section 40 of the Constitution. The principle denotes that each sphere of government must ‘exercise their powers and functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere’.¹¹⁰ The principle of co-operative governance is important for ICM as indicated by the intergovernmental integration element of ICM.¹¹¹

Section 160 of the Constitution sets out internal procedures undertaken by the municipal council. These include: decision-making powers concerning the ‘exercise

¹⁰⁸ Section 154.

¹⁰⁹ Section 1.

¹¹⁰ Section 41(1)(g).

¹¹¹ See Chapter 1, para 1.6 above for full discussion.

of all the powers and the performance of all the functions of the municipality’;¹¹² subject to national legislation, to ‘elect an executive committee and other committees’;¹¹³ and employing personnel ‘necessary for the effective performance of its functions’.¹¹⁴ The discussion on municipal coastal committees and the pivotal role they play in implementing the NEMICMA will commence in the following chapter.¹¹⁵

2.3 The Local Government: Municipal Systems Act 32 of 2000.

The MSA has been enacted to give effect to the powers and functions set out in the Constitution. As one of the principal Acts of local government, one has to establish the tools that are available to give effect to the functioning of coastal municipalities in promoting ICM.



2.3.1 Terminology

The MSA defines ‘basic municipal service’ as a service necessary to ensure an ‘acceptable and reasonable quality of life and, if not provided, would endanger public health or safety or the environment’.¹¹⁶ In order to promote a safe environment, the nature of municipal services must be environmentally sustainable. The term ‘environmentally sustainable’ denotes minimising the ‘risk of harm to the environment and to human health and safety’ to the extent where it is reasonably possible;¹¹⁷ ensuring the maximisation of the ‘potential benefits to the environment and to human

¹¹² Section 160(1)(a).

¹¹³ Section 160(1)(c).

¹¹⁴ Section 160(1)(d).

¹¹⁵ See Chapter 3, para 3.6.1 below for full discussion.

¹¹⁶ Section 1.

¹¹⁷ Section 1.

health and safety’;¹¹⁸ and ensuring that it complies with legislation intended to protect the environment.¹¹⁹ Therefore, for the City’s municipal services to be environmentally sustainable in nature, it is obligated to find measures of minimising negative impacts on the coastal environment to bolster benefits from these and secure the health and safety of coastal communities; and to ensure that it complies with its duties in terms of the NEMA and SEMAs at a local governmental level.

2.3.2 Local governance

In relation to section 156(5) of the Constitution, the Act empowers municipalities with the ‘right to do anything reasonably necessary for, or incidental to, the effective performance of its functions and the exercise of its powers’.¹²⁰ Section 11(3) sets out these legislative and executive powers through a number of means. These powers underpin the notion of local governance, in terms of which Du Plessis maintains that:

‘Local governance...embraces the duties of local government “to govern” and “to present”. “[T]o govern” means to exercise authority... and power to enforce legislation, policy-making, decision-making, implementation, as well as a regular review of these activities. “[T]o present” means that local authorities should be concerned with issues important to the public, and also requires continued public involvement.’¹²¹

Local governance within this context creates a two-leg test in determining whether municipalities are exercising their legislative and executive powers, through

¹¹⁸ Section 1.

¹¹⁹ Section 1.

¹²⁰ Section 8(2).

¹²¹ Du Plessis A “Local environmental governance” and the role of local government in realising Section 24 of the South African Constitution’ (2010) 21 *Stell LR*275.

governing and presenting. In light of this, it is clear that the City must enforce the NEMICMA, and makes by-laws, for example, to effect the implementation on the one hand; and take into account, for instance, the impact of climate change related issues (coastal human settlement and protecting ecosystems) affecting coastal communities' livelihoods, and create dialogue for public involvement on the other hand.

2.3.3 Municipal planning

Section 23(1) imposes an obligation upon municipalities to become developmental in nature, which includes: promoting a safe and healthy environment and involving communities in local matters, for instance;¹²² ensuring that the budget, administration and planning processes complement municipal coastal management efforts;¹²³ and progressively, with other organs of state, realising the fundamental rights of section 24 of the Constitution.¹²⁴

Municipal planning is listed in Schedule 4 Part B of the Constitution and therefore municipalities must legislate in this regard. However, neither the MSA nor the Constitution defines what municipal planning entails. The Constitutional Court in the case of *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others*,¹²⁵ per Jaftha J, gave meaning to this term.

'... Planning in the context of municipal affairs is a term which has assumed a particular, well-established meaning which includes the zoning of land and the

¹²² Section 23(1)(a).

¹²³ Section 23(1)(b).

¹²⁴ Section 23(1)(c).

¹²⁵ Case CCT 89/09 [2010] ZACC 11.

establishment of townships. In that context, the term is commonly used to define the control and regulation of the use of land.¹²⁶

In the case of *Wary Holdings (Pty) Ltd v Stalwo and Another*,¹²⁷ the minority judgement gave meaning to planning in general.¹²⁸ However, the core submission *in casu* is that ‘municipal planning is to be undertaken by municipalities’.¹²⁹

2.3.4 Integrated Development Planning

Section 25 of the MSA makes provision for the adoption of IDPs, and describes it as ‘a single, inclusive and strategic plan for the development of the municipality’.¹³⁰ In the case of *eThekweni Municipality v Tsogo Sun KwaZulu-Natal*¹³¹ the Court maintained that development should accord with an IDP, to conform with this planning tool.¹³² A core component of an IDP is a spatial development framework (SDF), which has the legal effect of guiding and informing land development and management.¹³³ Thus, in application, the SDF is a tool for guiding CZ development and management. It is submitted that the SDF must set out ‘objectives that reflect the desired spatial form of the municipality and contain strategies to achieve the desired form’.¹³⁴

¹²⁶ Par [57] of the judgment.

¹²⁷ 2009(1) SA 337 (CC).

¹²⁸ Par [128] of the judgement.

¹²⁹ Par [131] of the judgement.

¹³⁰ Section 25(1).

¹³¹ [unreported] 86/2006 (SCA) (2007).

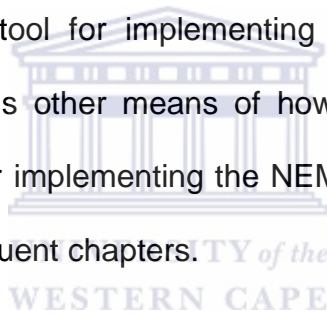
¹³² Par [25] of the judgment.

¹³³ Section 26(e).

¹³⁴ van Wyk J ‘Parallel planning mechanisms as a “recipe for disaster”’ (2010) 13(1) *PER/PELJ* 223.

It is important to note that local environmental management planning is governed by local governmental law, in terms of the MSA (IDP), and not by the national environmental framework as is the case with national and provincial spheres.¹³⁵ Thus, the IDP should be employed as an important mechanism for addressing environmental management, including coastal management.

In terms of the NEMICMA, an IDP is interpreted as a statutory plan¹³⁶ that has the legal effect of furthering the objects of co-operative governance (intergovernmental integration), which is key to ICM,¹³⁷ by way of aligning¹³⁸ and giving effect to the national CMP and the provincial CMP.¹³⁹ The abovementioned serves as a single illustration of the IDP as a tool for implementing the NEMICMA; however, the NEMICMA indicates numerous other means of how the IDP (including the SDF) could be used as a vehicle for implementing the NEMICMA. This will be highlighted within this chapter and subsequent chapters.



2.4 The National Environmental Management Act 107 of 1998

The NEMA is a framework Act, enacted to give effect to section 24 of the Constitution, and it is important to set out, for purposes of this study, local government's powers and functions in terms of the NEMA, specifically in relation to coastal management.

¹³⁵ National Environmental Management Act 107 of 1998, section 11(8): Requires both national and provincial spheres of government to adopt environmental implementation and management plans.

¹³⁶ Section 52(1)(b).

¹³⁷ See Chapter 1, para 1.6 above for full discussion.

¹³⁸ Section 51(a).

¹³⁹ Section 51(c).

2.4.1 Sustainable development

The NEMA defines 'sustainable development' as

'the integration of social, economic and environmental factors into planning, implementation and decision-making to ensure that development serves present and future generations'.¹⁴⁰

This concept is at the heart of the protection of the environment (coastal).¹⁴¹ It is therefore apparent that the City's current socio-economic problems which the City faces, in relation to the coastal environment, must be taken into consideration in planning along with the effects of climate change and the protection of the sensitive coastal ecosystems.



2.4.2 Integrated environmental management

At the heart of ICM,¹⁴² is the NEMA's notion of integrated environmental management (IEM). The NEMA provides that the purpose of IEM is to encourage the application of environmental management tools to ensure IEM of activities.¹⁴³ Thus, it is vital to discuss the factors influencing decision-making and the environmental management tools available at a municipal level, which will promote IEM and ultimately ICM.

¹⁴⁰ Section 1.

¹⁴¹ *Fuel Retailers Association of SA (Pty) Ltd v Director-General Environmental Management Mpumalanga and Others* 2007 (10) BLCR 1059 (CC). Par [45] of the judgment. See Chapter 3, para 3.8 below for full discussion.

¹⁴² See Chapter 1, para 1.6 above for full discussion.

¹⁴³ Section 23.

2.4.3 Section 2, principles of the NEMA

The principles provided in section 2 of the NEMA bind and guide the State (which includes municipalities) in interpreting and implementing not merely the NEMA, but other SEMAs, like the NEMICMA, and legislation enacted for the purposes of protecting and managing the environment,¹⁴⁴ like the MSA. Therefore it is important to explore the guiding principles relating to the protection of the Cape Metropolitan coast.

The principles that must be applied to coastal management include, amongst other, that-

- 'those sensitive and highly dynamic or stressed ecosystems, such as coastal shores, and similar systems require specific attention in management and planning procedures.'¹⁴⁵
- 'disturbance of ecosystems and loss of biological diversity are avoided, or minimised and remedied.'¹⁴⁶
- 'environmental management must place people and their need at the forefront of its concern.'¹⁴⁷

The management and protection of the environment (coast) is dependant on these principles,¹⁴⁸ and municipalities taking cognisance of them. In light of these principles, coastal municipalities are mandated to ensure that their planning tools (CMP, IDP, SDF and others discussed later) address issues of ecosystem

¹⁴⁴ Section 2(1)(e).

¹⁴⁵ Section 2(4)(r).

¹⁴⁶ Section 2(4)(a)(i).

¹⁴⁷ Section 2(2).

¹⁴⁸ *MEC for Agriculture, Conservation, Environment & Land Affairs v Sasol Oil (Pty) Ltd* 2006(5) SA 483 (SCA).

disturbance and stress, for instance. Against this background, it is expected that these principles ultimately resonate in the By-law.

2.4.4 Environmental management tools and governance

2.4.4.1 Environmental Impact Assessments

An environmental impact assessment (EIA) is a written statement used to guide decision-makers, with its functions including: providing decision-makers with information on environmental effects on proposed activities; and serves as a tool to which decisions are made.¹⁴⁹ Certain activities may have a negative effect on the coastal environment and hamper ICM; therefore this tool assists decision-makers in prohibiting them.



In light of the above, Chapter 5 of the NEMA provides that in order to give effect to the notion of IEM, the potential impact on the coastal environment of listed activities must be considered, investigated, assessed and reported onto the relevant authority empowered to grant the relevant environmental authorisation.¹⁵⁰ In July 2010 the Minister has listed activities that require basic assessment (GN R544), and EIA and scoping (GN R545).¹⁵¹ Both these regulations set out the activities within the CZ requiring basic assessment, and EIA and scoping, respectively. Such listed activities may not commence without environmental authorisation from the Minister with concurrence of the MEC (competent authority).¹⁵² However, these powers may be

¹⁴⁹ Kidd M *Environmental Law* 2ed (2011) 235.

¹⁵⁰ Section 24(1).

¹⁵¹ Kidd M *Environmental Law* 2ed (2011) 250.

¹⁵² Section 24(2)(a).

delegated to any organ of state;¹⁵³ thus, municipalities may play a fundamental role, upon delegation of such powers, to promote and implement coastal management efforts.

The NEMA states in peremptory terms that, prior to granting authorisation, competent authorities must consult every state department that administers law relating to the environment;¹⁵⁴ and obliges such departments to submit written comments within 40 days of the request by the consulting Minister.¹⁵⁵ Therefore it is critical that the City incorporates its coastal management efforts into planning mechanisms (IDP, SDF, CMP, Coastal Planning schemes) to assess whether the proposed activities are in line with these, for purposes of writing submissions, and promoting ICM. The abovementioned consultation process creates a mechanism that ensures that all role players' inputs are considered prior to a decision authorising an activity affecting the environment being made;¹⁵⁶ thus enhancing the notion of co-ordinated and integrated environmental governance and management.¹⁵⁷

Important to note is that the NEMA regulations often refer to the exclusion of certain activities 'behind the development setback line'.¹⁵⁸ In terms of the NEMICMA, this line is referred to as the coastal set-back line (CSBL) and in terms of the NEMA regulations (544 and 545) as development setback line. The following chapter entails

¹⁵³ Section 42(1).

¹⁵⁴ Section 24O(2).

¹⁵⁵ Section 24O(3).

¹⁵⁶ *Maccsand (Pty) Ltd v the City of Cape Town and Others* CCT 103/11 [2012] ZACC 7. Par [14] of the judgment.

¹⁵⁷ *Maccsand (Pty) Ltd v the City of Cape Town and Others* CCT 103/11 [2012] ZACC 7. Par [14] of the judgment.

¹⁵⁸ GNR 544: Activities 18 and 45.

a full discussion on CSBLs and the danger of not establishing such, in terms of ICM and EIA.¹⁵⁹

2.4.4.2 Compliance notices and environmental management inspectors

Another important tool for environmental management is compliance notices.¹⁶⁰

These are provided for in terms of section 31L of the NEMA which stipulates that compliance notices are issued by an environmental management inspector (EMI):

‘if there are reasonable grounds for believing that a person has not complied- (a) with a provision of the law for which that EMI has been designated; or (b) with a term or condition of a permit, authorisation or other instrument issued in terms of such law.’¹⁶¹

The NEMA similarly provides that the recipient of a compliance notice must carry out what is required in terms hereof, within the specified time period;¹⁶² and allows for the lodging of objections by the recipient.¹⁶³

Section 31A of the NEMA provides that compliance notices and EMIs find their application in the enforcement of both the NEMA and SEMAs.¹⁶⁴ The NEMA states that a staff member of a municipality may, by direction of an MEC, be designated as an EMI.¹⁶⁵ The NEMA also provides when an MEC may delegate her power to a municipality, subject to the latter agreeing thereto, provided that it does not fall within

¹⁵⁹ See Chapter 3, para 3.3.3 below for full discussion.

¹⁶⁰ Feris LA ‘Compliance notice - A New Tool in Environmental Enforcement’ (2006) 9*PER/PEJL* 4.

¹⁶¹ Section 31L(1)(a) and (b).

¹⁶² Section 31L(4).

¹⁶³ Section 31L(5).

¹⁶⁴ Section 31A(1).

¹⁶⁵ Section 31C(1)(iii).

the ambit of those powers that may not be delegated.¹⁶⁶ The NEMA also sets out the mandate¹⁶⁷, functions¹⁶⁸ and powers¹⁶⁹ of an EMI.

In conclusion, it is clear that EMIs plays a pivotal role in furthering the objectives of compliance notices in terms of the NEMA and SEMAs, and it is therefore important to assess the role of EMIs (which may include municipalities) in terms of the NEMICMA,¹⁷⁰ and ultimately the reflection hereof in the By-law.

2.4.4.3 Environmental management co-operation agreements

Section 35 of the NEMA introduces the establishment of environmental management co-operation agreements (EMCA), which have the legal effect of enhancing compliance with the principles set down in the NEMA.¹⁷¹ In light of this, the NEMA enables municipalities to enter into these EMCAs with any person or the community.¹⁷² The EMCAs must be entered into by the municipality if the activity for which the EMCA is sought falls within the jurisdiction of the said municipality;¹⁷³ is subject to public participation prior to entering into the agreement;¹⁷⁴ and complies with regulations stipulated by the Minister.¹⁷⁵ The purpose of EMCAs encourages the following functions: creating partnerships between local communities and authorities;

¹⁶⁶ Section 42A(4).

¹⁶⁷ Section 31D(1).

¹⁶⁸ Section 31G.

¹⁶⁹ Section 31H(1).

¹⁷⁰ See Chapter 3, para 3.6.4 below for full discussion.

¹⁷¹ Section 35(1).

¹⁷² Section 35(1).

¹⁷³ Section 35(2)(a)(i).

¹⁷⁴ Section 35(2)(b).

¹⁷⁵ Section 35(2)(c).

facilitating the sharing of power and responsibility;¹⁷⁶ and sustainable use of resources.¹⁷⁷

Analogous to the EMCA, section 11(3)(f) of the MSA empowers municipalities to appoint appropriate service providers. A municipality may enter into a SDA with external service providers (legally competent community based organisations and non-governmental organisations),¹⁷⁸ and is mandated to assess the service delivery options which focus on the environment and on human health, safety and well-being.¹⁷⁹ In cases where the SDA is one for basic municipal services, then community consultation is required.¹⁸⁰ Thus, careful consideration must be given to SDAs at the planning stage, which will have the effect of filling coastal service delivery gaps and promoting ICM at a grassroots level. Within the Cape Metro, for instance, there will be various coastal service delivery needs in different areas within the metropolitan; thus SDAs could be entered into to ensure that those coast-specific services are delivered within those specific areas; also specific CBOs or NPOs (established or establishing) may deliver coast-specific services in line with the need.

Based on the abovementioned analogy, it is clear that these two planning tools (EMCA and SDA) are similar in nature; although the White Paper SCD merely stresses the need of the former tool for implementing local coastal management efforts.¹⁸¹ The similarity extends to the point where municipalities enter into

¹⁷⁶ Hara M *Could co-management provide a solution to the problem of artisanal fisheries management on the South-East arm of Lake Malawi* (Unpublished LLD thesis UWC2001) 115.

¹⁷⁷ Hara M *Could co-management provide a solution to the problem of artisanal fisheries management on the South-East arm of Lake Malawi* (Unpublished LLD thesis UWC2001) 115.

¹⁷⁸ Section 78(3).

¹⁷⁹ Section 78(3)(b)(i).

¹⁸⁰ Section 80(2).

¹⁸¹ See Chapter 3, para 3.6.2 below for full discussion.

agreements with communities to deliver environmentally sustainable services. On the contrary, SDAs gives municipality carte blanche to enter into agreements; whilst EMCAs places ministerial stipulations and regulations. Also, SDAs invites a specific category of community members (CBOs and NPOs), which also find its application in the constitutional objects for municipalities;¹⁸² whilst the EMCAs invites any person or community. Coastal municipalities must thus also, within in its executive authority, employ the SDA as an aid in implementing coastal management efforts in specific areas based on public need, which in effect speaks to the concept of local governance.

2.4.4.4 Delegation of powers by the MEC

In terms of the NEMA, coastal municipalities may acquire more power or duties bestowed upon or delegated to the MEC in terms of either the NEMA or NEMICMA, upon agreement by the municipality,¹⁸³ and subject to certain formalities.¹⁸⁴ The NEMA similarly empower the MEC to ‘confirm, revoke or vary any decision taken in consequence of a delegation or subdelegation in terms of this section, subject to any rights that may have been accrued to a person as a result of the decision’.¹⁸⁵ However, certain powers or duties may not be delegated by the MEC (so-called ‘exclusionary clause’) either in terms of the NEMA or NEMICMA: ‘to make regulations’;¹⁸⁶ ‘to publish notices in the Gazette’;¹⁸⁷ ‘to appoint a member in the

¹⁸² See Chapter 2, para 2.2.2 below for full discussion.

¹⁸³ Section 42A(1)(c).

¹⁸⁴ Section 42A(2).

¹⁸⁵ Section 42A(3).

¹⁸⁶ Section 42A(4)(a).

¹⁸⁷ Section 42A(4)(b).

board or committee’;¹⁸⁸ ‘or to expropriate private land’.¹⁸⁹ These provisions will be fully applied in the following two chapters of the study.

2.5 National Climate Change Response White Paper

The White Paper NCC establishes objectives advocating on measures of mitigating and adapting to climate change related issues. In relation to climate change and the CZ, the White Paper NCC sets out objectives that speak to ecosystem-based adaptation and coastal human settlement. Discussed below is the nature of climate change related issues affecting ecosystems and coastal human settlement, in that order.

‘Global climate change is one of the most important present and potential threats to marine and coastal biodiversity.’¹⁹⁰ In light of this, the quantity and quality of the services these sensitive ecosystems provide will potentially be reduced.¹⁹¹ The White Paper NCC refers to these as ‘ecosystem-based adaption’, and provides a list of objectives streamlining climate change issues into the management of biodiversity and ecosystem services.¹⁹²

In relation to coastal human settlement, the White Paper NCC speaks to three categories of human settlement: urban, rural and coastal. For the purpose of this

¹⁸⁸ Section 42A(4)(c).

¹⁸⁹ Section 42A(4)(d).

¹⁹⁰ De Fontaubert AC, Downes DR and Agardy TS *Biodiversity in the Seas Implementing the Convention on Biological Diversity in Marine and Coastal Habitats* (1996) 46.

¹⁹¹ White Paper NCC, Objective 5.5.

¹⁹² Objective 5.5.

study, the primary focus is to ascertain coastal municipalities' role in matters relating to coastal human settlements.

This chapter and subsequent chapters briefly touch on the link between the City's role, ICM and climate change laws and objectives emanating from the NEMBA, NEMICMA and White Paper NCC.

2.6 The National Environmental Management: Biodiversity Act 10 of 2004

It is submitted that the City's coast is 'one of the most diverse and productive stretches of coastline in South Africa'¹⁹³ and is home to 'a diverse range of ecosystems'.¹⁹⁴ The NEMBA has been enacted to give effect to the NEMA and to principles preventing the loss of biodiversity, for example.¹⁹⁵ The NEMBA, Chapter 3, sets out planning mechanisms to be taken into account by the different spheres of government.¹⁹⁶ The primary planning mechanism is the NBF, established by the Minister, that integrates, co-ordinates and sets a uniform approach to biodiversity management by the organs of state in all spheres of government.¹⁹⁷ Another important tool for biodiversity management is a bioregional plan, which determines a specific region as a bioregion which contains several nested ecosystems;¹⁹⁸ the Minister or the MEC for environmental affairs must publish such a plan.¹⁹⁹ The NEMICMA identifies the NBF and bioregional plans as statutory plans that may

¹⁹³ City of Cape Town Local Biodiversity Strategy and Action Plan 2009-2019 16.

¹⁹⁴ Colenbrander C *et al* 'Adaptation Strategies for the City of Cape Town: Finding the Balance Within Social-Ecological Complexity' in Otto-Zimmermann K (ed) *Resilient Cities: Cities and Adaptation to Climate Change* (2011) 312.

¹⁹⁵ See Chapter 2, para 2.4 above for full discussion.

¹⁹⁶ Kidd M *Environmental Law* 2ed (2011) 105.

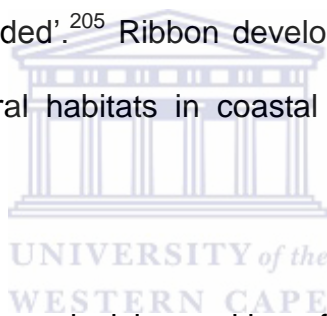
¹⁹⁷ Kidd M *Environmental Law* 2ed (2011) 105.

¹⁹⁸ Section 40(1)(a).

¹⁹⁹ Section 40(1)(b).

affect coastal management;²⁰⁰ and further mandates municipalities to ensure that their IDPs (including SDFs) are consistent with the NBF and bioregional plans.²⁰¹

Municipalities play a pivotal role in biodiversity management through spatial planning and land use planning, for instance.²⁰² Thus, municipalities are mandated to take biodiversity considerations into account in their decision-making, planning and other functions.²⁰³ Inappropriate land use decision-making, at times, fails to adequately address biodiversity which has negative consequences for ecosystem functioning.²⁰⁴ In light of this, the 2013 goal of the NBF stresses the need for publishing bioregional plans for municipalities which 'identify critical biodiversity areas in which loss of natural habitat should be avoided'.²⁰⁵ Ribbon development²⁰⁶ is one of the primary reasons for the loss of natural habitats in coastal ecosystems;²⁰⁷ so too, urban sprawl.²⁰⁸



Apart from inappropriate land use decision-making affecting biodiversity, and in light of climate change related issues, the spread of alien²⁰⁹ and invasive²¹⁰ species (AIS) may exacerbate the effects of climate change.²¹¹ The White Paper NCC recognises this threat and requires the enhancement of 'existing programmes to combat the

²⁰⁰ Section 52(1)(c).

²⁰¹ Section 52(4).

²⁰² NBF: GN 813 in GG 32474 of 3 August 2009.

²⁰³ NBF: GN 813 in GG 32474 of 3 August 2009.

²⁰⁴ NBF: GN 813 in GG 32474 of 3 August 2009.

²⁰⁵ NBF: GN 813 in GG 32474 of 3 August 2009.

²⁰⁶ 'Describes the spatial pattern of human settlement and infrastructure that is "thinly" spread along a line...'

²⁰⁷ National Biodiversity Framework: GN 813 in GG 32474 of 3 August 2009.

²⁰⁸ White Paper for Sustainable Coastal Development of April 2000.

²⁰⁹ 'a species that is not an indigenous species; or an indigenous species translocated to a place outside its natural distribution range in nature, but not an indigenous species that has extended its natural distribution range by natural means of migration or dispersal without human intervention.'

²¹⁰ 'any species whose establishment and spread outside of its natural distribution range- threaten ecosystems, habitats or other species or have demonstrable potential; may result in economic or environmental harm or harm to human health.'

²¹¹ White Paper NCC 2011, objective 5.5.5.

spread of AIS, especially in cases where such invasion worsen the impact of climate change'.²¹²

In light of the above, the NEMBA provides that persons carrying out activities relating to alien species must have a permit from the competent authority to undertake such activity;²¹³ so too for listed invasive species.²¹⁴ The Municipal Manager is the competent authority for controlling alien and invasive species, upon direction of the Minister, within the municipal area.²¹⁵ However, these powers must be exercised concurrently with other competent authorities.²¹⁶

By its definition in the NEMBA, it is clear that invasive species, and not alien species, are the cause of threatening ecosystems, habitats, and economic and environmental harm.²¹⁷ With regard to invasive species, municipalities are required to adopt an invasive species monitoring, control and eradication plan for land under their control,²¹⁸ and this plan must form part of its IDP.²¹⁹ The content of this plan requires the inclusion of 'measurable indicators of progress and success, and indicators of when the control plan is to be completed',²²⁰ amongst other. Thus, the CMP must be employed as the programme as stated in the White Paper NCC objective above, as the CMP is a policy directive for CZ management within the municipality's jurisdiction.²²¹ Further argumentative support stems from this that the municipal CMPs must include coastal management objectives (CMOs) within the jurisdiction of

²¹² Objective 5.5.5.

²¹³ Section 65(1).

²¹⁴ Section 71(1).

²¹⁵ AIS Regulations GN 347 of GG 32090 of 3 April 2009.

²¹⁶ AIS Regulations GN 347 of GG 32090 of 3 April 2009.

²¹⁷ NEMBA: Section 1.

²¹⁸ NEMBA: Section 76(2)(a).

²¹⁹ NEMBA: Section 76(2)(b).

²²⁰ NEMBA: Section 76(4)(f).

²²¹ NEMICMA: Section 49(1)(a).

the municipality.²²² The content of the invasive species monitoring, control and eradication plan requires performance indicators to measure progress with this plan. Similarly, the NEMICMA sets out that the municipal CMP must include ‘performance indicators to measure progress with the achievement’ of CMOs.²²³ Having said these, I recommend that the abovementioned objective of the White Paper NCC, relating to AIS, forms part of the City’s CMOs, which must form part of the draft By-law based on section 50 of the NEMICMA. Thus it will control, eradicate and monitor invasive species, on the one hand; but based on the White Paper NCC, also streamline climate change issues into coastal management, on the other hand.

2.7 Conclusion

This chapter highlighted and clearly set out the mechanisms in place that empower coastal municipalities to enhance CZ management. The following chapter sets out the powers and functions of municipalities, primarily, in terms of the NEMICMA, in an effort to use it as a yardstick for the eventual assessment of, and to observe the manner in which the draft By-law responds thereto.

²²² National Environmental Management: Integrated Coastal Management Act 24 of 2008: Section 49(2)(b).

²²³ Section 49(2)(d).

CHAPTER 3

AN OVERVIEW OF THE NATIONAL ENVIRONMENTAL MANAGEMENT: INTEGRATED COASTAL MANAGEMENT ACT 24 OF 2008

3.1 Introduction

This chapter sets out the role of local government according to the provisions of the NEMICMA. This will serve as a benchmark for the eventual assessment of the By-law.

3.2 The NEMICMA Chapter 1: Interpretation, objectives and application

The NEMICMA 'seeks to facilitate the implementation of the White Paper',²²⁴ and sets out the following five objectives:

1. To determine the CZ of the Republic.²²⁵

The White Paper SCD maintains that defining coastal boundaries is a challenge confronting many countries developing and implementing coastal management programmes.²²⁶ In light of this, South Africa has set a variety of landward and seaward boundaries to define the coast for different activities,²²⁷ which will be discussed below.²²⁸

²²⁴ Avery M 'Protecting SA's vulnerable coast' (2008) 8 Without Prejudice 56.

²²⁵ Section 2(a).

²²⁶ Section 3.1.

²²⁷ Section 3.1.

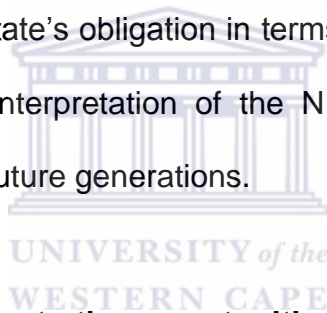
²²⁸ See Chapter 3, para 3.3 below for full discussion.

2. To provide, within the framework of the NEMA, for the co-ordinated and integrated management of the CZ.’²²⁹

The White Paper SCD recognised that legislation pertaining to coastal management was administered by diverse agencies and government departments, and that legislation was fragmented.²³⁰ Thus, displaying exactly how essential IEM is for ICM, as discussed previously.²³¹

3. ‘To preserve, protect, extend and enhance the status of the CPP as being held in trust by the State on behalf of all South Africans, including future generations.’²³²

This objective reiterates the State’s obligation in terms of protecting the environment which, as discussed in the interpretation of the NEMICMA includes the coastal environment, for present and future generations.



4. ‘To secure equitable access to the opportunities and benefits of CPP.’²³³

The White Paper SCD makes provision for the abovementioned objective.²³⁴ Discussed later in this chapter is the NEMICMA’s advocacy on the role municipalities play in establishing and managing access to the coast.

²²⁹ Section 2(b).

²³⁰ Glavovic BC and Cullinan C ‘The coast’ in Strydom HA and King ND (eds) *Environmental Management in South Africa* 2ed (2009) 895.

²³¹ See Chapter 2, para 2.4.2 above.

²³² Section 2(c).

²³³ Section 2(d).

²³⁴ Goal B2: ‘To ensure that the public has the right of equitable access to the opportunities and benefits of the coast, on a managed basis.’

5. 'To give effect to the Republic's obligations in terms of international law regarding coastal management and the marine environment.'²³⁵

This principle is viewed in terms of the White Paper SCD,²³⁶ and stresses compliance with international law relating to the coastal environment. However, for purposes of this study, and for convenience, these laws will not be discussed.

Apart from these objectives, the NEMICMA further makes provision for the duty of the State in terms of section 24 of the Constitution;²³⁷ where the NEMICMA applies;²³⁸ the relation between the NEMA and coastal management,²³⁹ and the manner in which conflict with other legislation is to be resolved.²⁴⁰

3.3 The NEMICMA Chapter 2: The coastal zone

The CZ, in a nutshell, consists of the following: 1. the coastal protection zone (CPZ), 2.CPP, 3. CSBLs, 4.coastal access land, 5.coastal waters, 6.coastal protected areas and 7.special management areas.²⁴¹ Briefly, the NEMICMA mandates the municipalities to perform certain functions in respect of the above-mentioned. Discussed below are its functions in terms of the CZ.

²³⁵ Section 2(e).

²³⁶ Goal A5.

²³⁷ Section 3.

²³⁸ Section 4(1).

²³⁹ Section 5(1).

²⁴⁰ Section 6.

²⁴¹ NEMICMA: Section 1.

3.3.1 Coastal protection zone

The CPZ consist of an uninterrupted strip of land, extending 100m inland from the high-water mark (which is usually the boundary of the CPP)²⁴² in urban areas,²⁴³ or 1km into undeveloped²⁴⁴ or rural areas.²⁴⁵ Protected areas falling partially within this zone will be treated as falling within the CPZ, unless otherwise excluded.²⁴⁶

The CPZ is situated adjacent to the CPP, and in order to protect the latter it is essential to impose restrictions on the former that forms part of coastal ecosystems.²⁴⁷ In terms of the NEMICMA, the restrictions must be placed in light of the purpose for which the CPZ is established: to protect the social, economic and aesthetic value of the CPP;²⁴⁸ to avoid the effect and ruthlessness of natural hazards;²⁴⁹ to protect people and property from sea-level rise,²⁵⁰ to preserve the natural functioning of the littoral active zone;²⁵¹ to protect the ecological integrity of the coastal environment;²⁵² and to perform rescue operations.²⁵³ Hereby it establishes an important legal tool for adapting to and mitigating the effects of sea-level rise on the coastal environment; protecting property and humans; and bolstering the socio-economic/environmental interplay.

²⁴² Glavovic BC and Cullinan C 'The coast' in Strydom HA and King ND (eds) *Environmental Management in South Africa* 2ed (2009) 900.

²⁴³ Section 16(1)(e).

²⁴⁴ Section 16(d)(i).

²⁴⁵ Section 16(d)(ii).

²⁴⁶ Glavovic BC and Cullinan C 'The coast' in Strydom HA and King ND (eds) *Environmental Management in South Africa* 2ed (2009) 900.

²⁴⁷ Glavovic BC and Cullinan C 'The coast' in Strydom HA and King ND (eds) *Environmental Management in South Africa* 2ed (2009) 900.

²⁴⁸ Section 17(a).

²⁴⁹ Section 17(b).

²⁵⁰ Section 17(c).

²⁵¹ Section 17(d).

²⁵² Section 17(e).

²⁵³ Section 17(f)(i).

The juridical meaning of municipal planning, as discussed earlier, expresses the City's mandate in terms of planning.²⁵⁴ Based on this, and the composition of the CPZ, it is noticeable that planning is essential for the protection of the CPZ; thus, discussed later in this chapter is the manner in which the City is mandated, through intergovernmental integration, to implement land use legislation in the CPZ.²⁵⁵

3.3.2 Coastal access land

One of the principles underpinning the White Paper SCD includes gaining access to CPP.²⁵⁶ The NEMICMA obliges coastal municipalities to designate coastal access land, within four years of the commencement of the NEMICMA, and to make 'by-laws that designates these strips of land as coastal access land in order to secure public access to that CPP'.²⁵⁷ Coastal access land serves as public access servitude in favour of the municipality.²⁵⁸ The NEMICMA also sets out guiding principles for the designation of coastal access land: land where municipalities may not designate coastal access land,²⁵⁹ the process for designating and withdrawing designation of coastal access land,²⁶⁰ and the responsibilities with regard to coastal access land.²⁶¹ In respect of the municipalities' responsibilities in respect of coastal access land, section 20 provides that coastal access land falling within the municipalities area

²⁵⁴ See Chapter 2, para 2.3.3 above for full discussion.

²⁵⁵ See Chapter 3, para 3.8.3 below for full discussion.

²⁵⁶ Goal B2.

²⁵⁷ Section 18(1).

²⁵⁸ Section 18(2).

²⁵⁹ Section 18(3) '...[H]arbour, defence or other strategic facility...without the consent of the Minister responsible for that facility.'

²⁶⁰ Section 19 'Before designating land as coastal access land or withdrawing any such designation, a municipality must-

(a) assess the potential environmental impacts of doing so;

(b) consult with interested and affected parties in accordance with Part 5 of Chapter 6; and

(c) give notice of the intended designation or withdrawal of the designation to the owner of the land.'

²⁶¹ Section 20.

must be sign post entry points;²⁶² 'control the use of, and activities on, that land';²⁶³ 'protect and enforce the rights of the public to use that land to gain access to the relevant CPP';²⁶⁴ maintain that land to ensure public access;²⁶⁵ provide facilities (parking areas, toilets and other amenities) that promote access to the CPP;²⁶⁶ ensure that the use and provision of coastal access land and related infrastructure do not cause adverse effects to the environment;²⁶⁷ 'remove any public access servitude that is causing or contributing to adverse effects that the municipality is unable to prevent or mitigate adequately';²⁶⁸ 'describe or indicate all coastal access land in any CMP and in any SDF';²⁶⁹ performing prescribed actions taken;²⁷⁰ and reporting to the MEC the measures adopted to implement these.²⁷¹ Apart from the NEMICMA requiring coastal municipalities to indicate all its coastal access land in its CMP or SDF,²⁷² the NEMICMA prescribes to municipalities to make by-laws for the proper implementation of the latter guiding principle (responsibilities with regard to coastal access land).²⁷³ Thus, to implement these provisions, it is vital that this resonates in the By-law, and that the designation of access land is incorporate into the IDP.

Section 18(6) and (7) [insertions] of the draft National Environmental Management: Integrated Coastal Management Amendment Bill of 2011²⁷⁴ (the draft NEMICMAB),

²⁶² Section 20(1)(a).

²⁶³ Section 20(1)(b).

²⁶⁴ Section 20(1)(c).

²⁶⁵ Section 20(1)(d).

²⁶⁶ Section 20(1)(e).

²⁶⁷ Section 20(1)(f).

²⁶⁸ Section 20(1)(g).

²⁶⁹ Section 20(1)(h).

²⁷⁰ Section 20(1)(i).

²⁷¹ Section 20(1)(j).

²⁷² Section 20(1)(h).

²⁷³ Section 20(2).

²⁷⁴ G 34781, GNR 840.

empowers the Minister to designate coastal access land where the municipality has failed to do so; however, amendment may only be effected after consultation with the MEC in that province and by 'giving the municipality a reasonable opportunity to make representation'. Briefly, the NEMICMA mandates municipalities to establish a CMP for its jurisdiction;²⁷⁵ the MEC must ensure compliance in terms of the content of the CMP;²⁷⁶ and give municipalities' reasonable opportunity to make representation.²⁷⁷ Additionally, the MEC is also empowered to issue directives upon a municipality to adopt and implement a municipal CMP.²⁷⁸ In the event that the municipality has failed to comply with the directive, then the MEC may implement and monitor compliance.²⁷⁹ Designating coastal access land must therefore be included in the CMP, and it is closely linked to the beaches and amusement facilitating [facilitating access to CPP (amusement)] competency of municipalities in terms of the Constitution. Thus, there are sufficient mechanisms in place to ensure compliance in terms designating coastal access land. Furthermore, section 20 of the NEMICMA (responsibilities of municipalities with regard to coastal access land) remains unaffected by the draft NEMICMAB; these are pertinent guidelines for implementing coastal access land. Therefore, this section of the draft NEMICMAB appears to be frivolous based on the abovementioned and amendment must not be effected.

²⁷⁵ See Chapter 3, para 3.7.1 below for full discussion.

²⁷⁶ See Chapter 3, para 3.7.1 below for full discussion.

²⁷⁷ See Chapter 3, para 3.7.1 below for full discussion.

²⁷⁸ NEMICMA, section 88(1)(b).

²⁷⁹ NEMICMA, section 88(3).

3.3.3 Coastal set-back lines

The NEMICMA sets out the purpose of the CSBL which includes: protecting public property, private property and public safety;²⁸⁰ protecting the CPZ,²⁸¹ and 'to preserve the aesthetic values of the CZ....'²⁸² Furthermore, the purpose of the CSBL is to 'prohibit or restrict the building, erection, alteration or extension of structures that are wholly or partially seaward of that CSBL'.²⁸³

The NEMICMA provides that an MEC must in regulations published in the Government Gazette establish or change a CSBL.²⁸⁴ To make regulations and to publish notices in the Government Gazette are inherent powers of the MEC that may not be delegated as provided by the NEMA.²⁸⁵ Before establishing or changing CSBLs, the MEC must consult 'with any local municipality within whose area of jurisdiction the CSBL is, or will be, situated';²⁸⁶ and inform interested and affected parties.²⁸⁷ Furthermore, the NEMICMA require local municipalities to delineate established CSBLs on maps forming part of its zoning scheme.²⁸⁸ Thus, it is crucial for the province to establish the line, and especially for the City to act promptly with the inclusion of these in their zoning schemes. What is important to note is that

²⁸⁰ Section 25(1)(a)(i).

²⁸¹ Section 25(1)(a)(ii).

²⁸² Section 25(1)(a)(iii).

²⁸³ Section 25(1)(b).

²⁸⁴ Section 25(1)(a).

²⁸⁵ See Chapter 2, para 2.4.4.4 above for full discussion.

²⁸⁶ Section 25(2)(a).

²⁸⁷ Section 25(2)(b).

²⁸⁸ Section 25(3).

CSBLs are becoming an increasingly important legal tool for 'preventing future physical development in areas of coastal erosion'.²⁸⁹

In light of the nature of the tool, the previous chapter has briefly introduced the potential danger of not establishing the CSBL, or as termed by the NEMA, the development setback line.²⁹⁰ The development setback is defined by the NEMA regulations as: '...a setback line as defined or adopted by the competent authority and where none has been defined or adopted it will be assumed that no setback line applies'.²⁹¹ The risk, in theory, of not establishing this line is found in the latter part of the definition for a development setback line: 'that no setback applies'. This indicates that activities that should have been subject to basic assessment or EIA and scoping will not be dealt with accordingly; the City will ultimately bear the brunt of handling various problems including those associated with the purpose for which the line is established as stipulated in section 25 (NEMICMA). Ultimately, this will have a domino effect: if the CSBL is not established, then it may have negative effects on the CPZ, which in turn may have negative effects on the CPP, humans and property, and will exacerbate the impact of climate change on these.

²⁸⁹ Glavovic BC and Cullinan C 'The coast' in Strydom HA and King ND (eds) *Environmental Management in South Africa* 2ed (2009) 901.

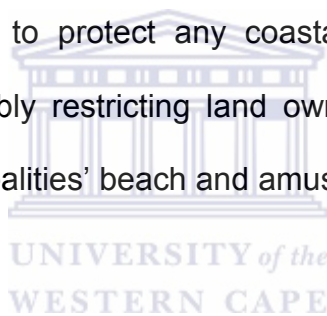
²⁹⁰ See Chapter 2, para 2.4.4.1 above for full discussion.

²⁹¹ GNR 544 and 545, Section 2.

3.4 The NEMICMA Chapter 3: Boundaries of coastal areas

The White Paper SCD stresses that boundaries are necessary for effective coastal management at a local level, amongst other, and defining the specific coastal boundaries on an “issue-by-issue” basis.²⁹²

Determining and adjusting coastal boundaries of coastal access land is a municipal function,²⁹³ and the NEMICMA further prescribes that a municipality must take into account the kind of public access required;²⁹⁴ potential adverse effects of public access;²⁹⁵ ‘the need for parking, recreational and ablution facilities’;²⁹⁶ ‘existing rights of way, public servitudes or customary means of gaining access to the seashore and coastal waters’;²⁹⁷ ‘the need to protect any coastal protected area’;²⁹⁸ and the importance of not unreasonably restricting land owners’ rights.²⁹⁹ Some of these factors give rise to the municipalities’ beach and amusement function, in terms of the Constitution.³⁰⁰



The NEMICMA grants the Minister, an MEC or municipality the power to authorise anyone to enter, without a warrant, the land or premises of an owner or occupier

²⁹² 3.1 Defining the coast.

²⁹³ NEMICMA, section 29(1)(d).

²⁹⁴ Section 29(a)-

(i) ‘pedestrians;
(ii) vehicles;
(iii) vessels; or
(iv) any other access.’

²⁹⁵ Section 29(b)-

(i) ‘associated infrastructure;
(ii) vehicles, vessels or other conveyances; and
(iii) increased numbers of people.’

²⁹⁶ Section 29(c).

²⁹⁷ Section 29(d).

²⁹⁸ Section 29(e).

²⁹⁹ Section 29(f).

³⁰⁰ Schedule 5B.

(excluding residences), after giving the owner reasonable notice,³⁰¹ to conduct any survey,³⁰² gather data,³⁰³ undertake an environmental assessment,³⁰⁴ erect a beacon,³⁰⁵ and any other steps.³⁰⁶ The person so authorised is required to provide their identity and authorisation on demand to enter such land or premises.³⁰⁷ In the case where the owner of the land or premises refused entrance or cannot be found, then the municipality *et al* may make an application to the High Court for an appropriate order.³⁰⁸ If any damage occurs to the property as a result of such entrance, the Minister, MEC or municipality must compensate the owner of the land or premises.³⁰⁹

Discussed above was municipalities' obligation to delineate CSBLs in their zoning schemes.³¹⁰ As with CSBLs, the City is required to delineate coastal boundaries (the adjustment and determination thereof) within their zoning schemes to afford to the public the 'position of the coastal boundary in relation to existing cadastral boundaries'.³¹¹

The municipality is responsible for notifying the relevant Registrar of Deeds when determination or adjustment to a coastal boundary is made,³¹² and makes provision of the content for this notification.³¹³

³⁰¹ Section 30(1).

³⁰² Section 30(1)(a).

³⁰³ Section 30(1)(b).

³⁰⁴ Section 30(1)(c).

³⁰⁵ Section 30(1)(d).

³⁰⁶ Section 30(1)(e).

³⁰⁷ Section 30(2).

³⁰⁸ Section 30(3).

³⁰⁹ Section 30(4).

³¹⁰ See Chapter 3, para 3.4 above for full discussion.

³¹¹ Section 31.

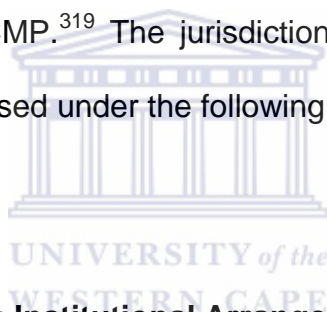
³¹² Section 32(1).

³¹³ Section 32(2).

3.5 The NEMICMA Chapter 4: Estuaries

The White Paper SCD stresses the need to protect coastal ecosystems, like estuaries.³¹⁴ In light of the effects of climate change, appropriate preventative and adaptive measures must be adopted in all coastal planning and management decisions and actions to protect estuaries.³¹⁵

The NEMICMA makes provision for the management of the Republic's estuaries in a coordinated and efficient manner to accord to the national estuarine management protocol (NEMP).³¹⁶ It similarly sets out the purpose³¹⁷ and requirements of the NEMP,³¹⁸ and submits that an estuarine management plan (EMPs) may form an integral part of a municipal CMP.³¹⁹ The jurisdictional and consequent mandatory aspects of these will be discussed under the following heading.³²⁰



3.6 The NEMICMA Chapter 5: Institutional Arrangement

This chapter sets guidelines for the establishment and functions of national,³²¹ provincial,³²² and municipal coastal committees.³²³ For the purpose of this study, the primary focus is municipal coastal committees.

³¹⁴ Objective C 5.2. Also section 2(4)(r) of the NEMA.

³¹⁵ Objective C 5.2.

³¹⁶ Section 33(1).

³¹⁷ Section 33(3).

³¹⁸ Section 34(1).

³¹⁹ Section 34(2).

³²⁰ See Chapter 3, para 3.6.3 below for full discussion.

³²¹ Section 35.

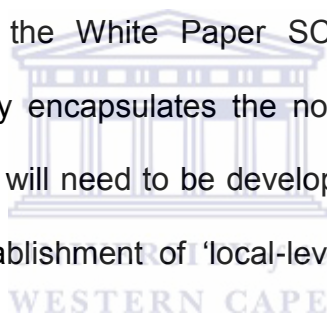
³²² Section 39.

³²³ Section 42.

3.6.1 Municipal Coastal Committee

The Constitution necessitates municipal Councils to elect committees subject to national legislation.³²⁴ In light of this, NEMICMA endorses this by allowing municipalities to establish coastal committees and to determine its powers.³²⁵ Additionally, the NEMICMA grants municipalities, having jurisdiction over any part of the CZ, the power to establish coastal committees and subcommittees of municipal coastal committees.³²⁶

The NEMICMA sets out the composition³²⁷ and the function³²⁸ of the coastal committee. Part of the municipal coastal committee's functions is the establishment of forums, which underpins the White Paper SCD's intention of building co-responsibility. Co-responsibility encapsulates the notion that 'responsibility for the consequences of their actions will need to be developed in the public'.³²⁹ The White Paper SCD includes the establishment of 'local-level coastal forums in as many



³²⁴ Section 160(1)(c).

³²⁵ Section 42(1).

³²⁶ Section 42(2).

³²⁷ Section 42(3)-

- (a) 'person with expertise in fields relevant to coastal management; and
- (b) representatives of the management authorities of coastal protected areas or special management areas within the municipality;
- (c) representatives of communities or organisations with a particular interest in contributing to effective coastal management, such as port authorities, organs of state, persons whose livelihoods or business rely on the use of coastal resources, environmental interest groups and research organisations.'

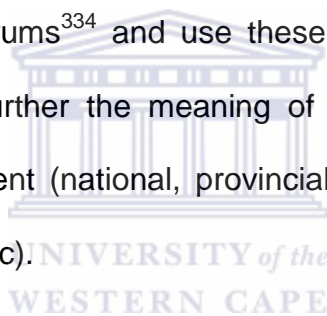
³²⁸ Section 42(4)-

- (a) 'promote ICM in the municipality and the co-ordinated and effective implementation of the NEMICMA and the municipal CMP;
- (b) advise the municipal manager, the municipal council and the provincial coastal committee on matters concerning coastal management within the area of jurisdiction of the municipal committee;
- (c) advise the municipality on developing, finalising, reviewing and amending the municipal CMP;
- (d) promote a co-ordinated, inclusive and integrated approach to coastal management within the municipality by providing a forum for, and promoting, dialogue, co-operation and coordination between the key organs of state and other persons involved in coastal management within its area of jurisdiction;
- (e) promote the integration of coastal management concerns and objectives into the municipality's IDP and SDF and into municipal plans, programmes and policies that affect the coastal environment; and
- (f) perform and coastal governance function delegated to it.'

³²⁹ White Paper SCD, Objective A 1.3.

coastal areas... in order to promote dialogue between coastal role-players at local level- including government, business and civil society'.³³⁰

The partaking of forums in the process of law-making plays a pivotal role: 'highly public processes'.³³¹ Additionally, the White Paper SCD stresses that local coastal forums may in the long-term advise municipal authorities in dealing with practical and detailed coastal management, and developing a shared responsibility for management and decision-making.³³² The White Paper SCD further avers that coastal forums play a pivotal role in implementing local coastal management efforts,³³³ also, that local government should be cognisant of existing local environmentally orientated forums³³⁴ and use these structures to address coastal issues.³³⁵ Coastal forums further the meaning of ICM³³⁶ in that it includes the different spheres of government (national, provincial and local), coastal scientists, and sectors (gas, oil, fishing etc).



In light of the nature and obligations of establishing coastal forums in terms of the White Paper SCD and the NEMICMA, it is imperative that the City lobby such initiatives. This could be achieved by initiating a coastal forum specific policy which sets out guidelines to the different sectors of government, civil society *et al* in coastal management. By achievement it would give rise to the White Paper LG's notion that forums 'tend to work better when it comes to formulating...issue-specific policies,

³³⁰ 9.2.2 Government Roles and Functions.

³³¹ *Minister of Health and Another v New Clicks South Africa (Pty) LTD and Others* 2006(2) SA 311 (CC).Par [171] of the judgement.

³³² 9.2.3 Non-government Roles and Functions.

³³³ 9.2.3 Non-government Roles and Functions.

³³⁴ E.g. 'Fisheries forums, catchment management forums, local environmental advisory forums and subcommittees of development forums...'

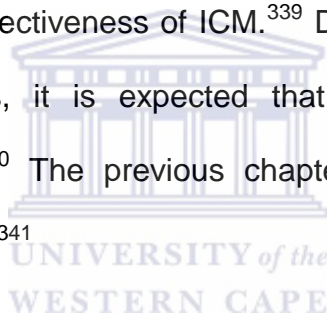
³³⁵ Chapter 9 Institutional and Legal Development, 9.2.3 Non-government Roles and Functions.

³³⁶ See Chapter 1, para 1.6 above for full discussion.

rather than for formulating multiple policies that affect a multiplicity of interests'.³³⁷ Thus, an ICM forum specific policy, as expressed above, would serve as a measure in promoting ICM. Thus, it will be imperative that the By-law provides for such dialogue, and set out the powers of the municipal coastal committee to perform such power and functions (establishing coastal forums).

3.6.2 Co-management initiatives

The White Paper SCD moreover stresses the need to generate funding for co-management initiatives.³³⁸ This is achieved by way of demonstration projects illustrating successfully the effectiveness of ICM.³³⁹ Due to the timeframe set within which to reach these goals, it is expected that the City has initiated such programmes- which it has.³⁴⁰ The previous chapter outlines the importance of EMCAs in terms of the NEMA.³⁴¹



As a point of departure, Du Plessis maintains that local government is the sphere of government which functions closest to the people,³⁴² and the Constitution stresses the need of encouraging the involvement of the community and CBOs in matters of local government.³⁴³ In light of bolstering this relationship, and taking into consideration that one of the functions of the EMCA is to create partnership,

³³⁷ Tools and approaches for developmental local government, 3.3 Working together with local citizens and partners.

³³⁸ Chapter 9 Institutional and Legal Development, 9.2.2 Government Roles and Functions.

³³⁹ Chapter 9 Institutional and Legal Development, 9.2.2 Government Roles and Functions.

³⁴⁰ <http://www.capetown.gov.za/en/EnvironmentalResourceManagement/projects/MarineCoastal/Page/default.aspx>: Blue Flag Beach Programme, Fixed Point Photography of Beaches Project, Sustainable Coastal Management Plans, and Shark Spotting Programme [accessed on 27 April 2012].

³⁴¹ See Chapter 2, para 2.4.4.3 above for full discussion.

³⁴² Du Plessis A *Fulfilment of South Africa's Constitutional Environmental Right in the Local Government Sphere* (2008) 119.

³⁴³ See Chapter 2, para 2.2.2 above for full discussion.

between local communities and authorities (local),³⁴⁴ it will be required that the City promote such initiatives. Furthermore, the EMCA will promote power sharing and the sustainable use of resources (coastal).³⁴⁵ Therefore, if funding is not sufficient to adopt EMCAs or the City's budget does not incorporate this in its planning process, then the City will to some extent be incapable of giving effect to constitutional imperatives, and procuring sustainable use of coastal resources.

3.6.3 Devolution of executive powers and responsibilities

The White Paper SCD requires that coastal municipalities reprioritises its budgets to effect coastal management efforts.³⁴⁶ The devolution of executive powers from provincial government to local include, for instance: estuary management, amongst others.³⁴⁷ Local communities benefit largely from the goods and services that estuaries supply; and municipalities, more than any other sphere of government, has a closer involvement with estuaries.³⁴⁸ Based on this provision, there rests a hypothetical burden of power devolution in respect of estuarine management; however, as discussed below, it is observed that the draft NEMP removes this hypothetical and casts it in stone.

The NEMICMA makes reference to the NEMP for indicating the authorities responsible for developing EMPs.³⁴⁹ The draft NEMP³⁵⁰ states that a municipality is the responsible authority for developing an EMP 'where an estuary falls within the

³⁴⁴ See Chapter 2, para 2.4.4.3 above for full discussion.

³⁴⁵ See Chapter 2, para 2.4.4.3 above for full discussion.

³⁴⁶ Chapter 9 Institutional and Legal Development, 9.2.2 Government Roles and Functions.

³⁴⁷ Chapter 9 Institutional and Legal Development, 9.2.2 Government Roles and Functions.

³⁴⁸ NEMP GNR 336: Responsible Authority for developing estuarine management plans,

³⁴⁹ Section 33(3)(e).

³⁵⁰ GNR 35296.

jurisdiction of a single municipality, the municipality must develop and implement an EMP'.³⁵¹ The NEMA also obliges the State (which includes municipalities) to give special attention in planning procedures to estuaries;³⁵² thus municipal planning procedures must incorporate estuarine management. Municipalities must therefore either establish standalone EMPs or integrate these into its CMP; the latter is preferred to ensure that coastal management is streamlined.

The NEMICMA empowers municipalities to pass by-laws for the implementation of its CMP.³⁵³ Thus, if EMP forms part of a municipal CMP, then it is expected that the By-law first, sought provision to this effect; and secondly, in order to give effect to the intention of the White Paper SCD, adopt adaptive and preventative measures in dealing with the effects of climate change impacting estuaries. The City boasts with opportunity to find plausible solutions on climate change related issues affecting the vulnerability of estuaries, amongst others, through its City of Cape Town- ICLEI (International Council for Local Environmental Initiatives): Local Government for Sustainability Partnership. This argument is substantiated by the fact that the ICLEI established a climate change programme, which speaks to issues on mitigation, adaptation and advocacy on climate change related issues.³⁵⁴

However, it is clear that the more power is being devolved to this sphere, the more responsibilities are acquired and the more capacitation is required to deal with estuarine management. For instance, the City has established the City-ICLEI partnership to adopt adaptive and preventative measures to climate change issues

³⁵¹ Responsible Authority for developing estuarine management plans, Objective 5.1.

³⁵² Section 2(4)(r).

³⁵³ Section 50.

³⁵⁴ www.file:///F:/ICLEI%20%20Local%20Governments%20for%20Sustainability%20%20Mitigation.htm (accessed on 28 May 2012).

affecting estuaries, additional financial burden will be placed on the City to implement recommendations made by the ICLEI. Having said this, it is clear that adequate fiscal mechanisms are set in place to assist with implementing these.

3.6.4 Voluntary coastal officers

The NEMICMA makes provision for the appointment of voluntary coastal officers, which is the duty of an MEC, and sets out the assessment criteria which an MEC must take into consideration.³⁵⁵ The NEMICMA does not make provision for the appointment of coastal officers by municipalities, nor the delegation of such powers by the MEC. The coastal officer assumes the role of an EMI in terms of the NEMA,³⁵⁶ which similarly empowers the MEC to designate these.³⁵⁷ However, the NEMA empowers the MEC to delegate this power of appointment to a municipality, by agreement of the said municipality,³⁵⁸ and appointment of the coastal officer (EMI) is not in the exclusionary list of powers that may not be delegated to the municipality by the MEC.³⁵⁹ Thus, provision in the By-law is subject to the said delegation and subsequent agreement by the City to appoint EMIs.

3.7 The NEMICMA Chapter 6: Coastal Management

This chapter of the NEMICMA is a novel in terms of South African coastal planning system.³⁶⁰ These planning systems covers coastal areas 'that extends seaward

³⁵⁵ Section 43(3).

³⁵⁶ See Chapter 2, para 2.4.4.2 above for full discussion.

³⁵⁷ See Chapter 2, para 2.4.4.2 above for full discussion.

³⁵⁸ See Chapter 2, para 2.4.4.4 above for full discussion.

³⁵⁹ See Chapter 2, para 2.4.4.4 above for full discussion.

³⁶⁰ Glavovic BC and Cullinan C 'The coast' in Strydom HA and King ND (eds) *Environmental Management in South Africa* 2ed (2009) 901-902.

beyond the high-water mark where terrestrial land-use management schemes stop, but that can be integrated into existing municipal land schemes',³⁶¹ for instance.

3.7.1 Coastal management programmes

In light of the above, the NEMICMA requires the preparation and adoption of CMPs at a national,³⁶² provincial,³⁶³ and municipal level.³⁶⁴ For purposes of this study, the primary focus entails ascertaining municipalities' duties in relation to the preparation and adoption of CMPs: a primary tool for coastal management.

Coastal municipalities are required to prepare and adopt CMPs, within four years of the commencement of the NEMICMA, to manage the CZ.³⁶⁵ Therefore municipalities must act soon enough to meet this time frame, also taking into consideration that public participation must be conducted prior to the adoption of the CMP.³⁶⁶ The CMP must be reviewed once every five years,³⁶⁷ and may, when necessary, be amended.³⁶⁸ The NEMICMA further states that a CMP may form an integral part of an IDP and SDF adopted in accordance with the MSA.³⁶⁹ It would however be preferable that the CMP forms an integral part of the IDP, not merely for refinement of the IDP³⁷⁰ but for other matters which will be pointed out later.

³⁶¹ Glavovic BC and Cullinan C 'The coast' in Strydom HA and King ND (eds) *Environmental Management in South Africa* 2ed (2009) 901-902.

³⁶² Section 44.

³⁶³ Section 46.

³⁶⁴ Section 48.

³⁶⁵ Section 48(1)(a).

³⁶⁶ Section 48(2).

³⁶⁷ Section 48(1)(b).

³⁶⁸ Section 48(1)(c).

³⁶⁹ Section 48(4).

³⁷⁰ Glavovic BC and Cullinan C 'The coast' in Strydom HA and King ND (eds) *Environmental Management in South Africa* 2ed (2009) 916.

The NEMICMA sets out content requirement for CMPs before its formal acceptance. A municipal CMP must be a policy directive ‘for the management of the CZ within the jurisdiction of the municipality’;³⁷¹ and must be consistent with national and provincial CMPs³⁷², and the NEMP.³⁷³ The municipal CMP must include: a vision for the management of the CZ within its jurisdiction;³⁷⁴ CMOs within the municipal jurisdiction;³⁷⁵ priorities and strategies;³⁷⁶ and performance indicators measuring the achievement of the CMOs.³⁷⁷

The NEMICMA also prescribes certain criteria that may be included in a municipal CMP, which include: a programme of projected expenditure and investment by the municipality to implement the CMP;³⁷⁸ a ‘description of specific areas within the CZ that require special coastal management, and management strategies for those areas’;³⁷⁹ estuarine management plans;³⁸⁰ and any other matter.³⁸¹ Section 50 of the NEMICMA entitles a municipality to make by-laws for the implementation, administration and enforcement of the policy (CMP). The NEMICMA further requires an IDP to be aligned with,³⁸² contain those provisions of,³⁸³ and give effect to national and provincial CMPs.³⁸⁴

³⁷¹ Section 49(1)(a).

³⁷² Section 49(1)(b)(i).

³⁷³ Section 49(1)(b)(ii).

³⁷⁴ Section 49(2)(a).

³⁷⁵ Section 49(2)(b).

³⁷⁶ Section 49(2)(c).

³⁷⁷ Section 49(2)(d).

³⁷⁸ Section 49(3)(a).

³⁷⁹ Section 49(3)(b).

³⁸⁰ Section 49(3)(c).

³⁸¹ Section 49(3)(d).

³⁸² Section 51(a).

³⁸³ Section 51(b).

³⁸⁴ Section 51(c).

The NEMICMA instructs municipalities to ensure that its IDP and SDF are consistent with other statutory plans adopted by either national or a provincial organ of state.³⁸⁵ For purposes of the NEMICMA, it sets out the encompassment of a statutory plan.³⁸⁶ In the event of conflict between a statutory plan and a CMP, the NEMICMA prescribes that such shall be resolved in terms of Chapter 4 of the NEMA, which provides predominantly for fair decision-making and conflict management through processes of conciliation, arbitration and investigation, among others. The Court in *National Gambling Board v Premier of KwaZulu-Natal*³⁸⁷ confirmed this view.³⁸⁸

The NEMICMA sets out the consultation and public participation process that must be followed before the Minister, MEC, or municipality performs certain powers which requires consultation and public participation *viz* consultation with the relevant sphere of government, reasonably accessible publication or broadcasting of intent, and by notice in the Government Gazette. To mention a few processes requiring municipalities to conduct public participation include: designating and withdrawing coastal access land;³⁸⁹ developing estuarine management plans;³⁹⁰ and when a municipal CMP will form an integral part of an IDP and SDF.³⁹¹ Therefore municipalities should be pro-active in promoting public participation for processes, as the NEMICMA is clear and unambiguous in directing when such process is

³⁸⁵ Section 52(4).

³⁸⁶ Section 52(1)-

- (a) 'an EIP or EMP prepared in terms of the NEMA;
- (b) an IDP adopted by a municipality in terms of the MSA;
- (c) a bioregional plan;
- (d) a provincial or municipal land development plan;
- (e) a provincial strategic policy and plan concerned with promoting sustainable development; and
- (f) the NEMP.'

³⁸⁷ 2002 2 BCLR 156 (CC).

³⁸⁸ Paragraph [36] of the judgement: '[G]overnment departments should not litigate against each other and that they should try to resolve disputes in the correct manner'.

³⁸⁹ Section 19.

³⁹⁰ Section 34.

³⁹¹ Section 48(4).

applicable. The case of *HTF Developers (Pty) LTD v Minister of Environmental Affairs and Tourism and Other*³⁹² confirm this view.³⁹³

The NEMICMA makes provision for the review of provincial³⁹⁴ and municipal CMPs.³⁹⁵ Again, the focus is on municipal CMPs. The NEMICMA contains a so-called “check” by the MEC (after being advised by the Provincial Coastal Committee) to ensure that municipal CMP complies with the content of municipal CMPs in terms of section 49;³⁹⁶ gives effect to national and the provincial CMPs;³⁹⁷ adequately protects CPP;³⁹⁸ and allowing meaningful public participation in its adoption process.³⁹⁹ In the event that a municipal CMP does not meet the requirements outlined above, then the MEC must, ‘by notice to the municipality concerned, require the municipality to amend or replace the municipal CMP within a reasonable period, which must be specified in the notice’.⁴⁰⁰ A municipality that receives the notice stipulated above, must start its CMP *de novo* and must follow the preparation and adoption procedure set out the NEMICMA.⁴⁰¹ The replaced or amended CMP may only be adopted with the consent of the MEC.⁴⁰² Therefore, in order to avoid the possible replacement or amendment or CMPs, municipalities should ensure, in establishing CMPs, it gives effect to the abovementioned process relating to CMP.

³⁹² 2007 (5) SA 438 (SCA).

³⁹³ Paragraph [444F-H] of the judgement: where legislation is clear and unambiguous, in respect of when direction is given to publish notices in a Government Gazette, then the responsible parties should carry out such duty.

³⁹⁴ Section 54.

³⁹⁵ Section 55.

³⁹⁶ Section 55(2)(a).

³⁹⁷ Section 55(2)(b).

³⁹⁸ Section 55(2)(c).

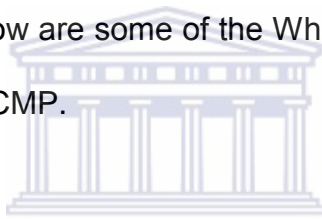
³⁹⁹ Section 55(2)(d).

⁴⁰⁰ Section 55(3).

⁴⁰¹ Section 55(4).

⁴⁰² Section 55(4).

In light of recent concerns with climate change, it is suggested that climate change considerations be incorporated into mainstream coastal management. As discussed above, the CMP must set out CMOs. The definition of a 'CMO' is defined by the NEMICMA as a 'clearly defined objective established by a CMP for a specific area within the CZ which coastal management must be directed at achieving'.⁴⁰³ Climate change related issues (sea level rise and storm surges) have, as evidenced, a negative effect on the functioning of coastal ecosystem functioning and coastal human settlement. Having said this, it is thus essential that this policy directive (CMP) integrate climate change related objectives (relating to the CZ management) that has the effect of being translated into law (by-law) as indicated by section 50 of the NEMICMA. Discussed below are some of the White Paper NCC's objectives that must be incorporated into the CMP.



The White Paper NCC stresses the need to 'conserve, rehabilitate and restore natural systems that improve resilience to climate change impacts or that reduce impacts'.⁴⁰⁴ The abovementioned objective is one stressed by the White Paper SCD.⁴⁰⁵ Dune ecosystems provide a critical service to the city: it acts as a buffer against storm surges,⁴⁰⁶ which within the context of climate change (and the White Paper NCC) is an important service.⁴⁰⁷ Storm surges may cause coastal erosion and

⁴⁰³ Section 1, Definition list.

⁴⁰⁴ Objective 5.5.2.

⁴⁰⁵ Objective D 1.1 and 1.2: 'minimising impacts upon the natural functioning of coastal ecosystems and processes; and giving special attention to maintaining and rehabilitating the diversity, health and productivity of coastal ecosystems, such as estuaries and dune systems, that are vulnerable to human induced disturbance.'

⁴⁰⁶ Glavovic BC and Cullinan C 'The coast' in Strydom HA and King ND (eds) *Environmental Management in South Africa* 2ed (2009) 868.

⁴⁰⁷ Colenbrander C *et al* 'Adaptation Strategies for the City of Cape Town: Finding the Balance Within Social-Ecological Complexity' in Otto-Zimmermann K (ed) *Resilient Cities: Cities and Adaptation to Climate Change* (2011) 313.

accretion, and in terms of the NEMICMA, the City is obliged to include priorities and strategies addressing issues of coastal erosion and accretion within their CMP.⁴⁰⁸

The White Paper NCC stresses the need to 'prioritise climate change research into marine and terrestrial biodiversity and ecosystems services, and institute effective monitoring to enhance the understanding and forecasting of critical future threats.'⁴⁰⁹ Within South Africa, the research of biodiversity and ecosystems, for instance, are functions of the South African National Biodiversity Institute (SANBI).⁴¹⁰ In light of this, the White Paper NCC makes provision for the establishment of an Adaptation Research Flagship Programme that is led by the SANBI.⁴¹¹ In terms of this programme, the SANBI is planning and rolling-out a national and regional research programme to seek opportunity for sectoral adaptation requirements and identifying adaptation strategies.⁴¹² These adaptive requirements include a cost benefit analysis; the methodology employed by the Durban Metro diverts from the norm when directing cost benefit analysis.⁴¹³ Discussed earlier was the *essentialia* of streamlining climate change objectives into municipal coastal management, through the municipal CMP. In light of this requirement, the NEMICMA provides that priorities and strategies must be driven to give effect to CMOs.⁴¹⁴ Thus, the City must incorporate priorities and strategies based on the recommendations of the Adaptation Research Flagship Programme for implementing coastal management efforts. The White Paper NCC raises the concerns that fiscal mechanisms to support

⁴⁰⁸ Section 49(2)(v).

⁴⁰⁹ Goal 5.5.4.

⁴¹⁰ NEMBA, section 11(1)(a)(i).

⁴¹¹ 8.8 The Adaptation Research Flagship Programme.

⁴¹² White Paper NCC, 8.8 The Adaption Research Programme.

⁴¹³ <http://www.cop17-cmp7durban.com/en/south-africa-on-climate-change> (accessed on 28 October 2012) '...Instead of calculating benefit in a monetary value, the benefit of an intervention is calculated in terms of the number of people reached, and the degree to which this intervention affects these people's lives...'

⁴¹⁴ Section 49(2)(c)(i).

municipalities' capital and operating expenditures do not incentivise them to streamline climate change responses into their activities.⁴¹⁵ Thus, National Treasury is required to revise fiscal measures to ensure that, locally, adaptation and mitigation responses can be implemented into activities.⁴¹⁶

The White Paper NCC further requires the development of Disaster Risk Management plans that take into account the potential consequences of climate change along the coast, particularly the increased incidence of extreme weather events.⁴¹⁷ In terms of the Disaster Management Act⁴¹⁸ the City is required to establish a disaster management plan⁴¹⁹ (DMP), and the DMP must be integrated into their IDP.⁴²⁰ In response to this legislative requirement, the City has within its DMP (in relation to sea-level rise associated with climate change), focuses on coastal oil spills; flooding and storms; and sea surges, tsunamis, tidal waves.⁴²¹

The White Paper NCC requires that national, provincial and municipal coastal management plans must incorporate 'relevant climate change information systems and adopt a risk-based approach planning that anticipates the consequences of the continued migration of communities into high risk coastal areas'.⁴²²

In light of the above, the City has a computerised model called the geographical information system (GIS) Inundation Model to predict and manage sea-level rise

⁴¹⁵ White Paper NCC, Roles and Institutional Arrangements 10.2.6.

⁴¹⁶ White Paper NCC, Roles and Institutional Arrangements 10.2.6.

⁴¹⁷ Objective 5.8.4.

⁴¹⁸ 27 of 2002.

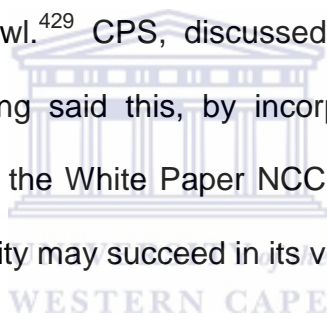
⁴¹⁹ Section 53(1)(a).

⁴²⁰ Section 53(2)(a).

⁴²¹ The City of Cape Town: Five-Year Plan for Cape Town 2007-2012, Integrated Development Plan 2011-2012 Review 115.

⁴²² Objective 5.8.1.

associated with climate change.⁴²³ One of the objectives to becoming more resilient to sea-level rise includes promoting a ‘no regret’ approach to coastal planning.⁴²⁴ The White Paper LG provides that metropolitan governments (like the Cape) should combine its land use planning with other functions⁴²⁵ (which could include coastal management functions) to facilitate the creation of a specific environment.⁴²⁶ In addition to this, the City must include this vision in its IDP, and convert that vision into realism through the collective exercise of land use planning and other powers.⁴²⁷ Ribbon development and urban sprawl may exacerbate impacts of climate change on the CZ, and may cause human harm.⁴²⁸ The White Paper SCD introduces the concept of nodal development through coastal planning to address issues of ribbon development and urban sprawl.⁴²⁹ CPS, discussed in detail below, facilitate the attainment of CMOs.⁴³⁰ Having said this, by incorporating these clearly defined abovementioned objectives of the White Paper NCC into the CMP, and having the CPS incorporating such, the City may succeed in its vision of ‘no regret’.



In the previous chapter, the IDP has been highlighted as a vital tool for municipal coastal management.⁴³¹ Once all these coastal management planning tools have been implemented and incorporated into the IDP, then all subsequent development

⁴²³ EnviroWorks Special Edition: Marine and Coastal Volume 2/10 December 2010 10. ‘This model uses long-term sea-level records, photographic images, and actual measurements of previous storms to predict the run-up of storm surges over the next 25 years.’ The threat of sea-level rise to the coastal regions that are low-lying was an issue raised by the Intergovernmental Panel on Climate Change and the Earth Summit in Rio de Janeiro in 1992.

⁴²⁴ EnviroWorks Special Edition: Marine and Coastal Volume 2/10 December 2010 11.

⁴²⁵ White Paper LG of March 1998, 2.3.2.

⁴²⁶ White Paper LG of March 1998.

⁴²⁷ White Paper LG of 9 March 1998.

⁴²⁸ See Chapter 2, para 2.6 above for full discussion.

⁴²⁹ Objective C 3.2.

⁴³⁰ NEMICMA, section 56(1).

⁴³¹ See Chapter 2, para 2.3.4 above for full discussion.

must conform to the IDP,⁴³² which has the legal effect of defining areas within the CZ that may or may not be used for certain purposes or restricting certain activities.

3.7.2 Coastal planning scheme

Before venturing into the content of CPS, it is important to bear in mind the concept/definition of municipal planning.⁴³³ This concept encompasses the zoning of land, which is speaks to zoning schemes. Zoning schemes are legally enforceable;⁴³⁴ municipalities are mandated to observe and enforce it;⁴³⁵ and 'the scheme clauses which regulate a particular zoning are incorporated in the scheme and become likewise enforceable'.⁴³⁶

In light of the above, one of the principle tools for coastal management is CPS. The NEMICMA obliges municipalities to create CPS (CPS)⁴³⁷ (in consultation with the MEC),⁴³⁸ and sets out the aims of this scheme. A CPS is a scheme that assists with the fulfilment of CMOs by: defining areas within the CZ that may⁴³⁹ or may not⁴⁴⁰ be used mainly or exclusively for certain purposes or activities; and restricting or prohibiting activities that do not comply with the scheme.⁴⁴¹ Section 2(4)(r) of the NEMA emphasises that vulnerable and sensitive ecosystems, like the Cape Metro coastal environment, requires specific management and planning, especially due to

⁴³² See Chapter 2, para 2.3.4 above for full discussion.

⁴³³ See Chapter 2, para 2.3.3 above for full discussion.

⁴³⁴ *eThekwini Municipality v Tsogo Sun KwaZulu-Natal* [unreported] 86/2006 (SCA) (2007) Paragraph [25-26] of the judgment.

⁴³⁵ *eThekwini Municipality v Tsogo Sun KwaZulu-Natal* [unreported] 86/2006 (SCA) (2007) Paragraph [25-26] of the judgment.

⁴³⁶ *eThekwini Municipality v Tsogo Sun KwaZulu-Natal* [unreported] 86/2006 (SCA) (2007) Paragraph [25-26] of the judgment.

⁴³⁷ Section 56(4)(d).

⁴³⁸ Section 56(3)(d).

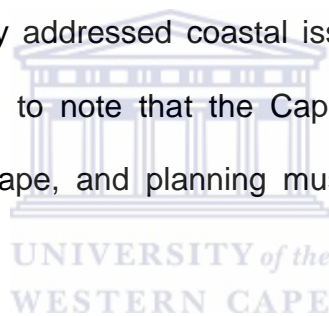
⁴³⁹ Section 56(1)(a)(i).

⁴⁴⁰ Section 56(1)(a)(ii).

⁴⁴¹ Section 56(1)(b).

human usage and development pressures. Within this context, the NEMICMA empowers the City to perform certain functions in terms of the CZ (CPZ, coastal access land and CSBLs) as highlighted above.⁴⁴² Thus, it is prudent that a municipal CMP must incorporate clearly defined CMOs for the CZ to which CPS can give effect, within the jurisdiction and functions of the said municipality.

The NEMICMA also makes provision for the integration of municipal CPS into municipal land use schemes,⁴⁴³ and prohibits the establishment of land use schemes that are inconsistent with CPS.⁴⁴⁴ This is a clear disposition of streamlining coastal management within the municipal jurisdiction, especially where municipal land use schemes have not adequately addressed coastal issues. However, in the spirit of IEM and ICM, it is important to note that the Cape Metropolitan falls within the jurisdiction of the Western Cape, and planning must run concurrently to prevent overlapping.



The principal legal planning mechanism in the Western Cape is the Land Use Planning Ordinances 15 of 1985 (LUPO).⁴⁴⁵ The LUPO mandates the City to establish structure plans and zoning schemes, the latter has been discussed fully.⁴⁴⁶ Structure plans serve as guidelines for 'future spatial development of an area to which it relates';⁴⁴⁷ also, that 'regard shall be had to the preservation of the natural and developed environment' when preparing, amending, withdrawing or reviewing a

⁴⁴² See Chapter 3, para 3.3 above for full discussion.

⁴⁴³ Section 57(1).

⁴⁴⁴ Section 57(2).

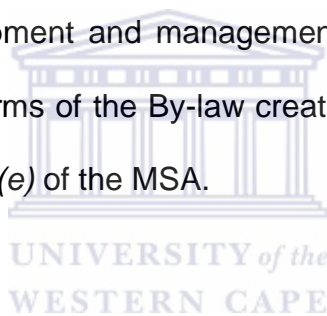
⁴⁴⁵ P E Claassen 'Spatial Planning, with the Western Cape Province as a case study' in Strydom HA and King ND (eds) *Environmental Management in South Africa* 2ed (2009) 921.

⁴⁴⁶ See Chapters 3, para 3.7.2 above for full discussion.

⁴⁴⁷ Section 5(1).

structure plan.⁴⁴⁸ It has been submitted that SDFs (in terms of section 26 (e) of the MSA) replaced the structure plans provided for under the LUPO, this applies to metropolitans (like the Cape) too.⁴⁴⁹ In light of this submission, it is evident that where the LUPO set out requirements for compliance with structure plans, this must be read as including SDFs. Thus, the SDF is a disguise to the pre-constitutional LUPO relating to structure plans.

In light of the above, and in relation to coastal management, the municipality is mandated to ensure that regard shall be had to the coastal environment when preparing, amending, withdrawing or reviewing its SDF, which (the SDF) guides and informs municipal CZ development and management.⁴⁵⁰ Therefore it is imperative that the coastal planning in terms of the By-law creates narrative for planning law in terms of the LUPO/ section 26(e) of the MSA.



3.8 The NEMICMA Chapter 7: Protection of Coastal Environment

Section 28 (duty of care and remediation of environmental damage) of the NEMA provides that 'every person who causes, has caused significant degradation of the environment must take reasonable measures to prevent such pollution or degradation'.⁴⁵¹ In the case of *Louw and Others v Long*⁴⁵² the Court maintained that the duty of care enunciates the existence of a causal nexus between the damage or pollution caused and the actions of the actor in relation to such damage or

⁴⁴⁸ Section 9.

⁴⁴⁹ Claassen P E 'Spatial Planning, with the Western Cape Province as a case study' in Strydom HA and King ND (eds) *Environmental Management in South Africa* 2ed (2009) 930.

⁴⁵⁰ See Chapter 2, para 2.3.4 above.

⁴⁵¹ Section 28(1). Also, in the case of *Rainbow Chicken Farm (Pty) Ltd 1963 (1) SA 201 (N)* the Court held that the duty of care is a retrospective duty, paragraphs [204F-205A] of the judgement.

⁴⁵² 1990 (3) SA 45 (E).

pollution.⁴⁵³ In line with NEMA, the NEMICMA interprets the term “Environment” to include the coastal environment.⁴⁵⁴ Considering this, the NEMA provision therefore reads that ‘significant pollution or degradation of the coastal environment’.⁴⁵⁵

3.8.1 Coastal protection notice and coastal access notice

‘If there is reason to believe that a person is carrying out, or intends to carry out, an activity that may have a negative effect on the coastal environment’, he or she may issue a coastal protection notice to the person responsible for the activity.⁴⁵⁶ The intention of such notice has the effect of prohibiting the activity if it is not already prohibited;⁴⁵⁷ and instructing that person to: (i) take steps to protect the environment;⁴⁵⁸ (ii) in terms of the NEMA, investigate and evaluate the impact of an activity on the environment;⁴⁵⁹ (iii) stop or postpone the activity subject to investigation and evaluation of the report.⁴⁶⁰

Prior to issuing the notice, the Minister must consult with the organ of state that authorised or authorises the activity;⁴⁶¹ and allow the person upon who such notice is served, an opportunity of making presentation.⁴⁶² The content of the notice must include the reasons for the notice;⁴⁶³ the period of carrying out anything required by

⁴⁵³ Paragraph [43 D] of the judgement.

⁴⁵⁴ Section 58(1)(b)(ii).

⁴⁵⁵ Section 58(i)(b)(i).

⁴⁵⁶ Section 59(1).

⁴⁵⁷ Section 59(1)(a).

⁴⁵⁸ Section 59(1)(b)(i).

⁴⁵⁹ Section 59(1)(b)(ii).

⁴⁶⁰ Section 59(1)(b)(iii).

⁴⁶¹ Section 59(2)(a).

⁴⁶² Section 59(2)(b).

⁴⁶³ Section 59(4)(i).

the notice;⁴⁶⁴ and allows the person to appeal against the notice.⁴⁶⁵ In addition to the peremptory content of the notice, the NEMICMA further states additional criteria for the notice set out in section 59(4)(b).

Important to note is that the NEMICMA empowers the Minister to delegate his power to issue coastal protection notices to an MEC, who may similarly subdelegate this power to a municipality in that province.⁴⁶⁶ Therefore, the By-law may provide for this subject to such power being delegated to the City, upon agreement between the MEC and the City.

3.8.2 Repair or removal of structures within CZ

The NEMICMA makes provision for the issuing of repair or removal notices by the Minister, MEC,⁴⁶⁷ or municipality (subject to delegation).⁴⁶⁸ The issuing of these notices are peremptory if that structure's existence, condition, or because of its abandonment is having or is likely to have an adverse effect on the environment⁴⁶⁹; or if its erection, construction or upgrade is in contravention of the NEMICMA or any other law.⁴⁷⁰

Before exercising the abovementioned powers, it is required that the authority (Minister, MEC or municipality) must consult the necessary organ of state that

⁴⁶⁴ Section 59(4)(ii).

⁴⁶⁵ Section 59(4)(iii).

⁴⁶⁶ Section 59(3)(a).

⁴⁶⁷ Section 60(1).

⁴⁶⁸ Section 60(3)(a).

⁴⁶⁹ Section 60(1)(a).

⁴⁷⁰ Section 60(1)(b).

authorised or is capable of authorising the activity;⁴⁷¹ and give the person receiving such notice reasonable opportunity to make presentation.⁴⁷² The NEMICMA further states that the notices must declare the reasons for the notice;⁴⁷³ and allows the person to appeal the notices.⁴⁷⁴ In addition to the peremptory content of the notices, the NEMICMA further states additional criteria for the notices.⁴⁷⁵ In light of the notices mentioned above, it could be viewed as analogous to those provisions relating to compliance notices, and the powers and functions of EMLs in terms of the NEMA.⁴⁷⁶

If the person responsible for the structure or building cannot be found, then the Minister or MEC may publish the repair or removal notice once in the Government Gazette and once a week for two successive weeks in a local newspaper,⁴⁷⁷ in addition to placing a notice on the structure during the period of advertisement.⁴⁷⁸

Failure to comply with these notices (coastal protection, coastal access, repair or removal) require organs of state to instruct appropriate persons to carry out what is prescribed by the notice,⁴⁷⁹ and to recover from the person to whom the notice was addressed, or the person responsible for the erection of the structure.⁴⁸⁰ In the case of *Minister of Water Affairs and Forestry v Stilfontein Gold Mining Co LTD and Others*⁴⁸¹ the Court stressed the importance of complying with environmental

⁴⁷¹ Section 60(2)(a).

⁴⁷² Section 60(2)(b).

⁴⁷³ Section 60(4)(a)(i).

⁴⁷⁴ Section 60(4)(a)(ii).

⁴⁷⁵ Section 60(4)(b).

⁴⁷⁶ See Chapter 2, para 2.4.4.2 above for full discussion.

⁴⁷⁷ Section 60(5)(a).

⁴⁷⁸ Section 60(5)(b).

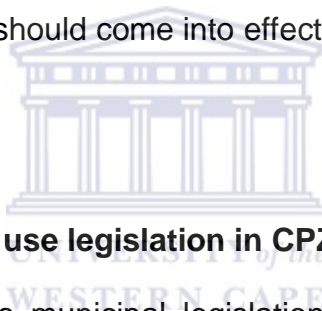
⁴⁷⁹ Section 61(a).

⁴⁸⁰ Section 61(b).

⁴⁸¹ 2006(5) SA 333 (W).

directives⁴⁸² (compliance notices) provided within the NEMA and SEMAs, ‘unless courts are prepared to assist the State by providing suitable mechanisms for the enforcement of statutory obligations’.⁴⁸³

The draft NEMICMAB explicitly deletes the powers of municipality to issue coastal protection and coastal access notices, as well as repair and removal of structures within the CZ notices. On the contrary, the NEMA expressly provides that a staff member of a municipality may, by direction of an MEC, be designated as an EMI who may issue compliance notices for the enforcement of the NEMA and other SEMAs,⁴⁸⁴ thus, the deletion of this section, as proposed by the draft NEMICMAB, is not in line with the NEMA and should come into effect.



3.8.3 Implementation of land use legislation in CPZ

The NEMICMA further obliges municipal legislation regulating planning and land development to further the objects of cooperative governance, and to apply these to land in the CPZ that gives effect to the reason for the establishment of the CPZ,⁴⁸⁵ as outlined above.⁴⁸⁶

Also, it prohibits the municipality from authorising the use of land or activities that may have an adverse effect on the environment, without considering environmental impact assessments.⁴⁸⁷ In light of this, the NEMA Regulation 544 lists the CPZ as a

⁴⁸² Also see *Kebble and Others v Minister of Water Affairs and Forestry* [unreported][2007] JOL 20659 (SCA).

⁴⁸³ Paragraphs [352D-352H] of the judgement.

⁴⁸⁴ See Chapter 2, para 2.4.4.2 above for full discussion.

⁴⁸⁵ Section 62(1).

⁴⁸⁶ See Chapter 3, para 3.3.1 above for full discussion.

⁴⁸⁷ Section 62(2).

geographical area (ecosystem) that requires EIA in terms of certain activities. The definition (composition) of the CPZ in terms of Regulation 544 and the NEMICMA are similar.⁴⁸⁸

The CPZ is an important legal tool for the implementation of the NEMICMA.⁴⁸⁹ Hence, to create the space intended for the purpose of which the CPZ was created, it would be recommended that the City realises the CPZ; review and amend its legislation to further the objectives of section 17 (NEMICMA); and where such area was subject to for example legislation in conflict with the NEMICMA (section 17), bring it in line with the NEMICMA.



3.8.4 Environmental authorisation for coastal activities

Environmental impact assessment, a tool for environmental management in terms of the NEMA, has been discussed in the previous chapter. To reiterate, the NEMICMA refers to the NEMA in relation to when an environmental authorisation is required for coastal activities.⁴⁹⁰ However, the NEMICMA sets out additional key requirements which guide the granting of environmental authorisations: 1. The factors that should be taken into account by the competent authority;⁴⁹¹ 2. Under what circumstances

⁴⁸⁸ Section 2(2) : ‘The following words relevant to coastal activities will have the meaning so assigned to it in the NEMICMA 24 of 2008 “coastal protection zone”:

- a) “coastal public property”;
- b) “high-water mark”;
- c) “littoral active zone”;
- d) “low-water mark”;
- e) “sea”; and
- f) “seashore”.

⁴⁸⁹ See Chapter 3 above for full discussion.

⁴⁹⁰ Section 63(1).

⁴⁹¹ Section 63(1).

the competent authority may not issue an environmental authorisation;⁴⁹² 3. The circumstances by which a competent authority may allow activities or developments in CPP, the coastal protection zone or coastal access land;⁴⁹³ and the circumstances under which the Minister may grant environmental authorisation in the interest of the whole community.⁴⁹⁴ These factors must therefore be incorporated into the By-law.

The draft NEMICAB deletes the latter three requirements, but extends the first requirement to include those omitted, thus retaining the substance.

3.8.5 Temporary occupation of land within CZ

Sections 65 and 66 of the NEMICMA set out the criteria for awarding of leases and concessions on CPP, and the terms of these. The NEMICMA makes provision for land within the CZ to be temporarily occupied for the purposes of 'building, maintaining or repair works to implement a CMP'; or to 'respond to pollution incidents or emergency situations',⁴⁹⁵ and 'may for these purposes take from the land stone, gravel, sand, earth or other material';⁴⁹⁶ 'deposit materials on it';⁴⁹⁷ and 'construct and use temporary works on it, including roads'.⁴⁹⁸ The power to direct such land is with the Minister, who may delegate these powers to the MEC, and the MEC may subdelegate these powers to the municipality.⁴⁹⁹ Thus, the By-law may effect such provision subject to delegation and agreement by the City.⁵⁰⁰

⁴⁹² Section 63(2).

⁴⁹³ Section 63(3)(a) and (b).

⁴⁹⁴ Section 64.

⁴⁹⁵ Section 67(1).

⁴⁹⁶ Section 67(1)(a).

⁴⁹⁷ Section 67(1)(b).

⁴⁹⁸ Section 67(1)(c).

⁴⁹⁹ Section 67(2)(a).

⁵⁰⁰ See Chapter 2, para 2.4.4.4 above for full discussion.

The NEMICMA makes provision for the amendment, revocation, suspension, or cancellation of authorisations.⁵⁰¹

3.9 The NEMICMA Chapter 8: Marine and coastal pollution control

This chapter of the NEMICMA relate predominantly to powers and functions of the Minister in respect of authorisations for discharging effluent into coastal water;⁵⁰² and the incineration and dumping at the sea.⁵⁰³

3.10 The NEMICMA Chapter 9: Appeals

The NEMICMA makes provision for the issuing of a range of notices upon certain persons in certain circumstances; these notices have legal force in terms of the NEMICMA. Similarly, it allows, in certain circumstances, that such persons may make certain representation to these notices, in other words- appeal.

The NEMICMA provides that persons to whom a coastal protection notice or coastal access notice or a repair and removal notice has been issued by,⁵⁰⁴ amongst other, a municipality, then such person may lodge a written appeal to the MEC of the province.⁵⁰⁵ The NEMICMA further maintains that if a person is dissatisfied with a decision taken to issue, refuse, amend, suspend, or cancel an authorisation, such a

⁵⁰¹ Section 68.

⁵⁰² Section 69.

⁵⁰³ Section 70.

⁵⁰⁴ Section 74(1).

⁵⁰⁵ Section 74(1)(b). Also see NEMA section 43(2).

person may lodge a written appeal⁵⁰⁶ to the MEC of that province, if that decision was taken by a municipality or a person exercising powers delegated to him by the MEC in terms of the NEMICMA.⁵⁰⁷ What this ultimately means is that aggrieved persons have an option in respect of decisions taken (authorisations, coastal and related notices) by a municipality: they can either appeal to the respective Department of the City or the MEC.

Furthermore, the NEMICMA also sets out the procedure for the submission of an appeal.⁵⁰⁸ Also, appeals do not have the legal force of suspending an authorisation or an exemption, conditions of an authorisation, or notices in terms of Chapter 7, unless so directed by the Minister or MEC.⁵⁰⁹

The NEMICMA makes provision for the appointment of an advisory appeal panel to advise the Minister or MEC;⁵¹⁰ interims orders, which the Minister or MEC may make;⁵¹¹ proceedings of the advisory appeal panel;⁵¹² and the powers of the Minister or MEC to either uphold or dismiss an appeal.⁵¹³

Municipalities are vested with powers to issue certain compliance notices in terms of the NEMICMA, as discussed above. Therefore, to give effect to the right of affected

⁵⁰⁶ Section 74(2).

⁵⁰⁷ Section 74(2)(iii).

⁵⁰⁸ Section 74(3)-

(a) '...lodge within 30 days of the appellant being given the notice...;

(b) state clearly the grounds of the appeal;

(c)..the facts on which the appellant relies and include any relevant information that was not placed before the decision-maker and which the appellant believes should be considered on appeal; and

(d) comply with any other requirements that may be prescribed.'

⁵⁰⁹ Section 74(4).

⁵¹⁰ Section 75.

⁵¹¹ Section 76.

⁵¹² Section 77.

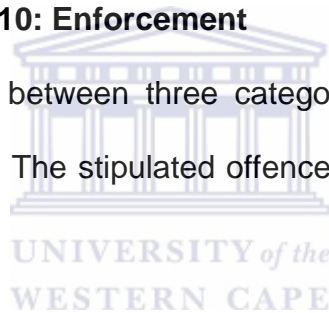
⁵¹³ Section 78.

persons to appeal in terms of the NEMICMA and NEMA,⁵¹⁴ it is pivotal that the By-law therefore make provision for appeals, if direction was given by the MEC's and subsequent agreement by the City.

In light of the draft NEMICAB's intention of withdrawing the powers of municipalities to issues compliance (coastal-related) notices, it has not included a provision excluding aggrieved parties from appealing to the MEC with regard to compliance notices issued by the municipality (EMI).

3.11 The NEMICMA Chapter 10: Enforcement

The NEMICMA distinguishes between three categories of offences: offence 1,⁵¹⁵ offence 2,⁵¹⁶ and offence 3.⁵¹⁷ The stipulated offences are not a closed list, and the



⁵¹⁴ Section 43.

⁵¹⁵ Section 79(1)-

- (a) 'discharges effluent originating from a source on land into coastal waters...'
- (b) incinerates at sea any waste or material...;
- (c) loads, imports or exports any waste or other material to be dumped or incinerated at sea...;
- (d) dumps any waste at sea...;
- (e) dumps any waste or other material at sea without a dumping permit...;
- (f) alters any authorisation;
- (g) fabricates or forges any document for the purpose of passing it off as an authorisation;
- (h) passes, uses, alters or has in possession any altered or false document purporting to be an authorisation; or
- (i) makes any false statement or report, for the purpose of obtaining or objecting to an authorisation.'

⁵¹⁶ Section 79(2)-

- (a) 'fails to comply with a repair or removal notice;
- (b) hinders or interferes with a duly authorised person exercising a power or performing a duty in terms of the NEMICMA; or
- (c) knowingly falsely represents that he or she is a person authorised to exercise powers in terms of the NEMICMA.'

⁵¹⁷ Section 79(3)-

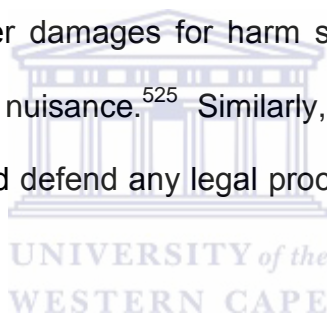
- (a) 'contravenes or fails to comply with a condition subject to which the authorisation has been issued;
- (b) performs an activity for which the authorisation was issued otherwise than in accordance with any conditions subject to which the authorisation was issued; or
- (c) allows any other person to do, or to omit to do, anything which is an offence in of paras (a) or (b).'

Section 79(4)-

- (a) 'fails to comply with a coastal protection notice or access notice issued...;
- (b) contravenes any other provision of this Act which is not referred to above.'

Minister and MEC may make regulations for further enforcement.⁵¹⁸ The draft NEMICMAB replaces the word “guilty” (in terms of the NEMICMA) to “convicted”, which the latter provides that a court of law has decided that someone is guilty of a crime.⁵¹⁹

The NEMICMA makes provision for penalties in relation to each offence; penalty in relation to: offence 1,⁵²⁰ 2,⁵²¹ and 3.⁵²² Persons charged with the commission of an offence on, in or above coastal waters, the court whose area of jurisdiction adjoins the coastal waters has jurisdiction to prosecute the offender.⁵²³ The NEMICMA further enables municipalities to institute legal proceedings or take measures to prevent damage or to ‘recover damages for harm suffered to the CPP or coastal environment’;⁵²⁴ or to abate nuisance.⁵²⁵ Similarly, the municipality may accept ‘service of legal processes and defend any legal proceedings instituted in relation to CPP’.⁵²⁶



The offence-penalty approach denotes the meaning of “command-and-control”. To facilitate the implementation of the White Paper SCD and for promoting successful ICM, it is important to consider “command-and-control” deviating mechanisms.⁵²⁷ It is

⁵¹⁸ Section 79(4)(b) and sections 83(1) and 84(1).

⁵¹⁹ http://dictionary.cambridge.org/dictionary/british/convict_1?q=convicted (accessed on the 12 November 2012)

⁵²⁰ Section 80(1)-

Up to R5 000 000 fine; or up to 10 years imprisonment; or both.

⁵²¹ Section 80(2)-

Up to R500 000 fine; or up to 5 years imprisonment; or both.

⁵²² Section 80(3)-

Up to R50 000 fine; or up to 6 months community service; or both.

⁵²³ Section 81.

⁵²⁴ Section 82(a)(i).

⁵²⁵ Section 82(a)(ii).

⁵²⁶ Section 82(b).

⁵²⁷ See Chapter 1, para 1.6 above for full discussion.

submitted that examples of these enforcement mechanisms include: co-regulatory instruments⁵²⁸ and self-regulatory instruments.⁵²⁹

The co-regulatory approach encompasses a co-operative relationship, usually an agreement, 'between the regulator and regulated'.⁵³⁰ An example of this form of enforcement has been highlighted in this study i.e. EMCAs, as set out by the NEMA and White Paper SCD,⁵³¹ as well as the SDA, as provided in the MSA.⁵³²

Self-regulatory instruments entail 'business[es] imposing its own regulatory structure without any direct compulsion from the relevant regulator in that community'.⁵³³ At a municipal level, the coastal forums (responsible for promoting co-responsibility) may serve as a vehicle to boost self-regulation. One of the functions of the forums is to promote dialogue between different coastal role-players. This dialogue may include requiring assistance from the private sector in the form of realising its social and environmental responsibilities and contributing to the green economy.⁵³⁴ Durban Metropolitan will be an example of a lesson to be learnt, later in the study.⁵³⁵

⁵²⁸ Kidd M *Environmental Law* 2ed (2011) 281.

⁵²⁹ Kidd M *Environmental Law* 2ed (2011) 282.

⁵³⁰ Kidd M *Environmental Law* 2ed (2011) 282.

⁵³¹ See Chapter 2, para 2.4.4.3 above for full discussion and Kidd M *Environmental Law* 2ed (2011) 282.

⁵³² See Chapter 2, para 2.4.4.3 above for full discussion.

⁵³³ Kidd M *Environmental Law* 2ed (2011) 282.

⁵³⁴ The definition for green economy includes: 'system of economic activities related to the production, distribution and consumption of goods and services that result in improved human well-being over the long term, while not exposing future generations to significant environmental risks or ecological scarcities.' <http://www.environment.gov.za> (accessed on 30 October 2012).

⁵³⁵ See Chapter 5, para 4.9.2 below for full discussion.

3.12 The NEMICMA Chapter 11: General Powers and Duties

The section commences with the powers of the Minister and MEC to make regulations and the procedure for making such regulations.⁵³⁶

The NEMICA allows the MEC to issue directives to a municipality if he/she 'is satisfied that the municipality is not taking adequate measures to'-

- '(a) prevent or remedy adverse effects on the coastal environment;
- (b) adopt or implement a municipal CMP; or
- (c) give effect to the provincial CMP.'⁵³⁷

The MEC must give the municipality reasonable opportunity to make representation before issuing the directive.⁵³⁸ Non-compliance with such directive by the municipality, grants the MEC with the powers to proceed with measures to prevent or remedy adverse effects on the environment (coastal), to implement or monitor compliance with provincial norms and standards, or 'to give effect to the provincial CMP'.⁵³⁹

The NEMICMA makes provision for the delegation of certain powers by the Minister and MEC.⁵⁴⁰ In relation to an MEC delegating his/her powers, the NEMICMA makes provision that delegation may be made to any organ of state (which include municipalities),⁵⁴¹ and sets out the procedure for such delegation.⁵⁴² Thus additional

⁵³⁶ Sections 83 and 84.

⁵³⁷ Section 88(1).

⁵³⁸ Section 88(2).

⁵³⁹ Section 88(3).

⁵⁴⁰ Sections 89 and 91.

⁵⁴¹ Section 91(1)(b).

⁵⁴² Section 91(2).

coastal management powers may be devolved to municipalities as indicated throughout this chapter of the study.

The NEMICMA further provides that a liaison function must be created between the MEC and municipalities, which aims to ensure that coastal actions taken by these two spheres are co-ordinated;⁵⁴³ and to ensure the monitoring of compliance by such municipalities.⁵⁴⁴ This liaising function enshrines the constitutional principle of cooperative governance, ultimately, in the context of this study, the ICM's element of intergovernmental integration. Based on the disposition, it is vital that policy considerations give effect to these.



3.13 The NEMICMA Chapter 12: Miscellaneous matters

3.13.1 Unlawful structures on CPP

Provision is made for the prohibition of unlawful construction of buildings or other structures on CPP.⁵⁴⁵ Section 96(1) provides that persons who have unlawfully constructed buildings or structures prior to the enactment of the NEMICMA, or subsequent to the enactment of the NEMICMA occupied a building or structure unlawfully built on CPP must, within 12 month of the origination of the NEMICMA, either apply for a coastal lease;⁵⁴⁶ or demolish the building or structure and restore *status ante quo*.⁵⁴⁷ The NEMICMA states that written repair and removal notices may be served upon persons failing to take the necessary steps to demolish the building

⁵⁴³ Section 94(a).

⁵⁴⁴ Section 94(b).

⁵⁴⁵ Section 96.

⁵⁴⁶ Section 96(1)(a).

⁵⁴⁷ Section 96(1)(b).

or structure and to restore the location to its original condition.⁵⁴⁸ Here the NEMICMA expresses that these notices are issued by the Minister or MEC,⁵⁴⁹ however, as discussed above,⁵⁵⁰ the municipality may, upon delegation, issue such notices. Thus, there is an omission in this regard. The NEMICMA further projects that this section does not affect the rights such persons may have in terms of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act,⁵⁵¹ for instance.⁵⁵²

3.13.2 Existing lawful activities in CZ

Persons who, after the NEMICMA commenced, for a period of 24 months lawfully engaged in- carrying out activities requiring environmental authorisation;⁵⁵³ abstracting water from coastal water⁵⁵⁴ are deemed to be the holder of the environmental authorisation that authorises that activity.

The NEMICMA also provides that person who within 24 months of the commencement of the NEMICMA makes an application for an environmental authorisation authorising the continuation of the said activity, shall remain to be regarded as the holder of such authorisation subsequent to the competent authority deciding on whether to grant or refuse the application.⁵⁵⁵

⁵⁴⁸ Section 96(3).

⁵⁴⁹ Section 96(3).

⁵⁵⁰ See Chapter 3 above, paras 3.8.1 and 3.8.2 for full discussion.

⁵⁵¹ 19 of 1998.

⁵⁵² Section 96(4)(c).

⁵⁵³ Section 97(1)(a).

⁵⁵⁴ Section 97(1)(b).

⁵⁵⁵ Section 97(2).

3.14 Conclusion

The NEMICMA, as outlined above, sets out numerous duties and functions for coastal municipalities to ensure that the policies and the main statute regulating the coastal environment is implemented at a local level for optimum protection of the coastal resources. In light of this, the following chapter focuses on assessing the By-law to these provisions.



CHAPTER 4

AN ASSESSMENT OF THE DRAFT ICM BY-LAW

4.1 Introduction

In previous chapters of this study the powers and functions of local government in relation to ICM have been highlighted. Following in this chapter is the assessment of the draft City of Cape Town Integrated Coastal Management By-law⁵⁵⁶ (hereafter the By-law) in terms of its constitutionality; the possible lack of implementing national laws and policy relating to integrated coastal management; and recommending possible improvements. As a point of departure, the previous chapters have referred to the role of the City (Cape Metropolitan) in its entirety to manage the CZ. However, this chapter (evidently, the By-law) is more specific in respect of applying the various roles of the departments (Environmental Resource Management, and Planning and Development) of the City and the municipal Council, in relation to coastal management.

4.1 Chapter 1 of the draft ICM by-law: Interpretation, objects and application

The By-law introduces an extensive list of definitions; however to the exclusion of the term environment. The significance of the definition stems from the NEMA's duty of care principle, which has been refined, in terms of the NEMICMA, to include the coastal environment.⁵⁵⁷ Thus, the By-law's definition list should include the term: 'Environment'- as defined in section 58(1)(b)(i) of the NEMICMA.

⁵⁵⁶ 31 March 2011.

⁵⁵⁷ See Chapter 3, para 3.8 above for full discussion.

The By-law sets out its objects⁵⁵⁸ and the area within which it would apply.⁵⁵⁹ The objects of the By-law are: to promote integrated management of the municipal ICM;⁵⁶⁰ to halt and reverse adverse effects on the municipal CPZ to improve the social, ecological, economic and spiritual health and well-being within the City;⁵⁶¹ preventing development seaward from CSBL that: enhances the coastal environment⁵⁶² and contributes to the attainment of CMOs;⁵⁶³ to forbid, limit and regulate activities in the municipal CPZ;⁵⁶⁴ protecting and enhancing the coastal environment in the interest of the whole community;⁵⁶⁵ securing access to CPP;⁵⁶⁶ softening the impact of climate change (sea level rise and storm surges) on coastal human settlement, economic activities and development;⁵⁶⁷ protecting coastal ecosystems;⁵⁶⁸ and maintaining coastal identity, scenic landscapes and aesthetic.⁵⁶⁹

These objectives above highlight pertinent municipal coastal management issues raised in the Chapter 3 of this study, for example: implementing land use legislation in CPZ;⁵⁷⁰ establishing CMOs;⁵⁷¹ demarcating CSBLs;⁵⁷² the designation of coastal access land;⁵⁷³ the regulation of activities within the CZ;⁵⁷⁴ establishing a DMP;⁵⁷⁵ protecting ecosystems that builds resilience against climate change related

⁵⁵⁸ Section 2.

⁵⁵⁹ Section 3.

⁵⁶⁰ Section 2(a).

⁵⁶¹ Section 2(b).

⁵⁶² Section 2(c)(i).

⁵⁶³ Section 2(c)(ii).

⁵⁶⁴ Section 2(d).

⁵⁶⁵ Section 2(e).

⁵⁶⁶ Section 2(f).

⁵⁶⁷ Section 2(g).

⁵⁶⁸ Section 2(h).

⁵⁶⁹ Section 2(i).

⁵⁷⁰ See Chapter 3, para 3.8.3 above for full discussion.

⁵⁷¹ See Chapter 3, paras 3.7.1 and 3.7.2 above for full discussion.

⁵⁷² See Chapter 3, para 3.3.3 above for full discussion.

⁵⁷³ See Chapter 3, para 3.3.2 above for full discussion.

⁵⁷⁴ See Chapter 2, paras 2.4.4.1 and 2.6 above for full discussion.

⁵⁷⁵ See Chapter 3, para 3.7.1 above for full discussion.

impacts;⁵⁷⁶ protecting and retaining the sense of place and coastal identity;⁵⁷⁷ and protecting the interest of the whole community.⁵⁷⁸

The By-law continues with a conflict of laws clause. In light of this, the NEMICMA prevails in cases where the By-law conflicts with it;⁵⁷⁹ the By-law prevails where there is conflict between municipal legislation regulating the use of land within the municipal CZ and zoning schemes;⁵⁸⁰ the By-law will prevail to the extent where it concerns municipal planning issues or constitutional municipal competence where there is conflict between it and provincial legislation regulating the use of land or activities within the municipal CZ.⁵⁸¹ In light of the conflict clause of the By-law, Chapter 3 of this study highlights that, in terms of the NEMICMA, regulations pertaining to coastal management should give effect to the NEMICMA;⁵⁸² that municipal legislation regulating land use in the CPZ, give effect to these;⁵⁸³ and that municipal planning in terms of the Constitution and case law must be exercised by municipalities.⁵⁸⁴ Thus, the conflict clause in terms of the By-law is in line with that provided for in the NEMICMA.

⁵⁷⁶ See Chapter 3, 3.7.1 above for full discussion.

⁵⁷⁷ See Chapter 2, para 2.2.1 above for full discussion.

⁵⁷⁸ See Chapter 2, paras 2.2.2,2.3.1,2.3.2,2.2.3.3, and 2.4.4.3 above for full discussion.

⁵⁷⁹ Section 4(1)(a).

⁵⁸⁰ Section 4(1)(b).

⁵⁸¹ Section 4(1)(c).

⁵⁸² See Chapter 3, para 3.7 above for full discussion.

⁵⁸³ See Chapter 3, para 3.8.3 above for full discussion.

⁵⁸⁴ See Chapter 2, para 2.3.3 above for full discussion.

4.2 Chapter 2 of the draft ICM by-law: Institutional arrangements

This chapter of the By-law stresses the responsibilities of the Department (Environmental Resource Management) in terms of ICM. It states in peremptory terms that the Department must determine, and review the coastal edge line.⁵⁸⁵ This provision is flawed in terms of the NEMICMA, as CSBLs are established by an MEC by way of regulations published in the Gazette, and amended by an MEC in concurrence with the municipality in whose area of jurisdiction it falls.⁵⁸⁶ It is important to note that making regulations and publishing these in the Gazette is an exclusive power of the MEC: one that cannot be delegated.⁵⁸⁷ To clarify any ambiguity, it is important to establish what the terms CSBL and coastal edge line represent. Coastal edge line: 'is demarcated around the coast primarily to protect coastal resources and avoid hazards and financial risks pertaining to areas at the risk of flooding'.⁵⁸⁸ CSBL: serves to protect the coastal protection zone, public safety, public and private property.⁵⁸⁹ Having said this, it may be concluded that these two terms are identical; however, due to the plethora of definitions the NEMICMA provides, and to prevent future uncertainty, it is important that the By-law uses the term 'CSBL' instead. In terms of the NEMICMA, the City is obliged to merely demarcate these lines (and where these are adjusted) on maps forming part of its zoning scheme, and become an integral part of the IDP.⁵⁹⁰ This is rightly stipulated in terms of section 5(b) of the By-law.

⁵⁸⁵ Section 5(a).

⁵⁸⁶ Section 25(2)(a).

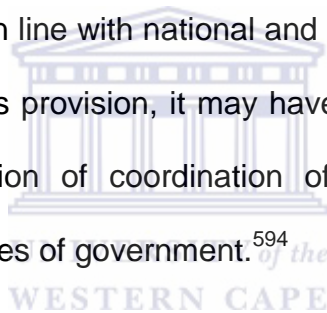
⁵⁸⁷ See Chapter 2, para 2.4.4.4 above for full discussion.

⁵⁸⁸ Draft Cape Town Development Edges Policy: Urban and Coastal Edge 2009 2.

⁵⁸⁹ See Chapter 3, para 3.3.3 above for full discussion.

⁵⁹⁰ See Chapter 3, para 3.3.3 above for full discussion.

Section 5(c) expresses the legislative requirement of establishing CPSs in accordance with section 56 of the NEMICMA, and giving effect to CMOs, which is prescribed by the NEMICMA.⁵⁹¹ Section 5(d) provides the responsibility of preparing a CMP, and the review, amendment to the CMP in terms of section 48 of the NEMICMA. It is similarly important that the By-law sought provision that the municipal CMPs must be consistent with national and provincial CMPs,⁵⁹² and the NEMP,⁵⁹³ for instance. Throughout this study the significance of intergovernmental integration (as found in the Constitution, national legislation and policy) relating to ICM has been highlighted. Thus, it is pivotal that the By-law, as part of the institutional obligations of the municipality, includes a provision that municipal management efforts must be in line with national and provincial coastal management efforts. In light of including this provision, it may have the effect of tacitly displaying the peremptory liaison function of coordination of coastal action between the provincial and municipal spheres of government.⁵⁹⁴



Section 5(e) provides that the City must designate coastal access land in terms of section 18(1) of the NEMICMA,⁵⁹⁵ and ensure that coastal access land is developed and managed in accordance with section 20 of the NEMICMA.⁵⁹⁶ What is omitted from this section is the Department's function in determining and adjusting coastal access land (NEMICMA, section 29(1)(d)).⁵⁹⁷ This section of the NEMICMA guides the Department as to the factors it should take into account upon determining or

⁵⁹¹ See Chapter 3, para 3.7.2 above for full discussion.

⁵⁹² Section 49(b)(i).

⁵⁹³ Section 49(b)(ii)

⁵⁹⁴ See Chapter 3, para 3.12 above for full discussion.

⁵⁹⁵ See Chapter 3, para 3.3.2 above for full discussion.

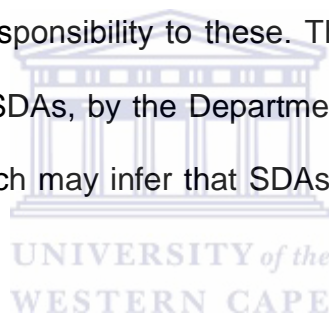
⁵⁹⁶ See Chapter 3, para 3.3.2 above for full discussion.

⁵⁹⁷ See Chapter 3, para 3.4 above for full discussion.

adjusting coastal access land.⁵⁹⁸ Thus, it is important that this provision is given effect to.

The By-law further provides that the Department has decision-making powers in terms of coastal permit;⁵⁹⁹ ensuring that the By-law is enforced;⁶⁰⁰ and monitoring and preparing reports on the state of the environment.⁶⁰¹

Essential to implementing municipal coastal management efforts, is the municipality's mandate of establishing SDAs and EMCAs.⁶⁰² The significance of these has been highlighted.⁶⁰³ That being said, it is important that the By-law elucidate the Department's responsibility to these. Thus, the By-law should include provision for the adoption of SDAs, by the Department. The By-law does later refer to contractors of the City, which may infer that SDAs and EMCAs might be entered into.



⁵⁹⁸ See Chapter 3, para 3.4 above for full discussion.

⁵⁹⁹ Section 5(f).

⁶⁰⁰ Section 5(g).

⁶⁰¹ Section 5(h).

⁶⁰² See Chapter 2, para 2.4.4.3 above for full discussion.

⁶⁰³ See Chapter 2, para 2.4.4.3 above for full discussion.

4.3 The ICM by-law Chapter 3: Coastal edge line and municipal coastal protection zone

4.3.1 Demarcation of coastal edge line and establishment of municipal CPZ

The By-law describes the position of the coastal edge line (CSBL) and the mandatory nature of it featuring on the City's zoning map and SDF.⁶⁰⁴ Hereby, it establishes the municipal CPZ.⁶⁰⁵

Section 6(3) of the By-law sets out the factors to be taken into account when reviewing and deciding whether or not to change the position of the line: the objects of the By-law⁶⁰⁶; coastal management objectives;⁶⁰⁷ coastal management principles;⁶⁰⁸ and studies and information modelling on: coastal processes;⁶⁰⁹ sea-level rise, coastal erosion and other risks;⁶¹⁰ and the health of indigenous species and coastal ecosystems.⁶¹¹ This section is flawed in as far as the NEMICMA does not confer inherent or delegated power to municipalities to change the position of the CSBLs, but confers such power to the MEC, in consultation with the municipality, and subject to public participation.⁶¹² However, it does incorporate features of the White Paper NCC, which relates to the incorporation of its GIS, municipal coastal management and climate change related issues.⁶¹³ Nothing in law prohibits the municipality from communicating its findings, in relation to its GIS, to the MEC who

⁶⁰⁴ Section 6(1).

⁶⁰⁵ Section 6(2).

⁶⁰⁶ Section 6(2)(a).

⁶⁰⁷ Section 6(2)(b).

⁶⁰⁸ Section 6(2)(c).

⁶⁰⁹ Section 6(2)(c)(i).

⁶¹⁰ Section 6(2)(c)(ii).

⁶¹¹ Section 6(2)(c)(iii).

⁶¹² See Chapter 3, para 3.3.3 above for full discussion.

⁶¹³ See Chapter 3, para 3.7.1 above for full discussion.

may approve adjustment of the CSBL, and the municipality then amending its zoning scheme to cater for this. This may instead bolster intergovernmental integration.

4.3.2 Coastal access land

Section 7 of the By-law sets out measures prohibiting the unreasonable restrictions to access the coast, as required in terms of the NEMICMA;⁶¹⁴ and prevents the damaging of any walkways, buildings, paths or other infrastructure on coastal access land.⁶¹⁵ This provision is necessary, as it ensures the aesthetic value of the coast, which flows from the “well-being” aspect of the constitutional environmental right.⁶¹⁶

However, in light of climate change related issues, for instance, the NEMICMA empowers the municipality to adjust coastal access land, and the guiding factors that must be taken into account for the adjustment.⁶¹⁷ This does not feature in the By-law. Similarly, the NEMICMA empowers the municipality to secure entry onto land by persons for purposes of determining and adjusting the coastal access land.⁶¹⁸ This too does not feature in the By-law.

4.4 The ICM by-law Chapter 4: Coastal management objectives and principles

This section of the By-law sets out certain coastal management principles and objectives. The objectives are those which coastal management aims to achieve,

⁶¹⁴ Section 7(1).

⁶¹⁵ Section 7(2).

⁶¹⁶ See Chapter 2, para 2.2.1 above for full discussion.

⁶¹⁷ See Chapter 3, para 3.3.2 above for full discussion.

⁶¹⁸ See Chapter 3, para 3.4 above for full discussion.

and both CMOs and principles aims to give effect to the municipal CMP.⁶¹⁹ The CMOs are clearly defined and includes objectives of the White Paper NCC in relation to climate change related issues on the one hand; and the White Paper SCD and NEMICMA relating to urban sprawl and ribbon development (amongst other), on the other hand.

As a point of departure, the By-law lists the clearing of alien vegetation as a permissible activity⁶²⁰ but does not make any mention of controlling invasive species, which the latter, as discussed earlier, is a primary species that threatens ecosystems, amongst others.⁶²¹ Discussed earlier, was the importance of the municipalities' role in controlling AIS, and the incorporation of these within the By-law.⁶²² This has not been clearly defined, in cases where AIS worsen the impact of climate change. I therefore recommend that the By-law includes a CMO to this effect as this would endorse the implementation of the NEMBA and White Paper NCC. Furthermore, the By-law defines 'indigenous species' to include those species that are indigenous to the Western Cape; however, what must be borne in mind is that indigenous species from neighbouring provinces (Eastern and Northern Cape) may be invasive in the Western Cape and affect coastal biodiversity, if it 'spreads outside of its natural distribution range' and causes multi threats and harm.⁶²³ This further stresses the need to legislate and establish priorities and strategies in this regard.

⁶¹⁹ Section 1: Definition list.

⁶²⁰ Section 15(1)(d)(iii).

⁶²¹ See Chapter 2, para 2.6 above for full discussion.

⁶²² See Chapter 2, para 2.6 above for full discussion.

⁶²³ See Chapter 2, para 2.6 above for full discussion.

4.5 The ICM By-law Chapter 5: Coastal planning

4.5.1 Land use plans to be consistent with the By-law

Section 10 mandates the City to establish its spatial planning instruments to accord to this By-law. As evidenced earlier, through the City's planning mechanisms are essential for implementing municipal coastal efforts.⁶²⁴

4.5.2 Municipal CMP

Section 11 of the By-law introduces the City's municipal CMP, which is an important tool for implementing integrated coastal management efforts. It sets out the relevant power to establish this in terms of the NEMICMA,⁶²⁵ and how this tool should relate to the municipal coastal principles⁶²⁶ and CMOs.⁶²⁷ The By-law fails to provide that CMPs must include priorities and strategies,⁶²⁸ and performance indicators measuring the achievement of the CMOs.⁶²⁹ In light of this, strategic decision-making is vital for furthering municipal coastal management efforts;⁶³⁰ and achieving CMOs is vital in light of climate change related issues, for instance.⁶³¹

4.5.3 Zoning schemes

Section 12 of the By-law sets out the manner in which zoning schemes should be applied within the municipal CPZ. As discussed, within the ambit of constitutional law

⁶²⁴ See Chapter 2, para 2.3.4 above for full discussion.

⁶²⁵ Section 11.

⁶²⁶ Section 11(a).

⁶²⁷ Section 11(b).

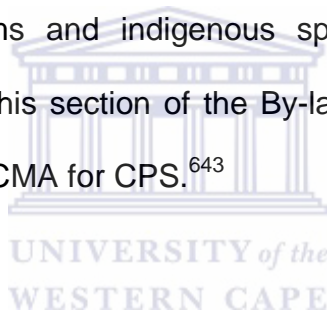
⁶²⁸ See Chapter 3, para 3.7.1 above for full discussion.

⁶²⁹ See Chapter 3, para 3.7.1 above for full discussion.

⁶³⁰ See Chapter 5, para 4.9.2 below for full discussion.

⁶³¹ See Chapter 3, para 3.7.1 and Chapter 2, para 2.6 above for full discussion.

and case law, municipalities are required to undertake municipal planning, which includes zoning of land, which will ultimately define the regulation and control of the use of land.⁶³² The By-law does so by its exposition of the areas where the zoning scheme or CPS (indication of NEMICMA's requirement of municipal land use schemes incorporating CPS)⁶³³ will designate certain areas mainly or exclusively used for coastal access land;⁶³⁴ boat launching;⁶³⁵ coastal recreational nodes;⁶³⁶ coastal resort areas;⁶³⁷ and coastal conservancy areas to be conserved and protected in order to- maintain and enhance the natural character of the coast;⁶³⁸ maintain and enhance the functioning of ecosystems;⁶³⁹ allow the public access to coastal spaces;⁶⁴⁰ act as buffer to protect people and property from coastal erosion;⁶⁴¹ protect ecosystems and indigenous species from development and harmful human activities.⁶⁴² This section of the By-law is a clear description of the intention created by the NEMICMA for CPS.⁶⁴³



4.5.4 Decisions regarding use of land within municipal CPZ

Section 13 of the By-law lays the foundation for decisions regarding the use of land within municipal CPZ. The By-law sets out that the coastal management principles and the section 2 principles of the NEMA must be applied in terms of decisions relating to land use planning or to grant a land use authorisation within the municipal

⁶³² See Chapter 2, para 2.2.2.1 above for full discussion.

⁶³³ See Chapter 3, para 3.7.2 above for full discussion.

⁶³⁴ Section 12(2)(a).

⁶³⁵ Section 12(2)(b).

⁶³⁶ Section 12(2)(c).

⁶³⁷ Section 12(2)(d).

⁶³⁸ Section 12(2)(e)(i).

⁶³⁹ Section 12(2)(e)(ii).

⁶⁴⁰ Section 12(2)(e)(iii).

⁶⁴¹ Section 12(2)(e)(iv).

⁶⁴² Section 12(2)(e)(v).

⁶⁴³ See Chapter 3, para 3.7.2 above for full discussion.

CPZ.⁶⁴⁴ The By-law further sets out the factors the decision-maker must be cognisant of: those pertaining to land use planning and granting authorisation;⁶⁴⁵ and whether any site is suitable for a particular use.⁶⁴⁶ Additionally, the By-law directs the decision-maker when 'preparing, amending, withdrawing or reviewing any structure plan', in terms of the LUPO, to have regard for the reason for which the CPZ has been established, along with the applicable principles.⁶⁴⁷ This is essential to ensure that regard shall be had to the coastal environment, and for the promotion of intergovernmental integration.⁶⁴⁸

4.6 The ICM by-law Chapter 6: Regulation of coastal activities

4.6.1 Activities for which a coastal permit is required

The By-law sets out the activities that are permissible⁶⁴⁹ and those requiring coastal permits that authorises the undertaking of certain activities.⁶⁵⁰

Section 14(2) of the By-law sets out the activities for which coastal permits are required, and to those required in terms the National Water Act 36 of 1998 (water use license);⁶⁵¹ the NEMICMA (coastal water discharge permit);⁶⁵² the National Environmental Management: Waste Act 59 of 2008 (waste management licence);⁶⁵³ National Environmental Management: Air Quality Act 39 of 2004 (atmospheric

⁶⁴⁴ Section 13(1).

⁶⁴⁵ Section 13(1)(a)-(e) and section 13(3).

⁶⁴⁶ Section 13(2).

⁶⁴⁷ Section 13(3).

⁶⁴⁸ See Chapter 3, para 3.7.2 above for full discussion.

⁶⁴⁹ Section 14(1)(a) and section 15.

⁶⁵⁰ Section 14(1)(b).

⁶⁵¹ Section 14(2)(i)(i).

⁶⁵² Section 14(2)(i)(ii).

⁶⁵³ Section 14(2)(i)(iii).

emission licence);⁶⁵⁴ and authorisation granted by the City.⁶⁵⁵ The impact of AIS on the coastal environment and the need to regulate these has been discussed fully.⁶⁵⁶ Against this background, it is recommended that the By-law includes a provision relating to permits/ authorisation for such activities as set out in the NEMBA. This would have the effect of aligning the By-law with the NBF, which would prevent deficiency in implementing national law (NEMBA) and policy (White Paper NCC).

4.6.2 Application for coastal permits

The By-law further provides that application for coastal permits must be directed to the Department prior to applying for any land use authorisation;⁶⁵⁷ state reasons why the Department is not obliged to refuse the application;⁶⁵⁸ explain how the activity will: further the objects of the By-law,⁶⁵⁹ be consistent with coastal management principles,⁶⁶⁰ and play a role in attaining the coastal management objectives;⁶⁶¹ show the extent to which the activity might be inconsistent with the By-law;⁶⁶² explain why granting the application would be in the interest of the whole community;⁶⁶³ and produce information that would satisfy the decision-maker that the site is suitable for the intended use.⁶⁶⁴

⁶⁵⁴ Section 14(2)(j)(iv).

⁶⁵⁵ Section 14(2)(j)(v).

⁶⁵⁶ See Chapter 2, para 2.6 above for full discussion.

⁶⁵⁷ Section 16(a).

⁶⁵⁸ Section 16(b).

⁶⁵⁹ Section 16(c)(i).

⁶⁶⁰ Section 16(c)(ii).

⁶⁶¹ Section 16(c)(iii).

⁶⁶² Section 16(d).

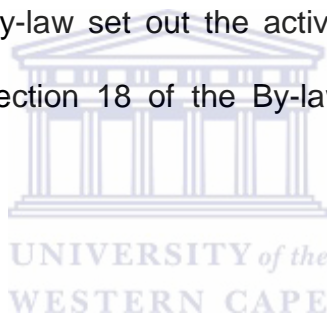
⁶⁶³ Section 16(e).

⁶⁶⁴ Section 16(f).

The abovementioned section of the By-law is modelled on the environmental authorisations (additional factors) for coastal activities, in terms of the NEMICMA.⁶⁶⁵

4.6.3 Decision-making in relation to coastal permits

The By-law provides that the decision-making power in respect of coastal permits is the City, in mandatory consultation with the Planning and Development Department of the City.⁶⁶⁶ The By-law continues by setting out the factors which the by-law should take into account upon deciding whether or not to grant a coastal permit;⁶⁶⁷ and the necessity of applying the coastal management principles and NEMA's section 2 principles.⁶⁶⁸ The By-law set out the activities for which authorisation is required, to be refused.⁶⁶⁹ Section 18 of the By-law explains the content of the coastal permit.



4.6.4 Appeals

Section 19 of the By-law deals with appeals; based on decisions taken by the Department to issue, amend, refuse, suspend or cancel a coastal permit or by the terms and conditions set in the coastal permit.⁶⁷⁰ As a point of departure, the By-law provides that the body, to which the written appeal should be made to, is the City Manager.⁶⁷¹ However, both the NEMICMA and the NEMA expressly states that a person, who is dissatisfied with a decision regarding an authorisation that was taken

⁶⁶⁵ See Chapter 3, para 3.8.4 above for full discussion.

⁶⁶⁶ Section 17(1)(a).

⁶⁶⁷ Section 17(1)(b).

⁶⁶⁸ Section 17(1)(c).

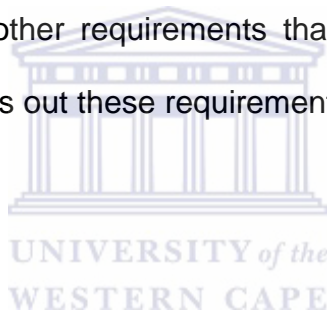
⁶⁶⁹ Section 17(2).

⁶⁷⁰ Section 19(1).

⁶⁷¹ Section 19(1).

by a municipality, may appeal to the MEC of that province.⁶⁷² Thus, it is crucial that the By-law expresses this option afforded to aggrieved person by legislation.

The By-law sets out the appeal procedure, which must- 'be lodged within 30 days of the appellant being notified of the decision or if the appellant is not notified of the decision, within 60 days of the decision being made';⁶⁷³ 'state clearly the ground of the appeal';⁶⁷⁴ 'state briefly the facts on which the appellant relies and include any relevant information that was not placed before the decision-maker and which the appellant believes should be considered on appeal'.⁶⁷⁵ The By-law's appeal procedure is identical to that outlined in the NEMICMA.⁶⁷⁶ The NEMICMA prescribes, within its appeal procedure, other requirements that the dissatisfied person must comply with.⁶⁷⁷ The By-law sets out these requirements in terms of section 19(3), (4), (5), and (6).



4.7 The ICM by-law Chapter 7: Enforcement

4.7.1 Powers of the Council

Section 20 of the By-law set out the powers of the Council. These powers include:

- 'a) demolishing, alter or otherwise deal with any building, structure, device or other thing that has been constructed, erected or laid in contravention of this by-law;

⁶⁷² See Chapter 3, para 3.10 above and Chapter 2, para 2.4.4.4 above for full discussion.

⁶⁷³ Section 19(2)(a).

⁶⁷⁴ Section 19(2)(b).

⁶⁷⁵ Section 19(2)(c).

⁶⁷⁶ See Chapter 3, para 3.10 above for full discussion.

⁶⁷⁷ Section 74(3)(d).

- b) remove and make good any excavated, removed or deposited in contravention of this by-law;
- c) repair and make good any damage that occurs as a consequence of a contravention of the by-law;
- d) remove anything that is endangering or damaging, or is likely to endanger or damage, human safety or health or the environment within the coastal conservation area;
- e) remove anything that is obstructing the movement of people-
 - (i) on coastal access land; or
 - (ii) on any part of the coastal conservation area or other than private land or land within a protected area;
- f) remove any person whom the Council reasonably believes has, or is about to, commit an offence under this by-law from any place within the coastal conservation area in order to apprehend that person or prevent the commission or continuation of such an offence;
- g) in order to deal with any situation which the Council considers to be an emergency-
 - (i) temporarily close or restrict access to any part of the coastal conservation area; and
 - (ii) remove members of the public from any part of the coastal conservation area that is not private property;
- h) recover reasonable costs incurred by it in taking measures that this by-law requires another person to take, from any such person who failed to take those measures after being directed by the Council to do so.'

These powers of the Council, relating to the protection of the coastal environment, have been extensively highlighted in the previous chapter of the study.⁶⁷⁸ The powers outlined sets out the reasons for which a coastal protection and coastal access notice⁶⁷⁹ or a repair or removal of structures within the CZ are issued,⁶⁸⁰ in terms of the NEMICMA. Some of these powers are, however, subject to certain conditions, which have been omitted. In terms of a repair or removal notice, the By-law fails to provide that the exercise of these powers is subject to, in respect of where the person responsible for the structure or building cannot be found, certain procedures;⁶⁸¹ thus it is equally important that the By-law makes provision for when certain powers are subject to certain conditions.

Also, the Constitution empowers the Council to elect certain committees, subject to national legislation, that are essential for the effective performance of its functioning.⁶⁸² Having said these, the NEMICMA has made provision for local municipalities to elect committees, and stresses the role of the committee and sets out its functions.⁶⁸³ Based on the nature of the functions of municipal coastal committees, the constitutional imperatives, and to promote ICM, it is clear that provision should be sought, within the By-law, relating to the Council's power to elect municipal coastal committees.

⁶⁷⁸ See Chapter 3, para 3.7 above for full discussion.

⁶⁷⁹ See Chapter 3, para 3.7.1 above for full discussion.

⁶⁸⁰ See Chapter 3, para 3.7.2 above for full discussion.

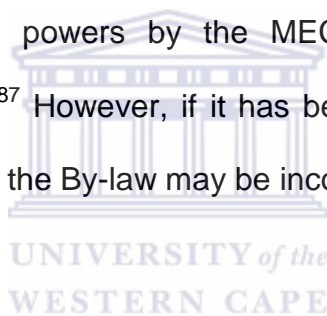
⁶⁸¹ See Chapter 3, para 3.7.2 above for full discussion.

⁶⁸² See Chapter 2, para 2.1.2 above for full discussion.

⁶⁸³ See Chapter 3, para 3.5.1 above for full discussion.

4.7.2 Coastal compliance officers

Section 21 of the By-law makes provision for the designation coastal compliance officers. This section is modelled on section 31A of the NEMA that makes provision for the designation of EMIs and their function of enforcing SEMAs.⁶⁸⁴ The By-law provides that a City Manager may designate any appropriately trained person in writing as a coastal compliance officer with authority to enforce the By-Law.⁶⁸⁵ The By-law continues to provide that a coastal compliance officer must be an employee of the City or any other person so designated with the requisite consent by an organ of state.⁶⁸⁶ This section is somewhat problematic, to the extent that it confers power to the City Manager that is not in conformity with the NEMICMA; however, the NEMA allows for the delegation of powers by the MEC by agreement of the said municipality to appoint EMIs.⁶⁸⁷ However, if it has been established that there was delegation, then this section of the By-law may be incorporated.



4.7.3 Compliance notice

Section 22 of the By-law makes provision for the issuing of compliance notices (issued by EMIs). This section is modelled on the NEMA⁶⁸⁸; and the NEMICMA, in terms of coastal protection,⁶⁸⁹ coastal access,⁶⁹⁰ and repair or removal notices.⁶⁹¹ To enhance the duty of care principle, it is pivotal, where the causal nexus between environmental degradation and the actor has been established,⁶⁹² to remedy such as

⁶⁸⁴ See Chapter 2, para 2.4.4.2 above for full discussion.

⁶⁸⁵ Section 21(1).

⁶⁸⁶ Section 21(2).

⁶⁸⁷ See Chapter 2, para 2.4.4.4 above for full discussion.

⁶⁸⁸ See Chapter 2, para 2.4.4.2 above for full discussion.

⁶⁸⁹ See Chapter 3, para 3.8.1 above for full discussion.

⁶⁹⁰ See Chapter 3, para 3.8.1 above for full discussion.

⁶⁹¹ See Chapter 3, para 3.8.2 above for full discussion.

⁶⁹² See Chapter 3, para 3.8 above for full discussion.

required in law. The importance of complying with legislative remediation mechanisms in terms of the *Minister of Water Affairs and Forestry v Stilfontein Gold Mining co LTD and Others*⁶⁹³ has been fully discussed.⁶⁹⁴ The By-law provides that these notices are issued by a coastal compliance officer to any person whom the officer has reasonable grounds for believing: has contravened the by-law;⁶⁹⁵ is not complying with the terms and conditions of a coastal permit,⁶⁹⁶ or is likely to contravene the by-law but for specified measure.⁶⁹⁷ The By-law also empowers the coastal compliance officer to vary compliance notices.⁶⁹⁸ The grounds for which the coastal compliance officer may issue compliance notices are identical to that provided in the NEMA⁶⁹⁹ and NEMICMA.⁷⁰⁰ However, if it has been established that the power to issue these notices has been delegated to the municipality, and upon agreement of the municipality, then this provision may be included.⁷⁰¹ The By-law fails to include the content of a coastal compliance notice; but does so for coastal permits. The NEMICMA provides the content of coastal compliance notices;⁷⁰² therefore, for completion, it is recommended that the By-law reflects this.

4.7.4 Objections to compliance notices

Section 23 of the By-law deals with objections to compliance notices. The By-law provides that any person objecting to a compliance notice may make written

⁶⁹³ 2006 (5) SA 333 (W).

⁶⁹⁴ See Chapter 3, para 3.7.2 above for full discussion.

⁶⁹⁵ Section 22(1)(a).

⁶⁹⁶ Section 22(2)(b).

⁶⁹⁷ Section 22(2)(c).

⁶⁹⁸ Section 22(3).

⁶⁹⁹ See Chapter 2, para 2.4.4.2 above for full discussion.

⁷⁰⁰ See Chapter 3, paras 3.7.1 and 3.7.2 above for full discussion.

⁷⁰¹ See Chapter 3, para 3.8.1 above for full discussion.

⁷⁰² See Chapter 3, paras 3.7.1 and 3.7.2 above for full discussion.

representation to the City Manager within 30 days of the receipt of the notice;⁷⁰³ and make written representation to the City Manager to suspend the operation of the notice pending finalisation of the objection.⁷⁰⁴ The By-law continues by stating the decisions that may be taken after representation.⁷⁰⁵ Again, the NEMICMA provides where the municipality made a decision on issuing a compliance notice, then a written appeal must be submitted to either the MEC of that province or the municipality.⁷⁰⁶ Thus, this section should be reviewed to include these parties.

4.7.5 Offences

Section 24 of the By-law constitutes the offence clause. In terms of the By-law, it is an offence to-

- 'a) to contravene any provision of this by-law;
- b) to fail to comply with the terms and conditions of a coastal permit;
- c) to fail to comply with the terms of a compliance notice issued in terms of this by-law;
- d) to threaten, resist, hinder, obstruct or use foul, abusive or insulting language towards a coastal compliance officer, a councillor, an employee or a contractor of the City, who is exercising powers or performing duties or function in terms of this by-law;
- e) to falsely hold himself or herself out to be a coastal compliance officer, councillor or an employee or a contractor of the Council; or

⁷⁰³ Section 23(1)(a).

⁷⁰⁴ Section 23(1)(b).

⁷⁰⁵ Section 23(2).

⁷⁰⁶ See Chapter 3, paras 3.10 above for full discussion.

- f) to intentionally or recklessly do anything that a reasonable person would have foreseen would be likely-
 - (i) to put at risk the health or safety of any person within the coastal conservation area; or
 - (ii) to have an adverse impact on the environment within the municipal CZ.’

The NEMICMA distinguishes between three categories of offences and penalties in relation to the offences.⁷⁰⁷ It would have been convenient if the By-law has grouped these offences as the NEMICMA has: in terms of labelling it offence 1, 2 and 3. This is so as there are corresponding penalties to these offences.⁷⁰⁸ The By-law encapsulates these offences, and covers contravention of the By-law broadly in terms of section 24(a) above; this provision therefore includes activities authorised by the NEMA and other SEMAs. However, the By-law fails to seek provision for persons who have fabricated or forged documentation for purposes of passing it off as an authorisation, which is an offence in terms of the NEMICMA.⁷⁰⁹ Thus, to curtail any fraudulent person’s actions from causing environmental harm, it is pivotal to include a provision within the By-law to this effect.

The By-law fails to make mention, or to endorse, “command-and-control” deviating mechanisms, which encapsulates the intention of the White Paper SCD.⁷¹⁰ Again, this speaks to co-regulation and self-regulatory mechanisms.⁷¹¹

⁷⁰⁷ See Chapter 3, paras 3.11 above for full discussion.

⁷⁰⁸ See Chapter 3, paras 3.11 above for full discussion.

⁷⁰⁹ See Chapter 3, paras 3.11 above for full discussion.

⁷¹⁰ See Chapter 3, paras 3.11 above for full discussion.

⁷¹¹ See Chapter 3, paras 3.11 above for full discussion.

4.7.6 Penalties

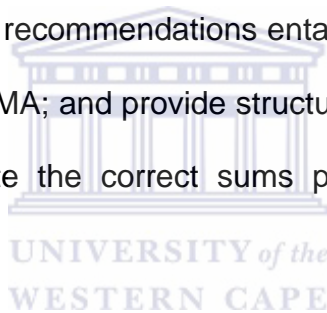
Section 25 of the By-law speaks to penalties in a broad manner. It provides the following:

- '(1) Any person who is convicted of an offence under this by-law is liable to imprisonment for a period not exceeding three years or to the payment of a fine no greater than two million Rands, or to both fine and such imprisonment.
- (2) In addition to imposing a fine or imprisonment, a court may order any person convicted of an offence under this by-law-
 - (a) to remedy any harm to the environment or private property that occurred as consequence of the commission of the offence;
 - (b) to compensate any person for any damage or loss suffered by that person as a consequence of the commission of the offence;
 - (c) to reimburse the City for the reasonable costs incurred by it in investigating and prosecuting the person convicted or taking action to prevent further harm, or to remedy harm arising from the commission of the offence;
 - (d) to pay an amount equivalent to the costs that the City is reasonably like to incur in future in taking action to prevent further harm, or to remedy harm arising from the commission of the offence.
- (3) If the court, in the exercise of its powers under subsection (1), orders a convicted person to pay a sum of money to the City or any other person, that order shall have the same effect and be executable in the same manner as if it had been given in a civil action duly instituted before a competent court.'

As a point of departure, the By-law correctly uses the word 'convicted' (in terms of the draft NEMICMAB), instead of 'guilty' (as termed in the NEMICMA).⁷¹² To reiterate, the NEMICMA makes provision for three categories of penalties, but the

⁷¹² See Chapter 3, para 3.11 above for full discussion.

By-law makes broad provision for these, without categorising them. Furthermore, the NEMICMA provides penalties in relation to each category of offence;⁷¹³ the By-law fails to adopt this style. The By-law provides, in one vein, a single amount and single years of imprisonment, or both payment of the single amount and single span of imprisonment years.⁷¹⁴ The NEMICMA varies these amounts and years of imprisonment, or community service, as the case may be.⁷¹⁵ An example of the offences: the sum payable in cases of a category one offence is R5 000 000;⁷¹⁶ and a category 3 offence prescribes community service for a period, instead of imprisonment for instance.⁷¹⁷ There is no indication within the NEMICMA empowering the municipalities to vary the amounts and other sanctioning mechanisms.⁷¹⁸ Therefore the recommendations entails restructuring of the offences clause, in line with the NEMICMA; and provide structuring the penalties and offences to be integrated, and indicate the correct sums payable and other sanctioning mechanisms.



4.8 The ICM By-law Chapter 8: Miscellaneous

4.8.1 Expropriation

Section 26 of the By-law makes provision for the claiming of compensation from the City in cases where, as a result of the By-law, any person's property has been expropriated due to a zoning scheme or CPS.⁷¹⁹ Notably, the NEMA provides that

⁷¹³ See Chapter 3, para 3.11 above for full discussion.

⁷¹⁴ See section 25 (1) above.

⁷¹⁵ See Chapter 3, para 3.11 above for full discussion.

⁷¹⁶ Section 80(1).

⁷¹⁷ Section 80(3).

⁷¹⁸ See Chapter 3, para 3.11 above for full discussion.

⁷¹⁹ Section 26.

the power to expropriate private land is with the MEC, as provided in its exclusionary clause of powers that may not be delegated.⁷²⁰

In my opinion, it would add more value to the By-law, if it makes provision for matter relating to unlawful structures on CPP, as in the NEMICMA, and how these rights correspond to the PIE.⁷²¹ The By-law does make provision for its disposition on rights of persons undertaking existing lawful activities in the CZ, as prescribed in the NEMICMA and the procedures that follow.⁷²²

4.9 The Durban Metro as an example for lessons to be learned.

It has been submitted that the Durban Metro is a leading example to other cities and the world in respect of dealing with the effects of climate change posing threats on sustainable development and human well-being.⁷²³ Also, its global leadership in climate change protection planning has been acknowledged.⁷²⁴ Discussed below are some of their tools that assist with strategic decision-making, in relation to the coastal environment.⁷²⁵ This is an exposition of certain elements that is utilised by the Metro to implement coastal management efforts.

⁷²⁰ See Chapter 2, para 2.4.4.4 above for full discussion.

⁷²¹ See Chapter 3, para 3.13.1 above for full discussion.

⁷²² See Chapter 3, para 3.13.2 above for full discussion.

⁷²³ <http://www.cop17-cmp7durban.com/en/south-africa-on-climate-change> (accessed on 28 October 2012).

⁷²⁴ <http://www.cop17-cmp7durban.com/en/south-africa-on-climate-change> (accessed on 28 October 2012).

⁷²⁵ <http://www.cop17-cmp7durban.com/en/south-africa-on-climate-change> (accessed on 28 October 2012).

4.9.1 Sea-level rise modelling

This is a tool that informs the locality and nature of future development, along with aiding to adapt existing systems and structures to the likely influences of sea level rise.⁷²⁶ The Metro has embarked on modelling to study consequences of 30cm, 60cm and 100cm sea level rise (this is similar to the City's GIS model)^{727, 728} This information is being used to apply adaptation responses and includes strategic withdrawal of infrastructure, nourishment of beaches, controlling development in the CZ and dune rehabilitation and refurbishment.⁷²⁹ The entire Metro is almost covered by CMPs and two EMPs are underway.⁷³⁰ Importantly, both the CMPs and EMPs incorporate sea level rise as crucial factors.⁷³¹ R500 000 has been budgeted to implement the sea level rise assessment.⁷³²

4.9.2 Ecosystem-Based Adaptation

The Durban Metro realises that the best cost-effective adaption option will lie in facilitating people in restoring or maintaining natural ecosystems so that they can continue to provide food, shelter and security.⁷³³ This will give rise to the municipalities' constitutional objectives of promoting social and economic

⁷²⁶ Durban: A Climate for Change Transforming Africa's Future <http://www.cop17-cmp7durban.com> (accessed on 28 October 2012) page 23.

⁷²⁷ See Chapter 3, para 3.7.1 above for full discussion.

⁷²⁸ Durban: A Climate for Change Transforming Africa's Future <http://www.cop17-cmp7durban.com> (accessed on 28 October 2012) page 23.

⁷²⁹ Durban: A Climate for Change Transforming Africa's Future <http://www.cop17-cmp7durban.com> (accessed on 28 October 2012) page 23.

⁷³⁰ Durban: A Climate for Change Transforming Africa's Future <http://www.cop17-cmp7durban.com> (accessed on 28 October 2012) page 23.

⁷³¹ Durban: A Climate for Change Transforming Africa's Future <http://www.cop17-cmp7durban.com> (accessed on 28 October 2012) page 23.

⁷³² Durban: A Climate for Change Transforming Africa's Future <http://www.cop17-cmp7durban.com> (accessed on 28 October 2012) page 23.

⁷³³ <http://www.cop17-cmp7durban.com/en/south-africa-on-climate-change> (accessed on 28 October 2012).

development.⁷³⁴ By designing its 74 000 ha of Durban Metropolitan Open Space System the Metro is protecting its biodiversity as well as the ecosystem services it provides.⁷³⁵ The protection of this system is essential for assisting the Metro in responding to the challenges created by climate change.⁷³⁶ At a strategic planning level, study is being steered at examining the distribution of key flora types that may alter under climate change, and what reactions will be desirable in ensuring the ongoing protection of ecosystems.⁷³⁷ By maintaining these open spaces, the Metro promotes green economy, where the restoration of natural ecosystems is undertaken by local communities, which in turn creates employment and developing skills to alleviate poverty.⁷³⁸ One of these job opportunities, amongst other, in relation to CZ management, is alien species removal.⁷³⁹ Large businesses and private sectors have also displayed their social and environmental responsibilities by contributing to this project.⁷⁴⁰



4.9.3 Durban central beachfront dune rehabilitation

This project assists in protecting existing dunes, through extension of frontal dune zones.⁷⁴¹ This is achieved by 'erecting fencing (to aid dune development) and timber boardwalks (to define beach access points), as well as planting of indigenous dune

⁷³⁴ See Chapter 2, para 2.2.2 above for full discussion.

⁷³⁵ <http://www.cop17-cmp7durban.com/en/south-africa-on-climate-change> (accessed on 28 October 2012).

⁷³⁶ <http://www.cop17-cmp7durban.com/en/south-africa-on-climate-change> (accessed on 28 October 2012).

⁷³⁷ <http://www.cop17-cmp7durban.com/en/south-africa-on-climate-change> (accessed on 28 October 2012).

⁷³⁸ <http://www.cop17-cmp7durban.com/en/south-africa-on-climate-change> (accessed on 28 October 2012).

⁷³⁹ <http://www.cop17-cmp7durban.com/en/south-africa-on-climate-change> (accessed on 28 October 2012).

⁷⁴⁰ <http://www.cop17-cmp7durban.com/en/south-africa-on-climate-change> (accessed on 28 October 2012).

⁷⁴¹ Durban: A Climate for Change Transforming Africa's Future <http://www.cop17-cmp7durban.com> (accessed on 28 October 2012) page 24.

plants'.⁷⁴² This has ensued in the establishment of 'a new frontal dune zone along extensive stretches of the Promenade'.⁷⁴³ Dune protection, as outlined, is fundamental in facing the threat of climate change.⁷⁴⁴ The Durban Metro has budgeted R6million capital expenditure for this project.⁷⁴⁵ The City has undertaken a similar project: The Dune Cordon Stabilisation and planting ('Witsands Beach Rehabilitation – An Example of Successful Management') that entailed rehabilitating the dune system to a more natural state.⁷⁴⁶

4.10 Conclusion

This chapter has illustrated the manner in which the By-law responds, or the lack thereof in light of national laws and policies. Also, it provides a brief overview of practical strategic decision-making tools for the implementation of municipal coastal efforts nationally, within the available resources and capacity. The following chapter highlights the rectifications required in order to align the By-law with the relevant coastal framework, and expresses the way forward.

⁷⁴² Durban: A Climate for Change Transforming Africa's Future <http://www.cop17-cmp7durban.com> (accessed on 28 October 2012) page 24.

⁷⁴³ Durban: A Climate for Change Transforming Africa's Future <http://www.cop17-cmp7durban.com> (accessed on 28 October 2012) page 24.

⁷⁴⁴ Durban: A Climate for Change Transforming Africa's Future <http://www.cop17-cmp7durban.com> (accessed on 28 October 2012) page 24.

⁷⁴⁵ Durban: A Climate for Change Transforming Africa's Future <http://www.cop17-cmp7durban.com> (accessed on 28 October 2012) page 24.

⁷⁴⁶ Local Action for Biodiversity (LAB), City of Cape Town Biodiversity and Climate Change Assessment Report, Environmental Resource Management Department, City of Cape Town October 2011 page 16.

CHAPTER 5: CONCLUSIONS AND RECOMMENDATIONS

5.1 Introduction

In this chapter, I will present my conclusions on the basis of the findings in the previous chapters, and on the basis of my conclusions I will make some recommendations.

5.2 Conclusions

5.2.2 Shortcomings in the draft ICM by-law

Intergovernmental integration, in terms of the concept of ICM, infers the integration of the different spheres (national, provincial and local) of government. However, the By-law demonstrates a more refined version of intergovernmental integration at a municipal level: the integration between the various Departments of the City, the Council *et al.*

As a point of departure, the By-law, in its entirety, is a noble model by-law; however, certain improvements must be made to bring it in line with national legislation and policy prior to adoption.

The By-law has an extensive list of definitions except for the term 'environment', which, in light of this study, is read to include the coastal environment. Thus, the duty of care principle in the NEMA that applies to the environment has similar meaning in

terms of the coastal environment.⁷⁴⁷ The By-law only makes provision for indigenous species and fails to define alien species and invasive species, respectively.

In terms of the institutional arrangements section of the By-law, it maintains that the Department must establish CSBLs, which is a provincial function; however, the demarcation of these lines in zoning schemes is a municipal function.⁷⁴⁸ The CSBL is defined as the 'coastal edge line', which is not in line with the NEMICMA.⁷⁴⁹ In light of the most vital tool for municipal coastal management (CMP), it must be made clear that the Department must ensure that its CMP gives effect to provincial and national CMPs; and the NEMP.⁷⁵⁰ Furthermore the NEMICMA explicitly provides that CMPs must include priorities and strategies; and indicators to measure the achievement of CMOs.⁷⁵¹ The By-law addresses the municipality's function of determining coastal access land but fails to address that adjustment of the coastal access land is its responsibility too, as well as ensuring that persons gain entry onto land for this purpose.⁷⁵² The power to implement SDAs and EMCAs is essential to ensuring coastal service delivery gaps are filled and that ensuring coastal compliance.⁷⁵³

In terms of adjusting CSBL, the NEMICMA does not confer power to the municipality to change the position of the coastal set back line, but confers such power to the MEC, in consultation with the municipality, and subject to public participation.⁷⁵⁴

⁷⁴⁷ See Chapter 4, para 4.1 above for full discussion.

⁷⁴⁸ See Chapter 4, para 4.2 above for full discussion.

⁷⁴⁹ See Chapter 4, para 4.3.1 above for full discussion.

⁷⁵⁰ See Chapter 4, para 4.2 above for full discussion.

⁷⁵¹ See Chapter 4, para 4.5.2 above for full discussion,

⁷⁵² See Chapter 4, para 4.2 above for full discussion.

⁷⁵³ See Chapter 3, para 3.11 above for full discussion.

⁷⁵⁴ See Chapter 3, para 3.3.3 above for full discussion.

The White Paper NCC recognises that certain alien invasive species may exacerbate the effect of climate change on coastal biodiversity, and the By-law must contain a CMO that seeks to address this issue.⁷⁵⁵

Certain authorisations are required in law to carry out certain activities within the CZ. Thus, the By-law maintains that regarded shall be had to authorisations in terms of the NEMWA, NEMAQA, NWA and NEMICMA. As a point of departure, the NEMBA also makes provision relating to authorisations for carrying out activities relating to alien invasive species, and the White Paper NCC confirms that these might worsen the effect of climate change.⁷⁵⁶

The section relating to appeals confers powers to the municipal manager only, but does not provide that which are provided by the NEMA or the NEMICMA: that aggrieved parties may appeal to the MEC.⁷⁵⁷ The Department of Environmental Resource Management is a Department of the City of Cape Town (municipality), and aggrieved persons are entitled to also appeal on decisions taken by a municipality to the MEC as provided for by the NEMICMA and the NEMA.⁷⁵⁸

The By-law fails to provide that powers of the Council relating to the establishment of municipal coastal committees as entrenched in the Constitution and White Paper

⁷⁵⁵ See Chapter 3, para 3.7.1 above for full discussion.

⁷⁵⁶ See Chapter 3, para 3.7.1 above for full discussion.

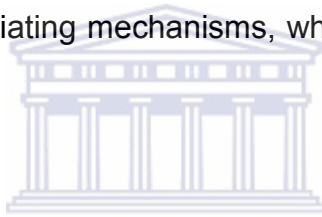
⁷⁵⁷ See Chapter 3, para 3.10 above for full discussion.

⁷⁵⁸ See Chapter 3, para 3.10 above for full discussion.

SCD, and the essential role coastal forums play in relation to coastal management.⁷⁵⁹

In terms of issuing compliance notices, the By-law does not stipulate the content of such notice but does so for coastal permits.⁷⁶⁰ However, if this power is not inherent to municipalities, but subject to delegation and agreement by the City.⁷⁶¹

In terms of the offences clause, the By-law has an extensive list of offences however the one relating to fabrication of authorisations (terms of the NEMICMA) has not been included.⁷⁶² In terms of enforcing ICM, the White Paper SCD stresses the need for 'command-and-control' deviating mechanisms, which have not been legislated in terms of the By-law.⁷⁶³



In terms of its penalties clause, there is no link between an offence and the corresponding penalty as set out in the NEMICMA,⁷⁶⁴ and the By-law varies its amounts payable upon conviction as well as the period of sentencing.⁷⁶⁵

5.3 Recommendations

I recommend that the inclusion of the following terms be defined within the definition list of the By-law, due to reasons mentioned above; these include: 'Environment', 'alien species' and 'invasive species'.

⁷⁵⁹ See Chapter 3, para 3.6.1 above for full discussion.

⁷⁶⁰ See Chapter 4, para 4.7.3 above for full discussion.

⁷⁶¹ See Chapter 3, para 3.6.4 above for full discussion.

⁷⁶² See Chapter 4, para 4.7.5 above for full discussion.

⁷⁶³ See Chapter 3, para 3.11 above for full discussion.

⁷⁶⁴ See Chapter 3, para 3.11 above for full discussion.

⁷⁶⁵ See Chapter 4, para 4.7.6 above for full discussion.

The By-law must express that the power of establishing and making regulations for CSBL is with the MEC. In respect of changing the position of the CSBLs, that that provision read to provide that the MEC is the body who has the power to change these, in consultation with the municipality; or the omission of this provision in its entirety.

It is important that the By-law expressly provide for the Department's function of ensuring that the municipal CMPs give effect to provincial and national CMPs; and the NEMP. The By-law must also make provision that strategies and priorities must be included in a municipal CMP; so too, indicators for attaining CMOS.⁷⁶⁶ Furthermore, the By-law must include the Department's responsibility in for adjusting coastal access land as stipulated in the NEMICMA. In order to encourage community and CBO's involvement in coastal management; implement 'softer' enforcement mechanisms; and effect power sharing, it is vital that provision be sought for SDAs and EMCAs.

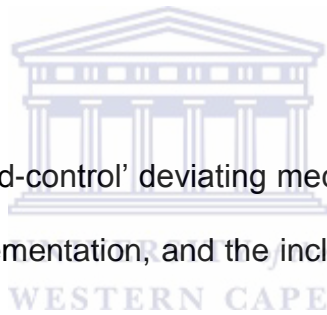
It is essential that the By-law include a CMO that directs municipalities to deal with AIS and understanding when and the kind of species that may worsen the impact of climate change. Also that provision must be made that persons intending to deal with activities relating to AIS, must, as stipulated in the NEMBA, have the necessary authorisation from the competent authority.

Furthermore, the appeals provision must express the provision that allows aggrieved person to appeal to the MEC, if the decisions were taken by a municipality or the appropriate body as delegated by the MEC.

The By-law must include a provision of the powers conferred upon the Council to establish coastal committees and the further establishment of coastal forums, as well as the functions of each (committees and forums).

If it has been established that the power to issue notices has been delegated to the City, then a provision expressing the content of a compliance notice must also be included.

The inclusion of 'command-and-control' deviating mechanisms must be incorporated in to the By-law to effect implementation, and the inclusion of preventing falsification of authorisations.



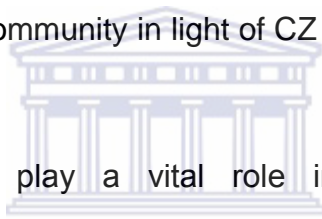
The penalties clause of the By-law must be brought in line with the NEMICMA as penalties are of national norms and deviation of these has not been provided.

5.5 Closing remarks

The City must be lauded for the By-law. In light of the definition of capacitation⁷⁶⁷ plays an essential role in affording municipalities' opportunity for implementing CMPs. Key to ICM is the principle of intergovernmental integration, which denotes cooperative governance, and national and provincial governments must capacitate

⁷⁶⁷ See Chapter 2, para 2.2.2 above.

coastal municipalities. The NEMICMA is fairly recent in vintage, thus all role players within the different Departments of municipalities must be aware of their respective roles, and the training of the officials on the NEMICMA is vital to have clear understanding of these roles and guided decision-making powers. Municipalities must understand how the NEMICMA creates legislative requirements to include climate change issues in mainstream municipal coastal management. Municipalities are encouraged to utilise its forums and committees to lobby initiatives of including private sectors and large businesses to contribute to the green economy. With all these mechanisms in place, the municipalities are then mandated to ensure that they arrange and control their administration and budgeting and planning processes to serve the basic needs of the community in light of CZ management.



As observed, municipalities play a vital role in the 'environment' (coastal environment); more decision-making powers are being devolved to this sphere (in respect of this study: biodiversity, estuarine management, climate change); the deliberate inclusion of 'environmental sustainability' in the MSA; and the Constitution mandating municipalities to promote a safe and healthy environment. In light of this, it is becoming seemingly obvious that, though the 'environment' is a shared provincial and national competency in terms of the Constitution, will it be expected that in the near future municipalities may share this power?

In conclusion, coastal municipalities that stand back from its duties in terms of law would result in not merely Mother Nature worsening the impacts of climate change, but the failure of coastal municipalities in realising the role of local government in the implementation of the NEMICMA.

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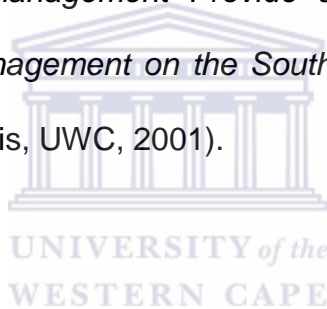
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