Centre *for* Environmental Rights
Advancing Environmental Rights in South Africa

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cc. Mr Skhumbuzo Makhubo
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Mr Morgam Munsamy
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15 February 2017

URGENT

Dear Mr Malibe

APPLICATION FOR AMENDMENT OF THE RELEVANT TOWN-PLANNING SCHEME AND IN TERMS OF SECTION 66 OF AN APPLICABLE PIXLEY KA SEME MUNICIPAL PLANNING LAND USE BY-LAW AND IN TERMS OF THE SPATIAL PLANNING AND LAND USE MANAGEMENT ACT 16 OF 2013 (SPLUMA) FOR THE REZONING OF PORTION 1 OF THE FARM YZERMYN 96 HT

1. We refer to our letters dated 25 January and 30 January 2017 regarding the application submitted by Uphondolwendlovu Town Planners (Pty) Ltd for the "*amendment of the relevant town-planning scheme and …for the rezoning of Portion 1 of the Farm Yzermyn 96 HT*" ("the application") and make the following further submissions.

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Incorrect basis for application

2. We have, since writing the letters referred to in paragraph 1, established that there is no town planning scheme in place for the Dr Pikley Ka Isaka Seme Local Municipality ("the Municipality") for the land outside of Volksrust, where Portion 1 of the Farm Yzermyn 96 HT ("the property") is situated. We also understand that a land use scheme as contemplated by the Spatial Planning and Land Use Management Act 16 of 2013 ("the SPLUMA") has not yet been approved by the Municipality for that area.

3. That being the case, we respectfully submit that the application, which is for the amendment of a town-planning scheme and for the rezoning of the property, is misconceived.

4. Instead, we submit that section 26(3) of the SPLUMA (quoted here for ease of reference), applies:

   "*Where no town planning or land use scheme applies to a piece of land, before a land use scheme is approved in terms of this Act such land may be used only for the purposes listed in Schedule 2 to this Act and for which such land was lawfully used or could lawfully have been used immediately before the commencement of this Act*"

5. One of the purposes listed in Schedule 2 is "*agricultural purposes*", and it appears to be common cause that the property was lawfully used for agricultural purposes or could lawfully have been used for that purpose immediately before the commencement of the SPLUMA on 1 July 2015.

6. The use of the property for mining purposes therefore requires an application in terms of section 26(4) of the SPLUMA, not for the amendment of a town-planning scheme or for rezoning, but for a change of land use permitted in terms of section 26(3) of the SPLUMA.

7. The application, of which our clients have still not had sight, is therefore fundamentally flawed.

No proper advertisement of application

8. Even if the application were not flawed in this way, the application has not been advertised in accordance with the Chief Albert Luthuli, Dipaleseng, Dr Pixley Ka Isaka Seme, Lekwa, Mkhondo and Msukaligwa Municipal By-law on Spatial Planning and Land Use Management ("the SPLUM By-law").

9. On 6 January 2017 a notice was published in the Volksrust Recorder ("the 6 January notice"). Apart from the mischaracterisation of the nature of the application as described above, as we pointed out in our letter of 25 January 2017, the notice suffered from the following defects:
   9.1. It provided for fewer than the requisite 30 days for the submission of comments or objections (section 100(h) of the SPLUM By-law) (The 6 January notice required that objections or representations be made by 25 January 2017, being 19 days after publication of the notice);
   9.2. It did not contain a valid physical address or contact details for Uphondolwendlovu Town Planners (Pty) Ltd, who were described in the notice as being the agent of the owner of the property (section 100(a) of the SPLUM By-law) (As appears from our letter of 25 January 2017 and as elaborated upon below, the address given in the 6 January notice does not exist); and
   9.3. It did not state the contact details of the relevant municipal employee (section 100(e) of the SPLUM By-law).

10. On 3 February 2017 a second notice was published in the Volksrust Recorder ("the 3 February notice"). The 3 February notice (which is attached for ease of reference), like the 6 January notice, mischaracterised the nature of the application. It also suffers from the same or similar defects as those described in paragraph 9 above in that:

10.1. It provided for fewer than the requisite 30 days for the submission of comments or objections (section 100(h) of the SPLUM By-law) (The 3 February notice required that objections or representations be made by 25 January 2017, being a date which had already passed when the notice was published);

10.2. It did not contain any of the required details of an applicant (The 3 February notice describes Uphondolwendlovu Town Planners (Pty) Ltd as being the agent of "*the mining right holder on [the property]*". The holder of a mining right in respect of land does not have standing in terms of the SPLUMA to apply for a change in land use in respect of that land (see section 45(1) of SPLUMA)); and

10.3. It did not state the contact details of the relevant municipal employee (section 100(e) of the SPLUM By-law).

11. We observe also that the Municipality has not elected to cause additional notice in terms of section 101 of the SPLUM By-law to be given, despite the fact that the application is one for a change in land use, and is of at least the same importance to the public as an application for rezoning, which would require such notice to have been given.

12. We point out also that in terms of regulation 18(4) of The Spatial Planning and Planning and Land Use Management Regulations: Land Use Management and General Matters, 2015 (published in GN R239 in GG 38594 of 23 March 2015) ("the Regulations"), the public participation procedures for an application in terms of section 26(4) of the SPLUMA for a change of land use permitted in terms of section 26(3) of the SPLUMA are the same as those determined by the Municipality for any other land development and land use application.

13. We respectfully submit that, even if the application had lain for inspection for the advertised period, which we demonstrate below it did not, the notices would not have constituted lawful notice of the application as required by the SPLUM By-law, sections 3 and 4 of the Promotion of Administrative Justice Act 3 of 2000 and section 33 of the Constitution.

The application did not lie for inspection during the inspection period

14. Quite apart from the problems with the form of notice, the application did not in fact lie for inspection during the advertised inspection period.

15. We have, since our letter of 25 January 2017, prepared affidavits in which we describe the steps which we and our clients took to inspect the application during the inspection period, and confirm that these included, but were not limited to, the following (to the extent that there is any inconsistency between our letter of 25 January 2017 and what is described below, the latter is correct and accords with the affidavits, which will be made available to the Municipality at its request):

15.1. On 12 January 2017 Bradley Gibbons of the Endangered Wildlife Trust, for whom we act in these proceedings, attended at the offices of the Municipality's municipal manager and its town planning office to inspect the application, but was informed by a municipal employee that it was not available for inspection at the Municipality and that he should contact Uphondolwendlovu Town Planners (Pty) Ltd at a telephone number which was provided to him;

15.2. On 13 January 2017 Mr Gibbons managed to make telephonic contact with Sibonelo Kubheka of Uphondolwendlovu Town Planners (Pty) Ltd who sent him a copy of an Environmental Impact Assessment Report and Environmental Management Programme for Yzermyn, but not a copy of the application;

15.3. On 17 January 2017 our Suzanne Powell sent an email to Morgam Munsamy of Atha Africa Ventures (Pty) Ltd ("Atha") in which she described the problems we were having obtaining the application and requested a copy of it, but on 19 January 2017 Mr Munsamy responded

to the effect that our claims were false and that the application could be viewed at the Municipality;

15.4. On 20 January 2017 our Marthán Theart arranged with the Municipality's senior town planner, Mr Skhumbuzo Makhubo, that Nonkazimlo Mafa (WWF officer: Land Reform and Biodiversity Stewardship Programme) would attend at the Municipality on our behalf to collect several municipal planning documents which we had requested, as well as the application, but although Mr Makhubo furnished Ms Mafa with certain of the requested documents on that day, the application was not among them;

15.5. On 23 January 2017 we briefed Frans Rabie Prokureurs to attend at the address which had been published in the 6 January and 3 February notices for Uphondolwendlovu Town Planners (Pty) Ltd, but on 24 January 2017 Frans Rabie Prokureurs reported that the address did not exist and that they had been told by a Mr Jonas Nkhuta of the Dipaleseng Municipality that Uphondolwendlovu Town Planners (Pty) Ltd had moved to Middelberg, Mpumalanga;

15.6. On 24 January 2017 Mr Kubheka of Uphondolwendlovu Town Planners (Pty) Ltd undertook in a telephone conversation with our Thobeka Gumede that he would provide us with the application via Dropbox link, but on 25 January 2017 Mr Kubheka advised our Catherine Horsfield that he had consulted with his colleagues and it was "*against the company policy to provide an electronic copy of the work we have done for Atha-Africa Ventures (Pty) Ltd*".

16. It is clear that the application did not lie for inspection for the full duration of the advertised inspection period, if at all. On the two occasions when we or our clients attended at the Municipality to inspect the application during the inspection period, it was not available for inspection. Neither we nor our clients have had sight of the application.

17. It goes without saying that any decision to grant the application in the present circumstances would be reviewable on the ground that the procedural fairness requirements contained in the SPLUM By-law, PAJA and section 33 of the Constitution have not been met.

<u>The Municipal Planning Tribunal</u>

18. In a letter dated 27 January 2017 from Atha to your office, which Atha also copied to us, Atha asserted that:

> "*The Municipality, as competent authority, in relation to land use applications and the lawful authority that is empowered to grant or approve a right to use of land for a specified purpose, is furthermore responsible for designating an "authorised official", in the employ of the municipality, to consider and determine land use applications as contemplated in section 35(2) of the Act. In this instance the "authorised official" is understood to be the Municipal Manager and therefore any land use applications must be submitted to the office of the Municipal Manager, as provided for in SPLUMA regulation 14(2)*"

19. We respectfully take issue with this description of the legal position.

20. Section 35 of the SPLUM provides as follows:

> "*(1) A municipality must, in order to determine land use and development applications within its municipal area, establish a Municipal Planning Tribunal.*
>
> *(2) Despite subsection (1), a municipality may authorise that certain land use and land development applications may be considered and determined by an official in the employ of the municipality.*
>
> *(3) A municipality must, in order to determine land use and land development applications within its municipal area, categorise development applications to be considered by an official and those to be referred to the Municipal Planning Tribunal.*"

21. Regulation 15(1) of the Regulations provides that:

"*If a municipality decides not to authorise an official to consider and determine certain land development and land use applications, the Municipal Planning Tribunal must consider and decide all land use and land development and land use applications that are submitted to the municipality.*"

22. Regulation 15(4) of the Regulations provides that:

"*The municipality must determine which category of land development and land use application must be considered and determined by the authorised official and which category must be considered and determined by the Municipal Planning Tribunal and may use the standard division of functions contained in Schedule 5.*"

23. It is clear from these provisions that a land use and development application must be heard by a Municipal Planning Tribunal, unless the Municipality has:
    23.1. authorised that certain land use and land development applications may be considered and determined by an official;
    23.2. categorised development applications to be considered by an official and those to be referred to the Municipal Planning Tribunal; and
    23.3. the application falls within a category to be referred to the official.

24. As regards the last of these requirements, schedule 5(3) of the Regulations suggests that this division of functions between an authorised official and a Municipal Planning Tribunal can be made on the basis that "*All category 1 applications and all opposed category 2 applications must be referred to the Municipal Planning Tribunal*". (We pause here to mention that since any land development application which is properly made by Uphondolwendlovu Town Planners (Pty) Ltd is likely to be opposed by our clients, assuming that the Municipality has followed the guideline contained in Schedule 5 of the Regulations, the application would be heard by the Municipal Planning Tribunal.)

25. The SPLUM By-law does not specify whether or how the Municipality has made the categorisation referred to in section 35(3) of the SPLUMA. It says only that "*The Council must, by resolution, categorise applications to be considered by the Land Development Officer and applications to be referred to the Municipal Planning Tribunal*" (section 31(1)); and that if "*the Council does not categorise applications contemplated in subsection (1), regulation 15(1) of the Regulations apply*" (section 31(3)).

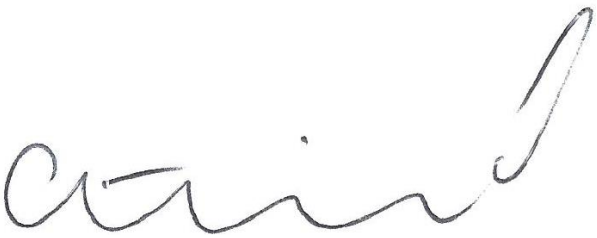
<u>Information urgently requested</u>

26. In the circumstances set out above, we hereby respectfully request on behalf of our clients:
    26.1. Confirmation as to whether or not you have received for determination any land development application in relation to the property;
    26.2. If you have received any such application, a copy of the application;
    26.3. Confirmation as to whether or not, assuming that you have received an application as described in paragraph 26.1, you are processing the application (despite the problems we have outlined in our previous letters and elaborated upon above);
    26.4. Confirmation as to whether or not, assuming that you are processing an application as described in paragraph 26.1, the Municipality has categorised development applications to be considered by an official and those to be referred to the Municipal Planning Tribunal; and if it has, a copy of the applicable Council resolution from which the basis or nature of such categorisation appears.

Intervener status

27. Finally, we hereby give notice that we intend to petition to intervene in terms of section 45(2) of the SPLUMA in any application for a change in land use of the property. In order for us however to assess the issues presented in any such application, we would obviously first need to have sight of it.

Yours sincerely
CENTRE FOR ENVIRONMENTAL RIGHTS



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