TO: MR LINDA BERNARD TSHABALALA

MUNICIPAL MANAGER

REGISTRAR, APPEAL AUTHORITY

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RE: APPEAL AGAINST THE RESOLUTION OF THE GERT SIBANDE DISTRICT MUNICIPAL PLANNING TRIBUNAL DATED 29 APRIL 2019 APPROVING A LAND DEVELOPMENT APPLICATION FOR PORTION 1 OF THE FARM YZERMYN 96 HT, MPUMALANGA PROVINCE

IN RE: APPLICATION BY THE PRACTICE GROUP (PTY) LTD (ON BEHALF OF ATHA-AFRICA VENTURES (PTY) LTD) FOR CHANGE IN LAND-USE IN TERMS OF REGULATION 18(1)(b) OF THE SPATIAL PLANNING AND LAND USE MANAGEMENT (SPLUM) REGULATIONS: LAND USE MANAGEMENT AND GENERAL MATTERS, 2015 READ WITH SECTION 98 OF THE SPLUM BY-LAW FOR DR PIXLEY KA ISAKA SEME LOCAL MUNICIPALITY, 2016

IN THE APPEAL OF:

EARTHLIFE AFRICA JOHANNESBURG	FIRST APPELLANT
BIRDLIFE SOUTH AFRICA	SECOND APPELLANT
MINING AND ENVIRONMENTAL JUSTICE COMMUNITY NETWORK OF SOUTH AFRICA	THIRD APPELLANT
ENDANGERED WILDLIFE TRUST	FOURTH APPELLANT
FEDERATION FOR A SUSTAINABLE ENVIRONMENT	FIFTH APPELLANT
BENCH MARKS FOUNDATION	SIXTH APPELLANT
ASSOCIATION FOR WATER AND RURAL DEVELOPMENT	SEVENTH APPELLANT
GROUNDWORK	EIGHTH APPELLANT

AND

GERT SIBANDE DISTRICT MUNICIPAL PLANNING TRIBUNAL	FIRST RESPONDENT
ATHA-AFRICA VENTURES (PTY) LTD	SECOND RESPONDENT

NOTICE OF APPEAL IN TERMS OF SECTION 142 OF THE SPATIAL PLANNING AND LAND USE MANAGEMENT (SPLUM) BY-LAW FOR THE DR PIXLEY KA ISAKA SEME LOCAL MUNICIPALITY, READ WITH SECTION 51 OF SPATIAL PLANNING AND LAND USE MANAGEMENT ACT, 2013 (ACT NO. 16 OF 2013)

INTRODUCTION

1. This document serves as an annexure to the prescribed *pro forma* Notice of Appeal to which it is attached.

2. The Appellants are a group of eight civil society and community non-profit organisations who filed, on 30 May 2018, a detailed Objection to the above application. The Objection is attached as **Annexure A** to the Notice of Appeal. Further particulars of the Appellants appear in the Objection.

3. The Appellants appoint the Centre for Environmental Rights ("CER") as their representative in this appeal.

4. The appeal is lodged against the **whole decision** of the Gert Sibande District Joint Municipal Planning Tribunal dated 29 April 2019 taken by Resolution: 12/2/1/10/3 (GSDM Ref no: 12/2/1).

   4.1. The Resolution was signed and stamped by M Mkhonza (Chairperson), dated 28 May 2019.

   4.2. The decision incorporating the Resolution was communicated by letter dated 6 May 2019 signed by LB Tshabalala (Municipal Manager) under cover of e-mail from M Ramukosi (mbekanyeni@pixleykaseme.gov.za) dated 12 June 2019. The letter communicating the decision was later resent under a changed date, 6 June 2019, under cover of e-mail from M Ramukosi dated Sunday, 23 June 2019.

5. The grounds for the appeal are as outlined hereinbelow.

SIGNED AND DATED AT **CAPE TOWN** ON THIS **3RD** DAY OF **JULY 2019**.

APPELLANTS' REPRESENTATIVE
CENTRE FOR ENVIRONMENTAL RIGHTS
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PART A: BACKGROUND TO THE APPEAL

1. In this matter, in about April 2018 Atha-Africa Ventures (Pty) Ltd ("Atha"), a company and holder of a mining right, brought an application to the Municipal Manager of the Dr Pixley Ka Isaka Seme Local Municipality ("the Local Municipality") in terms of the relevant provisions of the Spatial Planning and Land Use Management By-Law for the Dr Pixley Ka Isaka Seme Local Municipality, 2016 ("SPLUM By-Law") read with provisions of the Spatial Planning and Land Use Management Act, 2013 ("SPLUMA") ("the application").

2. The application was in respect of the property described as Portion 1 of the farm Yzermyn 96 HT ("the subject property").

3. The application sought a change of the land use of the subject property to mining and ancillary purposes. Further, the application sought an incorporation of the land use rights associated with the subject property into the Volksrust Town Planning Scheme, 1974.

4. CER, representing a coalition of eight civil society and community non-profit organisations, filed on 30 May 2018 a detailed Objection to the application.

5. Atha, through its representative, responded in detail to the Objection by letter dated 27 June 2018.

6. By letter dated 16 July 2018 CER provided its detailed response to that submitted by Atha.

7. No further correspondence was received from the Local Municipality until December 2018 when it came to light that the Local Municipality had issued correspondence dated 30 November 2018 in which it stated that:

> "*During the sitting of Dr Pixley Ka Isaka Seme Local Municipality joint Planning Tribunal (the Tribunal) on 14 November 2018, the Tribunal resolved to struck (remove) the subject application from the list of matter that were put up for consideration by it, because of the following reason:-*
>
> *The applicant was neither the owner of the land over application was lodged nor authorised by the owner to lodge the subject application. The application therefore had no locus standi to represent the owner before the Tribunal*" (sic)

8. Aggrieved by this decision, Atha then sought to appeal the decision of the Municipal Planning Tribunal ("Local Planning Tribunal"). Atha filed its notice of appeal by way of a letter dated 8 January 2019.

9. In response thereto, on 29 January 2019, CER filed a petition to be granted intervener status in the appeal. No response was received from the Local Municipality in respect of the petition.

10. Subsequent thereto, and out of the blue, Atha's representatives issued a letter dated 30 January 2019, headed "Draft for Comment", addressed to the Local Municipality's Acting Municipal Manager, and in which it stated *inter alia* that:

    10.1. Atha's representatives had been informed telephonically that the Local Planning Tribunal's decision had been erroneously communicated;

    10.2. Atha's representatives had been informed that the application's dismissal had not been an official decision of the Local Planning Tribunal;

    10.3. Atha's representatives had been informed that the application would be re-submitted to the Local Planning Tribunal which would conduct a hearing on the application;

    10.4. Atha was consequently withdrawing its notice of appeal and went on to ask the Acting Municipal Manager that all parties in the matter be afforded ample notice with regard to the hearing date and for all parties on record to receive, in advance, the full version of the recommendation report which, according to the letter, had been prepared by the Local Municipality to serve before the Local Planning Tribunal.

11. By letter dated 15 March 2019, CER asked the Local Municipality for a status report on Atha's application, and received no response to this request.

12. On 12 June 2019, CER was surprised to learn through a media article in *Mining Weekly* magazine, dated 11 June 2019, that the Gert Sibande District Municipal Planning Tribunal ("District Planning Tribunal") had approved Atha's application.

13. It is unclear how a consideration of Atha's application in this matter had shifted from a Municipal Planning Tribunal constituted by the Local Municipality to another Municipal Planning Tribunal constituted by the District Municipality.

14. CER made a follow-up on the media article with Mr Ramukosi, the Local Municipality's Town Planner, whereafter CER was provided, on 12 June 2019, with e-mail notification attaching a resolution of the District Planning Tribunal in which Atha's land use change application had been approved.

15. According to that resolution, on 29 April 2019 the District Planning Tribunal purported to make a resolution in the following terms:

> "*That the use of the farm Yzermyn 96 IT for agriculture is recognised as a legal land use in terms of section 26(4) of the Spatial Planning and Land Use Management Act 16 of 2013;*
>
> *The farm Yzermyn 96 IT is incorporated into the Volksrust Town Planning Scheme of 1974 in terms of section 30(2) of the Chief Albert Luthuli, Dipaleseng, Dr Pixley Ka Isaka Seme, Lekwa, Mkhondo and Msukalingwa Local Municipalities, 2016;*
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> *The rezoning of Portion 1 of the farm Yzermyn 96 IT from AGRICULTURE to SPECIAL, be APPROVED in terms of Section 66 of the Special Planning and Land Use Management By Law for: Chief Albert Luthuli, Dipaleseng, Dr Pixley Ka Isaka Seme, Lekwa, Mkhondo and Msukalingwa Local Municipalities, 2016 as per (attached) amendment scheme;*
>
> …"

PART B: GROUNDS OF APPEAL (Section 143(1)(c) of the SPLUM By-Law)

B1: The decision of the District Planning Tribunal is unlawful and invalid (first ground of appeal)

16. As outlined above, a decision in relation to Atha's application was taken by a duly constituted Dr Pixley Ka Isaka Seme Local Municipality Joint Planning Tribunal on 14 November 2018. The Local Planning Tribunal resolved to dismiss the application. That decision stands unless reviewed and set aside by a court of law.

17. This is trite law as demonstrated by the following authorities:

    17.1. In *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others [2004] 3 All SA 1 (SCA)* the Supreme Court of Appeal held:

"(para 26): *But the question that arises is what consequences follow from the conclusion that the Administrator acted unlawfully. Is the permission that was granted by the Administrator simply to be disregarded as if it had never existed? In other words, was the Cape Metropolitan Council entitled to disregard the Administrator's approval and all its consequences merely because it believed that they were invalid provided that its belief was correct? In our view it was not. Until the Administrator's approval (and thus also the consequences of the approval) is set aside by a court in proceedings for judicial review it exists in fact and it has legal consequences that cannot simply be overlooked. The proper functioning of a modern state would be considerably compromised if all administrative acts could be given effect to or ignored depending upon the view the subject takes of the validity of the act in question*."

17.2. Lord Radcliffe put it thus in *Smith v East Elloe Rural District Council [1956] AC 736 (HL) 769-70*:

"*An [administrative] order…is still an act capable of legal consequences. It bears no brand of invalidity upon its forehead. Unless the necessary proceedings are taken at law to establish the cause of invalidity and to get it quashed or otherwise upset, it will remain as effective for its ostensible purpose as the most impeccable of orders*."

17.3. In *MEC for Health, Province of Eastern Cape NO and Another v Kirland Investments (Pty) Ltd t/a Eye & Laser Institute 2014 (3) SA 219 (SCA)* the Supreme Court of Appeal dealt with the issue as follows- per Pasket AJA (as he then was):

"(para 22): *I therefore conclude that Boya could not validly take the view that because the decisions taken by Diliza were invalid, he could treat them as nullities and formally revoke them. For as long as the decisions taken by Diliza had not been set aside on review they existed in fact and had legal consequences. As Boya had no authority arising from the empowering legislation to revoke final decisions already taken – much less in the absence of a hearing being granted to Kirland Investments – he was, in relation to the decisions taken by Diliza in her capacity as acting superintendent-general,* functus officio."

17.4. *Cora Hoexter Administrative Law in South Africa (2 ed) (2012)* at 278 put the situation thus:

"*Ordinarily, however, the administrator will be* functus officio *once a final decision has been made and will not be entitled to revoke the decision in the absence of statutory authority to do so*."

18. The above authorities demonstrate that it was not open to anyone simply to ignore the decision taken by the Local Planning Tribunal on 14 November 2018, i.e. the resolution to dismiss Atha's application.

19. It is submitted that the first ground of appeal is dispositive of the entire appeal. In the event that the Appeal Tribunal is nevertheless minded to entertain the appeal on its merits, the following further grounds of appeal are advanced.

B2: Failure of to consider the Appellants' Objection (second ground of appeal)

20. Section 53(1) of the SPLUM By-Law states that the Municipal Planning Tribunal or Land Development Officer, when considering an application submitted in terms of this By-Law, must have regard to, *inter alia*, *"the comments in response to the notice of the application…"*.[1]

21. At no stage has the decision-maker, the District Planning Tribunal, demonstrated that it engaged with any of the detailed aspects which formed the Appellants' grounds of objection submitted on 30 May 2018. The decision-maker misdirected itself by failing to consider in any demonstrable way the grounds of objection.

22. **In the circumstances, the grounds of objection are reiterated and hereby incorporated into this Notice of Appeal, and thus form part of the grounds of appeal to be considered in the Appeal.**

B3: Additional ground of appeal: incremental decision-making (third ground of appeal)

23. In addition to the grounds of objection set out in the Appellants' Objection, the appellants submit that the decision-maker misdirected itself by engaging in incremental decision-making when approving Atha's application.

[1] SPLUM by-law, section 53(1)(d).

24. The proposed mine is intended to be located on various properties[2]. The surface infrastructure will be situated on Yzermyn Portion 1 whilst the underground mining will be undertaken on Yzermyn Portion 1 as well as the other five properties. Whereas the intended location of the surface infrastructure of the mine (Yzermyn Portion 1) is situated adjacent to the Mabola Protected Environment ("MPE"), the majority of the underground mining footprint falls within the MPE.[3]

25. The application for land-use change which forms the subject-matter of this appeal is in respect of Yzermyn Portion 1 only. This is problematic in two respects:

25.1. The District Planning Tribunal's decision constitutes incremental decision-making in that, in order for Atha to proceed with the proposed mine development, it will require land-use change for the additional five properties that it intends to undermine. Atha has not been granted, indeed it has not even applied for, land-use change of those properties. We submit that this incremental decision-making about a single development project is irrational; and

25.2. To the extent that the District Planning Tribunal's decision extends beyond the scope of the current application (which pertains only to Yzermyn Portion 1), the decision is materially flawed, irrational and unlawful.

PART C: THE RELIEF SOUGHT ON APPEAL (Section 143(1)(d) SPLUM By-Law)

26. The relief that the Appellants seek on appeal is that the appeal be upheld and that the appeal authority revoke the decision of the District Planning Tribunal in terms of section 169(1) of the SPLUM By-Law and remit the matter to the Tribunal in terms of Regulation 26(2).

PART D: ISSUE TO BE CONSIDERED BY THE APPEAL AUTHORITY IN MAKING ITS DECISION (Section 143(1)(e) SPLUM By-Law)

27. Section 52 of SPLUMA deals with **development applications affecting national interest**. In terms thereof, a land development application must be referred to the Minister of Rural Development and Land Reform where such an application materially impacts on matters within the exclusive functionality of the national sphere in terms of the Constitution; strategic national policy objectives,

[2] Surface infrastructure property: Portion 1 of Yzermyn 96 HT. Underground mining properties: Portion 1 of Yzermyn 96 HT, Goedgevonden 95 HT; Portion 1 and Remainder of Kromhoek 93 HT; Zoetfontein 94 HT; Remainder of Yzermyn 96 HT.

[3] Zoetfontein 94 HT is not in the MPE.

principles or priorities including international relations and co-operation; land use for a purpose which falls within the functional area of the national sphere of government.

28. In this regard, the Appellants direct the appeal authority to Paragraph G of its attached Objection (Annexure A) which presents a detailed explanation of why this land development application is one that affects national interest. The appeal authority ought to consider this in making its decision.

PART E: MOTIVATION OF AN AWARD FOR COSTS (Section 143(1)(f) SPLUM By-Law)

29. The Appellants note that section 169 of the SPLUM By-Law gives the appeal authority the power to include an award of costs in its decision.

30. The Appellants submit that should the appeal be dismissed, an award of costs should not be granted against them as the Appellants are acting in the public interest. Moreover, this appeal remedy provided by SPLUMA and the SPLUM By-Law is a remedy available to affected parties and they should therefore not be made to pay costs for utilising this remedy.

31. The Appellants also point out that there is no provision in SPLUMA which empowers the appeal authority to make an award of costs, and that section 169 of the SPLUM By-Law is therefore incompetent. As such, should the appeal authority make such an award of costs against the Appellants, we will be obliged to challenge it.

PART D: SUSPENSION OF TRIBUNAL'S DECISION PENDING OUTCOME OF THE APPEAL

32. The legal effect of lodging an appeal of this nature was considered by the court in *Morrison v City of Johannesburg [2014] 2 All SA 100 (GNP)* paras 28 and 29. The court found that noting an appeal in terms of section 139 of the Town Planning and Townships Ordinance (Transvaal) to a Townships Board has the legal effect of suspending the decision of the municipality against which the appeal lies.

33. We submit that the same principle applies in this instance, and therefore that the District Planning Tribunal's decision is suspended pending the outcome of this appeal.

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