



SUBMISSIONS ON THE DRAFT AIR QUALITY MANAGEMENT BY-LAW

Introduction

1. We note that, during the meeting, we were advised that Jenny Hall of Environmental Counsel CC had been instructed by NDM to draft the by-laws. In this regard, Jenny Hall advised that:
 - 1.1. The draft by-laws are still very much in the draft stages;
 - 1.2. The draft by-laws are based largely upon the Model Air Quality Management By-Law for the Easy Adoption and Adaptation by Municipalities GN 579 of 2 July 2010 (“the model by-laws”);
 - 1.3. The intention is for the by-laws only to cover issues not already regulated by provincial or national legislation, in order to avoid duplication of provisions of national or provincial legislation in the by-laws; and
 - 1.4. The main justification for seeking to avoid duplication of existing legislation was in order to avoid any necessary amendments of the by-laws in the event that the national or provincial legislation cited or referred to in the by-laws is amended.
2. Our general remarks and recommendations, followed by our submissions and comments on each of the sections of the draft by-laws appear below.
3. Where additions or inclusions to certain existing provisions are suggested, these are underlined. We again reiterate that we reserve the right to make additional or other submissions, once the by-laws are more complete and we have consulted with our clients and received input from technical experts.

General Comments

4. There are numerous issues which are unclear from the draft by-laws and which require clarification and confirmation before meaningful submissions can be made on these.
5. It is recommended that the draft by-laws draw a clear distinction between authorisations referred to in the various provisions of the draft by-laws and other authorisations such as atmospheric emission licences (AELs) in respect of which municipalities, in terms of AQA, are, in general, the licensing authorities. It is important that there be clarity as far as NDM’s powers and duties in respect of AELs on one hand, and authorisations in terms of the draft by-laws on the other, are concerned.
6. Similarly, it is recommended that the draft by-laws make clear the powers and duties of NDM in respect of compliance notices (such as removal or abatement notices) in terms of the draft by-laws, and the powers and duties of environmental management inspectors who operate at a local level in terms of section 31C(1)(a)(iii) NEMA, to issue directives and compliance notices in terms of sections 31G to 31L of NEMA.

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Submissions on Specific Provisions of the Draft By-laws

7. Definitions (Chapter 1, section 1)

- 7.1. It is recommended that all definitions contained in the draft by-laws, including the definition of 'environment', align with the definitions of any of the same terms that appear in AQA and that all definitions reiterate AQA's aim to enhance the quality of ambient air to secure an environment not harmful to health or wellbeing.
- 7.2. It appears that the following definitions remain "to be checked":
- 7.2.1. 'control measure'; and
 - 7.2.2. 'dark smoke'
- 7.3. It is submitted that we are not in a position to provide meaningful comment on the above definitions. Given the short period of time afforded to us to make submissions hereon, we have not had an opportunity to obtain the necessary expert scientific input on this. We reserve the right to comment on the above definitions at a later stage.
- 7.4. We note that the definition of 'dust' has been taken from and aligned with the National Dust Control Regulations, 2013 ("Dust Control Regulations"). Our clients have numerous objections to the Dust Control Regulations, which we don't intend to address herein. Nevertheless, we submit that the definition of 'dust' in this section and in the Dust Control Regulations is too narrow and would result in the exclusion of particulate matter in ambient air that is most likely to cause public health effects. It is generally accepted that the smaller the aerodynamic diameter of a solid particle, the more potently it will impact human health by penetrating deeper into the lung than larger particles. Exposure to particles with an aerodynamic diameter of less than 10 microns, called PM10, is known to give rise to serious human health effects, including premature mortality. Very fine particulate matter (PM2.5), which makes up dust and which is regulated in the National Ambient Air Quality Standards for Particulate Matter with Aerodynamic Diameter less than 2.5 Micron metres, as well as ultrafine particulate matter (PM1.0) cause disproportionately high rates of human health effects. It is therefore recommended that 'dust' be defined as, "solid particulate matter released into or carried in the air by natural forces, by any fuel-burning, combustion, process equipment or device, construction work, mechanical or industrial processes".
- 7.5. We submit that the draft by-laws should include definitions for the following terms which appear in the draft by-laws, and which, for purposes of certainty, require further clarification:
- 7.5.1. 'landscaping activities' as referred to in section 11(3)(a), should be defined to specify the nature and scope of the activities envisaged, bearing in mind that the relevant provision deals with the control of dust emissions; and
 - 7.5.2. 'recreational outdoor activities' as referred to in section 12(3), should be defined to specify the nature and scope of the activities envisaged, for example, "camp fires and fires used solely for outdoor cooking and other recreational purposes, or for ceremonial occasions, or for human warmth and comfort, and which do not create a nuisance and do not use synthetic materials or refuse for fuel".
- 7.6. We recommend that the paragraphs, following the definition of 'vehicle', be numbered to avoid confusion and that the penultimate paragraph of section 1 be restructured to read as follows:
- "Neither-
- (a) a reference to a duty to consult specific persons or authorities;
 - (b) nor the absence of any reference in these by-laws to a duty to consult or give a hearing

exempts the official or authority exercising a power or performing a function from the duty to act fairly”

8. Objectives (Chapter 1, section 2)

8.1. It is recommended that the reference to “public health” in section 2(1)(b) be replaced with reference to “human health”.

9. Application (Chapter 1, section 3)

9.1. It is recommended that section 3 be amended to provide the following:

“These By-laws apply within the jurisdiction of the Municipality and must be read with any applicable provisions of the –

- (a) National Environmental Management Act, 1998 and relevant regulations and notices published thereunder;*
- (b) National Environmental Management: Air Quality Act, 2004 and relevant regulations and notices published thereunder;*
- (c) National Environmental Management: Waste Act, 2008 and relevant regulations and notices published thereunder;*
- (d) National Environmental Management: Biodiversity Act, 2004 and relevant regulations and notices published thereunder;*
- (e) National Environmental Management: Protected Areas Act, 2003 and relevant regulations and notices published thereunder;*
- (f) National Water Act, 1998 and relevant regulations and notices published thereunder;*
- (g) Mineral and Petroleum Resources Development Act, 2002 and relevant regulations and notices published thereunder;*
- (h) National Veld and Forest Fire Act, 1998 and relevant regulations and notices published thereunder;*
- (i) The National Forests Act, 1998 and relevant regulations and notices published thereunder;*
- (j) Local Government Municipal Systems Act, 2000 and relevant regulations and notices published thereunder;*
- (k) The Environment Conservation Act, 1989;*
- (l) the National Framework; and*
- (m) any other applicable provisions of relevant national, provincial or local legislation.”*

9.2. It is noted in a ‘Discussion Point’ in this section that “*the rules of interpretation regarding conflicts between local, provincial and national legislation are contained in the Constitution. However, if the Municipality wants to draw the reader’s attention to that fact, an additional clause can be inserted in the section above.*” We recommend that the additional Constitutional clause referred to be inserted for purposes of certainty.

9.3. We recommend further that this section be aligned with and confirm sections 6 and 11(2) of AQA. Section 6 addresses any conflicts between AQA and subordinate legislation issued in terms of AQA and other Acts of Parliament, provincial legislation and municipal by-laws. Section 11(2) regulates conflicts between emission standards set by national, provincial and local authorities. See paragraph 11 below.

10. Duty of Care (Chapter 1)

10.1. We note that this provision has been taken from NEMA section 28, but that it confers powers on the municipality, as opposed to the Director General and provincial head of department as provided for in NEMA.

10.2. We have no objections to the inclusion of this provision, but note that there are various grammatical errors in the wording and inconsistencies with the paragraph numbering and number references, which need to be addressed.

11. Local Emission Standards (Chapter 2, Part 1)

- 11.1. We refer to section 11(2) AQA which provides that: *“If national or provincial standards have been established in terms of section 9 or 10 for any particular substance or mixture of substances, a municipality may not alter any such national or provincial standards except by establishing stricter standards for the municipality or any part of the municipality.”* In terms of this provision, it is necessary that any local standards to be set by NDM be stricter than the national minimum emission standards (GN 893 of 2013) and any other emission standards promulgated nationally or provincially.
- 11.2. It is suggested that the following subsection be included in section 6: *“If national or provincial standards have been established in terms of AQA for any particular substance or mixture of substances, such national or provincial standards will enjoy preference, unless the Council established stricter standards for the municipality or any part of the municipality.”*
- 11.3. In light of the fact that NDM falls within the HPA and due to the prevailing health and environmental concerns resulting from the air pollution in the area, it is important that the NDM take steps to set local standards without delay.
- 11.4. It is recommended that section 5 include lists of criteria and factors to be considered by NDM in the setting of local emission standards. The following serves as an example:
“The Council must apply the following criteria when identifying and prioritising the substances in ambient air that presents threat to public health to the environment:
(a) the possibility, severity and frequency of effects, with regard to human health and the environment as a whole, with irreversible effects being of special concern;
(b) widespread and high concentration of the substance in the atmosphere;
(c) potential environmental transformation and metabolic alterations of the substance, as these changes may lead to the production of chemicals with greater toxicity or introduce other uncertainties;
(d) persistence in the environment, particularly if the substance is not biodegradable and able to accumulate in humans, the environment or food chain;
(e) the impact of the substance taking the following factors into consideration: (i) size of the exposed population, living resources or ecosystems; (ii) the existence of particularly sensitive receptors in the zone concerned; and
(f) substances that are regulated by international convention.
- The Council may, when developing the local emissions standards:*
(a) identify the critical factors for public health impacts;
(b) identify sensitive sub- populations;
(c) review available databases for public health status
(d) review available databases for ambient air quality information; and
(e) review and assess international guidelines and standards.
- The Council may take the following factors into consideration in setting local emission standards:*
(a) Health, safety and environmental protection objectives;
(b) Analytical methodology;
(c) Technical feasibility;
(d) Monitoring capacity; and
(e) Socio-economic consequences.”
- 11.5. We recommend that section 5(2) be amended to read as follows: *“Any emission standards that are adopted must be published in the Provincial Gazette, and the relevant community/interested parties must*

be given an opportunity to comment thereon in terms of the processes envisaged by Chapter 4 of the Local Government: Municipal Systems Act, 2000."

11.6. Our clients reserve their rights to comment on the draft list of substances contained in schedule 1.

12. Air Pollution Control Zones (Chapter 2, Part 2)

12.1. Insofar as NDM is empowered to declare 'air pollution control zone' as suggested in the draft by-laws, the by-laws should make clear what the status is of such zones and the obligations therein – as compared to declaration of the HPA. It is recommended that the draft by-laws provide for NDM to, from time to time and by notice in the provincial gazette, take certain steps, such as:

- 12.1.1. prohibiting or restricting the emission of one or more air pollutants from all premises or certain premises;
- 12.1.2. prohibiting or restricting the combustion of certain types of fuel;
- 12.1.3. declaring smokeless zones, in which smoke with an obscuration of more than 10% may not be emitted;
- 12.1.4. prescribing different requirements in an air pollution control zone relating to air quality in respect of:
 - 12.3.4.1. different geographical portions;
 - 12.3.4.2. specified premises;
 - 12.3.4.3. classes of premises; or
 - 12.3.4.4. premises used for specified purposes.

13. Specific Regulatory Measures (Chapter 2, part 3)

13.1. It is recommended that the provisions falling in part 3 make additional provision for monitoring and sampling steps to be taken by owners as conditions of any authorisations granted under these draft by-laws, as and where appropriate.

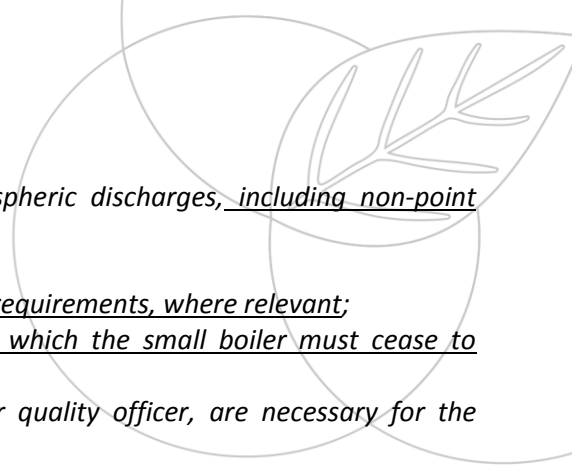
13.2. Small boilers (section 9)

13.2.1. Please be advised that neither AQA nor the Declaration of a Small Boiler as a Controlled Emitter and Establishment of Minimum Emission Standards (GN 831 of 2013) ("the declaration") make provision for authorisations, as envisaged in this section, to be required. The declaration simply requires that emissions from small boilers comply with the standards set out in the declaration and that the reporting requirements to the air quality officer in terms of the declaration be complied with.

13.2.2. To the extent that NDM is empowered to require authorisations for small boilers, it is recommended that the following sub section (unnumbered) in section 9 be amended as indicated:

An authorisation issued in terms of this section (1) above must specify—

- (a) the product name and model of the small boiler;*
- (b) the premises in respect of which it is issued;*
- (c) the person to whom it is issued;*
- (d) the period for which the authorisation is issued;*
- (e) the periods at which the authorisation may be reviewed;*
- (f) the maximum allowed amount, volume, emission rate or concentration of pollutants that may be discharged in the atmosphere , which amount must coincide with or be stricter than national standards imposed in GN 831 of 2013;*
- (g) point source emission measurement and reporting requirements;*

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- (h) *any other operating requirements relating to atmospheric discharges, including non-point source or fugitive emissions;*
 - (i) *penalties for non-compliance;*
 - (j) *greenhouse gas emission measurement and reporting requirements, where relevant;*
 - (k) *any decommissioning requirements and the date by which the small boiler must cease to operate; and*
 - (l) *any other matters which in the discretion of the air quality officer, are necessary for the protection or enforcement of air quality.*

13.2.3. It is recommended that the following subsection be included in section 9: *“The Municipality must review the authorisation issued in terms of this section at intervals specified in the authorisation, or when circumstances demand that a review is necessary.”*

13.2.4. It is further recommended that section 10 ‘Transitional arrangements in respect of existing boilers’ be incorporated as a subsection of section 9.

13.2.5. We refer to the drafting note with question, *“Do municipalities require authorisations for existing small boilers? If it is required an additional provision regarding the process will be inserted”*.

13.3.5.1. We assume that the question is whether NDM would be required to require authorisation from owners/occupiers of premises where a boiler already exists, although it is not entirely clear.

13.3.5.2. In terms of the declaration, existing small boilers are required to comply with existing small boiler emission standards within 5 years from the date of publication (s6). In order for air quality officers to exercise their compliance-monitoring and enforcement duties in terms of the declaration in respect of existing boilers, we propose that authorisation for existing boilers should be required.

13.3.5.3. It is therefore recommended that a provision requiring authorisation for existing small boilers be included.

13.3. Dust emissions (section 11)

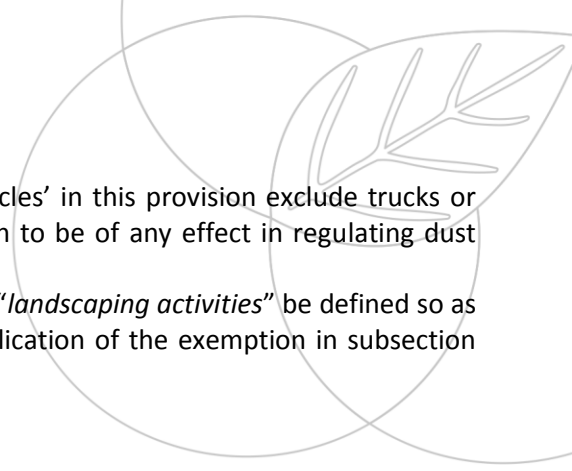
13.3.1. We submit that the National Dust Control Regulations, 2013 (“the dust control regulations”) are flawed and fail to effectively address dust emissions on a national level, in that, inter alia, the dustfall standard with a maximum dustfall rate averaged only over 30 days, as provided for in the dust control regulations, is an inadequate measure for controlling dust emissions. The regulation of dust emissions should be based on ambient air quality monitoring for PM10 and PM 2.5 rather than dustfall rates, as it is the concentration of dust in air that people breathe, not how much dust falls to the ground that constitutes a public health risk. This is simply one example of why our clients regard the dust control regulations as inadequate. We are instructed also to address the national government in relation to the flaws in the dust control regulations.

13.3.2. It is therefore recommended that the draft by-laws incorporate stricter measures, distinct from the dust control regulations, for the regulation and management of dust emissions within the NDM.

13.3.3. It is recommended that section 11 be amended as follows:

13.4.3.1. subsection 3(a) be amended to read *“landscaping activities by or on behalf of a person at their place of residence”*;

13.4.3.2. in relation to subsection 3(c), it is submitted that the allotted vehicle limit of 500 vehicles per day is excessive. We recommend that this number be reduced substantially,



and recommend further that reference to 'vehicles' in this provision exclude trucks or any heavy duty vehicles in order for this section to be of any effect in regulating dust emission;

13.4.3.3. Note that it has been recommended above that "*landscaping activities*" be defined so as to provide further clarity on the scope and application of the exemption in subsection 11(3)(a).

13.4. Emissions caused by open burning (section 12)

13.4.1. It is recommended that sections 13 and 14, referred to below, be incorporated in this provision. Namely that this section should confirm the prohibition on the burning of industrial waste, garden waste or domestic waste without the requisite licence or permit in terms of the National Environmental Management: Waste Act, 2008 or the Environment Conservation Act, 1989 and the absolute prohibition on the burning of any toxic waste or industrial by-product, tyres, rubber products, cables and other non-vegetative material in open spaces. It should be confirmed that no authorisation can be granted in such instances.

13.4.2. Note that it has been recommended above that "*recreational outdoor activities*" be defined so as to provide further clarity on the scope and application of the exemption in subsection 12(3). See paragraph 7.5.2 above.

13.4.3. It is recommended further that open burning of vegetative material as authorised in terms of these by-laws only be permitted to take place after 8h00, and no additional material can be added to the existing burning material after 18h00.

13.4.4. It is recommended that provision be made in this section for instances where NDM intends to conduct open burning activities and the steps that will be taken by it to notify stakeholders prior to any proposed burning.

13.5. Emissions caused by the burning of industrial waste, domestic waste and garden waste (section 13)

13.5.1. It is recommended that this provision be retained, despite the fact that it merely confirms the already existing legal position, as it is, nevertheless, important for the sake of clarity. We recommend that this provision be incorporated into section 12.

13.6. Emissions caused by tyre burning and burning of rubber products and cables in open spaces (section 14)

13.6.1. The drafting note "*Discussion point: should this section not be combined with the open burning section above as one of the instances in which no permission may be given?*" refers. We agree and recommend that section 14 be included as a subsection in section 12.

13.7. Sugar cane burning emissions (section 15)

13.7.1. It is recommended that the title of this section be changed to "*Agricultural and plantation burning emissions*" which would read as follows:

13.7.2. It is further recommended that the following subsections, or something similar, be inserted:

"(1) Any person who burns agricultural land or plantations must, in addition to the requirements of the National Veld and Forest Fire Act, 1998 (Act 101 of 1998), comply with the following control measures:

(a) obtain the prior written authorisation of the Council, which authorisation may be granted by the Council with conditions; and
(b) notify in writing the owners and occupiers of all adjacent properties, including communities within 150 metres of where the burning will take place, providing: (i) the details of the proposed area to be burned; (ii) the reason for the agricultural or plantation burning; (iii) the date and approximate time of the agricultural or plantation burning; (iv) in the event of inclement weather conditions, an alternative date or dates on which the agricultural or plantation burning may occur; (v) the right of owners, occupiers of adjacent properties and communities within 150 metres to lodge written objections to the proposed agricultural or plantation burning with the municipality within 7 days of being notified; and
(c) pay an administrative fee that may be levied by the municipality.

(2) The Council may not authorise agricultural or plantation burning:

(a) unless it is satisfied that the requirements set out in subsection (1) have been complied with; and
(b) where a warning notice in terms of section 10(1) of the National Veld and Forest Act, 1998 (Act No. 101 of 1998) has been published for the region."

13.8. Sandblasting emissions (section 16)

- 13.8.1. The 'discussion point' "Would the provisions of this section not be covered by the section on dust? If so, can it be omitted?" refers. It is recommended that this provision be included as a subsection in the 'dust emissions' section.
- 13.8.2. If this section is to remain in its current location, we suggest that it be numbered correctly, namely section 18 and not section 16, and that the numbering of the following sections be adjusted accordingly.

13.9. Emissions that cause a nuisance (section 18)

- 13.9.1. It is recommended that this section be amended to read, "Notwithstanding any other provisions of these By-laws, no occupier, or owner, or person in control of premises may allow emissions from those premises to cause an offence."
- 13.9.2. It is recommended that the above provision be amended further to give clarity on whether the 'offence' referred to implies a criminal offence or simply an offensive disturbance.

13.10. Noise pollution management (section 19)

- 13.10.1. "It is noted that the provisions regarding noise pollution management contained in the model by-laws have been omitted." Please provide clarity as to why this has been done. We recommend that these provisions be included.

14. Compliance and Enforcement (Chapter 3)

14.1. Administrative enforcement

- 14.1.1. The following drafting note refers, "*The model by-laws contain different administrative enforcement mechanisms. The provisions are copied below for ease of reference. It is suggested that these mechanisms be contained in the compliance and enforcement chapter and that consideration be given to the feasibility of devising one 'compliance notice' that can be used for all situations.*" It is recommended that the 'repair notice', 'removal notice' and 'abatement notice' be replaced with one general compliance notice to fulfil the intended function of all three notices.

14.1.2. It is recommended that the provisions for the compliance notice state something along the lines of the following:

“An authorised person must issue a notice compelling compliance with a provision of these by-laws if there are reasonable grounds for believing that a person has failed/is failing to comply with a provision of these by-laws. Such notice may direct a person to take certain steps within a specified period of time, including but not limited to the following:

- (a) to abate any nuisance within a period specified in the notice;*
- (b) to take all necessary steps to prevent a recurrence of a nuisance;*
- (c) to remove an item from premises;*
- (d) to repair a vehicle and take it to a place identified in the notice for re-testing;*
- (e) to pay an administrative fine of a specified amount to the Municipality; and*
- (f) to comply with any other conditions contained in the notice.”*

14.1.3. It is recommended further that this suggested provision set out clearly what information the compliance notice should contain, namely the full name, identity number and address of the person to whom it is addressed, the date by which the directed steps must be taken, and the consequences of non-compliance.

14.1.4. In the interests of aligning such a compliance notice with the compliance notice provided for in section 31L NEMA, a provision should be included stating that the notice must set out:

- 14.1.4.1. The details of the conduct constituting non-compliance with the by-laws;
- 14.1.4.2. any steps the person must take and the period within which those steps must be taken;
- 14.1.4.3. anything which the person may not do, and the period during which the person may not do it; and
- 14.1.4.4. the procedure to be followed in lodging an objection to the compliance notice.

14.1.5. As mentioned above, it is important that the by-laws clearly set out the distinction between compliance notices issued under section 31L NEMA and the compliance notice issued in terms of the draft by-laws and the roles of EMIs and other municipal officials in this regard.

14.2. Offences (section 20)

14.2.1. It is recommended that the ‘Offences’ section be amended to read as follows:

“A person is guilty of an offence if that person –
(a) contravenes any section contained in Part 3 of these By-laws;
(b) refuses or fails to comply with a directive or compliance notice issued in terms of these By-laws;
...”

14.3. Penalties (section 21)

14.3.1. Please be advised that the Adjustment of Fines Act, 1991 applies when no fine is prescribed.

14.3.2. It is recommended further that the following subsection be included in the ‘penalties’ provision, in keeping with section 34 of NEMA, alternatively that this provision at least make mention of section 34 NEMA:

“In addition to imposing a fine or imprisonment, a court may order any person convicted of an offence under these by-laws: (a) to remedy the harm caused; (b) to pay damages for harm caused to

another person or to property, which order shall have the force and effect of a civil judgment; and (c) to install and operate at the person's own expense air pollution measuring equipment."

- 14.3.3. The 'Discussion point' "*what fines should be imposed and should there be different fines for different offences? Reference can be had to the provisions of the MSA and PFMA*" refers. It is recommended that provision be made in these by-laws for the issuing of administrative fines by NDM in addition to the criminal fines provided for in section 21.

14.4. Compliance Monitoring and Enforcement (section 22)

- 14.4.1. It is recommended that section 22(1) be amended to read, "*the Municipality must appoint as many authorised persons as it considers necessary for compliance monitoring and enforcement with this By-law.*"

- 14.4.2. It is noted that EMIs and air quality officers (AQOs) are recognised as 'authorised persons' for purposes of compliance monitoring and enforcement of the draft by-laws in terms of section 22(2) and that the definition of 'authorised person' in section 1 of the by-laws includes any member of the municipal police service and any peace officer. Please advise who else might act as an 'authorised person' in terms of these by-laws and what the appointment requirements and processes are.

15. General Matters (Chapter 4)

15.1. Appeals (section 24)

- 15.1.1. It is recommended that the 'Appeals' section (section 24) provide further clarity on the steps to be taken in the appeal procedure and the relevant appeal authorities, bearing in mind that, in terms of section 62 of the Local Government Municipal Systems Act, 2000, the appeal authority differs depending on the decision-maker.
- 15.1.2. It is recommended further that clarity be given on the status on a decision pending an appeal and on the position where the appellant is a third party (a stakeholder for instance) and not the applicant, as this provision appears to envisage only instances where the applicant would be the appellant. It seems from this provision that a decision would remain in force pending appeal. We request clarity and recommend that this section provide for the suspension of a decision pending appeal, as does section 43 of NEMA.

15.2. Exemptions (section 25)

- 15.2.1. It is recommended that provision be made for instances in which exemptions cannot apply, for example, in cases of severe harm or risk of irreparable harm or detriment to human health and/or the environment. In addition, no exemptions should be provided from the requirement to obtain authorisations in terms of the by-laws.

- 15.2.2. It is further recommended that subsection 25(4) be amended to read as follows:

"The Municipality may not grant an exemption under subsection (1) until the Municipality has - taken measures to ensure that all persons whose rights may be significantly detrimentally affected by the granting of the exemption, including but not limited to all interested and affected parties, including adjacent land owners or occupiers, are aware of the application for exemption and how to obtain a copy of it..."

Conclusion

16. As indicated above and in the cover letter, the draft by-laws are still very much in draft form. The gaps and concerns highlighted above should be addressed before the next draft of the document is made available to stakeholders.

