

**TO: MS MM PHETLA
ACTING MUNICIPAL MANAGER
REGISTRAR, APPEAL AUTHORITY**

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RE: PETITION TO BE GRANTED INTERVENER STATUS

IN RE: APPEAL BY THE PRACTICE GROUP (PTY) LTD (ON BEHALF OF ATHA VENTURES AFRICA (PTY) LTD) AGAINST THE DECISION OF THE JOINT MUNICIPAL PLANNING TRIBUNAL SITTING IN THE APPLICATION FOR CHANGE IN LAND-USE (IN TERMS OF REGULATION 18 OF THE SPLUM REGULATIONS) IN RESPECT OF PORTION 1 OF YZERMYN 96 HT, IN THE DR PIXLEY KA ISAKA SEME LOCAL MUNICIPALITY AND THE GERT SIBANDE DISTRICT MUNICIPALITY, MPUMALANGA

PETITIONING PARTIES SEEKING INTERVENER STATUS:

MINING AND ENVIRONMENTAL JUSTICE COMMUNITY NETWORK OF SOUTH AFRICA	First Petitioner
GROUNDWORK	Second Petitioner
EARTHLIFE AFRICA, JOHANNESBURG	Third Petitioner
BIRDLIFE SOUTH AFRICA	Fourth Petitioner
ENDANGERED WILDLIFE TRUST	Fifth Petitioner
FEDERATION FOR A SUSTAINABLE ENVIRONMENT	Sixth Petitioner
ASSOCIATION FOR WATER AND RURAL DEVELOPMENT (AWARD)	Seventh Petitioner
BENCH MARKS FOUNDATION	Eighth Petitioner

PETITION TO BE GRANTED INTERVENER STATUS IN APPEAL PROCEEDINGS IN TERMS OF S 147 OF THE DR. PIXLEY KA ISAKA SEME LOCAL MUNICIPALITY BY-LAW

INTRODUCTION

1. This is a petition to be granted intervener status in the appeal lodged by the Practice Group (Pty) Ltd ('the Practice Group') to the appeal authority, in respect of an application submitted on behalf of Atha-Africa Ventures (Pty) Ltd ('the Appellant') in terms of regulation 18 of the Spatial Planning and Land Use Management (SPLUM) Regulations to the Dr Pixley Ka Isaka Seme Local Municipality ('the Municipality') for a land-use change regarding portion 1 of Yzermyn 96 HT ('the Application') in the Dr Pixley Ka Isaka Seme Local Municipality and the Gert Sibande District Municipality, Mpumalanga ('the Appeal').
2. This petition is submitted in terms of section 147 of the SPLUM By-Law, 2016 for the Dr. Pixley Ka Isaka Seme Local Municipality ('the by-law'); section 45(2) and (3) of the Spatial and Land Use Management Act, 16 of 2013 (SPLUMA), and regulation 31 of the SPLUM Regulations, 2015 ('the Regulations').
3. The petition is submitted on behalf of the abovementioned eight civil society organisations, who are represented by the Centre for Environmental Rights NPC ('CER').

THE PETITIONERS ARE INTERESTED PERSONS

4. The Petitioners are 'interested persons' in terms of section 45(2) of SPLUMA and regulation 31(4) of the Regulations.

4.1. The first is the **Mining and Environmental Justice Community Network of South Africa**, a non-profit voluntary network of communities, community based organisations and community members whose environmental and other human rights are affected, directly or indirectly, by mining and mining-related activities. MEJCON has more than 300 members who come from different parts of South Africa, including but not limited to communities from KwaZulu-Natal, Limpopo, Northern Cape,

Gauteng, North West and many communities across the Mpumalanga Province. The members of MEJCON have played an active role in fighting for the rights of their communities which have been affected by neighbouring mines. The primary objectives of MEJCON include the promotion, defence and advocacy of environmental and other human rights of communities affected by mining; and ensuring the sustainable use of mineral resources.

4.2. The second is **groundWork**, a non-profit environmental justice service and development organisation working primarily in Southern Africa in the areas of, *inter alia*, coal, climate and energy justice, and environmental health. groundWork places particular emphasis on assisting vulnerable and previously disadvantaged people, who are most affected by environmental injustice, to engage with stakeholders in development projects and to promote the expression of their environmental concerns in the public debate carried by the media. groundWork has done extensive research and advocacy work on the detrimental impacts of coal mining on communities in the Mpumalanga Highveld, and published a 2016 research report called "*The Destruction of the Highveld: Digging Coal*". groundWork's NPO number is 045-235 and its physical address is 6 Raven Street, Pietermaritzburg.

4.3. The third is **Earthlife Africa Johannesburg**, a non-profit organisation that was founded in 1988 to mobilise civil society around environmental issues. It is an organisation with approximately 100 members, led by a core group that serves as its management committee. Earthlife seeks to improve the quality of life of vulnerable people in South Africa by supporting them to play a meaningful role in environmental governance based on an understanding of their constitutional rights, particularly section 24 of the Constitution of the Republic of South Africa. Earthlife's NPO number is 004-159 and its offices are at 5th Floor Heerengracht Building, 87 De Korte Street, Braamfontein, Johannesburg.

4.4. The fourth is **Birdlife South Africa**, a non-profit and public benefit organisation with a vision of seeing a country and region where nature and people live in greater harmony, more equitably and more sustainably. Its mission is to conserve birds, their habitats and biodiversity through, *inter alia*, scientifically based programmes, and supporting the sustainable and equitable use of natural resources. BirdLife SA has

NPO number 001-298 and PBO number 930 004 518, and its head office is at Isdell House, 17 Hume Road, Dunkeld West, Johannesburg.

4.5. The fifth is the **Endangered Wildlife Trust**, a non-profit organisation and public benefit organisation dedicated to conserving threatened species and ecosystems in Southern Africa to the benefit of all people. The EWT believes that the environment in which we live underpins every human need, demonstrated every day by the loss of thousands of lives due to environmental disasters, the lack of access to quality natural resources, as well as the dependence of millions of people on their natural surroundings for their everyday existence. The EWT strives to facilitate the protection and sustainable use of key ecosystems. The EWT's NPO Number is 015-502 and PBO number is 930 001 777, and its physical address is Building K2, Ardeer Road, Pinelands Office Park, Modderfontein, Gauteng.

4.6. The sixth is **Federation for a Sustainable Environment**, a non-profit organisation with the objective of promoting the ecological sustainability of development and the wise use of natural resources in South Africa. The FSE's non-profit organisation registration number is 2007/033134/08 and its NPO number is 062986-NPO. The FSE has its physical address at 8 Palladio, corner of Ryk Street and Roux Avenue, Beverley Gardens, Johannesburg.

4.7. The seventh is the **Association for Water and Rural Development (AWARD)**, a non-profit organisation specialising in multi-disciplinary, participatory, research-based project implementation aimed at addressing issues of sustainability, inequity and poverty. AWARD recognises that natural resources are limited and undergoing rapid depletion and transformation, negatively affecting the health and functioning of the earth's social-ecological systems. In consequence, AWARD seeks to contribute to building a more sustainable and equitable society by encouraging active civil society participation in wise water and biodiversity stewardship, management and governance. AWARD's company registration number is 98/03011/08 and non-profit organisation registration number is 006-821. Its physical address is at Sunset View Office Park, corner Buffel and Koedoe Streets, Hoedspruit, Limpopo Province.

4.8. The eighth is **Bench Marks Foundation**, a non-profit, faith-based organisation owned by churches in South Africa. The Bench Marks Foundation works in the area of corporate social responsibility and monitors corporate performance against an

international measuring instrument, the Principles for Global Corporate Responsibility: Benchmarks for Measuring Business Performance. It is committed to providing leadership and advocacy on issues regarding ethical and socially-responsible investment, as well as linking people and institutions committed to these ideals. The Bench Marks Foundation's physical address is 6th Floor, Khotso House, 62 Marshall Street, Marshalltown, Johannesburg.

5. Each of the Petitioners has juristic personality. They comprise both registered non-profit conservation organisations and communities affected by mining in South Africa. Their objectives include environmental conservation but also advancing the rights of those who are most vulnerable to the effects of environmental degradation. Many of them have the express objective of protecting the environment and the people who depend on it for their livelihoods.
6. The Petitioners' interest in the matter, and objection to the Application, stems from the environmental and hydrological significance of the area proposed for land use change from agriculture to mining as follows:
7. The area in which the mine would be located has been recognised in spatial development frameworks and national programmes and policies as falling within a strategically important area from a conservation point of view, but also from a national water supply perspective:
 - 7.1. In March 2009 the National Protected Area Expansion Strategy ('the NPAES') was approved by the national government for implementation. The NPAES identified the vast majority of the area which now comprises the Mabola Protected Environment ('MPE') and the mine area, as well as Portion 1 of Yzermyn 96 HT, as a priority area for inclusion as a protected area in terms of the Protected Areas Act ('Moist Escarpment Grasslands').
 - 7.2. On 30 November 2010 the Municipality published its Spatial Development Framework ('SDF') in terms of the Local Government: Municipal Systems Act 32 of 2000 from which the following things, among others, appear:

7.2.1. The area comprising the proposed mine area was identified as a '*sensitive natural area*' meaning that it '*should be considered as protected and development proposed in the area should be directed by the different environmentally sensitive aspects as described in the environmental section of the SDF. Furthermore the abundance of conservation and protected areas should also be utilised as part of the natural environment to promote the economy and tourism in the municipal area by developing the areas to attract tourists and promote the attractiveness of the municipality*'.

7.2.2. The environmental section of the SDF stated that:

7.2.2.1. Operational mines pose a significant threat to underground water quality;

7.2.2.2. '*[t]he spreading of coal mining activities in the Wakkerstroom area is of concern as this area is of high conservation value to the extensive wetlands found there. Mining would seriously threaten the integrity of the wetlands and other habitats*';

7.2.2.3. '*The high value of properly functioning ecosystems particularly in terms of water services provides an economic justification for their protection and restoration*';

7.2.2.4. '*One of the key regulating ecosystem services provided by [the] grasslands area [is] associated with the water environment given the area's importance at the headwater of three major [Water Management areas]... Numerous wetlands... are centres of biodiversity, act as carbon sinks and are paramount to the hydrological functioning of drainage systems. The services provide water security for the area and also play a critical role as a "water factory" area with national importance for water security...*' and

7.2.2.5. '*The available evidence and observation of the situation in other mining areas indicates a high risk of significant unmitigated cumulative impacts from intensive mining*'.

7.3. In August 2011 the Water Research Commission, the Council for Scientific and Industrial Research ('the CSIR'), the South African National Biodiversity Institute (SANBI), the Department of Water Affairs (now the Department of Water and Sanitation) and the Department of Environmental Affairs ('DEA') published the Atlas of National Freshwater Ecosystem Priority Areas in South Africa ('the NFEPA Atlas'). The then Minister of Water and Environmental Affairs (the Hon. Edna Molewa) said in the foreword to the NFEPA Atlas, that it was essential that water is dealt with in an

integrated and cooperative manner across key government departments and that the NFEPA Atlas would inform decisions about land use. In terms of the NFEPA Atlas:

- 7.3.1. The Wakkerstroom area, within which the mine area is located, was classified as a priority river and wetland ecosystem;
- 7.3.2. By this it was meant that the rivers were still in relatively good ecological condition occurring in healthy catchments and should remain in relatively good condition to contribute to national biodiversity goals and support sustainable use of water resources (p. 14); and that the wetlands and wetland clusters had to be maintained if they were in good ecological condition and rehabilitated to the best attainable ecological condition if they were in a substandard ecological condition (p. 14);
- 7.3.3. The area now comprising the MPE was located in a high water yield area, which areas are important *'because they contribute significantly to the overall water supply of the country. They can be regarded as our water factories, supporting growth and development needs that are often a far distance away. Deterioration of water quantity and quality in these high water yield areas can have a disproportionately large adverse effect on the functioning of downstream ecosystems and the overall sustainability of growth and development in the regions they support. High water yield areas should therefore be maintained in a good condition (A or B ecological category). This requires minimising land use activities that reduce stream flow in these areas (e.g. plantation forestry), as well as any activity that would affect water quality (e.g. timber mills, mining, over-grazing). Wetlands also play an important role in these areas, regulating stream flow and preventing erosion...'* (p. 44).

7.4. On 9 December 2011 the then Minister of Water and Environmental Affairs published in terms of section 52(2)(b) of the National Environmental Management: Biodiversity Act 10 of 2004, a national list of ecosystems that are threatened and in need of protection¹. The Wakkerstroom/Luneburg Grasslands (MP11) was listed as an endangered ecosystem. The area now comprising the MPE and the mine area, as well as Portion 1 of Yzermyn 96 HT, is located in the Wakkerstroom/Luneburg Grasslands endangered ecosystem.

¹ GN 1002 in GG 34809 dated 9 December 2011.

7.5. On 21 February 2012, the MEC published by notice in the Mpumalanga Gazette, an Environmental Management Framework ('EMF') for the Local Municipality in terms of sections 24(5) and 44 of NEMA and the Environmental Management Framework Regulations, 2010. The Environmental Management Zones figure published with the EMF shows that the proposed mine area falls within a 'Zone 1: Conservation' Environmental Management Zone. In terms of the EMF, '*Mining, dumping, dredging and prospecting*' is an '*undesirable type of activity*' and should '*not [be] allowed at all*' in a Zone 1: Conservation area.

7.6. In 2013, the proposed mine area was depicted in the 2013 Mpumalanga Biodiversity Sector Plan, as falling within areas largely classified as '*Irreplaceable Critical Biodiversity Areas*'² and '*Optimal Critical Biodiversity Areas*'³.

7.7. In March 2013, the CSIR completed the Strategic Water Source Areas Report for WWF-SA. On the basis of this report, in August 2013 WWF-SA published an '*Introduction to South Africa's Strategic Water Source Areas*'. The following things appear from the latter report:

7.7.1. The area now comprising the MPE and the mine area, as well as Portion 1 of Yzermyn 96 HT, were identified as comprising part of the Enkangala Drakensberg Strategic Water Source Area;

7.7.2. The Strategic Water Source Areas were described as being the 8% of South Africa's land area that provides 50% of our surface water run-off. They '*provide a disproportionate amount of run-off to the rest of the catchment ... Downstream users and ecosystems are dependent on the healthy functioning of these areas to sustain good quality water supplies ... Disrupting water supply from these 16 strategic WSAs would effectively turn off the taps to our economy and seriously impact our food and water security*' (p. 14);

² Which means that it was '*considered critical for meeting biodiversity targets and thresholds ...which are required to ensure the persistence of species and the functioning of ecosystems*' (MBSP, 2013).

³ Which means that it has an irreplaceability of less than 80% but collectively with other such areas it incorporates the most biodiversity in the smallest area and therefore provides the most cost-effective options for bio-diversity (MBSP, 2013). After the MPE had been declared on 22 January 2014, the areas comprising the MPE were classified in the MBSP as protected environment areas, while the remaining mine area not falling within the MPE (Portion 1 of Yzermyn 96 HT and Zoetfontein 94 HT) were largely classified as '*Irreplaceable Critical Biodiversity Areas*' and '*Optimal Critical Biodiversity Areas*' and were depicted as falling within a '*Protected Area Buffer*'.

7.7.3. The Enkangala Drakensberg Strategic Water Source Area ‘*supplies water to South Africa’s economic hub, Gauteng...*’ (p. 46). Numerous headwater and mountain streams flow from the study area into rivers that drain into the Assegai River. The Assegai River, in turn, flows into the Heyshope Dam, from which water is diverted into the Vaal River System (the *Introduction to South Africa’s Strategic Water Source Areas* report p. 46). Accordingly, the area constituting the mine area and the MPE is a water source of the Vaal River System which, as stated, supplies water to Gauteng⁴);

7.7.4. Following the Strategic Water Source Areas Report referred to above, in April 2015 the Water Research Commission initiated a 3-year project led by the CSIR with the aim of building on the Strategic Water Source Area work. A project reference group, which included scientific experts, senior planners and policymakers within the Department of Water and Sanitation, Department of Environmental Affairs, SANBI, Water Research Commission and SANParks, guided the work and assessed progress. In terms of the Project Report dated March 2018, the entire MPE is part of the now expanded Enkangala Drakensberg Strategic Water Source Area.

7.8. On 22 May 2013 the ‘*Mining and Biodiversity Guideline: Mainstreaming Biodiversity into the Mining Sector*’ was published by the DEA, the Department of Mineral Resources, the Chamber of Mines, the South African Mining and Biodiversity Forum and SANBI. The mine area falls within an area which has been identified in the Mining and Biodiversity Guideline as a Category B area, having the “*Highest biodiversity importance*” and being at the “*Highest Risk for mining*”. The significance of the biodiversity features in a Category B area is that (p. 29):

7.8.1. If the existence of the biodiversity features is confirmed in an environmental impact assessment, ‘*the likelihood of a fatal flaw for new mining projects is very high because of the significance of the ... ecosystem services*’;

7.8.2. Category B areas ‘*are viewed as necessary to ensure the protection of biodiversity, environmental sustainability, and human well-being*’; and

⁴ Downstream of the Heyshope Dam, the Assegai River flows into the Usutu River (the “*Hydrological Assessment*” by the Appellant’s first EA Practitioner dated 16 August 2013). The Usutu River flows through Swaziland and, after joining the Pongola River, flows into Mozambique, where it is known as the Maputo River. Accordingly, the health of the Usutu River System is also relevant to South Africa’s international obligations to Swaziland and Mozambique.

7.8.3. *'An EIA ...should fully take into account the environmental sensitivity of the area, the overall environmental and socio-economic costs and benefits of mining, as well as the potential strategic importance of the minerals to the country. Authorisations may well not be granted. If granted, the authorisation may set limits on allowed activities and impacts, and may specify biodiversity offsets...'*

7.9. In November 2014, the Gert Sibande District Municipality published its 2014 SDF in which it reiterated statements in an earlier SDF about the importance of conserving the wetlands and grasslands in the Wakkerstroom area, including that, owing to their *'crucial role in maintaining the ecological integrity in the area'* and in *'hydrological management, flood attenuation and water quality maintenance'*, the grasslands and wetlands in the Wakkerstroom region *'have a high conservation value and should be protected at all cost'* (p. 112).

8. The environmental and hydrological significance of the area was described in an objection to the Application submitted by the Petitioners to the Municipality on 30 May 2018 ('the Objection'). The Objection is attached as **Annexure A.**
9. It is clear from the above submissions that the area in which the coal mine would be situated is unlike other areas in which coal mines might be situated. Apart from anything else, it is to be located in an environment which has been granted protected status by the MEC.
10. The Petitioners have, in the circumstances, launched the following legal challenges of the proposed mine:
 - 10.1. A judicial review of the mining right granted to Atha-Africa Ventures (Atha) by the Minister of Mineral Resources, which judicial review is pending in the Pretoria High Court;
 - 10.2. An judicial review of the environmental authorisation issued by the Mpumalanga environment department, which judicial review is pending in the Mbombela High Court;
 - 10.3. An appeal against the water use licence granted to Atha by the Department of Water and Sanitation, KZN, which appeal has been heard and a ruling awaited; and
 - 10.4. An appeal against the Environmental Management Programme granted to Atha by the Department of Mineral Resources, which appeal is still pending.

11. Furthermore, the Petitioners successfully applied for the review and setting aside of the decisions by the Ministers of Mineral Resources and Environmental Affairs under the Protected Areas Act to grant Atha permission to mine inside a Protected Environment. Judgment in favour of the Petitioners was handed down by the Pretoria High Court on 8 November 2018.
12. The aforesaid legal challenges underline the Petitioners' interest in any application for land use change of the area from agriculture and/or conservation to mining, as well as the consequent interest held by the Petitioners in any appeal proceedings related thereto. They also deal with the reasons the Petitioners objected to the application for land use change.

BACKGROUND TO THIS PETITION

13. On 20 April 2018, a Notice was published in a local newspaper, the Volksrust Recorder, stating that application had been made by the Practice Group (on behalf of the Appellant) to the Municipality for the change of land use in respect of Portion 1 of the Farm Yzermyn 96 in terms of Regulation 18(1)(b) of the Regulations read with Schedule 2 of SPLUMA ('the Notice'). The Notice invited any objections and/or comments to the Application to be submitted to the Municipality. A copy of the Notice is attached as **Annexure B**.
14. Accordingly, on 30 May 2018, on behalf of the Petitioners, the CER submitted the abovementioned Objection in terms of section 104 of the by-law, in response to the Notice.
15. On 5 July 2018, the CER received an email from the Municipality attaching the Practice Group's written response to the Objection (**Annexure C**). The CER responded on behalf of the Petitioners in a letter dated 16 July 2018 (**Annexure D**).
16. On 14 November 2018, the Dr Pixley Ka Isaka Seme Local Municipality Joint Municipal Planning Tribunal ('the Tribunal') resolved to "*struck (remove) the subject application from the list of matter that were put up for consideration for it*"(sic). The reason for this was that, in the Tribunal's view, the Appellant "*lacked locus standi to represent the owner before the Tribunal*" in terms of section 90 of the By-law. The Appellant was informed of the Tribunal's decision in a letter from the Municipality dated 30 November 2018, under cover of an email dated 18 December 2018. That email and letter are attached as **Annexure E**.

17. The Appellant subsequently lodged a notice of appeal to the Municipality by email dated 8 January 2019, copying in that email all the objectors to its application. Those objectors included Ms Sally Hurt, who submitted the Objection on behalf of the CER. As Ms Hurt was by that time no longer working for the CER, the CER did not receive that email. The CER came to know of the Appeal on 14 January 2019 when the CER offices reopened after its end of year closure. The notice to appeal was received through another objector who had forwarded to CER the Appellant's email and notice of appeal. That email and notice of appeal are attached as **Annexure F**.

GROUNDS FOR THIS PETITION

18. The Petitioners submit this petition because their rights as interested parties may be affected by the decision of the appeal authority.

19. The Appellant seeks as its relief in the Appeal that the Tribunal's decision be set aside, and that the merits of the Application "*be considered in the context of the original land development application and the comments received with regard thereto and that a decision be handed down by the Appeal Authority with regard to the application once the parties on record have been offered the opportunity to be heard accordingly.*" (para 6, **Annexure F**)

20. The Petitioners submit that the Tribunal's decision to reject the Application was correct but that the reasoning was incorrect. The correct bases for rejecting the Application are dealt with in the Objection to the Application submitted by the Petitioners.

21. For all the reasons contained herein, the Petitioners wish to oppose the appeal and to participate in the appeal proceedings before the appeal authority. They seek the opportunity to present written and oral submissions in terms of section 151 of the by-law and regulation 25 of the Regulations.

22. Moreover, to the Petitioners' knowledge, the only parties to the Appeal currently are the Appellant and the Tribunal (section 146 of the By-law). Accordingly, they submit that their interests are not adequately represented by the current parties to the appeal proceedings.

23. Should the petition be successful, the appeal authority's attention is respectfully drawn to section 152 of the by-law, which places an obligation on the appeal authority to notify the

parties of the date, time and place of a hearing at least 14 days before the hearing commences.

24. The CER has attempted to obtain a copy of the prescribed form approved by Council, for a petitioner to be granted intervener status in appeal proceedings in terms of section 147 of the By-Law. Ms Khanyisile, the secretary to the Acting Municipal Manager of the Municipality, confirmed telephonically to the CER on 24 January 2019 that no such form yet exists, and that this petition may simply be attached to an email addressed to the office of the Municipal Manager.

25. The prescribed affidavit in terms of section 105(2) is attached as **Annexure G**.

26. It is accordingly requested that Intervener Status be granted to the First to Eighth Petitioners in terms of section 147 of the by-law. The rights of the Petitioners, including, but not limited to the right to supplement their petition, are in all the circumstances, reserved.

27. Kindly take note that section 147(4) of the by-law and regulation 31(4)(5) of the SPLUM regulations states that a ruling on the admissibility of a petitioner to be granted intervener status must be communicated to the petitioner and the parties. We look forward to hearing from the appeal authority in this regard.

SIGNED AT CAPE TOWN ON 29 JANUARY 2019 ON BEHALF OF THE FIRST TO EIGHTH PETITIONERS

CENTRE FOR ENVIRONMENTAL RIGHTS

Per:



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