A critical analysis of the legal framework governing open space systems in the eThekwini and City of Cape Town Metropolitan Municipalities

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DECLARATION

In fulfilment of the degree of Master of Laws (Environmental Law), College of Law and Management Studies, University of KwaZulu-Natal, I**, Mpumelelo Ngalo,** declare that:

I. This thesis contains my original work, except where referenced.

II. This thesis has not been submitted to any University for acceptance and is not being currently submitted in candidature for any degree in any University.

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IV. This research does not contain other persons' writing, unless specifically acknowledged as sourced from other researchers. Where other written sources have been quoted then:

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CHAPTER ONE
INTRODUCTION

1.1 Background of the study

As its title indicates, the purpose of this study is to analyse the legal and policy framework governing open space systems in the eThekwini and City of Cape Town Metropolitan Municipalities. Given this purpose, it is important to understand what is meant by the concept of an open space system. The concept of an open space system is defined in both the Durban Metropolitan Open Space System (D'MOSS) and the Cape Town Metropolitan Open Space System (CMOSS). The D'MOSS and CMOSS are initiatives aimed at creating, protecting and promoting a network of interlinked open spaces in each of these two municipalities.

In its definition of open spaces, the D'MOSS distinguishes between urban and natural open spaces and provides that "urban open spaces" are areas that are created for communal usage, whether they are man-made or legally designated. They include "parks, sports fields, agricultural fields, streets, town squares, road reserves, servitudes for services such as electricity transmission lines, dams, private gardens, etc". "Natural open spaces" are the remaining undisturbed natural and undeveloped areas. They are the areas that contain core terrestrial, freshwater, estuarine and marine ecosystems. These ecosystems include "land cover types such as grasslands, forests, beaches, estuaries, rivers, wetlands, etc".[1] The CMOSS, in contrast to the D'MOSS, defines open spaces much more simply as the undeveloped area inside the urban border that fulfils a range of roles.[2]

As these definitions indicate, open space systems have the potential to play a vital role in the conservation of biodiversity,[3] and biodiversity is crucial for the survival of humankind, and to keep a balance of life on earth. The conservation of biodiversity, therefore, is not negotiable.[4] South Africa is a country that is very rich in biodiversity due to its species diversity, rate of

[1] J van Wyk "Open-space Systems in Urban Land-use Planning -- Invaluable Assets in Conserving the Environment and Enhancing the Quality of Life" (2005) 2 *Journal of South African Law/Tydskrif vir die Suid-Afrikaanse Reg* 256-273.
[2] Van Wyk fn 1 above at 258.
[3] See the United Nations Convention on Biological Diversity 1992 definition of "biological diversity": "the variability among living organisms from all sources including … terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part: this includes diversity within species, between species, and of ecosystems". The recognised short version of "biological diversity", "biodiversity", will be used throughout the study.
[4] Anel du Plessis & Louis J Kotze "Regulation of International Trade in Biodiversity Resources: Towards Sustainable Trade in South Africa" (2007) 13(4) *Tilburg Law Review* 335 at 339.

endemism and diverse ecosystems.[5] South Africa is "home to over 95 000 known species, contributing a significant proportion to world plant species (6%), reptile species (5%), bird species (8%) and mammal species (6%), with more species regularly discovered and described".[6]

Municipalities, in their municipal planning processes, can utilise open space systems as a biodiversity consideration in order to protect the environment. One of the foremost benefits of an open space system is that it protects the environment as it makes provision for the conservation of the environment.[7] First and foremost, it is crucial to remember that the traditional goal of creating parks and open spaces in cities was to raise the physical well-being and morale of the working class while simultaneously offering recreational opportunities to increase labour productivity.[8] Concern over the conditions of the high-density working population during the industrial revolution led to the creation of parks inside cities; the most well-known of these parks are Central Park and Prospect Park in New York City, in the United States of America.[9]

Royal, in dissecting the history of open space systems, observed that traditionally the concept was referred to as open spaces and it concentrated on parks for recreational activities.[10] However, the name later changed to metropolitan open space systems, and the concept developed to link nature conservation areas, natural open spaces and parks within a city. Such a system's primary goals include biological preservation, safeguarding watercourses, connecting natural areas, leisure, aesthetic appeal, and education.[11] It is the metropolitan open space system that has been adopted and developed by the eThekwini Municipality (D'MOSS) and the City of Cape Town (CMOSS). As observed by Bux et al a metropolitan open space system is not legally enforceable, hence the eThekwini Municipality incorporated its D'MOSS into its town planning scheme (now referred to as a land use scheme) to enable it to be legally

[5] See the United Nations Convention on Biological Diversity *Country Profiles South Africa* https://www.cbd.int/countries/profile/?country=za#measures (2016).
[6] South Africa"s Fifth and Sixth National Reports to the Convention on Biological Diversity.
[7] See Van Wyk fn 1 above at 259.
[8] R Royal *Public Open Space Policy for Durban and Surroundings: Is it Sustainable?* (Master's dissertation University of Natal 1998) at 29.
[9] Royal fn 8 above at 29.
[10] Royal fn 8 above at 41.
[11] Royal fn 8 above at 41.

enforceable.[12] This is what led to litigation in the case of *Le Sueur and Another v Ethekwini Municipality and Others*,[13] which will be discussed in detail in Chapter Two below.

Integrated development plans (IDPs) and spatial development frameworks (SDFs), which are mandated for all municipalities in South Africa, offer potentially effective ways to incorporate biodiversity considerations into the main functions of local government.[14] Section 23(1)*(c)* of the Local Government: Municipal Systems Act (MSA) specifically provides that:

"A municipality must undertake developmentally-oriented planning so as to ensure that it … together with other organs of state contribute to the progressive realisation of the fundamental rights contained in sections 24, 25, 26, 27 and 29 of the Constitution."

Section 24 of the Constitution,[15] which needs to be taken into account when developing municipal planning tools such as IDPs and SDFs, deals with the right to the environment, and it provides that everyone has the right --

"*(a)* to an environment that is not harmful to their health or well-being; and
(b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that ---

(i) prevent pollution and ecological degradation;

(ii) promote conservation; and

(iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development".

Biodiversity is an integral part of the environment, and it is central to the realisation of the aforementioned right in section 24 of the Constitution. Although municipal planning unequivocally falls within the competency of municipalities,[16] the competency to deal with environmental issues falls within the functional areas of concurrent national and provincial legislative competence,[17] and that has caused confusion as to how local government's authority features in relation to this competence.

[12] Q Bux, P Anderson & P J O'Farrell "Understanding the Local Biodiversity and Open Space Strategies in Two South African Cities" (2021) 26(3) *Ecology and Society* 4.
[13] *Le Sueur and Another v Ethekwini Municipality and Others* [2013] ZAKZPHC 6 (30 January 2013).
[14] Local Government: Municipal Systems Act 32 of 2000 (MSA) chapter 5.
[15] Constitution of the Republic of South Africa, 1996.
[16] Schedule 4 part B to the Constitution.
[17] Schedule 4 part A to the Constitution.

Furthermore, section 2 of the National Environmental Management Act[18] (NEMA), which is one of the legislative instruments that was enacted to give effect to section 24 of the Constitution, contains national environmental management principles. In terms of section 2(1), these principles apply throughout the Republic to the actions of all organs of the state (including municipalities) that may significantly affect the environment, and the principles also "serve as guidelines by reference to which any organ of state must exercise any function when taking any decision in terms of [NEMA] or any statutory provision concerning the protection of the environment" as well as "guide the interpretation, administration and implementation of [NEMA], and any other law concerned with the protection or management of the environment".[19] Amongst these principles is that set out in section 2(3) that provides: "Development must be socially, *environmentally* and economically sustainable." (Emphasis added.)

It is therefore clear that municipalities need to take into account biodiversity as an environmental consideration within their municipal planning decisions, and the open space system is one of the tools that can be used to achieve this. However, as noted above, there is confusion as to how municipalities can achieve this without falling foul of the Constitution in relation to the functional competency of the environment.

The court, in the case of *Le Sueur*,[20] provided some clarity to municipalities in relation to the confusion highlighted above. This case dealt with the constitutional powers of a municipality to legislate within the environmental functional area. The eThekwini Municipality had made amendments to its town planning scheme and introduced what is known as the D'MOSS, which, as mentioned above, is a management plan for the protection of biodiversity and ecosystems within the jurisdiction of the eThekwini Municipality, and the plan was applicable to both public and private property. In terms of the D'MOSS, any development of land which is included or covered within the D'MOSS plan may not take place without the support of the Municipality's Environmental Planning and Climate Change Department. Le Sueur went to court to challenge this. The City of Cape Town was admitted by order of the court as an *amicus curiae*. The City of Cape Town had an interest in this matter, firstly, as a municipality, and

[18] 107 of 1998.
[19] Section 2(1)*(c)* and *(e)* of NEMA.
[20] *Le Sueur v Ethekwini Municipality* fn 13 above.

secondly, because it was also implementing its own metropolitan open space system (CMOSS) within its municipal planning strategic tools.

The court dismissed Le Sueur's challenge and held that municipalities had the authority to legislate on environmental matters such as biodiversity and conservation. In its reasoning, the court held that section 23(1)*(c)* of the MSA is clearly a legislative mandate from the national legislature in regard to environmental matters to municipalities.[21] The court went further to state that NEMA recognises the role of municipalities and municipal duties with regard to the environment in its municipal planning function. It concluded, therefore, that it was evident that municipalities have the right to regulate environmental matters from the micro level in order to protect the environment.[22] The *Le Sueur* judgment does not provide a very strong legal foundation for the open space system, as is evidenced by the critical analysis of the judgment by various scholars;[23] however, it was a test case that gave municipalities the green light to implement legally enforceable open space systems. It is therefore submitted that the confusion relating to the competency of municipalities within the functional area of the environment has been judicially addressed, and the judgment in *Le Sueur* has paved the way for municipalities to regulate environmental matters.

Despite the fact that the *Le Sueur* judgment has been welcomed and appears to have given municipalities the go-ahead, there are still some challenges for local government in relation to the implementation of its duty to protect the environment. Bux et al note that South Africa's local governments still lack the resources, ability, and clear mandate for biodiversity management, which creates challenges for the nation's efforts to conserve biodiversity.[24]

The recently published *Draft White Paper on Conservation and Sustainable Use of South Africa's Biodiversity 2022*[25] recognises the role local government must play in the conservation of biodiversity since municipalities have "land that has important biodiversity features and areas that support biodiversity and ecosystem functioning". All the aforementioned

[21] *Le Sueur* at para 24.
[22] *Le Sueur* at para 37.
[23] D W Freedman "The Legislative Authority of the Local Sphere of Government to Conserve and Protect the Environment" (2014) 17(1) *Potchefstroom Electronic Law Journal* 567; T L Humby "Localising Environmental Governance" (2014) 17(4) *Potchefstroom Electronic Law Journal* 1660; and A Muir "The *Le Sueur* Case and a Local Government"s Constitutional Right to Govern" (2015) 30 *South African Public Law* 556.
[24] Bux et al fn 12 above.
[25] *Government Gazette* 46687 dated 8 July 2022.

considerations are a strong indication that, in relation to the competency of local government in environmental matters, local government should not shy away from enacting bylaws to strengthen its enforcement of environmental matters, particularly within municipal planning. Hence, this study is advocating the enactment of bylaws to regulate open space systems.

Against this background, it is important to analyse the legal framework relating to the implementation of open space systems to highlight the response from municipalities to the *Le Sueur* judgment, and various other developments in our jurisprudence, and to what extent municipalities have utilised open space systems within their municipal planning mechanism to increase their footprint in the protection of the environment. As indicated earlier, open space systems are a crucial biodiversity consideration, and it is imperative to unpack the legal tools that have been used by municipalities to ensure that this consideration is taken into account in order to give effect to the right to a healthy environment.

When it comes to realising the right to a healthy environment, municipalities have to incorporate in their strategic documents, such as their integrated development plans (IDPs) and their spatial development framework (SDFs), an element of biodiversity, to ensure that the environment is protected. This is essential because, as Bux et al[26] have stated, the D'MOSS and CMOSS on their own do not have legal standing; hence, they have to be incorporated into documents that have legal effect. This study intends to venture into the legislative tools available to municipalities through their power to legislate (pass bylaws) on their competencies, which, according to the *Le Sueur* judgment, includes the environment.

Muir, in his critique of the *Le Sueur* judgment, proposes that the right of a municipality on environmental issues should not be constrained on its "authority to legislate" in terms of section 156 of the Constitution but rather on its "right to govern" in terms of section 151(3) of the Constitution.[27] If this approach is adopted, it will simplify the approach of municipalities by incorporating open space systems into their strategic documents without focusing on the "legislate" part which confines them to making bylaws relating to open space systems. The word "govern" allows a hybrid approach in terms of which a municipality can legislate on an open space system through bylaws and also plan through its strategic municipal planning

[26] Bux et al fn 12 above.
[27] Muir fn 23 above.

documents (eg IDPs, SDFs and town planning schemes). This hybrid approach will assist local government in dealing with the challenge of the "biodiversity" mandate mentioned above.

It is therefore important to look at how far these strategic municipal documents have bolstered the legal standing of open space systems. It is also important to ascertain whether the two municipalities (eThekwini and City of Cape Town) have been aggressive enough after the *Le Sueur* judgment to legislate and enact what is referred to as "green bylaws" in order to elevate the D'MOSS and the CMOSS to effective legislative tools with serious criminal consequences for non-compliance. As indicated earlier, both the eThekwini Municipality and the City of Cape Town incorporated open space systems into their strategic municipal planning tools and that is what led to the litigation in the *Le Sueur* matter. This study argues that the procedure followed by the municipalities is inadequate for environmental enforcement purposes, and the argument will be detailed in Chapter Five below.

Section 13 of the Spatial Planning and Land Use Management Act (SPLUMA)[28] provides that "an adopted and approved land use scheme has the force of law". Laubscher et al[29] argue that the use of the words "force of law" in this provision automatically means that the land use scheme is a bylaw. If this argument were to be sustained and supported, then there would be no need for this study and other academic writings that predate this study arguing for local government to legislate and enact bylaws on environmental matters as such would already have been covered under the land use schemes adopted and approved by municipalities. This argument is flawed as it is in contrast with section 32 of SPLUMA which provides that "a municipality may pass by-laws aimed at enforcing its land use scheme". If a land use scheme is a bylaw as argued by Laubscher et al, how can the same legislation which gives it legal effect require a "bylaw" for its enforcement?

A land use scheme, therefore, is not a bylaw but rather subordinate legislation, ie legislation that owes its existence to an Act of Parliament, and in this instance, section 24 of SPLUMA.[30]

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[28] Act 16 of 2013.

[29] N Laubscher, L Hoffman, E Drewes & J Nysschen *SPLUMA: A Practical Guide* (2016 LexisNexis) at 150.

[30] The "subordinate" nature of a land use scheme arises out of the fact that the power to adopt such a scheme is conferred on a municipality by national legislation, namely section 24 of SPLUMA. In *JDJ Properties CC and Another v Umngeni Local Municipality and Another* 2013 (2) SA 395 (SCA) at para 49, the Supreme Court of Appeal held that a land use scheme "is a hybrid form of legislation created by resolution in the local sphere of government, and approval and promulgation in the provincial sphere of government with a public participation process sandwiched between the two". In as much as it is hybrid in its legal nature (see discussion in Chapter 3 at 3.5 below), it still requires a bylaw for its enforcement.

On the other hand, a bylaw is original legislation since "Municipal councils as per the Constitution have original legislative powers and may pass by-laws for their areas on matters referred to in Schedules 4B and 5B of the Constitution without the need for enabling parliamentary or provincial Acts".[31] As noted above, more argument on the legal instruments will be advanced in Chapter Three; however, as can be seen above, a bylaw is necessary to enforce a land use scheme.

Several municipalities in South Africa have adopted open space systems; however, this study will concentrate on two municipalities, namely the eThekwini and City of Cape Town Metropolitan Municipalities. The rationale for choosing these two municipalities is that they are two of the biggest metropolitan municipalities in South Africa. They are also located within the coastal zone in South Africa – an area very rich in biodiversity and in need of conservation. The environmental protection measures that are in place in these two cities, therefore, are of the utmost importance and worthy of analysis. The literature also suggests that these two cities were the first to adopt open space systems, and it is, consequently, opportune to examine how far they have progressed in implementing the systems, especially after the *Le Sueur* decision, taking into account that both municipalities were involved in that case, with the eThekwini Municipality as a litigant (first respondent) and the City of Cape Town admitted as *amicus curiae*.[32]

A review of the relevant literature indicates that the legal framework used by municipalities is mainly limited to the use of strategic planning documents to cater for open space systems without resorting to enacting bylaws for enforcement. Could this be motivated by a lack of resources? Could it be that even after the *Le Sueur* judgment, municipalities are still unsure how far they can go in implementing the "biodiversity" mandate to realise the right to the environment guaranteed in the Constitution? This study will endeavour to answer those questions, and also explore how "green bylaws" can be of further assistance to municipalities in their quest to use open space systems as a biodiversity consideration within their municipal planning processes.

[31] C Botha *Statutory Interpretation: An Introduction for Students* 5 ed (Juta 2012) at 22.
[32] *Le Sueur* at para 2.

The study will examine these two municipalities" efforts, in the period between 2013 and 2023, to implement open space systems and the tools that have been used, and analyse whether these cannot be improved to bolster their legal status and their practical implementation.

1.2 Research problem

As indicated above, various municipalities in South Africa use open space systems in their municipal planning decisions to conserve biodiversity and protect the environment. It is important to note, however, that the legal instruments relied on by the eThekwini and City of Cape Town Metropolitan Municipalities are their land use schemes, IDPs, SDFs and other strategic planning documents. It is, therefore, clear that these two municipalities have not enacted other legislative measures, such as "green bylaws", in order to conserve biodiversity and protect the environment through open space systems.

1.3 Research objectives

The first objective of this research is to investigate and analyse the legal framework that the eThekwini and City of Cape Town Metropolitan Municipalities are utilising to implement their open space systems following the *Le Sueur* judgment.

The second objective is to investigate and analyse the strategic planning framework that the eThekwini and City of Cape Town Metropolitan Municipalities are utilising to implement their open space systems since the *Le Sueur* judgment.

The third objective is to investigate the current legal status of both the D'MOSS and the CMOSS.

The last objective is to determine whether either of these municipalities has bolstered the legal framework governing their open space systems through the enactment of additional legislative measures, such as "green bylaws".

1.4 Research questions

Against this background, the main questions to be answered are:

- Which legal instruments are the eThekwini and City of Cape Town Metropolitan Municipalities utilising to implement open space systems as a biodiversity consideration in their town planning decisions following the *Le Sueur* judgment?
- Which strategic planning instruments are the eThekwini Municipality and the City of Cape Town Metropolitan Municipalities utilising to implement their open space systems following the *Le Sueur* judgment?
- What is the current legal status of both the D'MOSS and the CMOSS?
- Have the eThekwini and City of Cape Town Metropolitan Municipalities bolstered the legal framework governing open space systems through legislative measures, like enacting "green bylaws"?

1.5 Rationale for the study

This study is important as it will examine the road travelled within the sphere of local government to ensure the realisation of the right to the environment as provided for in the Constitution, especially after the *Le Sueur* case. It will consider the role played by open space systems within municipal planning and how this role can be improved within the available legal framework and beyond. It will assist in guiding two of the biggest metro municipalities in South Africa, which are located within very rich biodiversity areas, to realise and improve their strategies and legislative instruments to protect the environment through their open space systems.

1.6 Research methodology

This research is qualitative. Its main foundation is a desktop analysis of primary and secondary legal sources. Common-law principles, statutes, and court rulings comprise the main resources. Textbooks, journal articles, reports, and websites are examples of secondary materials. Using electronic databases and library resources, these materials were located and gathered. A positivist approach was then used for the review and critical analysis of these materials.

1.7 Proposed structure of the dissertation

The study consists of five chapters.

- Chapter One presents the introduction, background to, and overview of the study.

- Chapter Two discusses the *Le Sueur* case.
- Chapter Three presents and discusses the municipal planning framework.
- Chapter Four presents and discusses developments following *Le Sueur* in both the eThekwini and City of Cape Town Metropolitan Municipalities.
- Chapter Five concludes the thesis with an analysis, conclusion and recommendations.

CHAPTER TWO
THE *LE SUEUR* CASE

2.1 Introduction

The previous chapter introduced the focus of this study and summarised how the study will be structured. As will be noted from Chapter One above, the purpose of this study is not to critically analyse the *Le Sueur* judgment as that has already been done.[33] The purpose is to investigate and analyse the manner in which the eThekwini and City of Cape Town Metropolitan Municipalities have exercised their environmental powers by utilising the open space system as a biodiversity consideration in their municipal planning decisions following the *Le Sueur* judgment. Even though this is not a critical analysis of the *Le Sueur* judgment, it is important to understand the judgment. It will, therefore, be helpful to set out the judgment in some detail and to explore the significant criticisms that have been levelled against it. This chapter begins with a brief discussion of the constitutional legislative and executive powers of local government. The chapter then focuses on the judgment, beginning with a summary of the facts, and then proceeding to the arguments raised by the parties, the judgment of the court, a brief analysis of the judgment, and a conclusion.

A brief summary of the allocation of legislative and executive authority to the local sphere of government according to the Constitution is necessary, as it is difficult to understand the *Le Sueur* judgment without first explaining that allocation. After 1994, and with the adoption of the Constitution, the status and the powers of local government were enhanced. The system of local government as a sphere of government is now much stronger and more powerful than before.[34] One of the ways in which the Constitution has enhanced the status and the powers of local government is by conferring original law-making powers on municipal councils in terms of the provisions of section 156(1)*(a)* and *(b)*.[35] The functional areas of competence listed in part B of schedule 4 (schedule 4B) and part B of schedule 5 (schedule 5B) mentioned in section 156(1)*(a)* are specifically reserved for local government[36] -- these are the original powers which local government can exercise, for instance, "municipal planning" and "noise pollution".

[33] See Freedman, Humby and Muir fn 23 above.
[34] Section 40 of the Constitution.
[35] Section 156(1) of the Constitution provides that "[a] municipality has executive authority in respect of, and has the right to administer -- *(a)* the local government matters listed in Part B of Schedule 4 and Part B of Schedule 5; and *(b)* any other matter assigned to it by national or provincial legislation".
[36] *Govan Mbeki Local Municipality and Another v Glencore Operations South Africa (Pty) Ltd and Others* 2022 (6) SA 106 (SCA) at para 14.

It should be noted that the functional areas listed in Schedule 4B and Schedule 5B include some functional areas which are relevant to the environment, for instance, "air pollution", "stormwater management", "noise pollution" and "cleansing"; however the functional area of "environment" is listed in part A of Schedule 4 (Schedule 4A), which is a concurrent functional area of both provincial and national government, and as will be seen later, this is the reason why municipal planning is regarded as the source of local government's power to legislate on the environment.

In addition to conferring original powers on local government, the Constitution in section 156(1)*(b)* provides that national and provincial legislation may assign powers to municipalities. A distinction should be drawn between assigned and delegated powers. In the case of an assigned power, there is a full transfer of the authority over such assigned power,[37] whereas in a delegation, the holder of the delegated authority or power retains control of the power. In relation to assigned powers, section 156(4) of the Constitution provides that:

"The national government and provincial governments must assign to a municipality, by agreement and subject to any conditions, the administration of a matter listed in Part A of Schedule 4 or Part A of Schedule 5 which necessarily relates to local government, if –

(a) that matter would most effectively be administered locally; and

(b) the municipality has the capacity to administer it."

The above provision does not require the assignment of a power to local government to be explicit; therefore the assignment of power to local government can also occur by implication.[38] Section 156(2) provides that a municipality "may make and administer by-laws for the effective administration of the matters which it has the right to administer", and this includes those matters that are assigned to it.[39] Lastly, the Constitution also confers incidental law-making powers on municipal councils in terms of section 156(5), which provides that "a municipality has the right to exercise any power concerning a matter that is reasonably necessary for, or incidental to, the effective performance of its functions". Freedman[40] refers to this power as "incidental powers", and he further unpacks it as referring "to those matters which, strictly

[37] See Freedman fn 23 above at 571.
[38] See Freedman fn 23 above at 579.
[39] M P Poswa *Planning Law as a Source of Environmental Legislative Power for Local Government* (Master's dissertation University of KwaZulu-Natal 2018) at 15.
[40] See G*ovan Mbeki Local Municipality* fn 35 above; see also Freedman fn 23 above at 581.

speaking, fall outside the functional areas over which a municipality has authority, but are so closely connected to the 'effective performance of its functions' that they are considered to be a part of the functional areas over which a municipality has authority".

This explanation resonates with what Salie-Hlophe AJA had to say about incidental powers in the recently decided case of G*ovan Mbeki Local Municipality v Glencore Operations South Africa*[41] when she highlighted that "there might be matters that fall outside the local government's core powers and competencies, but are nevertheless indispensable for the effective administration of those matters". The judge went on to caution that incidental powers may not be used to increase the competencies of local government but rather to administratively enhance an already existing functional area, and to find that the purpose of section 156(5) is not to create a new category of functions. Against the above explanation and background, the *Le Sueur* case is discussed below.

2.2 Facts of the *Le Sueur* case

On 9 September 2010, the eThekwini Metropolitan Municipality adopted an amendment to its town planning scheme to introduce the D'MOSS.[42] The D'MOSS was applicable to both public and private property and it introduced limitations on the development of affected properties.[43] As mentioned in Chapter One above, the D'MOSS was introduced as an environmental safeguard to protect the environment, and it provided that all developments that were affected by the D'MOSS had to be approved by the environmental branch of the eThekwini Municipality before such developments could be undertaken. Le Sueur, as a property owner within the eThekwini Municipality, challenged this decision on various grounds. This chapter will concentrate on only one ground, namely that the municipality had no constitutional authority to legislate on the functional area of "environment" since that was a matter listed under schedule 4A, a concurrent competency of the national and provincial government.[44] The eThekwini Municipality opposed the court action, and the City of Cape Town was admitted as *amicus curiae* by the court.[45]

[41] See G*ovan Mbeki Local Municipality* at para 18.
[42] *Le Sueur* at para 1.
[43] See Poswa fn 39 above at 24.
[44] *Le Sueur* at para 4.
[45] *Le Sueur* at para 2.

In advancing this argument on the lack of authority of local government in environmental matters, Le Sueur raised the following four key points:

(a) by introducing the D'MOSS amendments to its town planning scheme, "the municipality had acted *ultra vires* its powers as it did not have the authority to legislate in the sphere of the environment", which was the exclusive sphere of the national and provincial governments. When it adopted the D'MOSS, therefore, the municipality had "acted unconstitutionally and illegally;[46]

(b) apart from not having original authority to legislate in the sphere of the environment, the municipality did not have delegated authority to do so either.[47] This is because NEMA, which is the overarching legislation for the environment, made no reference to municipalities exercising environmental impact assessment procedures, nor did it empower municipalities to enact bylaws for the protection of the environment;[48]

(c) the functions of the national, provincial and municipal governments, as far as they related to the environment, were different and distinct, and the municipality was confined exclusively to those areas mentioned in schedules 4B and 5B. Although section 156(2)*(d)* of the Constitution obliged municipalities to promote a safe and healthy environment, this did not extend to the area of "environment", "nature conservation", or "biodiversity protection";[49] and

(d) lastly, although there might be an overlap between the regulation of land use and other functional areas as per the *Maccsand* case,[50] such an overlap did not give a municipality the power to legislate in the overlapping functional areas.[51]

It was on the above basis that Le Sueur requested the court to set aside the decision of the eThekwini Municipality to incorporate the D'MOSS in its town planning scheme.

2.3 Judgment

The court, per Gyanda J, and in agreement with the submissions made by the eThekwini Municipality and the City of Cape Town, held that the approach by Le Sueur to the matter was narrow and incorrect.

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[46] *Le Sueur* at para 16.
[47] *Le Sueur* at para 16.
[48] *Le Sueur* at para 16.
[49] *Le Sueur* at para 16.
[50] *Maccsand (Pty) Ltd v City of Cape Town and Others* 2012 (4) SA 181 (CC).
[51] *Le Sueur* at para 16.

In providing its reasons, the court concentrated on several aspects, including the arguments raised by Le Sueur, the proper interpretation to be accorded to the constitutional provisions relating to the powers of local government, and the functional area of "municipal planning" as a source of local government power to legislate on the environment. The court could have rested on these aspects, but it went on and considered the issue of implied assignment of powers in terms of several statutes. The various aspects of the court's reasoning are summarised below:

2.3.1 Interpretation of constitutional powers of local government

The court held that section 7(2) of the Constitution obliges the state to "protect, promote and fulfil the rights in the Bill of Rights", including the right to an environment that is not harmful to health and wellbeing in section 24, and that municipalities are part of the "state" referred to therein.[52] The court, in agreement with the submissions made by the eThekwini Municipality, held that "there is nothing in the Bill of Rights itself to suggest that the protections offered by section 24 of the Constitution are binding only on National and Provincial spheres of Government" and that "[q]uite evidently these obligations apply to all three spheres of Government".[53]

Although it is true, the court held further, that the "environment" is primarily a functional area of national and provincial competence, municipalities are best placed to understand, know and deal with issues involving the environment at a local level as they are close to the local environment. Taking into account the provisions of section 156(5) of the Constitution, the legislative and executive powers and functions of the three spheres of government set out in the Constitution were not intended to be static and sealed in compartments by the framers of the Constitution, and should not be analysed in that context.[54] As the eThekwini Municipality correctly argued, the court concluded, the "environment" is an "ideal example of an area of legislative and executive authority or power which had to reside in all three levels of Government and, therefore, could not be inserted in Parts B of Schedules 4 and 5 and was instead inserted in Part A of Schedule 4".[55]

[52] *Le Sueur* at para 19.
[53] *Le Sueur* at para 19.
[54] *Le Sueur* at para 20.
[55] *Le Sueur* at para 20.

2.3.2 Implied assignment of powers to local government by legislation

The court in applying a purposive approach of interpretation indicated that the provisions of the Constitution cannot be read in isolation, and that, from a reading of sections 7(2), 24, 152(1)-(2) and the provisions relating to cooperative governance, it can be deduced that schedules 4 and 5 are not the only provisions that deal with governmental responsibilities and duties.[56] The court held that municipalities are not confined to those matters listed in schedules 4B and 5B as section 156(4) provides that they can perform matters "assigned to [them] by National or Provincial Government". In advancing this assignment argument, the court held that in the context of chapter 5 of the MSA, which deals with the development of IDPs, particularly section 23(1)*(c)*, which requires municipalities to "contribute to the progressive realisation of the fundamental rights contained in section 24 of the Constitution", that chapter is unquestionably a legislative directive from the national legislature with respect to environmental issues.[57] The court, therefore, took note of the fact that the D'MOSS was introduced as a means to meet the requirements of the IDP, together with the fact that it legally required that environmental considerations should be taken into account when drafting an IDP.

Still on the issue of assignment, the court dismissed Le Sueur's argument that even NEMA did not mandate municipalities to legislate on environmental matters. The court held that the NEMA principles set out in section 2 apply "throughout the Republic to the actions of *all organs of State* that may significantly affect the environment" and that organs of state include municipalities. The court held further that there are other provisions in NEMA which recognise the competency of municipalities to legislate in respect of the environment, and further that the Environmental Management Framework Regulations, which were published under NEMA in June 2010, emphasise the importance of municipalities and make specific mention of the spatial development frameworks that, in accordance with the MSA, municipalities must prepare.[58]

Section 48 of the National Environmental Management: Biodiversity Act 10 of 2004, which calls for the coordination and alignment of biodiversity plans, was cited by the court to highlight the issue of assignment by national legislation. This section mandates coordination between any IDP a municipality adopts, any spatial development framework regulating land-use management, land development, and spatial planning matters administered by the minister

[56] *Le Sueur* at para 19.
[57] *Le Sueur* at para 24.
[58] *Le Sueur* at para 36.

responsible for land affairs, and any other plans prepared in compliance with national or provincial legislation. The court determined that although municipalities do not primarily focus on biodiversity conservation, item 1.2 of the National Biodiversity Framework acknowledges that their policies, programmes, and choices have a direct and significant impact on how South Africa's biodiversity is managed.[59]

2.3.3 Municipal planning as a source of power

The court considered the powers of municipalities before the advent of the Constitution and held that historically municipalities had always exercised executive and legislative authority over environmental affairs under the banner of "municipal planning"; therefore, the crafters of the Constitution were aware of this and took it into consideration when the new Constitution was drafted and finalised.[60] In reaching this conclusion, the court noted that municipal planning encompasses a range of environmental issues that are mandated to be regulated by national, provincial, and local laws and policies.[61] This key finding was made by the court when it concluded that the functional area of "municipal planning" listed in Schedule 4B was wide enough to include the D'MOSS as an environmental consideration. In holding that environmental matters find their existence within municipal planning and that the two cannot be divorced, the court said that "it is impossible to separate environmental and conservation concerns in town planning practice from a "*Municipal Planning*" perspective".[62] This meant that the eThekwini Municipal Council had original powers (s 156(1)*(b)*) to enact the D'MOSS.

The court noted that pursuant to s 11 of NEMA, the KwaZulu-Natal Province published the KwaZulu-Natal Environmental Implementation Plan in an *Extraordinary Provincial Gazette* dated 13 May 2009. In section 2.2 the plan listed "functional areas of competence with environmental relevance" for municipalities and includes "municipal planning". It also recognised in section 2.5.1 that implementation of environmental governance in the local government sphere will occur through the IDP, which is the "key strategic document that guides all development activities within each Municipality". As a matter of provincial policy, therefore, the KwaZulu-Natal Province recognised the importance of environmental matters within "municipal planning".[63]

[59] *Le Sueur* at para 38.
[60] *Le Sueur* at para 21.
[61] *Le Sueur* at para 22.
[62] *Le Sueur* at para 33.
[63] *Le Sueur* at para 35.

Lastly, the court also noted that the Minister of Environmental Affairs and the Provincial Department of Environmental Affairs, although party to the litigation, never contended nor argued that the municipality had no authority to enact the D'MOSS neither did they support Le Sueur's submissions -- this was a clear indication that these respondents had no qualms with municipalities legislating on environmental affairs for the protection of the environment; if they had foreseen problems, they would surely have raised them, and supported the standpoint of Le Sueur on this issue.[64]

Based on the above, the court held that municipalities are entitled to regulate environmental matters on a micro level for the protection of the environment. In its final paragraph, the court held that it was "satisfied that Municipalities are in fact authorised to legislate in respect of environmental matters to protect the environment at the local level and that the D'MOSS Amendments in no way [transgressed] or [intruded] upon the exclusive purview of the National and Provincial governance in respect of environmental legislation". The application, therefore, was dismissed.

Most criticism of this judgment stems from the court's reasoning that municipalities have original powers in the functional area of "environment" in the context of "municipal planning" whilst at the same time pronouncing that municipalities have "assigned powers" in relation to the "environment". These findings are controversial and have been subjected to much criticism, especially as the court did not expand much on its authority in relation to its reasoning. It is also important to note that the court did not say much about incidental powers but merely mentioned them in passing.

2.4 Analysis

The *Le Sueur* judgment was groundbreaking for local government in relation to the competency of environment, as, until it was handed down, there had been confusion as to the role of municipalities within that competency. Despite all its flaws, the judgment has provided a green light for local government to legislate on and exercise executive authority over environmental matters, at least insofar as they relate to municipal planning.

[64] *Le Sueur* at para 29.

It is noteworthy that our jurisprudence is also warming to the task of ensuring that the green light provided in *Le Sueur* gets brighter. *Nel v Hessequa Local Municipality*[65] is a case in point: The Hessequa Municipality was challenged in relation to its authority to enact bylaws relating to the use and management of rivers. In its judgment, the court (per Meer J) found that the object of local government "includes promoting a safe and healthy environment, and section 24 of the Constitution", and based on this it was entirely permissible for a municipality to enact bylaws relating to the use and management of rivers.[66] Interestingly, the court further relied on paragraph 20 of the *Le Sueur* judgment to support its view that two spheres of government are able to co-exist and exercise control over one competency, i.e. the environment in this instance. This has been an interesting development in our jurisprudence as it gives credence to the ability of municipalities to enact legislation (bylaws) relating to open space systems in order to protect the environment. Du Plessis and Fuo correctly point out that the *Hessequa* case strengthens the power of local government to enact bylaws in relation to the environment as the pressing challenge "facing developmental local government is its poorly defined functions and powers".[67]

As alluded to above, the *Le Sueur* judgment was criticised by several scholars,[68] not because of its outcome, which has been welcomed by all, but because of the reasoning of the judge in reaching his conclusion. Many scholars agree that this judgment is good for local government because it provides clarity on the role and authority of this sphere of government in the competency of the environment, particularly under the banner of municipal planning, However, scholars note that the judgment lacks detail on the exact legislative authority under which local government can legislate on the environment. For the purposes of this study, it is not necessary to discuss these criticisms in any detail.

2.5 Conclusion

The *Le Sueur* judgment is an important and welcome development for local government in relation to municipal powers over the environment. The judgment strengthens the power of local government and propels it to do more to ensure that the right enshrined in section 24 is

[65] *Nel and Others v Hessequa Local Municipality and Others* (WCC unreported case no 12576/2013 14 December 2015).
[66] *Nel v Hessequa* at para 14.
[67] A du Plessis & O Fuo "Governing Authorities in the Same Boat and a Tale of Two Schedules: *Marius Nel v Hessequa Local Municipality*" (2015) 20 *Commonwealth Journal of Local Governance* 71-82.
[68] See Freedman, Humby and Muir fn 23 above.

realised. Humby notes that had the judgment been against the municipality, it would have "strained the potential for adaptive environmental governance in South Africa".[69] As noted by Fuo, however, the judgment also makes it clear that the authority of local government in relation to the environment is closely linked to municipal planning, and that it should always find its existence within municipal planning tools.[70]

Even with its flaws, as pointed out by the scholarly writings, the judgment provides a foundation for municipalities to strengthen their legal framework for the environment.

The following chapter will delve into the legal tools utilised by municipalities in implementing open space systems as a biodiversity consideration within their municipal planning instruments.

[69] Humby fn 23 above at 1684.
[70] O Fuo "Role of Courts in Interpreting Local Government's Environmental Powers in South Africa" (2015) 18 *Commonwealth Journal of Local Governance* 17-35 at 32.

CHAPTER THREE
THE MUNICIPAL PLANNING FRAMEWORK

3.1 Introduction

Chapter Two above dealt with the *Le Sueur* case, which has provided municipalities with the assurance that as part of their authority over municipal planning, municipalities are entitled to conserve and protect biodiversity by establishing open space systems that encompass privately owned land and to prohibit development within those areas without prior municipal approval. Section 24[71] of the Constitution, which was a point of departure in the judgment, entrenches the right to a healthy environment for all citizens of South Africa, and, as highlighted in the *Le Sueur* judgment, the Constitution mandates "all organs of state" to take all reasonable means to protect the Bill of Rights and ensure that the rights in the Bill of Rights are realised.[72] As noted by Fuo,[73] as a "co-responsible sphere of government, local government is obliged to contribute towards achieving the transformative commitments of the Constitution", and this includes the realisation of the right to a healthy environment as envisaged in section 24 of the Constitution.

In light of this serious obligation and the *Le Sueur* judgment, this chapter seeks to analyse the municipal planning instruments used by municipalities to discharge this obligation. As highlighted in Chapter One, the intention of this study is to set out and discuss the statutory and policy framework governing open space systems in the eThekwini and City of Cape Town Metropolitan Municipalities. In particular, this study's purpose is to present and consider changes that have been made to this framework following the *Le Sueur* judgment. However, before this study does so, it will be helpful to analyse the statutory framework governing municipal planning in general and especially the municipal planning instruments envisaged by this statutory and policy framework. The key planning instruments envisaged by the general

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[71] Section 24 provides: "Everyone has the right –
(a) to an environment that is not harmful to their health or well-being; and
(b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that --
(i) prevent pollution and ecological degradation;
(ii) promote conservation; and
(iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development."

[72] Section 7(2) of the Constitution.

[73] O N Fuo "A Critical Investigation of the Relevance and Potential of IDPs as a Local Governance Instrument for Pursuing Social Justice in South Africa" (2013) 16(5) *Potchefstroom Electronic Law Journal* 220-286 at 267.

municipal planning statutory framework are integrated development plans (IDPs), spatial development frameworks (SDFs), land use schemes (LUSs) and municipal bylaws.

In this chapter, each of the abovementioned instruments will be discussed. The discussion will focus on what each instrument means, its key components, its legal nature and status, and the process of implementing such an instrument.

Section 153[74] of the Constitution paves the way for the development of strategic municipal planning instruments as it requires municipalities to manage and structure their planning processes in order to give priority to the needs of their communities, and to promote socio-economic development within their jurisdiction. One of the needs of the communities, it can be argued, is the protection and conservation of the environment within that particular community in order to realise the right to a healthy environment as enshrined in the Constitution. As Fuo correctly argues, section 153 highlights the need for municipal planning to be guided by the satisfaction of the basic needs of communities.[75]

3.2 Municipal planning

Given that the above strategic legal instruments are found within the context of municipal planning, it is important to consider the definition of "municipal planning" in our legislation. SPLUMA[76] defines "municipal planning" as:

"*(a)* [t]he compilation, approval and review of integrated development plans;

(b) the compilation, approval and review of the components of an integrated development plan prescribed by legislation and falling within the competence of a municipality, including a spatial development framework and a land use scheme; and

(c) the control and regulation of the use of land within the municipal area where the nature, scale and intensity of the land use do not affect the provincial planning mandate of provincial government or the national interest".

[74] Section 153: "A municipality must … *(a)* structure and manage its administration and budgeting and planning processes to give priority to the basic needs of the community, and to promote the social and economic development of the community; …"
[75] Fuo fn 73 above at 234.
[76] See section 5(1) of SPLUMA.

This definition encapsulates three of the instruments to be discussed in this chapter, namely IDPs, SDFs, and LUSs, and it can be argued that the use of the words "control and regulation" refers to the enactment of bylaws. The definition of municipal planning, therefore, captures all of the key instruments utilised in the context of municipal planning to protect and conserve the environment through open space systems.

Du Plessis[77] correctly refers to the utilisation of these instruments to protect the environment as "local environmental governance", which she defines as:

"the management process executed by local government and communities to holistically regulate human activities and the effects of these activities on their own and the total environment ... at local levels; by means of formal and informal institutions, processes and mechanisms embedded in and mandated by law, so as to promote the present and future interests human beings hold in the environment. This management process necessitates a collection of legislative, executive and administrative functions, instruments and ancillary processes that could be used by local government, the private sector and citizens to stimulate sustainable behaviour within the community as far as products, services, processes, tools and livelihoods are concerned, both in a substantive and procedural sense".

This definition is important as it highlights the significance of sustainable development and that instruments can be utilised from a legislative, executive, or administrative angle. The instruments serve distinctive purposes and may be divided into different classes. According to Du Plessis, these classes can be listed as follows:

(a) Compliance-based instruments: Compliance-based instruments are those instruments that can be used where municipalities are regulated or governed by other organs of state, for instance, in the context of the environment, NEMA-related legislative requirements for municipalities.
(b) Governance-based instruments: Governance-based instruments are those instruments used by municipalities to govern and control their own affairs and processes, for instance IDPs and SDFs.

[77] A du Plessis (ed) *Environmental Law and Local Government in South Africa* (Cape Town Juta 2021) chapter 3, available at https://search-ebscohostcom.ukzn.idm.oclc.org/login.aspx?direct=true&db=nlebk&AN=2990518&site=ehost-live&scope=site (accessed 24 November 2022).

(c) Governing-based instruments: Governing-based instruments are those instruments that municipalities use to control the behaviour of others, for instance, municipal bylaws or LUSs. *(d)* Cross-cutting instruments: Cross-cutting instruments are those instruments that cut across governance and governing functions of municipalities, for instance, SDFs and LUSs.[78]

This study will focus mostly on the classes listed in *(b)* to *(d).* The first of these are the governance-based instruments. This class generally comes into existence because of the requirements of certain laws that regulate local government,[79] and they are in place mostly to ensure that the systems, activities and processes of local government are conducted in a lawful, transparent and accountable manner.[80] Fuo correctly characterises governance-based instruments as "mechanisms through which governments pursue public purposes and defined objectives, allocate resources, and communicate to the public their understanding of the collective problems of society as well as their vision for the future".[81] The phrase "vision for the future" reflects the principle of sustainable development, which is one of the cornerstones of section 24 of the Constitution. Under the class of governance-based instruments, this study will investigate two instruments, namely the IDP and the SDF. However, it should be noted that SDFs have a "cross-cutting" element to them.

3.3 Integrated development plans

As its name suggests, an integrated development plan (IDP) can be characterised as the heartbeat of municipal internal governance and municipal planning since it gives birth to and directs all other local environmental governance instruments within municipal planning. This is clear from the MSA, which provides that a municipality is required by law to "conduct its affairs in a manner that is consistent with its integrated development plan".[82]

Du Plessis traced the definition of an IDP back to the 1994 Reconstruction and Development Plan (RDP), which defined an IDP to mean:

"A participatory approach to integrate economic, sectoral, spatial, social, institutional, environmental and fiscal strategies in order to support the optimal

[78] Du Plessis fn 77 above chapter 3 at 3-2.
[79] See for example the MSA and SPLUMA.
[80] See Du Plessis fn 77 above chapter 3 at 3-24.
[81] Fuo fn 73 above at 225.
[82] Section 36 of the MSA.

allocation of scarce resources between sectors and geographical areas and across the population in a manner that provides sustainable growth, equity and the empowerment of the poor and the marginalised."[83]

Once again, the element of "sustainability" is mentioned, and the definition specifically includes "environmental … strategies". The MSA, which makes it mandatory to develop IDPs, sums up an IDP as being "a single, inclusive and strategic plan for the development of the municipality".[84] This plan, section 25(1) of the MSA further provides, should be one which:

"*(a)* links, integrates and co-ordinates plans and takes into account proposals for the development of the municipality;
(b) aligns the resources and capacity of the municipality with the implementation of the plan;
(c) forms the policy framework and general basis on which annual budgets must be based;
(d) complies with the provisions of [Chapter 5]; and
(e) is compatible with national and provincial development plans and planning requirements binding on the municipality in terms of legislation".

As the IDP is the heartbeat of municipal governance, the elements pointed out by Du Plessis from as long ago as the introduction of the RDP and those that are in the MSA clearly indicate that the IDP should integrate all municipal plans in all areas of responsibility, including the environment and all other areas. In addition, the IDP ensures that municipal resources are aligned with its plan. As will be seen below, the IDP gives birth to the SDF, which in turn gives rise to LUSs and ultimately bylaws that regulate matters relating to the environment within municipal planning. This cumulative activation process may be referred to as the "domino effect".

The legislative framework regulating local government fleshes out the foundational requirement for the development of IDPs.[85] This can be seen in section 23(1) of the MSA which provides that:

"A municipality must undertake developmentally oriented planning so as to ensure that it:
(a) strives to achieve the objects of local government set out in section 152 of the Constitution;

[83] Du Plessis fn 77 above chapter 4 at 4-2.
[84] Section 25(1) of the MSA.
[85] The MSA.

(b) gives effect to its developmental duties as required by section 153 of the Constitution; and

(c) together with other organs of state contribute to the progressive realisation of the fundamental rights contained in sections 24, 25, 26, 27 and 29 of the Constitution."

From the above provisions, it is apparent that planning by municipalities, which involves the creation of IDPs and other municipal planning instruments, should be "developmentally oriented" so as to ensure that the section 153 duties are given effect to, and most importantly that local government contributes towards the progressive realisation of the fundamental rights contained in section 24 of the Constitution (the right to a healthy environment). Section 23(1)*(c)* of the MSA clearly indicates, by the use of the words "developmentally oriented planning", that municipal planning needs to take into account the "basic needs" of the community so that a municipality can "contribute to the realisation of the fundamental rights in sections 24, 25, 26, 27 and 29 of the Constitution"[86] which deal with the basic needs of humans who make up a community.

Section 26*(a)-(i)* of the MSA requires the IDP to have various core components and those can be summarised as follows: the long-term development goals and objectives of the municipal council, with a focus on the most urgent internal transformation and development needs; an evaluation of the current state of development in the municipality; the council's development priorities and objectives for its elected term; the council's development strategies; a framework for spatial development that includes the fundamentals of a land use management system; the council's operational strategies; applicable disaster management plans; a financial plan; and key performance indicators and performance targets. As correctly pointed out by Fuo, this list is not exhaustive as there might be other legislative instruments that require the inclusion of sector specific plans within the IDP.[87] The Water Services Act,[88] for example, requires the inclusion of a water services development plan in the IDP.

Of importance in this list is the development of strategies, which is one of the mechanisms used by a municipality to ensure that the needs of the poor are prioritised within the goals and objectives of its IDP.[89] Although "development strategies" are not defined in the MSA, they

[86] These are the right to a healthy environment; property; health care, food, water and social security; and education.
[87] Fuo fn 73 above at 238.
[88] 108 of 1997.
[89] See Fuo fn 73 above at 237.

provide solutions in relation to "how" a municipality will achieve its objectives or goals, and they "consist of plans, programs, operations and projects which are implemented by a municipality in order to realise its objectives" and goals.[90] One of the development goals that a municipality has to provide for in its IDP is the "protection of the environment", and the IDP should indicate how the municipality intends to achieve this goal. Another key component, mentioned in section 26*(e)* of the MSA, is the requirement that the IDP must contain a spatial development framework (SDF), which must include guidelines for a land use management system. This provision clearly shows the "domino effect" of the IDP mentioned above.

Once an IDP has been adopted by the council of a municipality, it becomes the "principal strategic planning instrument which guides and informs all planning and development, and all decisions with regard to planning, management and development in the municipality".[91] When adopted, the IDP binds the municipality in the exercise of its executive authority unless it is in conflict with national or provincial legislation.[92] These provisions mean that a municipality must conduct its affairs in accordance with the content and provisions of its IDP and may not deviate from it, and that all budgetary plans of the municipality should align with the finance plan as per the IDP.[93] This is reinforced by the provisions of section 36 of the MSA which oblige a municipality to give effect to its IDP and to conduct all its affairs in a manner that is consistent with its adopted IDP.

As mentioned above, an IDP is an internal governance tool, and as such, it is binding on the municipality (councillors, members of the executive and members of the administration) as its "principal strategic document"; however, insofar as other persons are concerned, it is only binding "to the extent that those parts of the integrated development plan that impose duties or affect the rights of those persons have been passed as a bylaw".[94] Taking into account the legal status of the IDP, it follows that an IDP, including those parts of an IDP that impose duties or affect the rights of persons, will be binding on such persons only if and when it is transformed into a bylaw.

[90] See Fuo fn 73 above at 238.
[91] Section 35(1)*(a)* of the MSA.
[92] Section 35(1)*(b)* of the MSA.
[93] See Fuo fn 72 above at 262.
[94] Section 35(1)*(c)* of the MSA.

The proper implementation of an IDP has the potential to enhance sustainable development and ensure that municipalities contribute positively towards the rights enshrined in section 24 of the Constitution.[95]

3.4 Spatial development frameworks

As mentioned above, section 26*(e)* of the MSA obliges every municipality to include a spatial development framework (SDF) within its IDP, and this obligation is emphasised in SPLUMA.[96] Although it is categorised as a governance tool, an SDF also has the elements of a governing tool and thus encompasses both categories. It has internal (municipality) and external (other persons) effects. In its preamble, SPLUMA recognises and acknowledges that spatial planning has a role to play in the realisation of the rights in sections 24, 25, 26 and 27 of the Constitution, and in the context of section 24, a land use planning system that seeks to protect the environment falls to be classified as a "reasonable and other legislative [measure]" which needs to be taken by the state in order to protect the environment.

An SDF should constitute the basis for all municipal planning decisions and land use decisions as it informs and guides land use management systems, and it should also assist in "integrating, coordinating, aligning and expressing development policies and plans emanating from the various sectors of the various spheres of government as they apply within the municipal area".[97] A municipality's economic, sectoral, spatial, social, institutional, and environmental vision is fundamentally based on its SDF. Put differently, it serves as a vehicle for achieving the municipality's intended spatial shape.[98] An SDF must support the municipal IDP and be a component of it. It must also help integrate, coordinate, align, and express development plans and policies from the various sectors of the spheres of government within the municipal area.[99] As required by section 26*(e)*, an SDF should additionally ascertain the intent, intended results, and framework of the land use scheme in that municipal area.[100]

It is noteworthy that the legislation that regulates the processes and the legal effect and status of SDFs, namely SPLUMA, was enacted after the *Le Sueur* judgment was handed down, and

[95] See Fuo fn 73 above at 266.
[96] See section 20(2) of SPLUMA.
[97] See Fuo fn 73 above at 245.
[98] *Guidelines for Spatial Development Frameworks* published by the Department of Rural Development and Land Reform in 2010.
[99] *Guidelines for Spatial Development Frameworks*.
[100] *Guidelines for Spatial Development Frameworks*.

it provides interesting provisions in respect of the core components of an SDF, including those relating to environmental considerations. SPLUMA was in its final draft phase when the judgment in *Le Sueur* was handed down on 30 January 2013, and it was assented to on 2 August 2013 and came into effect on 1 July 2015. The provisions of SPLUMA, as will be seen below, mirror the reasoning in *Le Sueur*, namely that within its municipal planning competence, local government has a role to play in realising the environmental rights provided for in section 24 of the Constitution, and therefore is authorised to administer environmental matters within the context of municipal planning.

Chapter 4 of SPLUMA deals with the development of SDFs at a national, provincial, regional and local level. However, for the purposes of this study, the focus will be on sections 12, 20, 21 and 22 of chapter 4 of SPLUMA as they deal directly with municipal SDFs. Section 20(2) of SPLUMA makes it obligatory for an SDF to form part and parcel of the IDP development process. It follows, therefore, that the processes discussed above for drafting and adopting an IDP apply *mutatis mutandis* to the drafting and adopting of an SDF.

Sections 12 and 21 list various elements which are core components of an SDF;[101] however, this study will only consider those that are linked to environmental considerations and implementation. As Du Plessis mentions, SDFs are often informed by other environmental information-based instruments such as metropolitan open space systems (the focus of this study), strategic environmental assessments, environmental management frameworks, bio-regional plans and other environmental strategic plans.[102] Section 12(1)*(m)* requires that every municipal SDF must "take cognisance of any environmental management instrument adopted by the relevant environmental management authority". This means that a municipality in its SDF should make provision for open spaces in order to protect the environment, and take into account any other relevant environmental management plan that has been adopted by the municipality. In the context of this study, this refers to the eThekwini and Cape Town Metropolitan Municipality Open Space Systems (D'MOSS and CMOSS).

Section 21*(a)* of SPLUMA, which deals specifically with SDFs, reinforces the duty to "protect and conserve" the environment through an SDF by making it mandatory for municipal SDFs

[101] See section 12(1)*(a)-(o)* and section 21*(a)-(p)* of SPLUMA.
[102] Du Plessis fn 77 above chapter 3 at 3-60.

to "give effect to the development principles and applicable norms and standards set out in Chapter 2" of SPLUMA. One of the development principles set out in chapter 2 of SPLUMA is the principle of "spatial sustainability",[103] which requires SDFs to ensure "that special consideration is given to the protection of prime and unique agricultural land, … uphold consistency of land use measures in accordance with environmental management instruments; … [and] promote land development in locations that are sustainable and limit urban sprawl". The name of the principle itself is self-explanatory as it is concerned with sustainability which is a core value of section 24 of the Constitution. One of the ways in which the limitation of urban sprawl (ie all spaces being occupied by buildings) may be achieved is the implementation of open space systems, especially in urban areas, as they provide for green areas and thus ensure that the environment is conserved for use by the current and future generations.[104] It is, therefore, imperative for the achievement of "spatial sustainability" for SDFs to include open space systems to manage the protection of the environment.

Another component of an SDF listed in SPLUMA is that it should "include a strategic assessment of the environmental pressures and opportunities within the municipal area, including the spatial location of environmental sensitivities, high potential agricultural land and coastal access strips, where applicable".[105] This is an essential part of an SDF as it requires a municipality to carry out an in-depth analysis of pressures on its environment and opportunities presented by the environment with the aim of helping the municipality identify environmentally sensitive areas that require attention and protection and areas that could be included in an open space system. This will also assist the municipality in guiding and informing its land use management systems to avoid or minimise developments in environmentally sensitive areas.

Lastly, section 21*(p)* requires an SDF to have an implementation plan with specific implementation targets, dates and monitoring indicators. The implementation plan should further allocate resources and budgets for the implementation of the SDF together with specific institutional arrangements necessary for implementation. The implementation plan is important as it ensures that what is required by the SDF is practical and will be implemented.

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[103] Section 7*(b)* of SPLUMA.
[104] Urban open spaces also foster social equality as discussed in the case of *Sea Front for All and Another v MEC: Environmental and Development Planning, Western Cape Provincial Government and Others* 2011 (3) SA 55 (WCC) at paras 40 and 41.
[105] Section 21*(j)* of SPLUMA.

The legal status of an SDF is not specifically spelled out in SPLUMA. Given that a municipality must, by notice in the Provincial Gazette, adopt its SDF, it could be argued that an SDF has the force of law and thus also has the properties of both a governing and a governance tool. However, it is important to note that in the case of *Ensemble Trading 535 (Pty) Ltd v Mangaung Metropolitan Municipality and Another*,[106] the court, per Daffue J, held that an "SDF has no statutory or legal force, but is a tool used for land use planning at local level".[107] This case was decided before the commencement of SPLUMA, and hence it did not take into account the wording and processes stipulated in SPLUMA for the development of an SDF. In terms of SPLUMA,[108] any authority required or mandated to make a land development decision under SPLUMA or any other land development legislation, including the Municipal Planning Tribunal (MPT), may not make a decision that conflicts with its municipal SDF. This provision is also applicable to external persons as they are required to submit land development applications that are in line with SDF requirements.

After setting out the provision relating to the implementation of an SDF, SPLUMA then creates a legislative conundrum by providing for an exception. In sections 22(2) and 42, SPLUMA provides that an MPT or any other authority may depart from the provisions of an SDF if "site-specific circumstances" justify such a departure. As pointed out by Laubscher et al, the exercise of this discretion hinges on the meaning of the words "site-specific circumstances", which SPLUMA does not define.[109] An MPT or authorised authority that has to apply this exception, or an applicant that has to motivate for the implementation of this exception in its land development application, will have no clear indication of what considerations will be taken into account when determining "site-specific circumstances".

The City of Cape Town endeavoured, in 2015, to solve this conundrum by publishing an Operational Guideline for its decision-makers.[110] The purpose of the guideline is to assist decision-makers when they have to apply the exception so that there is consistency in terms of what is considered to be "site-specific circumstances". The guideline provides that "unique and

[106] [2015] ZAFSHC 85 (30 April 2015).
[107] *Ensemble Trading* fn 104 above at para 16.
[108] Section 22(1) of SPLUMA.
[109] Laubscher et al fn 29 above at 134.
[110] City of Cape Town *Operational Guideline 1 of 2015 Assessing MSDF Consistency and Deviating from its Provisions in Site-Specific Circumstances* (2015).

exceptional circumstances … [should be present] at the level of the site" and that they "should be motivated by the applicant to be noticeably different from surrounding sites as a means to support the intended deviation".[111] To this end, the guideline makes reference to "substantive differences between the site in question and adjacent sites".[112]

It can, therefore, be said that "site-specific circumstances" relate to an attribute or attributes of a site that makes it unique or different from adjacent sites and surrounding areas, which justifies an exception to the provisions of the applicable SDF.[113] Other municipalities can adopt this guideline as a way to administratively deal with the discretion conferred on them, thus also ensuring consistency in their decision-making process.

3.5 Land use schemes

An SDF lays the foundation for a land use scheme (LUS); therefore, an LUS should give effect to and be consistent with an SDF. An LUS's main goal is to decide how to use and develop land inside the municipal area to which it belongs in a way that will maximise social inclusion, economic growth, and minimal negative effects on the environment, public health, and natural resources.[114] Just like an SDF, an LUS is both a governance and a governing tool that can be utilised by municipalities when it comes to managing the environment.

It is important to consider the definition of the term "land use scheme" before scrutinising what it entails. First, land use relates to the type of activity that occurs on a piece of land, and in turn, a land use scheme is a planning tool that is used to manage such activity – it can authorise or restrict certain types of land use to certain geographic areas.[115] In the past, the term used was "town planning scheme", coupled with the term "zoning scheme". With the commencement of SPLUMA in 2015, the phrase was changed to "land use scheme".[116]

The objectives and purpose of an LUS are to guide and manage development within a municipality according to the vision and strategies set out in the municipality's IDP and SDF in order to promote sustainable development and quality of life, including the protection of the

[111] See City of Cape Town *Operational Guideline* at para 4.2*(b)*.
[112] See City of Cape Town *Operational Guideline* at para 4.2*(c)*.
[113] See Laubscher et al fn 29 above at 135.
[114] Section 25(1) of SPLUMA.
[115] Department of Rural Development and Land Reform *Land Use Scheme Guidelines* (2017) at 1 para 1.3.
[116] See *Land Use Scheme Guidelines* at para 1.3.

natural environment.[117] To achieve its purpose, an LUS uses "zones" or "zoning" to depict the controlled geographical areas. It also relies on "scheme regulations" to set out procedures and conditions relating to the use of land in any particular zone.

With the advent of SPLUMA, each and every municipality was required to adopt and approve a single LUS for its entire area (a "wall-to-wall scheme") within five years after the commencement of SPLUMA.[118] This provision was adopted in order to ensure uniformity, as in the past, there was a myriad of schemes, with every area within a municipality having its own specific "town planning scheme". Section 24(1), therefore, required that, by the year 2020, all municipalities in South Africa had to have adopted and approved a single LUS for their entire area. In the formulation of its LUS, each municipality was required to take into account the development principles set out in Chapter 2 of SPLUMA, especially the principle of spatial sustainability.[119]

Amongst other things, an LUS must "include appropriate categories of land use zoning and regulations for the entire municipal area, including areas not previously subject to a land use scheme; take cognisance of any environmental management instrument adopted by the relevant environmental management authority, and must comply with environmental legislation; include provisions that permit the incremental introduction of land use management and regulation in areas under traditional leadership, rural areas, informal settlements, slums and areas not previously subject to a land use scheme, … and give effect to municipal spatial development frameworks and integrated development plans".[120] These provisions were all introduced with the intention of creating a single and uniform scheme.

Once again, the obligation to take environmental management instruments into account and to comply with environmental legislation illustrates the important role that municipalities are expected to play in the protection of the environment. Another significant provision from an environmental perspective is the requirement that an LUS has to cover traditional areas and informal settlements; this is vital because environmentally sensitive areas can also be located in traditional land, especially in KwaZulu-Natal, and such land can now be subject to protection

[117] See *Land Use Scheme Guidelines* at para 1.4.
[118] Section 24(1) of SPLUMA.
[119] Section 7(b) of SPLUMA.
[120] Section 24(2) of SPLUMA.

through the provisions of an LUS. Lastly, the so-called "domino effect" (from IDP to SDF to LUS) referred to above is apparent in the requirement that an LUS must give effect to an IDP and SDF.

An LUS must primarily have three elements, namely scheme regulations, a zoning map, and scheme controls.[121] Each of these will be briefly discussed below:

Scheme regulations specify the rules and regulations governing the use and development of land in a specific zone.[122] Scheme regulations, therefore, contain the rules that apply to a particular scheme and which regulate the manner in which the LUS must be applied. Scheme regulations typically contain the following:

(a) General provisions: The general provisions set out the purpose and objects of the scheme, the components of the scheme, the area of application of the scheme, and what is normally referred to as the "user orientation". The user orientation details the relationship between the IDP, SDF, LUS and other legislation.
(b) Definitions: As its name suggests, the definitions define many of the terms used in the scheme and especially those that have a technical meaning. There are also definitions of the type of land use classifications that are used in the scheme.
(c) Development policy provisions: The development policy provisions refer to the essential control measures included in an LUS. These measures include land use zones, management zones and general development regulations.
(d) A register of all amendments to the scheme.

A zone is applied to a piece of land, designating it for a specific use or purpose. Land parcels with cadastral boundaries are typically classified as zones. A zone's various land uses are represented by colours on the scheme map and certain land uses can be permitted freely, with consent, or the zone can prohibit certain uses.[123] A zone transmits possible development rights as outlined in the plan.

[121] Section 25(2) of SPLUMA.
[122] *Land Use Scheme Guidelines* at para 3.1.1.
[123] *Land Use Scheme Guidelines* at para 3.2.

SPLUMA itself includes three specific land uses relevant to the environment and suggests that municipalities should use these specific land uses when they create zones in their LUSs. These three specific land uses are as follows:[124]

(a) A conservation zone. A conservation zone is one which is included for uses customarily or otherwise rationally related to the conservation or preservation of the built or natural environment, including the conservation or preservation of the land's physical, ecological, cultural, or historical features against unfavourable development or human activity.
(b) An agricultural zone. An agricultural zone is one which is included for uses customarily or otherwise rationally connected to the use of land for farming operations, such as the use of land for structures, buildings, and residential units that are logically required for or connected to the use of the land for farming operations.
(c) Public purposes zone. A public purpose zone is one which is included for uses that are customarily or otherwise logically related to the use of land as recreation areas, public parks, public gardens, open spaces, sports fields, public squares, or places of worship.

In each zone, a municipality can determine which uses are freely permitted, which uses are permitted only by consent and which uses are prohibited. Uses that are freely permitted are usually those that are compatible with the surrounding land uses in that zone. Uses that are permitted only by consent require the consent of the municipality and neighbouring landowners and may have conditions attached to them. Uses that are prohibited are usually those that are incompatible with the surrounding land uses.[125]

Another important component of an LUS is a scheme map which indicates the zoning of the municipal area into land use zones. A scheme map depicts all of the cadastral entities that make up the municipality (farm portions, agricultural or small holdings, erven, etc) and assigns a zoning or zone to that property by means of a colour or similar notation.[126]

Lastly, a scheme must have scheme controls or development parameters. These tools are used to manage land development by imposing controls or parameters on the manner in which land

[124] Schedule 2 to SPLUMA.
[125] *Land Use Scheme Guidelines* at para 3.2.1.
[126] *Land Use Scheme Guidelines* at para 3.1.2.

may be developed, especially in relation to buildings, built-forms and sub-divisional matter. They may differ from zone to zone.[127] The most commonly used scheme controls are:

(a) Density restrictions: These restrictions limit the number of dwelling units per erf/lot or per hectare.
(b) Height restrictions: These restrictions limit the height of buildings and are expressed as the number of storeys or in metres above ground level or above mean sea level.
(c) Floor area ratios (FARs): These restrictions determine the ratio of the total floor area of the building to the total area of the subdivision on which the building is or is to be erected.
(d) Coverage restrictions: These restrictions limit the amount of land on a particular erf or lot that may be covered by buildings. They are expressed as a percentage of the erf or plot that may be covered by buildings or roofs.
(e) Building lines: Building lines refer to lines which are invisible lines within a property demarking how far a person can build within their property.[128] A building line prevents a person from building too close to their neighbours or a road.

The legal nature and effect of an LUS is that once approved and adopted, it has the force of law and is applicable to the municipality and all persons outside of the municipality.[129] This provision clearly shows the "cross-cutting" (that is, governing and governance) nature of an LUS as a municipal planning instrument for environmental governance. For enforcement purposes, a municipality may pass bylaws aimed at enforcing its land use scheme or use civil litigation processes for such enforcement purposes.[130] As mentioned in Chapter One, although an LUS has the force of law, it does not enjoy the status of a bylaw, which is discussed below.

3.6 Municipal bylaws

A bylaw is an instrument used to govern, and its principal element is that of command and control. A municipality adopts a bylaw and uses it to govern all persons and activities within its jurisdiction.[131]

[127] *Land Use Scheme Guidelines* at para 3.3.
[128] *Land Use Scheme Guidelines* at para 3.3.
[129] Section 26(1)*(a)* of SPLUMA.
[130] Section 32(1) and (2) of SPLUMA.
[131] See Du Plessis fn 77 above chapter 3 at 3-33.

The executive and legislative authority of every municipality is vested in its municipal council,[132] and, in the exercise of its legislative function, a municipal council may make bylaws for the effective administration and management of the municipality on any of the local government matters listed in Schedules 4B and 5B to the Constitution, and on any matter assigned to it by national or provincial legislation.[133] Unlike Schedules 4A and 5A (national and provincial functions), Schedules 4B and 5B do not specifically refer to strictly environmental competencies that are allocated to municipalities; however, they do deal with several matters which form part of the environment, including pollution, municipal health services, stormwater management, trading, water and sanitation, beaches, cleansing, public nuisances, accommodation, care and burial of animals, fencing, local amenities, markets, abattoirs, parks and recreation, roads, noise pollution, pounds, public spaces, refuse removal, refuse dumps and solid-waste disposal.[134] When drafting bylaws to regulate these matters, a municipal council must take into consideration its obligation in terms of section 24*(b)*(i) of the Constitution to "prevent pollution and ecological degradation", as well as its obligation in terms of section 152(1)*(d) "*to promote a safe and healthy environment" and include provisions that adhere to these obligations.

It is important to note that, despite the fact that section 156 makes reference only to matters in Schedules 4B and 5B to the Constitution, a municipality can make bylaws on matters of the environment listed in Schedules 4A and 5A to the Constitution in the context of municipal planning for the reasons already articulated in Chapter Two, where the *Le Sueur* judgment provided the green light for municipalities to exercise their legislative power to protect biodiversity as part of an open space system and to prohibit development within an open space system without environmental authorisation. This view is supported by the literature referred to in Chapter Two.

As noted by Du Plessis, section 156 is not the only source of the power of municipalities to make bylaws; another source is what she refers to as the "delegated mandate", whereby provision is made in specific sector legislation for municipalities to promulgate bylaws to address "specific environmental matters".[135]

[132] Section 151(2) of the Constitution.
[133] Section 156(1) and (2) of the Constitution.
[134] See Du Plessis fn 76 above chapter 3 at 3-33.
[135] Du Plessis fn 77 above chapter 3 at 3-35.

Any bylaw enacted by a municipal council should not conflict with the provisions of national or provincial legislation, and if such conflict exists, the bylaw is invalid, and the provisions of the national or provincial legislation prevail.[136] A bylaw is original legislation according to the provisions of section 43*(c)* and section 156(2) of the Constitution. Local government is one of the three spheres of government which are interdependent and interrelated;[137] however, local government is unique in that it exercises both executive and legislative powers by itself, and a municipal council may not delegate its power to promulgate a bylaw.[138]

Bylaws are generally preceded by policies and strategic documents, like an IDP and SDF. These are followed by a causal sequence (the so-called "domino effect"), which results in the promulgation of a bylaw that gives practical and operational realisation to the contents of the IDP or SDF.

The most important characteristic of a bylaw for the purposes of this study is its substantive provisions, which include:

(a) the conferral of powers to authorised officials because no public official may exercise any power not authorised by law. The conferral of powers is at the centre of the bylaw drafting process because, if no powers are conferred, the bylaw will be difficult to enforce. Among the powers which may be conferred on authorised officials are the power to request information, to enter property and to search and seize (in the exercise of these powers, the constitutional rights of individuals should be observed); and
(b) the imposition of offences and penalties; these provisions criminalise contraventions of provisions of the bylaw and impose penalties for such contraventions. An offence is created by declaring expressly that a certain act is prohibited or is an offence and that the person who commits the offence is liable to a penalty.[139]

3.7 Conclusion

Municipalities have various legal instruments available to them to realise the environmental rights safeguarded in section 24 of the Constitution and to provide for open space systems. The

[136] Section 156(3) of the Constitution.
[137] Section 40(1) of the Constitution.
[138] Section 160(2) of the Constitution.
[139] As highlighted by Prof R Malherbe & Adv Anton Meyer *Short Learning Programme in Legislative Drafting Course Notes* (University of Johannesburg 2017) at 51-65.

analysis above shows the importance of strategic planning and reliance on governance instruments to make certain that a municipality contributes to the realisation of the constitutional right enshrined in section 24.

Municipal planning tools ensure the proper chain of events from the design of the strategic plan to the implementation of that plan. The IDP is the principal strategic planning tool of a municipality and is the key to guiding and providing direction on how the municipality will deal with the protection of the environment through open space systems. For this reason, the IDP needs to be specific as to the kinds of environmental goals the municipality wants to achieve. The SDF, LUS and bylaws are instruments that bring to fruition these strategic goals, each functioning in its unique sphere. The similarities between LUSs and bylaws are noteworthy for implementation purposes as they both have similar substantive provisions and have the force of law after adoption. However, for reasons which will be advanced in Chapter Five below, bylaws seem to be the more favourable tools to be utilised to realise the section 24 right through open space systems.

The introduction of SPLUMA in 2015, which provided for environmental consideration to be taken into account by municipalities in crafting their municipal planning tools, reaffirmed the principles and the reasoning of the *Le Sueur* judgment in relation to the authority of local government in environmental matters.

On the aforementioned premise, Chapter Four below will analyse the situation in the eThekwini and City of Cape Town Metropolitan Municipalities to ascertain how they have utilised these instruments post the *Le Sueur* judgment. It is imperative to examine the extent of the changes in these municipalities and to determine which instrument has been given more emphasis in order to accommodate the open space system as a biodiversity consideration within the municipal planning decisions of these two municipalities.

CHAPTER FOUR
POST *LE SUEUR* DEVELOPMENTS IN THE CITY OF CAPE TOWN AND THE ETHEKWINI MUNICIPALITY

4.1 Introduction

In the previous chapter, the study discussed in detail the statutory and policy planning framework instruments which are utilised by municipalities to address environmental protection. As can be noted from the discussion, these instruments have different elements and purposes, with the IDP being the "heartbeat" of all the instruments, complemented by the other instruments. Each of these instruments has a link to or has a "domino effect" on the others, in that the environmental goals that are set out in an IDP filter down through the instruments until the stage is reached where a bylaw is promulgated.

Having laid out the statutory and policy framework, it is prudent that the study now focuses on the two municipalities, being the City of Cape Town and the eThekwini Metropolitan Municipalities, to assess the development of these instruments following the *Le Sueur* judgment in their municipal planning decision-making processes using the open space system as a biodiversity consideration. As mentioned in Chapter One above, both these municipalities were parties to the *Le Sueur* case, with the eThekwini Municipality as the main respondent and the City of Cape Town being admitted as an *amicus.*

The chapter will discuss and analyse the municipal planning instruments of the two municipalities (IDPs, SDFs, LUSs and relevant bylaws) to see how they have developed these instruments to incorporate the open space system as a biodiversity consideration in their municipal planning processes. The chapter will analyse these instruments, particularly in the period 2013 to date. Because of the limitations of this study, the analysis will only concentrate on the environmental aspects of these instruments incorporating the open space system. The chapter will start with the City of Cape Town, followed by the eThekwini Municipality.

4.2 City of Cape Town

4.2.1 Introduction

The City of Cape Town (the city) is one of the eight metropolitan municipalities in South Africa. It is considered to be one of the cities richest in biodiversity as, amongst other things, three of the biosphere reserves (the West Coast Biosphere Reserve, Kogelberg Biosphere

Reserve and Cape Winelands Biosphere Reserve) are within or around the boundaries of the city.[140] The city is located within the Cape Floristic Region which is home to 9 600 plant species, 70% of which are found nowhere else in the world, and the region is recognised as being one of the planet's 25 most threatened ecosystems.[141] The city manages about 20 nature reserves and has over 45 000 hectares of accessible protected areas.[142] One of the most iconic places in the city is the Table Mountain National Park, an important global natural, scenic, historical and recreational asset that provides vital ecosystem benefits to the city.[143]

The open space system that is in use in the city is the CMOSS, which comprises various kinds of generic places including but not limited to ecologically determined space, inclusive of the biodiversity network and declared protected areas.[144] As highlighted in Chapter One, the CMOSS defines "open space" as principally the unbuilt component inside the urban edge that serves a variety of purposes and functions.[145] The CMOSS also comprises seven generic open space types, which are:

(a) ecologically determined space – the biodiversity network and declared protected areas;
(b) agricultural anchors – described as those areas with intrinsic value (agricultural potential) as well as existing agricultural areas;
(c) "blue parks" – the vleis and watercourses, with appropriate buffer zones or edges;
(d) scenic routes – part of the tourist and recreational experience of Cape Town;
(e) beaches and public edges – ensuring public access;
(f) multi-purpose urban parks – serving a variety of functions, including core conservation, sports facilities, cemeteries and hiking trails; and
(g) socially determined open space – including recreational facilities, cemeteries, solid waste disposal sites and urban public space.[146]

According to a report prepared by Marlene Laros & Associates,[147] the Biodiversity Network (BioNet) is seen as the "backbone" of the CMOSS. The BioNet is a map of biodiversity

[140] City of Cape Town *State of the Environment* 2022 at 21.
[141] City of Cape Town *State of the Environment* 2022 at 21
[142] City of Cape Town *State of the Environment* 2022 at 15.
[143] City of Cape Town *State of the Environment* 2022 at 15.
[144] Marlene Laros & Associates *The Identification and Prioritization of a Biodiversity Network in Cape Town* at 5.
[145] Van Wyk fn 1 above at 258.
[146] Marlene Laros & Associates fn 142 above at 5.
[147] Marlene Laros & Associates fn 142 above at 5.

priorities and the corresponding guidelines for land use planning and decision-making. These are intended to guide a variety of sectors whose policies and decisions have an impact on biodiversity in terms of land use planning, environmental assessments and authorizations, and natural resource management.[148] The BioNet is used as a spatial planning tool that shows terrestrial and aquatic features that are critical for the conservation of biodiversity and the maintenance of ecosystem functioning within the city.[149] The BioNet identifies which land parcels are designated as critical biodiversity areas (CBAs), which must be preserved in order to meet national conservation targets. It also includes all priority natural and semi-natural wetlands and rivers.[150] Although the BioNet includes all the parcels of land within the City of Cape Town (63.4% of the BioNet is public land versus 36.6% in private ownership),[151] it serves mostly as a guideline for decision-making within the city on public land use and environmental matters; as far as private land owners are concerned its application is not mandatory for the development of private property, as will be seen in the discussions below.

4.2.2 Policies

To ensure that the responsibility to protect and maintain the city's ecosystem is implemented, the city adopted a Bioregional Plan (the plan) on 19 August 2015. The plan comprises a biodiversity profile for the bioregion, the BioNet and management guidelines.[152] The plan serves as the main environmental data source for integrating biodiversity concerns into land use planning and decision-making to prevent the loss and deterioration of the natural habitat that is still present in CBAs inside the city.[153] According to the plan, all city line departments are mandated to use it in their decision-making processes and all city strategic planning documents are to be informed by the plan. The plan further instructs all departments whose functions impact on biodiversity to align their activities with the plan.[154] It is interesting to note that when it comes to private land owners, individuals and companies "who want more information about the biodiversity value of their landholdings and who wish to make a contribution to conserving the nation's natural heritage", it is only recommended that they to use the plan "by ensuring that the use of their land is compatible with biodiversity conservation

[148] Cape Town *BioRegional Plan* Part A clause 1.1 at 10.
[149] Cape Town *BioRegional Plan* Part A clause 1.1 at 10.
[150] City of Cape Town *State of the Environment* 2022 at 26.
[151] Cape Town *BioRegional Plan* Part E clause 17.2 at 59.
[152] Cape Town *BioRegional Plan* Executive Summary at 3.
[153] Cape Town *BioRegional Plan* Part A clause 1.3.3 at 10.
[154] Cape Town *BioRegional Plan* Part A clause 1.4.1 at 15.

and/or by securing priority sites in stewardship contracts".[155] This is reflected in the language used in the plan, where, in relation to private land owners, the word "mandated" had been changed to "recommended", thus indicating that the application of the plan to private land owners is by choice through agreements like "stewardship contracts".[156] This clearly shows why the application of the BioNet, which is a component of the plan, is not compulsory when it comes to private land ownership.

The plan, in fact, acknowledges that about 54.3% of private land is non-conserved BioNet property, and proposes that one of the mechanisms that can be used to achieve biodiversity targets by securing private land is stewardship contracts.[157] The plan encourages private owners to enter into stewardship contracts by providing incentives such as rate rebates, and biodiversity management advice and assistance for properties outside the urban edge. For properties within the urban edge with existing development rights, stewardships may open the possibility "for land swaps, limited development rights or biodiversity offsets in combination with enhanced development rights as part of the conditions of approval in an Environmental Impact Assessment or Land Use Planning Ordinance process".[158]

In 2017, the city adopted an "Environmental Strategy of the City of Cape Town" (the Strategy) which, according to its vision statement, is meant --

"[t]o enhance, protect and manage Cape Town's natural and cultural resources for long-term prosperity, in a way that promotes access and social well-being, and optimises economic opportunities".

The Strategy is not meant to be an overarching environmental strategy for the whole city, but it is designed to contribute "significantly towards the environmental component of sustainability by providing decision-makers in the City with an effective policy and governance framework for decision-making, management, and operational implementation where the environment is concerned".[159] One of the components of the strategy is an "Implementation Framework" which has strategic focus areas, and one of the most important of these areas is

[155] Cape Town *BioRegional Plan* Part A clause 3 at 20.
[156] A stewardship contract is defined as "a voluntary conservation initiative that focuses on biodiversity conservation on private land identified as a priority"; see Cape Town *BioRegional Plan* Part E clause 17.1 at 59.
[157] Cape Town *BioRegional* Plan Part E clause 17.2 at 59.
[158] Cape Town *BioRegional Plan* Part E clause 17.2 at 59.
[159] City of Cape Town *Environmental Strategy* 2017 clause 4.1 at 7.

"natural systems planning and management" "focusing on the management of natural resources and ecosystems, including biodiversity, open spaces, river and wetland systems, and the coast".[160] One of the key components of natural systems planning and management is the natural systems plan, which aims to identify key natural systems in the city and to prioritise the management and conservation of these systems, with the intention to incorporate this component into the city's SDF.[161]

The Strategy is based on 11 principles that aim to "collectively enable the City to achieve its environmental sustainability vision". One of the principles that is relevant to this study is principle 6, which is concerned with "[p]reventing, minimising and mitigating environmental impacts".[162] The principle provides that the city must make sure that the idea of proactively preventing negative environmental impacts is upheld when making decisions, running the business, and making future plans.

One of the foremost outcomes that the Strategy seeks to achieve is an environment where "[a] range of open spaces (including parks, nature reserves, public open spaces, recreational and sports facilities, cemeteries and memorial gardens) are provided that meet the full spectrum of community needs (including social, cultural, religious, and spiritual needs), are high-quality community spaces, and are integrated into the City's open space and natural systems planning".[163] This is another indication that the open space system in Cape Town is meant to apply mostly to publicly owned land.

4.2.3 The city's integrated development plan

The city's IDP 2022-2027 is informed by 16 objectives which are meant to help the city to achieve its vision of being a "City of Hope". Objectives 9 and 11 are relevant for the purposes of this study. These objectives fall under two priorities in the IDP, namely "Public Space, Environment and Amenities" and "A more spatially integrated and inclusive City", and they provide as follows:

[160] City of Cape Town *Environmental Strategy* clause 9 at 25.
[161] City of Cape Town *Environmental Strategy Implementation Framework* at clause 4.1
[162] City of Cape Town *State of the Environment* 2022 at 17.
[163] City of Cape Town *Environmental Strategy* clause 5.2.10 at 12.

(a) Objective 9:[164] This objective is aimed at achieving a healthy and sustainable environment. In achieving this objective, the city intends to implement environmental and biodiversity management initiatives/programmes, and under the banner of an environmental management programme, the city is "committed to protecting, restoring and managing its natural areas to ensure their long-term sustainability and efficacy, and improve Cape Town's resilience to climate change".
(b) Objective 11: This objective is aimed at providing quality and safe parks and recreation facilities supported by community partnerships. It stipulates that the "city will design and manage quality public spaces and facilities where communities can gather to learn, collaborate and relax in safe and welcoming places".[165]

4.2.4 The city's spatial development framework

The city's SDF was approved in 2018, and it sets out the spatial vision and development priorities to achieve a reconfigured, inclusive spatial form for Cape Town. It is important to highlight that the City adopted a new SDF on 23 February 2023, the contents of which are similar to that adopted in 2018 in relation to environmental protection aspects and, therefore, have no adverse impact on the arguments advanced in this study about the city's SDF.

The city's SDF forms part of its five-year IDP and also supports a long-term plan beyond the IDP timeline.[166] It highlights two spatial strategies under the banners of "Public Open Space, Environment and Amenities" and "Spatially Integrated and Inclusive City". These are as follows:

(a) building an inclusive, integrated, vibrant city which seeks to maintain and develop high-quality, secure public spaces and open space systems by strategically placing new facilities while maximising current ones through partnerships and commitments from the public and private sectors.;[167] and

[164] City of Cape Town *Integrated Development Plan July 2022-June 2027* objective 9 at 83.
[165] City of Cape Town *Integrated Development Plan* at 88.
[166] https://www.capetown.gov.za/work%20and%20business/planning-portal/regulations-and-legislations/cape-town-spatial-development-framework.
[167] City of Cape Town *Spatial Development Framework* 2018 clause 5.1.1 at 56.

(b) regulating urban growth and striking a balance between environmental preservation and urban development in order to actively pursue both the City's BioRegional Plan's and national biodiversity targets.[168]

The SDF also contains development directives which should be taken into account in deliberations of development applications relating to any land within the city. One of the directives is that consideration must be given to protected environmental/marine or wetland areas, the coastal edge and high potential and/or unique agricultural land and aquifers.[169] The SDF states that in assessing development proposal/applications "within the context of these development directives", applicants and decision makers "will demonstrate that cognisance has been given to adopted environmental management instruments and the protection of agricultural resources" as provided for in section 12(1)*(i)-(n)* of SPLUMA.[170]

One of the principles guiding the directives specifies that, if land has been identified through the BioNet as being protected, then, as a general rule, development of that land should not be considered.[171] The SDF includes conceptual designations, which consist of spatial transformation areas with land use guidelines that inform the development of a land use scheme[172] for the city. In one of the spatial transformation areas, it is provided that growth should be discouraged in certain areas, particularly in areas zoned as open space areas in terms of the LUS of the city.[173]

Lastly, the SDF, under "Spatial Strategy Two", contains sub-strategies and land use policy guidelines that must be used to manage and promote urban growth and create a balance between urban development and environmental protection. One of the sub-strategies is the appropriate management of development impacts on natural resources and critical biodiversity networks. This sub-strategy provides that the city should adopt policy guidelines to increase its efforts to protect and enhance biodiversity.[174] The city aims to comply with this sub-strategy by working towards national biodiversity targets, pursuing innovative solutions for achieving biodiversity

[168] City of Cape Town *Spatial Development Framework* clause 5.1.2 at 57.
[169] City of Cape Town *Spatial Development Framework* clause 5.2 at 61.
[170] For a discussion of the requirements of s 12(1) of SPLUMA, see fn 101 above.
[171] City of Cape Town *Spatial Development Framework Development Directives* table 8 at 62.
[172] Interestingly, the city refers to the land use scheme as a development management scheme.
[173] City of Cape Town *Spatial Development Framework Development Directives* table 8 at 62.
[174] City of Cape Town *Spatial Development Framework Policy Statements* at 126.

conservation in critical biodiversity areas where development rights already exist, and introducing a critical biodiversity network overlay zone.[175]

4.2.5 The city's bylaws and land use schemes

The introduction of SPLUMA in 2015 changed the face of town planning in South Africa. Municipalities were required to align their town planning bylaws and LUSs with the provisions of SPLUMA.[176] The city was amongst the first municipalities in South Africa to develop and adopt town planning bylaws and LUSs that are in line with SPLUMA. The city adopted its Municipal Planning Bylaw in 2015[177] and the bylaw has been amended four times with the last amendment in 2019.[178] The purpose of the bylaw is the regulation of municipal planning within the jurisdiction of the city.[179]

One of the unique features of this bylaw is that it encompasses the city's LUS, which is referred to in the bylaw as a development management scheme, by including it as schedule 3 to the bylaw.[180] This is novel, as an LUS is usually a standalone strategic document that is given the force of law by SPLUMA,[181] and which a municipality may pass bylaws for its enforcement.[182]

The city has opted for an "all in one" approach, as both the bylaw and the LUS are contained in a single document. Whether this approach is legally practicable is debatable, especially because amendments to a bylaw require a more rigorous legislative process[183] than amendments to an LUS. It will, therefore, be of interest to see how the city deals with amendments to its development management scheme or the review of its LUS.[184]

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[175] City of Cape Town *Spatial Development Framework Policy Statements* at 126.
[176] See discussion in Chapter Three relating to LUSs.
[177] See Cape Town Municipal Planning Bylaw 2015 as amended.
[178] See Cape Town Municipal Planning Bylaw 2015 as amended.
[179] See preamble to the Cape Town Municipal Planning Bylaw 2015.
[180] Section 26(2) and (3) of the Cape Town Municipal Planning Bylaw 2015 which provides: "The development management scheme is the scheme in Schedule 3." And: "The development management scheme is an integral part of this By-Law and its provisions have force of law."
[181] Section 26(1)*(a)* of SPLUMA.
[182] Sections 31(1) and (2) of SPLUMA.
[183] An amendment to a bylaw may be introduced only by a member of the Municipal Council, and must go through a public participation process (section 12 of the MSA).In addition, any such amendments must also be published in the *Government Gazette* (section 13 of the MSA) Unlike amendments to a bylaw, amendments to a LUS arising out of a development application do not need to be published in the *Government Gazette.*
[184] See discussion in Chapter Three relating to LUSs.

Section 26(1)*(e)* of the bylaw lists the "protection of areas with an environment which could be substantially adversely affected by development" as one of its purposes. Decision-makers within the city must ensure that an application for land use is consistent with the city's SDF[185] and must also consider the impact of a proposed development on the biophysical environment.[186]

The LUS makes a distinction between public open space and open space. Public open space is defined as "land which is designated as public open space, under the ownership of the City or other organ of state, with or without access control, and which is set aside for the public as an open space for recreation or outdoor sport, including a park, playground, public or urban square, picnic area, public garden, nature area; and includes ancillary buildings, infrastructure and uses".[187] And open space is defined as "land, not designated as public open space or not deemed to be an ancillary use, which is used primarily as a site for outdoor sports, play, rest or recreation, or as a park or nature area; and includes ancillary buildings, infrastructure and uses, but excludes shops, restaurants and gymnasiums".[188]

The definition of "open space" is thought-provoking because it appears to suggest that the open space system is not only applicable to public land but also to private land, and it does this by excluding land "designated as public open space" or "deemed to be an ancillary use" and by including land used primarily as a "nature area". This is also seen in the zoning of "open space" which is discussed below.

The city, being in the province of the Western Cape, is fortunate as it is the only province in South Africa that has enacted provincial spatial planning legislation[189] that aligns with SPLUMA. The WCLUPA has introduced what it refers to as Open Space Zone III, which is a nature conservation area and the purpose of this zone is to protect undeveloped landscape areas, such as forests, ridges, wetlands, and the coastline, by allowing for the conservation of natural resources in areas that have not been designated as nature areas (also known as non-statutory conservation).

[185] Section 99(1)*(b)* of the Cape Town Municipal Planning Bylaw 2015.
[186] Section 99(3)*(h)* of the Cape Town Municipal Planning Bylaw 2015.
[187] Section 1 of the Cape Town Municipal Planning Bylaw 2015.
[188] Section 1 of the Cape Town Municipal Planning Bylaw 2015.
[189] Western Cape Land Use Planning Act 3 of 2014 (WCLUPA).

In line with WCLUPA, the city's LUS has an open space zone that has three categories. This categorisation is motivated by the realisation that different open spaces have particular importance as natural, cultural heritage or environmental areas and that separate zoning facilitates the management of these areas.[190] The LUS of the city also takes cognisance of the fact that there are special areas of open space that are not designated as public open space, but may be privately owned.[191] The three categories of the open space zone are as follows:

(a) Open Space Zoning 1 (environmental conservation) ensures the preservation of natural resources, though resources related to cultural heritage may also be covered. This zone provides infrastructure and facilities for tourists and visitors, as well as restricted, low-impact uses related to conservation, like environmental education. Minor rooftop base telecommunication stations, minor freestanding base telecommunication stations, and environmental conservation are the main uses.[192]

(b) Open Space Zoning 2 (public open space), which protects landscape and historic areas, such as forests, ridges, watercourses, wetlands, and the coastline, in addition to active and passive recreation areas on public land. The main purposes are minor rooftop base telecommunication stations, minor freestanding base telecommunication stations, public open space, and environmental conservation use.[193]

(c) Open Space Zoning 3 (special open space), which allows for open spaces and active or passive recreation on land that isn't officially designated as public open space. This zone does not have the status of public open space, which calls for special protection, so land under it may be owned by private or public entities. This zone is suitable for relatively large areas with unique open space characteristics, like golf courses. The main purposes are open space, private roads, small freestanding base telecommunication stations, small rooftop base telecommunication stations, and environmental conservation use.

In line with the city's strategy, the bylaw defines "an overlay zone" as "zoning, in addition to the base zoning, stipulating the purposes for which land may be used and the development rule which may be more or less restrictive than the base zoning". In terms of its strategy, an overlay zone is meant to apply in environmentally sensitive areas as a zone to protect the environment

[190] City of Cape Town *Development Management Scheme* chapter 12 at 140.
[191] See City of Cape Town *Development Management Scheme* chapter 12 at 140.
[192] City of Cape Town *Development Management Scheme* chapter 12 items 97-107.
[193] City of Cape Town *Development Management Scheme* chapter 12 items 99-103.

through open space systems. Section 24(5) of the bylaw empowers the city to "designate a specified area or land unit to have an overlay zoning, or to no longer have an overlay zoning". The city's LUS provides that "overlay zonings should be applied to promote the City's planning principles, goals, objectives and strategies as may be identified in the approved Integrated Development Plan, Integrated Metropolitan Environmental Policy strategies, or spatial plans".[194] The environmental management overlay zoning (EMO), which provides for "the management and protection of the unique natural and environmental characteristics of environmentally sensitive places and areas, or those that are worthy of protection in accordance with the city's environmental management frameworks", is the most pertinent category within the overlay zone for the purposes of this study.[195]

In terms of the general provisions of an EMO, certain activities which affect the area protected by an EMO zoning require the approval of the city before the owner of a property can participate in such activities; these are:

(a) any change in land use resulting from an application in terms of the bylaw;
(b) any subdivision of the land;
(c) the addition of any new structure requiring building plan approval in terms of the National Building Regulations and Building Standards Act 103 of 1997;
(d) the removal of indigenous vegetation or site clearing, or felling, lopping, topping or otherwise damaging any tree that is either more than six metres in height or more than 500 millimetres in diameter, other than for the removal of dangerous branches or *bona fid*e pruning; and
(e) any below-ground excavation or change to watercourses.[196]

In terms of the development rules of the EMO zoning, the city may approve any appropriate use as a consent use in terms of EMO zoning provided that:

(a) it considers such use to be desirable or justified in order to provide the owner with an incentive to preserve the environmental resource; and
(b) the city may require cessation of the consent use right if the environmental resource is not properly maintained and protected to the city's satisfaction.[197]

[194] City of Cape Town *Development Management Scheme* chapter 20 items 159-164 at 168.
[195] City of Cape Town *Development Management Scheme* chapter 20 items 165-168 at 170.
[196] City of Cape Town *Development Management Scheme* chapter 20 items 165-168, especially item 166 at 170.
[197] City of Cape Town *Development Management Scheme* chapter 20 items 165-168, especially item 165 at 170.

In considering an application for approval for an activity within an EMO zoning, the city may require the following from an applicant in order to consider the application thoroughly:

(a) statements of significance in relation to the site;
(b) environmental, botanical or other audit or research information; and
(c) photographs of the site.[198]

Item *(b)* seems to suggest that an environmental assessment of some kind will have to be conducted in relation to the site, this is reflected in the use of the words "audit" and "research information". This environmental assessment and any subsequent approval of the activity in an EMO zoning does not preclude the applicant from obtaining any other necessary legislative approvals, such as an environmental impact assessment in terms of NEMA, if such approvals are required for the site.[199]

In approving an application for an activity within an EMO, the city may impose any condition it deems appropriate for the protection and enhancement of the area protected by the EMO zoning, including, amongst others, conditions regarding environmental site management and activity management plans.[200]

The City of Cape Town has clearly been robust in policy making in relation to the protection of the environment; however, its municipal strategic planning documents and policies do not seem to enforce the CMOSS under the BioNet in respect of private property, it is mostly applied to public land. Furthermore, its open space zone within the LUS applies mostly in public open spaces, with the only exception being the special open zone, which applies to private property but only larger properties. However, the introduction of the EMO zone within the city's LUS is to be welcomed. This will play a vital role in the use of the open space system within municipal planning for environmental protection. In addition, it has provisions that mirror the D'MOSS requirements relating to developments on a site within an EMO zone, even though they are not as restrictive as the D'MOSS.

[198] City of Cape *Town Development Management Scheme* chapter 20 items 165-168, especially item 168 at 170.
[199] City of Cape Town *Development Management Scheme* chapter 20 items 165-168, especially item 168(3) at 170.
[200] City of Cape Town *Development Management Scheme* chapter 20 items 165-168, especially item 168(3) at 170.

4.3 eThekwini Municipality

4.3.1 Introduction

The eThekwini Municipality (the municipality) is situated at the centre of one of the 35 global biodiversity hotspots, being the Maputaland-Pondoland-Albany (MPA) region.[201] The MPA region is home to more than 7 000 species of vascular plants, 25% of which are endemic to the region.[202] eThekwini covers 97 kilometres of coastline with a diversity of beach types, and it covers an open space system of approximately 97 000 hectares of land, which is almost a third of the whole Durban municipal area.[203] Three of the country's nine terrestrial biomes, namely savanna, forest and Indian Ocean coastal belt, are within the municipality's region. The region has 17 river catchments and 16 estuaries, and consists of 4 000 kilometres of rivers.[204] The open spaces in the municipality can be categorised into four distinct entities: terrestrial, freshwater, estuarine and marine.[205] Amongst the biggest threats to this rich biodiversity are the transformation of natural areas, the introduction and spread of invasive alien species, over-exploitation, and human-induced climate change.[206] Furthermore, rapid urbanisation has increased the fragmentation of landscapes, making management interventions in natural areas even more critical.[207] As can be seen from the above, the municipality is rich in biodiversity; however, this richness is negatively impacted by the rise of urbanisation.[208]

In order to achieve its goal of conserving and protecting the environment, the municipality relies, amongst other municipal planning tools, on the D'MOSS. The D'MOSS has been defined in Chapter One, and the system applies to both public and private land. In the context of municipal planning, the municipality defines it as being "a spatial layer, based on a systematic conservation assessment approach that identifies key areas that are selected to ensure representation and persistence of biodiversity and the supply of ecosystem services".[209] Historically, the D'MOSS used to be applicable only as a policy layer in restricted and mostly

[201] C T McLean, L E Ground, R G C Boon, D C Roberts, N Govender & A McInnes *Durban's Systematic Conservation Assessment* (eThekwini Municipality, Environmental Planning and Climate Protection Department, Durban South Africa 2021) at 9.
[202] See McLean et al fn 201 above at 9.
[203] eThekwini Municipality *Durban: State of Biodiversity Report* 2020/2021 at 5.
[204] eThekwini Municipality *Durban: State of Biodiversity Report* at 5
[205] See eThekwini Municipality *Durban: State of Biodiversity Report* at 18.
[206] See eThekwini Municipality *Durban: State of Biodiversity Report* at 9.
[207] eThekwini Municipality *Durban: State of Biodiversity Report* at 19
[208] See McLean et al fn 201 above at 9.
[209] See eThekwini Municipality *Durban: State of Biodiversity Report* at 6.

developed areas of what was then the Durban Metro Council.[210] However, it now applies to the whole of the municipality's jurisdiction in public, private and traditional authority areas, covering 97 000 hectares of land consisting of 2 400 hectares of estuarine environment, including sand and mudbanks, mangrove and swamp forests; 14 000 hectares of forests, including dune, coastal and scarp forests; 7 500 hectares of wetlands, including floodplains, swamp forest and reedbeds; 13 000 hectares of grassland, including the threatened KZN sandstone sourveld grasslands; and 40 000 hectares of dry valley thicket.[211]

As stated in Chapters One and Two, the D'MOSS was incorporated by the municipality into its town planning scheme in 2010, and one of the main reasons for doing so was that "the ability of the eThekwini Municipality to enforce D'MOSS while it was purely a Council policy, albeit in a spatial layer, was limited because it did not enjoy the legislative authority".[212] This led to the *Le Sueur* case in which the court affirmed that municipalities have the authority to regulate the environment within the context of municipal planning.

The municipality has thus far incorporated the D'MOSS in its IDP, SDF and LUS as a controlled development layer.[213] The municipality is cognisant of the importance of the *Le Sueur* judgment in relation to the implementation of the D'MOSS as a biodiversity consideration in its municipal planning tools, as it points out in its 2021 Conservation Assessment that the "inclusion of D'MOSS into the Municipality's planning legislation in 2010, confirmed as being constitutionally sound by the High Court in 2013, now allows for the greater protection of biodiversity".[214]

4.3.2 Policies

In 2017, the municipality took steps to further protect biodiversity on privately owned land. It adopted a biodiversity stewardship policy[215] that seeks to support the formalisation and formation of alliances with traditional and private landowners and administrators in order to achieve sustainable management of natural resources. In its preamble,[216] the policy provides

[210] See McLean et al fn 201 above at 11.
[211] https://www.durban.gov.za/pages/residents/environmental-planning-climate-protection (accessed on 14 November 2022).
[212] See *Le Sueur v eThekwini Municipality* fn 13 above.
[213] See *Le Sueur v eThekwini Municipality* fn 13 above.
[214] McLean et al fn 201 above at 19.
[215] eThekwini Municipality *Biodiversity Policy* 2017.
[216] eThekwini Municipality *Biodiversity Policy* clause 3.2.

that it seeks to be a tool that "represents a shift from the "conservation for landowners" approach to the "conservation with landowners" approach".

The policy includes ways to "empower, guide and incentivise private and communal land administrators to manage the environmental components of their properties, and further formalise mutually beneficial partnerships-based conservation of critical biodiversity assets that fall within communal, private and state land parcels in the eThekwini municipal area".[217] In terms of clause 8.1.1 of the policy, it is targeted at:

(a) formal private land ownership, usually associated with an urban or suburban area comprising many properties covered by a planning scheme;
(b) communal land made up of large, undivided properties falling under the representative administration of the Ingonyama Trust Board (ITB); and
(c) state land.

However, it is important to note that one of the basic principles of the policy is that its application is voluntary, in that "the final decision on whether to participate or not lies with the landowner or land administrator".[218] This suggests that the policy is applicable to areas that are covered by the D'MOSS as long as the owner of the property consents to the stewardship.

With the introduction of the stewardship policy, the municipality aims to "expand the biodiversity conservation estate beyond traditional state-owned protected areas, improve EM's role in environmental protection and management and ensure that private, communal and state-owned areas with high biodiversity value receive secure conservation status and are linked to a network of other conservation areas in the landscape".[219]

4.3.3 The municipality's integrated development plan

The eThekwini Municipality's vision in its IDP[220] is that "[b]y 2030 eThekwini will be Africa's most caring and liveable city". In order to achieve this, the IDP of the municipality has an eight-point plan with specific goals. The most relevant plan for the purposes of this study is

[217] eThekwini Municipality *Biodiversity Policy* clause 3.4.
[218] eThekwini Municipality *Biodiversity Policy* clause 6.1.
[219] https://economic.durban.gov.za/storage/Documents/Biodiversity/EcoFileEThekwiniBiodiversityStewardshipProgramme_English.pdf (accessed on 24 May 2023).
[220] eThekwini Municipality *Integrated Development Plan 2017-2022* Review for 2021/2022.

plan 1, which is to "develop and sustain our spatial, natural and built environment", and the goal under this plan is to "lead, direct and manage the spatial, built and natural environment to ensure the sustainable, resilient and integrated growth and development" of the municipality for the benefit of all its citizens.[221]

The municipality appreciates the principle of sustainable development, which is the pillar of section 24 of the Constitution, in that under this plan, it highlights that "all development must function in harmony with the natural resource base upon which human wellbeing and the economy depends".[222] Under each plan, the IDP features strategic focus areas, one of which is to develop, manage and regulate the built and natural environment, with a critical programme being to "ensure the long-term sustainability of the natural resource base".[223] Under this "long-term sustainability" programme, the municipality emphasises that it is devoted to guaranteeing the long-term sustainability of the natural resource base through coordinated efforts in several crucial areas, which it sees as carrying out its constitutional duty under section 24 to protect the environment.[224]

The programme of "long-term sustainability" identifies the D'MOSS as being one of the tools to be used to "identify open spaces of high conservation value and associated ecological support areas which require protection and management" through a variety of mechanisms inclusive of other land use mechanisms.[225] The programme also stresses that the municipality, in protecting open spaces, should not limit itself to the D'MOSS but should promote private partnerships with communities in order to protect biodiversity. This has been achieved through the stewardship policy discussed above.

4.3.4 The municipality's spatial development framework

The municipality's SDF was adopted for a period of five years (2017-2022) and is reviewable annually.[226] Much like the City of Cape Town the municipality has adopted a new SDF (2022-2027), the contents of which are of a similar nature to that adopted in 2018 in relation to the

[221] See eThekwini Municipality *Integrated Development Plan* at 382.
[222] See eThekwini Municipality *Integrated Development Plan* at 383.
[223] See eThekwini Municipality *Integrated Development Plan Programme* 1.2 at 418.
[224] See eThekwini Municipality *Integrated Development Plan Programme* 1.2 at 418.
[225] See eThekwini Municipality *Integrated Development Plan Programme* 1.2 at 418.
[226] eThekwini Municipality *Spatial Development Framework 2017-2022* Review 2021/22.

aspects of environmental protection, and, therefore, have no adverse impact on the arguments advanced in this study in relation to the municipality's SDF.

The SDF is meant to give effect spatially to the vision of the IDP. According to the SDF vision, by 2030, the municipality "will be a socially equitable, environmentally sustainable, resilient and functionally efficient Municipality that bolsters its status as a gateway to Africa and the world".[227] The spatial principles as laid down in SPLUMA[228] are the foundation of the municipality's SDF, particularly the principle of sustainability and resilience, discussed in Chapter Three above.

Under "environmental issues and trends" the SDF discusses the D'MOSS and highlights it as one of the primary response tools which inform the municipality's response to the protection of its rich biodiversity.[229] The SDF details the processes that must unfold when land, be it private or public, falls within a D'MOSS layer and the owner wants to develop it. In summary, the processes are as follows:

(a) A detailed investigation of the site to be developed must be conducted by the biodiversity impact assessment team which comes from the municipality's Environmental Planning and Climate Change Branch, in order to assess any potential environmental impacts.
(b) The assessment must be conducted primarily in terms of the town planning scheme but possibly also in terms of NEMA to assess any environmental pressures on the site, and to determine exactly what the D'MOSS covers.
(c) If no adverse impacts are expected from the development, then the activity may proceed with the authority of the Environmental Planning and Climate Change Branch.
(d) If significant adverse impacts are expected, an environmental assessment[230] must be conducted by a suitably qualified practitioner in order to fully assess the application. Thus, if it is determined that the activity might activate a formal EIA, the owner may be required to submit the development to a formal EIA process under section 24 of NEMA.

[227] eThekwini Municipality *Spatial Development Framework* at 388.
[228] Section 2 of SPLUMA.
[229] See eThekwini Municipality *Spatial Development Framework* at 149.
[230] The reference to an environmental assessment does not refer to the section 24 NEMA EIA process, but rather to an informal assessment required by the Municipality due to the significant adverse impacts expected.

(e) After the environmental assessment (this excludes a NEMA formal EIA) has been submitted, approval may be granted with or without conditions, or approval may be refused where the harmful impacts are significant and cannot be mitigated.[231]

The above process can have huge implications for private landowners, as it can be seen from *(d)* above that a costly and time-consuming environmental assessment may be required.

The SDF highlights the eight-point plan that has been identified in the municipality's IDP, and linked to that the municipality has adopted development strategies, policy statements and land use guidelines which are meant to ensure implementation of the plan in the IDP.[232] In relation to plan 1 of the IDP, one of the development strategies (strategic focus area 1) is to "manage urban growth, construct and maintain viable built environment and sustain natural environments and resources" and this strategy is informed by the principle of sustainability.[233] The key focus area of this strategy is to protect and enhance rural, agricultural and urban built and natural environments, and it aims to promote sustainable use of resources and the protection of the natural environment and agricultural resources.[234]

Under this strategic focus area, there are policy statements, requirements to achieve those policy statements and land use guidelines.[235] These are the implementation tools required to ensure that this strategic focus area is achieved, and thus ensure that plan 1 of the IDP becomes a reality. One of the policy statements is "sustaining the environment", and the requirements that have to be met to achieve this are to "[d]evelop, maintain, and regularly update an open space plan (D'MOSS) in keeping with the best available science to identify environmental significant areas within the municipal area". The land use guidelines provide that the D'MOSS should be integrated into municipal strategic spatial planning and schemes, and stipulate that care should be taken to ensure that a proposed development does not encroach on environmentally sensitive land.[236]

[231] See eThekwini Municipality *Spatial Development Framework* at 152.
[232] See eThekwini Municipality *Spatial Development Framework* at 495.
[233] See eThekwini Municipality *Spatial Development Framework* at 497.
[234] See eThekwini Municipality *Spatial Development Framework* at 497.
[235] See eThekwini Municipality *Spatial Development Framework* table 38 at 500.
[236] See eThekwini Municipality *Spatial Development Framework* table 38 at 500.

The SDF, as mentioned in Chapter Three above, acts as a tool that guides and informs the LUS; consequently, the land use guidelines should be incorporated in the municipality's LUS.

4.3.5 The municipality's land use scheme

In line with the requirement of a single land use scheme, the municipality adopted its LUS on 26 June 2020,[237] and the LUS has six sub-schemes each with the same scheme regulations, and zones depending on the area where it applies.[238] The LUS is applicable to all areas of the municipality inclusive of traditional authority areas, which is mostly where the biodiversity of the municipal area is located. The LUS is linked with plan 1 of the IDP and strategic focus area 1 of the SDF. With a view to realising plan 1 of the IDP and strategic focus area 1, the LUS scheme regulations define the D'MOSS as applicable to:

"any area demarcated upon the map by the overprinting of a green hatched pattern (or by a green layer on the GIS), where, by reasons of the natural biodiversity, the existence of flora and fauna, topography, or the environmental goods and services provided or other like reasons, development or building may be prohibited, restricted or permitted upon such conditions as may be specified having regard to the nature of the said area".[239]

The LUS has introduced the D'MOSS as a layer[240] rather than a zone. It is important to note that a layer imposes specific limitations on land, which are in addition to the zone restrictions, and are able to be amended more easily as they are not subject to a formal rezoning process. This was clearly the motivation for the introduction of the D'MOSS as a layer -- the D'MOSS changes over time depending on the environmental factors at a site. The D'MOSS as a layer has the following development conditions included in its scheme regulations:

(a) No development in any D'MOSS area may occur without the municipality's approval.
(b) No approval will be given without a proper examination of the site for the municipality to satisfy itself that the development will not cause degradation or harm to the environment.

[237] See eThekwini Municipality *Integrated Development Plan* at 406.
[238] eThekwini Municipality *Land Use Scheme: Outer West Sub-scheme* (reviewed 30 June 2022) section 1.1 at 7.
[239] eThekwini Municipality *Land Use Scheme: Outer West Sub-scheme* section 2.1 at 29.
[240] eThekwini Municipality *Land Use Scheme: Outer West Sub-scheme* section 1.20 at 25.

(c) The municipality may require an applicant to submit certain documentation for its proper examination and may require those documents to be certified as being correct by a registered environmental consultant.
(d) The municipality may impose conditions on its approval, including restricting the form and nature of the building, prescribing or limiting the material to be used to construct the structure, prohibiting or controlling the removal of natural vegetation or controlling any aspect which the municipality considers to be necessary.[241]

These provisions are onerous and may have serious implications for landowners whose properties fall within the D'MOSS controlled layer. As pointed out above, the D'MOSS is not used as a zone but rather as a layer. On its website, the municipality indicates that "there is no intention to change D'MOSS from a controlled area or layer to a conventional zone".[242]

4.3.6 The municipality's bylaws

In line with SPLUMA, the municipality promulgated its Planning and Land Use Management Bylaw in 2017.[243] According to the short title, the bylaw is meant "to regulate and manage spatial and land use planning and development" within the municipality's jurisdiction.

The bylaw is not directly specific in relation to the use of open spaces for the protection of biodiversity; however, it replicates what is contained in section 26(1)*(a)* of SPLUMA in that it affirms the legal status of an adopted LUS by confirming that it has the force of law and is applicable to all persons within the jurisdiction of the municipality.[244] The bylaw further provides that before any decision is taken, a decision maker must, amongst other things, consider the provisions of the municipality's IDP, SDF and LUS, the principles of SPLUMA, such as sustainability and adherence to environmental laws, as well as any additional applicable laws pertaining to land use management and planning.[245]

Taking into account the extent to which the open space system adopted in the D'MOSS is dealt with in the municipality's IDP, SDF and LUS, it would seem that the municipality did not deem

[241] eThekwini Municipality *Land Use Scheme: Outer West Sub-scheme* section 1.20 at 190.
[242] https://www.durban.gov.za/pages/residents/environmental-planning-climate-protection (accessed on 14 November 2022).
[243] *Provincial Gazette* 1871 dated 31 August 2017.
[244] Section 16(1)*(a)* of the eThekwini Planning and Land Use Management Bylaw 2017.
[245] See section 44(1) of the eThekwini Planning and Land Use Management Bylaw 2017.

it necessary to include substantive provisions relating to the open space system in its town planning bylaw; instead, the bylaw has provisions that give effect to these strategic planning documents, and it prescribes that consideration must be given to their provisions when making decisions.

4.4 Conclusion

The City of Cape Town and the eThekwini Metropolitan Municipalities have made positive strides in their policy and municipal planning tools with regard to the use of open space systems as a biodiversity consideration. However, it is concerning that the application of those policies to privately owned properties in the City of Cape Town is limited, and relies on the voluntary participation of private land owners.

SPLUMA has, in its provisions relating to the protection of the environment, played a vital role in guiding these two cities on the steps required to be taken. The impact of the *Le Sueur* judgment on the stance taken by these cities can be seen in the fact that eThekwini has mirrored the D'MOSS tool in almost all its municipal planning documents, and the City of Cape Town has mirrored the CMOSS, through its BioNet tool, across all its environmental protection policies and municipal strategic planning instruments. Furthermore, with the introduction of the EMO zoning, the City of Cape Town has given the enforcement of the CMOSS some leverage in respect of private land owners, even though the EMO zoning is not specifically directed at the CMOSS, but at the protection of the environment as a whole.

An interesting observation in this study is that the CMOSS in the City of Cape Town is different from the D'MOSS in the eThekwini Municipality in relation to each system's approach to private property. The D'MOSS, together with its conditions, is applicable to all land of high biodiversity irrespective of whether it is public or private land. As dealt with above, the D'MOSS prohibits development without authorisation, and before granting such authorisation, the municipality may require an environmental assessment or may even require a formal EIA process in terms of NEMA to be followed.

However, things are different in the City of Cape Town. The CMOSS, which falls under the BioNet, is only mandatorily applicable to publicly owned land, and there is no requirement for private land owners to obtain authorisation before developing their land. In the City of Cape Town, authorisation for development is required on land in an EMO zone; thus, the CMOSS

will apply to privately owned land only if it falls within an EMO zone. However, the conditions and requirements of an EMO zone are not as rigorous as those of the D'MOSS, because they do not include a formal environmental assessment.

Bux et al[246] correctly note that the City of Cape Town has adopted many more policies in relation to biodiversity management than the eThekwini Municipality; however, eThekwini has mirrored its open space system tool across all its municipal strategic planning documents. Although the CMOSS, through the BioNet, is distinct from the D'MOSS, it is comforting to note that in both systems, "their primary aim and objectives are centred on biodiversity and open space conservation and the continued provision of ecosystem services".[247]

In addition, with the inclusion of its LUS in its town planning bylaw, it appears that the City of Cape Town is trying to elevate the status of its LUS for enforcement purposes. However, that inclusion presents legal problems of its own, as any amendment of the LUS will have to go through the bylaw amendment process. Similarly, the decision by eThekwini not to declare the D'MOSS as a zone but rather as a layer presents problems of its own because this system does not entirely preclude unneeded development in a D'MOSS area.[248]

Taking into account the restrictions imposed by the D'MOSS on owners of private land, and the fact that such owners are still not receptive to the system because they believe that it infringes their rights,[249] it would have been preferable to entrench the legal status of the D'MOSS.[250] The City of Cape Town needs to revisit the status of its BioNet so that it can be mandatorily applicable to private owners, as the EMO zoning on its own is not sufficient to ensure the enforcement of environmental management to privately owned land.

The following chapter will analyse and make recommendations on whether the City of Cape Town and the eThekwini Municipality need to do more to strengthen the legal nature of the tools used to implement their open space systems.

[246] See Bux et al at fn 12 above.
[247] See Bux et al at fn 12 above.
[248] See Bux et al at fn 12 above.
[249] See Bux et al at fn 12 above.
[250] Please see discussion on 4.3.5 at page 59 above regarding the legal status of a layer and zone.

CHAPTER FIVE
ANALYSIS, CONCLUSION AND RECOMMENDATIONS

5.1 Introduction

This chapter seeks to analyse and make recommendations, taking into account the information and findings of the study provided in the previous chapters.

5.2 Analysis

As has been noted, open spaces play an important role in the preservation of the environment. As can be seen from the definition of open spaces, the preservation of the environment can be achieved in various ways, whether through parks or recreational areas or through municipal planning tools. Open space systems are crucial for biodiversity conservation, and are essential devices that can be used by municipalities to achieve their goal of realising the constitutional right provided for in section 24 of the Constitution.

The *Le Sueur* judgment has contributed significantly to clearing the path for local government's legal role in the functional area of the environment. The case provided the green light for municipalities to actively regulate within the functional area of the environment, despite its minor shortcomings, as alluded to by various scholarly writings critical of the judgment. The case can thus be seen as an encouragement for municipalities to regulate the functional area of the environment in the context of municipal planning. This municipal role has been strengthened by *Nel v Hessequa Local Municipality*,[251] a case that endorsed the *Le Sueur* judgment and held that a municipality can enact bylaws to regulate the use and management of rivers. These judgments clearly show that the judiciary has the appetite to develop our jurisprudence to provide clarity on the role of local government in the functional area of the environment. The *Le Sueur* judgment is of utmost importance for the purposes of this study as it deals specifically with an open space system in the form of the D'MOSS, providing clarity and making it more desirable for municipalities to legislate within the functional area of environment in the context of municipal planning.

The municipal planning instruments that have been analysed above provide for the protection of biodiversity, to be catered for in a variety of strategic municipal planning documents, from

[251] See *Nel and Others v Hessequa Local Municipality and Others* fn 65 above.

IDPs, SDFs, and LUSs to bylaws. Furthermore, the introduction of SPLUMA has been indispensable in the post-*Le Sueur* era as it specifically requires strategic municipal planning documents such as SDFs and LUSs to make provision for environmental protection and to provide meaningful ways for the achievement of such protection.

On its own, however, SPLUMA does not necessarily remove the uncertainty surrounding the legislative competence of local government in relation to the functional area of the "environment". This is because SPLUMA is not aimed primarily at addressing environmental issues. Instead, SPLUMA is aimed primarily at regulating municipal planning and addresses environmental issues only insofar as they are related to municipal planning. In addition, SPLUMA does not amend the functional areas listed in Schedules 4B and 5B of the Constitution. It is submitted, therefore, that while SPLUMA may sufficiently provide for the legislative competence of local government in relation to the environment as a part of municipal planning, it does not do so in relation to the environment *per se*. It may, therefore, be necessary for municipalities to rely on *Le Sueur* when it comes to regulating the environment *per se*.

It is noteworthy that most strategic planning documents, like IDPs, SDFs and certain municipal planning-related policies, only have an internal effect (that is, they are mostly applicable to internal municipal departments for decision-making). They are nonetheless important because they lay the foundation for other more binding legislative documents like LUSs and bylaws (see the domino effect, discussed above) in the protection of biodiversity.

LUSs and bylaws have been shown to be more effective in the context of the inclusion of environmental protection measures as a biodiversity consideration because they also have external effects. An LUS, through its "zoning" element, can be an effective measure to enforce environmental protection in relation to private properties. As observed in this study, bylaws are crucial for effective enforcement purposes, especially for the imposition of criminal sanctions. Most importantly, bylaws are original legislation, not delegated or subordinate legislation.

It is interesting to note the different approaches that have been adopted by both the eThekwini Municipality and the City of Cape Town in the application of the open space systems in the context of municipal planning post the *Le Sueur* case. Taking into account that both

municipalities were part of the *Le Sueur* case, one as a litigant, and the other as an *amicus*, and that the court ruled in their favour, one would think that both municipalities received the legal assurance they were looking for in this case, and therefore after the judgment they would tighten their regulation in the competency of the environment through municipal planning tools that have a more stringent legal status, like bylaws. The City of Cape Town has included its biodiversity conservation mostly in its municipal planning documents that have an internal effect, and with more of a policy or guideline impact (IDP, SDF, BioNet and its Environmental Strategy). The city incorporated its CMOSS under the BioNet, which, unfortunately, is not binding on private properties. The city has, through the EMO zone in its LUS, endeavoured to tighten the regulation of open space or the conservation of biodiversity in the context of municipal planning, but as highlighted in Chapter Four, the conditions and requirements of an EMO zone are not as rigorous as those of the D'MOSS as they do not include a formal environmental assessment requirement, and further to that, the city's LUS is part of its Municipal Planning Bylaw and, as indicated in Chapter Four above, this raises its own legal problems. The criticisms that have been levelled against the reasoning in the *Le Sueur* judgment might be a contributing factor towards the city not adopting a rather stringent approach in the regulation of the environment, however, due to the limitations of this study, that avenue could not be explored. As highlighted by Bux, the approach adopted by the City of Cape Town does not automatically stop development in environmentally sensitive areas since the municipal documents are mainly applicable internally.[252]

The eThekwini Municipality, on the other hand, has incorporated its D'MOSS provisions as a layer in its LUS. The eThekwini Municipality has also mirrored the D'MOSS with specific mention in all its municipal planning documents from the IDP, SDF and LUS, with no D'MOSS-related provisions in its Planning and Land Use Management Bylaw. The inclusion of the D'MOSS as a layer in its LUS with rigorous provisions, which have an effect of requesting an environmental assessment where necessary, is a bold step by the municipality, and the influence of the *Le Sueur* case has played a role in that. Even though the eThekwini Municipality has included the D'MOSS as a layer in its LUS, it is still not a formal zone, and therefore does not entirely preclude unneeded development in a D'MOSS area; however, it does help private landowners determine whether their land has significant biodiversity assets

[252] Bux et al fn 12 above.

and helps them plan for the development and management of their properties.[253] Nevertheless, the inclusion of biodiversity conservation considerations in both these municipalities" municipal strategic documents is a welcomed and fundamental step which paves the way forward for a more stringent approach with legal certainty, and enforcement capabilities.

5.3 Conclusion and recommendations

Municipalities have a duty to ensure that the right in section 24 of the Constitution is protected and realised. Our courts, through the *Le Sueur* judgment, affirmed that municipalities have the authority to regulate the functional area of the environment in the context of municipal planning, and can thus utilise open space systems as a biodiversity consideration in their municipal planning decisions. The City of Cape Town and the eThekwini Metropolitan Municipalities have made great strides since the *Le Sueur* judgment to include biodiversity conservation in their strategic planning documents to ensure that all municipal planning decisions take these considerations into account. The question nonetheless remains whether it is adequate to include restrictions on development rights in subordinate or delegated legislation in the form of LUSs and other municipal planning policies.

This study contends that it is not. The development restrictions introduced by the D'MOSS and CMOSS, which brought about the inclusion of biodiversity conservation provisions in both the eThekwini Municipality's and the City of Cape Town's planning documents, are better placed in original legislation in the form of green/biodiversity protection bylaws to ensure legal certainty and enforcement. Bylaws enhance the legal status of instruments used for enforcement purposes, especially since criminal sanctions can be imposed for offences committed by contravening their provisions.

The contents, scope and extent of the provisions of such a bylaw can be explored in later studies and cannot be canvassed in this study due to the limitations of this study.

[253] Bux et al fn 12 above.

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Mr Mpumelelo Ngalo Ngalo (217081061)
School Of Law
Pietermaritzburg

Dear Mr Mpumelelo Ngalo Ngalo,

Original application number: 00017945
Project title: A critical analysis of the legal framework governing open space systems in the eThekwini and City of Cape Town Metropolitan Municipalities

Exemption from Ethics Review

In response to your application received on 10 August 2023 , your school has indicated that the protocol has been granted **EXEMPTION FROM ETHICS REVIEW.**

Any alteration/s to the exempted research protocol, e.g., Title of the Project, Location of the Study, Research Approach and Methods must be reviewed and approved through an amendment/modification prior to its implementation. The original exemption number must be cited.

For any changes that could result in potential risk, an ethics application including the proposed amendments must be submitted to the relevant UKZN Research Ethics Committee. The original exemption number must be cited.

In case you have further queries, please quote the above reference number.

PLEASE NOTE:
Research data should be securely stored in the discipline/department for a period of 5 years.

I take this opportunity of wishing you everything of the best with your study.

Yours sincerely,

[redacted]

Mr Matthew Blain Kimble
obo Academic Leader Research
School Of Law