



Centre for Environmental Rights

Advancing Environmental Rights in South Africa

Mr P Thwala
Municipal Manager (Acting)
Dr Pixley Ka Isaka Seme Local Municipality
Volksrust

By email: mbekanyeni@pixleykaseme.gov.za

Your ref.: 15/4/1/2 (MR/PS/SN)
Our ref.: Mabola WUL Appeal CH/SP/ZO
16 July 2018

Dear Mr Thwala

RE: OBJECTION TO APPLICATION IN TERMS OF REGULATION 18(1)(b) OF THE SPATIAL PLANNING AND LAND USE MANAGEMENT REGULATIONS: LAND USE MANAGEMENT AND GENERAL MATTERS, 2015 READ WITH SECTION 98 OF THE SPATIAL PLANNING AND LAND USE MANAGEMENT BY-LAW FOR PIXLEY KA ISAKA SEME LOCAL MUNICIPALITY, 2016

1. We refer to our clients' aforesaid objection dated 30 May 2018, and to the letter of Peter Dacomb of the Practice Group, dated 27 June 2018, in response thereto. Pursuant to the email of Ramukosi Mbekanyeni, on behalf of the Dr Pixley Ka Isaka Seme Local Municipality (the "Municipality"), dated 5 July 2018, we set out hereunder our clients' response to Mr Dacomb's letter. As is evident from our clients' below representations, Mr Dacomb's responses to our clients' objections are entirely without merit.¹ Our clients therefore unqualifiedly reiterate their request for the relief set out in paragraph 64 of their objection.
2. In this regard, our clients request that their full objection, including annexures, and this letter with all annexures be made available to the Municipal Planning Tribunal tasked with considering this application for land-use change. Our clients respectfully submit that any failure to do so would constitute an administrative injustice and a violation of their right to procedural fairness.
3. As required by administrative justice and procedural fairness, our clients also respectfully request an opportunity to amplify their objection and this response in the event of (1) the land development applicant (or its agent) being given a further opportunity to respond, or (2) the land development applicant (or its agent) being given an opportunity to be heard in person by the Municipal Planning Tribunal. In the latter instance, our clients also specifically request an opportunity to be heard in person by the Municipal Planning Tribunal.

¹ Our omission to respond to any criticisms in Mr Dacomb's letter of our clients' objection should not be regarded as our acceptance thereof. Rather, where we omit to respond we do so because Mr Dacomb's criticisms are so baseless that they require no substantiated response by us, and are denied.

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4. RE: paragraph 9.3 of Mr Dacomb's letter

4.1. We annex as Annexure "F" a figure of the proposed mine area, including the subject property, with an overlay of the Mpumalanga Biodiversity Sector Plan-2014 ("MBSP").² It is evident therefrom that the subject property is identified in the MBSP as an "Ecological Support Area: protected area buffer zone", and accordingly we reiterate the Land-use guidelines for protected area buffer zones contained in the MBSP, as referenced in paragraph 15 of our clients' objection.

4.2. The MBSP was compiled by the Mpumalanga Tourism and Parks Agency ("MTPA") in association with the Mpumalanga Department of Agriculture, Rural Development, Land and Environmental Affairs ("the Mpumalanga Environmental Department"). In his foreword to the MBSP Handbook the MEC, at that time Mr Andries Gamede, stated that: *"The realisation is that Critical Biodiversity Areas should remain in a natural state and be managed appropriately in order to meet our commitments to sustainable development and a healthy environment for all. Our natural environment offers us a suite of natural solutions in the face of unemployment, rising poverty and climate change. The Mpumalanga Provincial Government is committed to ensure that the MBSP is implemented by provincial departments and municipalities."* (p. x).

5. RE: paragraph 9.4 of Mr Dacomb's letter

We reiterate paragraph 50 of our clients' objection.

6. RE: paragraphs 9.7 to 9.9 of Mr Dacomb's letter

6.1. In paragraph 9.7, Mr Dacomb asserts that the spatial development frameworks and related national programmes and policies *"indeed identify the conservation area (as demarcated and proclaimed), [however] they do not include the subject property"*. Mr Dacomb's reference to the *"conservation area (as demarcated and proclaimed)"* must be to the Mabola Protected Environment.

6.2. Mr Dacomb's aforesaid assertion is baseless and therefore it is unsurprising that he failed to substantiate it. As stated in our clients' objection, the subject property is regarded as follows in, amongst others, the following national, provincial and municipal planning documents and policies:

- 6.2.1. a "sensitive natural area" in terms of the SDF – see paragraphs 14.5 and 40.3.2 of our clients' objection;
- 6.2.2. an "Ecological Support Area: protected area buffer zone" in terms of the MBSP – see paragraph 4 above;
- 6.2.3. a "Zone 1: Conservation" Environmental Management Zone in terms of the EMF – see paragraph 20.11 of our clients' objection;
- 6.2.4. a priority area for inclusion as a protected area in terms of the NPAES – see paragraph 40.3.1 of our clients' objection and Annexure G attached³;
- 6.2.5. a priority river and wetland ecosystem in terms of NFEPA – see paragraph 40.4.1 of our clients' objection and Annexure H attached⁴;

² The figure comprising Annexure F was prepared by Vanessa Stone of the World Wide Fund for Nature South Africa ("WWF-SA")

³ The figure comprising Annexure G was prepared by Vanessa Stone of the WWF-SA

⁴ The figure comprising Annexure H was prepared by Vanessa Stone of the WWF-SA

6.2.6. a Strategic Water Source Area – see paragraph 60.9 of our clients’ objection and Annexure I attached⁵.

7. RE: paragraphs 9.5, 9.7, 9.10, 9.13, 9.14, 9.15, 9.18, 9.19, 9.20, 9.21, 9.23 of Mr Dacomb’s letter

7.1. In these paragraphs, Mr Dacomb repeatedly asserts that the anticipated environmental and water impacts of the proposed mine are not within the “*ambit of authorisation*”⁶ of the Municipality in considering the land-use change application. Mr Dacomb even goes as far as to say that “*the municipality is not authorized to decide on such matters*”⁷ (own emphasis). Mr Dacomb further asserts that these impacts are matters for consideration by other authorities (not the Municipality) and that the “*appropriate authorities*”⁸ have already “*decided*”⁹ and “*concluded*”¹⁰ them in the applications for a mining right in terms of the MPRDA, environmental authorisation in terms of NEMA, and a water-use licence in terms of the NWA. He also states that these issues have “*no bearing on the decision to be taken by the municipality in terms of its by-law read with the relevant provisions of SPLUMA*”¹¹. This interpretation of SPLUMA and the subject-matter jurisdiction of the local sphere of government (in this case the Municipality and the Municipal Planning Tribunal) is wholly incorrect.

7.2. SPLUMA recognises the environmental mandate of local government in its preamble, which states that “*sustainable development of land requires the integration of social, economic and environmental considerations in both forward planning and ongoing land use management to ensure that development of land serves present and future generations*” (own emphasis).

7.3. We also refer to the High Court decisions of ***Le Sueur v Ethekwini Municipality***¹² and ***Nel v Hessequa Local Municipality***¹³ where it was found that it is competent for the municipal sphere of government to regulate environmental functions. This competency is evident in the Municipality’s publication of a SDF and an EMF, both of which regulate environmental and water considerations.

8. RE: paragraphs 9.6 and 9.24 to 9.25 of Mr Dacomb’s letter

8.1. In these paragraphs Mr Dacomb asserts that our clients’ view that section 52 of SPLUMA applies to the present land-use change application because it affects the national interest “*is premised on an incorrect interpretation of the provisions of SPLUMA with particular reference to Section 52 thereof*”¹⁴. Although not explicitly referenced, this assertion by Mr Dacomb appears to be based on an erroneous interpretation of the Constitutional Court’s decision in ***Maccsand v City of Cape Town***¹⁵ (“Maccsand”).

⁵ The figure comprising Annexure I was prepared by Vanessa Stone of the WWF-SA

⁶ See paragraph 9.14 of Mr Dacomb’s letter

⁷ See paragraph 9.18 of Mr Dacomb’s letter

⁸ See paragraph 9.7 of Mr Dacomb’s letter

⁹ See paragraph 9.7 of Mr Dacomb’s letter

¹⁰ See paragraph 9.20 of Mr Dacomb’s letter

¹¹ See paragraph 9.19 of Mr Dacomb’s letter

¹² *Le Sueur and Another v Ethekwini Municipality and Others* (9714/11) [2013] ZAKZPHC 6 (30 January 2013)

¹³ *Nel and Others v Hessequa Local Municipality and Others* (Case number 12576/2013)

¹⁴ See paragraph 9.24 of Mr Dacomb’s letter

¹⁵ *Maccsand (Pty) Ltd v City of Cape Town and Others* 2012 (4) SA 181 (CC); 2012 (7) BCLR 690 (CC)

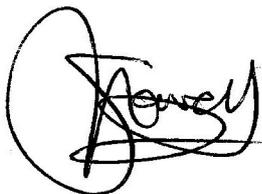
8.2. The Constitutional Court in *Maccsand* in fact found that:

“The Constitution allocates powers to three spheres of government in accordance with the functional vision of what is appropriate to each sphere. But because these powers are not contained in hermetically sealed compartments, sometimes the exercise of powers by two spheres may result in an overlap. When this happens, neither sphere is intruding into the functional area of another. Each sphere would be exercising power within its own competence. It is in this context that the Constitution obliges these spheres of government to cooperate with one another in mutual trust and good faith, and to co-ordinate actions taken with one another.”

8.3. This finding of the Constitutional Court is exactly what is envisaged by section 52 of SPLUMA. When a development application affects the national interest, which our clients have coherently explained that the present land-use change application does¹⁶, the Municipality, Municipal Planning Tribunal and the Minister of Rural Development and Land Reform must apply section 52 of SPLUMA in the spirit of cooperative governance.

Yours sincerely

CENTRE FOR ENVIRONMENTAL RIGHTS

A handwritten signature in black ink, appearing to read 'Suzanne Powell', enclosed within a hand-drawn circle.

per:

Suzanne Powell
Attorney

Direct email: spowell@cer.org.za

¹⁶ See paragraphs 58 to 62 of their objection