

**Provincial Standard Draft Environmental Bylaws for Local Government in the
North West Province**

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Abstract

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A crucial challenge facing South African municipalities today, particularly in the North West Province (NWP), is the execution of sustainable environmental governance in local communities. The challenge has been brought about, *inter alia*, by the new constitutional framework regulating local government. Today, municipalities do not only constitute the sphere of government that is closest to the people, but they must also provide services to local communities in a sustainable manner whilst securing development among community members.

Although, local government is an autonomous sphere of government - all three (the national, provincial and local) spheres are interdependent and interrelated. They must support and monitor each other to ensure the realisation of environmentally relevant rights, among others. They are further mandated by the *Constitution of the Republic of South Africa, 1996* (the Constitution), as well as legislation, together to realise people's substantive environmental rights by legislating on certain environmental issues, for example.

However, sustainable service delivery by municipalities in the NWP, in particular, is compromised by an array of factors. One of them is the bylaw-making capacity of municipalities in the Province. In order to address this, the NWP provincial legislature can however enact generic type bylaws (Standard Draft Bylaws) (SDBs) which can then be adapted by each municipality. The province must further monitor the performance by municipalities with respect to all issues falling within the regulatory domain of local government by virtue of the Constitution.

This dissertation focuses on the worth and use of SDBs in addressing the bylaw-making gap in the NWP specifically with regard to environmental governance and the provision of environmental services. The dissertation questions and aims to estimate how the constitutional and legislative environmental duties of local

government should be translated in environmental bylaws and specifically, how provincial environmental SDBs could provide support in this regard. The study looks at the NWP as a case study.

KEYWORDS: Local Government Law, Local Government, Environmental Bylaws, Provincial Standard Draft Bylaws, Local Environmental Governance

Opsomming

Standaard Konsepomgewingsverordeninge vir Plaaslike Regering in die NoordWes Provinsie

'n Wesenlike uitdaging wat plaaslike regering vandag in die gesig staar (spesifiek in die Noordwes Provinsie) (die NWP) is volhoubare omgewingsregering in plaaslike gemeenskappe. Hierdie uitdaging spruit onder andere voort uit die grondwetlike raamwerk wat munisipaliteite beheers. Vandag stel munisipaliteite nie net die sfeer van regering die naaste aan mense voor nie, maar moet hulle ook dienste op 'n volhoubare wyse lewer en terselfdertyd ontwikkeling vir gemeenskapslede verseker.

Plaaslike regering is 'n outonome regeringsfeer – al drie sfere (nasionaal, provinsiaal en plaaslik) is egter interafhanklik en aan mekaar verbonde. Die sfere moet mekaar ondersteun en monitor ten einde die realisering van onder andere omgewingsverwante regte te verseker. Die *Grondwet van die Republiek van Suid-Afrika*, 1996 (die Grondwet) en wetgewing verplig munisipaliteite om byvoorbeeld by wyse van verordeninge, die omgewingsregplig in die Grondwet, te realiseer.

Volhoubare diensverskaffing deur munisipaliteite in die NWP spesifiek, word gestrem deur verskillende faktore. Een hiervan is die kapasiteit van munisipaliteite in die provinsie om plaaslike verordeninge te promulgeer. Die NWP provinsiale wetgewer kan egter generiese verordeninge in provinsiale wetgewing neerlê (Standaard Konsepverordeninge) (SKVs). Die provinsie moet verder die prestasie van munisipaliteite ten aansien van hulle grondwetlike bevoeghede monitor.

Hierdie studie ondersoek die wyse waarop die grondwetlike en statutêre omgewingsverpligtinge van munisipaliteite in plaaslike verordeninge vervat behoort te word en hoe SKVs hierin van kan hulp kan wees. Die studie kyk na die NWP as 'n voorbeeld provinsie.

SOEKWOORDE: Plaaslike Owerheidsreg, Plaaslike Regering, Omgewingsverordeninge, Provinsiale Standaard Konsepverordeninge, Plaaslike Omgewingsregering

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List of abbreviations

CEM	Centre for Environmental Management
CHAP	Chapter
DEA	Department of Environmental Affairs
IDP	Integrated Development Plan
IWMP	Integrated waste management plan
MEB	Model Environmental Bylaw
KPI	Key Performance Indicator
MEC	Member of Executive Committee
MFMA	Local Government: Municipal Finance Management Act
NEM:AQA	National Environmental Management: Air Quality Act
NEMA	National Environmental Management Act
NEM:BA	National Environmental Management: Biodiversity Act
NEM:PAA	National Environmental Management: Protected Areas Act
NEM:WA	National Environmental Management: Waste Act
NHRA	National Heritage Resources Act
NWA	National Water Act
SDB	Standard Draft Bylaw
WSA	Water Services Act
SAHRA	South African Heritage Resources Authority
SCH	Schedule
NWP	North West Province
NWU	North West University

1 Introduction

Local government, as one of the three spheres of government in South Africa, is closest to the people; it must *inter alia* facilitate active participation of local communities in public decision-making processes and governance activities.¹ Since 1996, Local Government is an autonomous sphere of government as entrenched in the *Constitution of the Republic of South Africa, 1996* (the Constitution).²

One of the most prominent constitutional mandates and prerogatives of local government is to be developmentally oriented.³ Developmental local government can be described in different ways but means in a nutshell that, “local government must be committed to working with citizens and groups within the community to find sustainable ways to meet their social, economic and material needs and improve the quality of their lives”.⁴

Steytler and De Visser⁵ define developmental local government as:

Improving the financial position of the community, the upliftment of a community with reference to its social, economic, environmental, spatial, infrastructural, institutional, organisational and human resource aspects.

Developmental local government requires that development should be carried out by local government, and should not compromise the development of the next generation. The constitutional autonomy of municipalities must be purposively employed to not only provide services but also to actively promote development.

1 Bekker *Citizen Participation* 11.

2 See Chap 7 of the Constitution. Also see s 152(1)(a)-(e) of the Constitution.

3 S 153 of the Constitution states that a municipality must structure and manage its administration, budgeting and planning processes to give priority to the basic needs of the community, and to promote social and economic development.

4 *White Paper on Local Government* (March 1998) (hereafter White Paper). See also Parnell *et al Democratizing Local Government* 79.

5 Steytler and De Visser *Local Government Law* 27.

In this regard, it is important to bear in mind that the Constitution enshrines different rights for all people in the country,⁶ and depending on the availability of resources, compels government to take reasonable measures to ensure that all people have adequate access to housing, health care, education, food, water and social security.⁷ In addition, the state has the positive duty to protect and realise the right to an environment that is not detrimental to health or well-being and to take specific measures to protect natural resources as per section 24 of the Constitution.

The constitutional objects of local government, accordingly, include both the provision of services to communities in a sustainable manner and the promotion of a safe and healthy environment.⁸ In an elementary sense this means that local government has a role to play in the provision of environmental services but also in the protection and management of natural resources.

Alongside its substantive duties, developmental local government is bestowed with executive and law-making powers. In order to be able to fulfil its substantive duties, including those related to environmental services and environmental protection, local government has to make use of its power to make and administer environmental bylaws. Section 156(2) of the Constitution is very clear in this regard. The functional areas for which local government may make bylaws are found in Schedules 4B and 5B of the Constitution. The environmentally relevant areas within the functional domain of local government include: air pollution, water and sanitation services, control of nuisance, local transportation and waste management, for example. These matters arguably lie at the heart of both the notions of developmental local government and sustainable development.

6 S 7 of the Constitution.

7 White Paper par 38.

8 S 152(a)-(e) of the Constitution contains the objects of local government. These include *inter alia*, the provision of accountable government, to promote social and economic development as well as promotion of a safe and healthy environment.

It is, however, important to note that the Constitution and national legislation also empower local authorities to make bylaws on areas not necessarily explicitly listed in the schedules.⁹ It has been proposed that bylaws can meaningfully be used to give effect to the policies of government, generally, as well as to the policies of a municipality specifically.¹⁰ The law-making power of local government has been affirmed by the Constitutional Court in *inter alia* the case of *Fedsure Life Assurance v Greater Johannesburg Transitional Metropolitan Council*.¹¹

Section 4(2) of the *Local Government: Municipal Systems Act 32 of 2000* (the Systems Act) compels the municipalities' councils, within their financial and administrative capacity, to exercise and use their legislative powers in the best interests of the community. It will be argued elsewhere in this dissertation,¹² that although the making of bylaws on issues of development (including sustainable development and more specifically the environment), may principally be voluntary, the actual governing act of municipalities compels them to have suitable bylaws in place. This is so because bylaws can potentially serve a particularly important role in regulating and ultimately, fortifying service delivery and achieving sustainable development in the local government sphere. Besides, bylaws enable municipalities to set rules and standards, to regulate the conduct of community members and industries and can be regarded as regulatory tools in as far as they are enforceable within the jurisdiction of municipalities.

Moreover, as regulatory tools, bylaws are not necessarily influenced by a change in elected councillors. A body of bylaws creates a regulatory basis for such

9 S 156(4) of the Constitution.

10 Mokale and Scheepers *Developmental Local Government* 112.

11 1999 1 SA 374 (CC) 35-39 at 393-394. The court stated that the constitutional status of local government is materially different from what it was when Parliament was supreme and when not only the powers but the very existence of local government depended entirely on superior legislatures. Although the detailed powers and functions of local authorities have to be determined by laws of a competent authority, this does not mean that the powers they exercise are delegated powers and does not prevent the powers from being regarded as original and not delegated. See also De Visser *Developmental Local Government* 112.

12 See chapter 3 for a detailed discussion on the bylaw-making powers of local government and the relevance of Standard Draft Bylaws in this context. See chapter4 for environmental obligations.

councillors and officials dealing in the broad sense with issues of development and local environmental governance.¹³

The power to make bylaws does however not automatically translate into the ability and capacity to make them. Bekink¹⁴ states that "all local authorities in the world are facing new demands and challenges". In South Africa, despite the fact that local government is empowered by the Constitution and legislation to administer local affairs, several factors, demands and challenges currently result in limited bylaw-making capacity.¹⁵ These include, *inter alia*, issues of capacity and resources.¹⁶

In the light of the potential use of bylaws, this *status quo* may hamper municipalities' ability to effectively exercise their executive powers and to ensure compliance with their constitutional mandate, including the mandate to be developmentally oriented and to fulfil rights such as the right of access to sufficient water (section 27) and the environmental right (section 24).

From the Constitution, it seems that despite the autonomy of local government, provincial authorities may not stand oblivious towards the challenges experienced by it. In *Executive Council of the Province of the Western Cape v Minister of Provincial Affairs and Constitutional Development*,¹⁷ it was held, for example that "the powers and functions of municipalities are set out in section 156, but it is clear

13 Local environmental governance is defined as the collection of legislative, executive and administrative functions, processes and instruments used by government to ensure sustainable behaviour by all as far as governance of environmental activities, products, services, processes and tools are concerned. See Du Plessis *Fulfilment of SA's Constitutional Environmental Rights* 109.

14 Bekink *Local Government Law* 124.

15- The capacity to make bylaws is lacking in municipalities in that in most municipalities, there are no resources or capacity to draft them. Capacity include trained people who are enough to draft them and a resource has to do with financial capacity to draft them. There seems to be little or no cooperation and coordination among different environmentally relevant government structures and spheres such as the provincial government and district and local authorities. There are further insufficient human resources as well as financial capacity to draft and implement suitable environmental bylaws in the local sphere

16 See 3 where the powers of local government and Standard Draft Bylaws are discussed.

17 1999 (12) BCLR 1360 (CC) par 29.

from sections 155(7) and 151(3) that these powers are subject to supervision by the national and provincial government".

The above sections of the Constitution¹⁸ provide that a municipality has the right to govern on its own initiative, the local government affairs of its community, subject to provincial and national legislation.¹⁹ Furthermore, section 155(7) of the Constitution states that national and provincial governments have the legislative and executive authority to see to the effective performance by municipalities of their functions in respect of Schedules 4B and 5B matters. This means that once it has been determined that a specific matter is to be classified as part of local government's affairs, a municipality has a constitutional right to govern that matter on its own, and the national and provincial authority can only oversee municipal performance on that matter subject to section 156(1) of the Constitution.²⁰

In addition, the *Local Government: Municipal Finance Management Act* 56 of 2003 (MFMA) deals with the national and provincial government's duty of support and capacity building,²¹ the timely transfer of funds,²² and the sharing of information and predictable allocation of resources to local governments.²³ This is a clear indication that there is a general obligation on the part of the provincial authorities to support local authorities.

Ultimately, in terms of the Constitution, national and provincial government, by legislative and other measures must support and strengthen the capacity of municipalities to manage their own affairs.²⁴ Local authorities should not be left alone in the dark in terms of challenges related to their ability and capacity to make bylaws, for example. Van Donk²⁵ states that "municipal government exercises its

18 Ss 151(3) and 156 of the Constitution

19 S 151(3) of the Constitution.

20 Bekink *Local Government Law* 222.

21 S 34 of the MFMA.

22 S 35(1) of the MFMA.

23 S 36 of the MFMA.

24 S 154(1) of the Constitution.

25 Van Donk *et al Consolidating Local Government* 378

legislative competency subject to the powers of national and provincial government to provide monitoring and support". One of the means by which provincial government authorities can pursue this task is by publishing Standard Draft Bylaws as will be discussed below.²⁶

Bylaws are important tools for local governance generally. They may, however, be particularly important for local environmental governance to the extent that the latter involves various local government decisions and activities and requires local government to exercise firm control over the provision of environmental services and the protection of certain natural resources. The presumed role of environmental bylaws is specifically highlighted by the fact that section 24 of the Constitution²⁷ (read with the Systems Act),²⁸ compels local government (as one of the spheres of government comprising "the state") to realise the constitutional environmental right by taking legislative measures.

Challenges with regard to municipalities' ability and capacity to make bylaws, generally, may have an environmentally relevant spin-off too. Fortunately, it seems as if the national legislature has put mechanisms in place to address the matter. Section 14(2) of the Systems Act provides that a provincial government may design and adopt Standard Draft Bylaws (SDBs) on, for example, environmental affairs listed in Schedules 4B and 5B of the Constitution.²⁹ Although not entirely similar, comparable thinking appears in section 46 of the *National Environmental Management Act* 107 of 1998 (NEMA) which provides for Model Environmental Bylaws (MEBs) that can be made at the national level.

It seems as if the provincial aid specifically, could, in relation to bylaw-making, be relevant for the North West Province (NWP). Local environmental governance in

26 See 3.

27 S 24 of the Constitution states *inter alia* that everyone has the right to an environment that is not harmful to health or well-being and to have the environment protected through legislative and other measures that prevent pollution and preserve conservation.

28 S 4(2) of the *Systems Act*.

29 Mokale and Scheepers *Developmental Local Government* 20.

this province is currently challenged in several ways including lack of financial resources, lack of human resources and blurred role division among government departments.³⁰ Part of the challenge appears to be the lack of suitable environmental bylaws to regulate local environmental affairs and people's conduct within the environment.³¹

Against this background, this study aims to determine to what extent the constitutional and legislative environmental duties of local government should be translated in environmental bylaws and specifically, how provincial environmental SDBs could provide support in this regard. The study looks at the NWP as a case study. This study starts out with a review of the environmental duties of local government in terms of the Constitution and legislation thereafter, closer attention is paid to the bylaw-making powers of local government, the potential of environmental SDBs and the application of the former information in the case of the NWP.

2 Statutory environmental mandates of local government

This section considers the key environmental mandates of local government. The objective is to distil from national legislation the environmental duties that municipalities are responsible for in its capacity as "governor" and "governed" sphere of government.³² Local environmental bylaws and therefore SDBs must arguably be designed around these duties and environmental law principles, generally. Mokale and Scheepers³³ on the duties of local government towards the environment opine that: "the municipality, as government on the ground, is the

30 See *Status Quo Report on Standard Draft Bylaws of the North West Province 17* as prepared by the Faculties of Law and the Centre for Environmental Management (CEM) of the North West University (NWU) in 2009. See 5.1 below for a brief discussion of the project.

31 See *Status Quo Report on Standard Draft Bylaws of the North West Province 17*.

32 Local government as governor entails that it is responsible for monitoring and regulation in the community. As governed it means that it is subject to the monitoring and regulation of other entities such as other spheres of government. See also Du Plessis 2010 *Stell LR* 275. The focus of this paper will be on local government as governor.

33 Mokale and Scheepers *Developmental Local Government* 141.

custodian of the principles of development contained in the national policies and the laws".

2.1 *The Constitution and local environmental governance*

The Constitution empowers local authorities to govern within its area of jurisdiction as an autonomous sphere of government.³⁴ Local government is well positioned to deal with environmental challenges. Municipalities (metro, local and districts) are expected to regulate environmentally relevant activities such as air pollution, waste, water and sanitation. These are challenges to local municipalities in relations to which Bekink³⁵ opines "are comprehensive in nature and difficult to achieve in practice".

The constitutional objects of local government includes to provide democratic and accountable government for local communities,³⁶ ensure the provision of services to communities in a sustainable manner,³⁷ promote a safe and healthy environment,³⁸ and encourage the involvement of communities in matters of local government.³⁹ This implies that municipalities must estimate what the basic needs of communities are. It means that when an area of need has been identified, municipalities must exercise their legislative and executive authority to address this need through, *inter alia*, the drafting of bylaws,⁴⁰ should the area fall within the scope of Schedules 4B and 5B. This should be understood in the light of the fact that there is a positive duty on the state to enact laws (including bylaws) that protect the environment. The developmental duty of local government in terms of section 153 of the Constitution requires municipalities to give priority to the basic needs of the community and to participate in national developmental programmes.

34 S 155(6)(b) of the Constitution.

35 Bekink *Local Government Law* 69.

36 S 152(1)(a) of the Constitution.

37 De Visser *Developmental Local Government* 70-71.

38 A safe environment refers to an environment free from harmful pollutants, for example. Also see De Visser *Developmental Local Government* 71 and the definition of environment in s 1 of the NEMA.

39 S 152(1)(e) of the Constitution.

40 See 4.4 for a discussion of specific environmental bylaws.

This confirms the inter-dependence between local and provincial government when it comes to development at the local level. It should further be borne in mind that “development” in this context also includes attendance to matters such as air pollution and public nuisance. These matters fall within the constitutional areas of competence of local government – local government may accordingly pass bylaws regulating these areas.

The Constitution sets specific mandates for local government that should be achieved.⁴¹ Local government, in enacting bylaws, must give effect to its constitutional mandate relating to the environment. Mokale and Scheepers put it more clearly stating that a municipality must strive within its financial and administrative capacity, along with its constitutional legislative competence, to ensure that the needs of the people and the environment are protected, which includes drafting environmental bylaws.⁴² In essence, the Constitution creates a legally valid and enforceable environmentally relevant expectation on the part of rights holders. Du Plessis,⁴³ when affirming this fact, opines that, “it is the enforceable duty of local government to realise the section 24 environmental right within the limits of the scope of its constitutional powers”.

It should be noted that a municipality also has executive authority and has the right to administer matters listed in Schedules 4B and 5B.⁴⁴ Still, as indicated earlier, local authorities can incur additional environmental duties and obligations assigned to them in terms of national or provincial laws.⁴⁵ This follows the fact that municipalities have executive and legislative authority and the right to administer any other matter assigned to it by national or provincial legislation (including environmental law).⁴⁶

41 Bekink *Local Government Law* 67.

42 Mokale and Scheepers *Developmental Local Government* 16.

43 Du Plessis 2010 *Stell LR* 268.

44 S 156(1)(a)-(b) of the Constitution.

45 Du Plessis 2009 *SA Public Law* 60.

46 S 156(1)(a) of the Constitution. See also Glazewski *Environmental Law in SA* 113.

As is clear by now, in addition to its executive authority, a municipality may make and administer bylaws (that are not in conflict with national or provincial legislation) for the effective administration of the matters which it has the right to administer.⁴⁷ It seems that municipal bylaws are tools for the administration, managers and leaders at the local level for achieving the goals and objectives implied by developmental local government and to secure the rights of community members entrenched in the Constitution of the country. Local government must exercise its legislative and executive powers, to also develop and adopt policies and programmes for the setting of objectives and benchmarks for service delivery. For without laws, and arguably also accompanying sound decisions, policies and programmes, "it is unlikely that there will be any development".⁴⁸

2.2 *Local government framework acts*

The following section reviews the national government framework acts set to contribute to local environmental governance, and considers how these acts compel local government as well as other spheres of government to realise the constitutional environmental right.

2.2.1 *Local Government: Municipal Systems Act*⁴⁹

The Systems Act is specifically aimed at local authorities.⁵⁰ The Act introduced a totally new approach to local governance in that it brought stabilisation and consolidation in the implementation of laws and policies regulating affairs at the local level. The aim of the Systems Act is to provide core principles, mechanisms

47 S 156(2). For the manner in which a municipality may exercise its legislative or executive authority, refer to s 11(3) of the Systems Act. See also Steytler and De Visser *Local Government Law* 5-9 to 5-16.

48 Mokale and Scheepers *Developmental Local Government* 88.

49 Act 32 of 2000.

50 See preamble of the Systems Act. See also Kotzé *A Legal Framework for Environmental Governance* 116.

as well as processes of a generic nature that are necessary to move progressively towards the social and economic development of local communities.⁵¹

The Act further aims to establish an enabling framework for planning in municipalities as a whole. Importantly, it provides for the manner in which powers and functions of municipalities (as entrenched in the Constitution) are to be exercised.⁵²

In support of and in compliance with the Constitution,⁵³ the Systems Act confirms that both the legislative and executive authority of a municipality is exercised by its elected council.⁵⁴ It confirms also that municipalities exercise their executive and legislative authority *inter alia* through the passing of bylaws.⁵⁵

Section 6 of the Act contains duties of the municipal administration while section 51 deals with principles that should guide the municipality in organising its administration. This is a repetition of the Constitution.⁵⁶ These duties, as well as other duties under the Constitution,⁵⁷ relate to the fact that a municipality's administration should be efficient and that effective resource use must be promoted.⁵⁸ The administration of a municipality must also be responsive to the needs of the local community,⁵⁹ and should be developmentally orientated.⁶⁰ In combination, these duties impose a legal and moral duty on municipalities to plan and act towards future socio-economic development in the area for which they are responsible.⁶¹

51 See the Preamble.

52 See Chap 5 of the Systems Act.

53 S 156 of the Constitution.

54 Steytler and De Visser *Local Government Law* 2-30.

55 S 11(n) of the Systems Act.

56 See 2.1.

57 S 195(1) of the Constitution.

58 S 195(b) of the Constitution.

59 S 6(a) of the Systems Act.

60 S 195(c) of the Constitution.

61 Scheepers 1999 *Koers* 339.

Chapter 11 of the Systems Act deals with the bylaw-making process. Only a member of a municipal council may introduce a draft bylaw in council.⁶²

In order for a draft bylaw to become an enforceable bylaw, it must be passed by a decision taken with a supporting vote of the majority of council members. All members must be given reasonable notice and each proposed bylaw must be published for public comment in a manner that allows the public an opportunity to make representations.⁶³ The Systems Act reiterates the constitutional requirements for passing bylaws in that there should be sufficient consent on the proposed law by all stakeholders, including the public.⁶⁴ A bylaw passed by a municipal council must be published in the *Provincial Gazette* and where feasible, in the local newspaper to bring its content to the attention of the community.⁶⁵

Even though bylaws can be made by local authorities, several external factors may impact on the actual passing and implementation thereof. Bylaw-making capacity of municipalities remains a challenge.⁶⁶ As such, it hampers a municipality's ability to exercise its legislative power and to achieve constitutional compliance with its duty to fulfil the constitutional rights of people. To remedy the existing challenges, the Minister of Cooperative Governance and Traditional Affairs does have the power generally, to make or amend SDBs.⁶⁷ The Minister may draft SDBs at the request of organised local government, for example.⁶⁸ Such SDBs may be drafted on any matter (including environmental matters) listed in Schedules 4B or 5B of the Constitution and would typically then be called provincial (environmental) SDBs.

Conversely, such SDBs may be tailored and adopted by any municipality within the province. In order to protect the autonomous legislative authority of municipalities, the Systems Act states that "a SDB is applicable in a municipality only if, to the

62 S 12(1) of the *Systems Act*. Also see Mokale and Scheepers *Developmental Local Government* 89.

63 S 12(2)(b) of the *Systems Act*. See Steytler and De Visser *Local Government Law* 5-14.

64 S 160(3)(b) of the Constitution.

65 S 14(1) of the *Systems Act*. Also see Steytler and De Visser *Local Government Law* 5-15.

66 See *Status Quo Report* 24.

67 S 14(2) of the *Systems Act*.

68 S 14(1)(a) of the *Systems Act*.

extent that and subject to any modification and qualifications by the council of that municipality". In other words, in the environmental context, contributing to the maintenance of sustainable development, a local council can decide whether or not to use environmental SDBs as a basis for its own environmental bylaw-making process. A council may also change a SDB to fit local conditions or unique circumstances. SDBs can therefore not be imposed on local authorities but establishes a supportive, yet voluntary, mechanism from the side of provincial authorities.

As was indicated above, once a municipality wants to adopt a SDB, it **may** first tailor and adopt such a SDB to aptly suit local circumstances. In principle therefore, SDBs can fill the gap where municipalities do not have adequate bylaws on Schedules 4B or 5B matters, including environmental matters. A critical question is whether local authorities are generally aware that they can request the Minister or the MEC in the province to draft SDBs for local authorities in the province,⁶⁹ and whether they actively pursue this opportunity. The provincial government's will and ability to draft SDBs are of course also matters of importance in this context.

2.2.2 Local Government: Municipal Structures Act

The objective of the Structures Act is *inter alia*, to provide for the establishment of municipalities, to establish the criteria for determining the categories and types of municipalities to be established in an area and to provide for appropriate division of functions and powers between different categories of municipalities.⁷⁰

The Constitution⁷¹ requires national legislation to define the different types of municipalities that may be established within each category.⁷² Local functions and powers must be divided in the case of the co-existence of a district municipality

69 This question is returned to in 5.

70 See long title of the Act.

71 S 155(3) of the Constitution.

72 See long title of the Act.

and local municipality, for example. The aim of the Act is to ensure that each type of local authority has clearly assigned roles in terms of *inter alia* executing sustainable environmental governance.

The relevance of the Structures Act for this study lies therein that the design and content of environmental SDBs must take into account the structural differences and the division of powers and functions within the local government sphere. These differences and division of powers do not only apply between different spheres of government but is a factor in designing SDBs that are practical and useful and are aligned with local government law framework.

3 Law-making powers of local government and SDBs

3.1 Background

As stated above,⁷³ in terms of section 156(1) of the Constitution, a municipality has executive authority in respect of, and has the right to administer matters listed in Schedules 4B and 5B of the Constitution, and any matter assigned to it by national or provincial government. This power is complemented by the authority to make bylaws.⁷⁴ This section discusses the bylaw-making powers of local government as well as the relevance of provincial SDBs in municipalities' execution of their legislative power. It is shown how the promulgation of SDBs can contribute to overcoming the barriers to effective bylaw-making at the local level.

3.2. Legislative and executive powers of municipalities

As was mentioned above, a distinction should be drawn between the original and assigned powers of local government.⁷⁵ In addition to its executive powers, a

73 See 2.1.

74 S 156(2) of the Constitution.

75 De Visser 2002 *SA Public Law* 224. For a discussion of the process of assignment, see ss 44(a) (iii), 104(1) (c), 99 and 126 of the Constitution. Original powers in relation to Schedules 4B and 5B matters refer to the powers of local government directly derived from the Constitution. Such powers cannot be removed or amended by national statutes or provincial laws. Assigned powers imply that

municipality may make bylaws for the effective administration of the matters it has the right to administer.⁷⁶ Du Plessis⁷⁷ is of the view that "local government is allowed to make bylaws, but in terms of section 24(b) read with section 8(1) and (2) of the Constitution, is obliged to take reasonable legislative measures". It is agreed that an inclusive reading of the Constitution constitutes an obligation on local government to actively design and implement bylaws to facilitate sustainable development, among other things.

A bylaw that conflicts with national or provincial legislation is invalid.⁷⁸ This means that although municipalities have legislative authority, such authority cannot be exercised without limits. The process of bylaw-making is outlined in section 12 of the Systems Act and, as was shown above, once drafted, a bylaw can only be enforced (as part of the executive powers of local government) after publication in the official *Provincial Gazette*.⁷⁹ All bylaws should also be made accessible to the public.⁸⁰

The NWP case discussed later in this study proves however that it is one thing for municipalities to have bylaw-making and executive powers but that capacity and resource constraints can be a significant barrier to actually executing these powers. The theory on local government powers can accordingly at times be vastly different from the *status quo* in relation to utilising and optimising these powers in real life.

3.3 *Provincial monitoring and support*

Provincial governments have a duty to support local government. National and provincial government should take legislative and other measures to support and

national and provincial government can assign some of their original powers to local government through the passing of national and provincial laws.

76 S 156(2) of the Constitution.

77 Du Plessis *Fulfillment of SA's Constitutional Environmental Rights* 303.

78 S 156(3) of the Constitution.

79 S 156(3) of the Constitution.

80 S 162(1) of the Constitution. Also see s 14 of the Systems Act.

strengthen the capacity of municipalities to manage their own affairs, to exercise their powers and to perform their functions.⁸¹

The Constitution empowers provincial government to take legislative measures to monitor and support local government,⁸² promote the development of local government capacity,⁸³ and to see to effective performance by municipalities of their functions with respect to matters listed in Schedules 4B and 5B.⁸⁴ This suggests that provincial governments may have to assist where municipalities experience bylaw-making related challenges. This idea is expounded on below.

3.4 Standard Draft Bylaws

In terms of the Systems Act,⁸⁵ the Minister for Provincial and Local Government, at the request of organised local government representing local government and after consulting with the MEC for Local Government in the province, may make SDBs concerning any matter for which local government may make bylaws.⁸⁶ This implies that the environmental functions and duties of local government by virtue of the Constitution or delegated national and provincial functions could be the subject of a SDB. Before adopting SDBs the MEC must publish them in the *Provincial Gazette* for public comment.⁸⁷ This suggests that similar to the publication of a bylaw of a municipality, the community is not excluded from the process of making SDBs that could eventually have an effect on them.

To become enforceable, SDBs must first be transformed into ordinary bylaws through an adoption process within individual municipalities.⁸⁸ A council may

81 S 151(4) of the Constitution.

82 S 155(6) of the Constitution.

83 S 155(6) (b) of the Constitution.

84 S 155(7) of the Constitution. Also see De Visser *Developmental Local Government* 174.

85 S 14(1) of the Systems Act.

86 S 14(1)(ii) of the Systems Act.

87 S 14(2)(b)(i) of the Systems Act. See also 3.1 above.

88 Ss 14(2)(a) and (b) of the Systems Act.

change any SDB to fit in with local conditions and circumstances.⁸⁹ This implies that should a province pass an environmental SDB that is not entirely suitable for the environmental features and challenges of a particular municipal area, the council of that municipality can tailor and adapt the SDB prior to adoption as an environmental bylaw. SDBs are therefore flexible 'draft' bylaws that do not infringe the autonomous legislative powers of local government. A municipality may also decide not to adopt a provincial SDB at all and to rather design and adopt its own unique bylaw on a specific subject matter.

In similar vein, NEMA provides for national model environmental bylaws (MEBs),⁹⁰ which can be complementary to the idea of provincial SDBs. MEBs are not promulgated at the provincial level but by national Parliament and are intended to address issues of environmental management at the local level. Any municipality may request the Director-General of DEA to assist it with the preparation of environmental bylaws to which he or she may not unreasonably refuse such request.⁹¹ In addition to the provisions on MEBs and support in the environmental bylaw-making process of local governments, the Director-General of DEA may institute programmes (probably nation-wide) to assist municipalities with the preparation of environmental bylaws for purposes of implementing NEMA.⁹² There is accordingly acknowledgment in the Systems Act and the NEMA that local authorities could end up in need of environmental bylaw-making support and an implicit duty is placed on provincial and national government to assist in this regard.

It is argued that in principle SDBs (and MEBs) will assist local authorities in improving local environmental governance. Suitable bylaws are necessary to implement and enforce those measures necessary at the local level to regulate provision of environmental services and to ensure protection of natural resources.

89 S 14(3)(a) of the Systems Act.

90 S 46(1) of NEMA.

91 S 46(2) of NEMA.

92 S 46(3) of NEMA.

SDBs should however, be designed with all relevant stakeholders involved to ensure its suitability – it may, for example, also be important to involve local authorities themselves together with provincial and national departments responsible for environmental and local government (and traditional) affairs. SDBs should be seen as a way in which to contribute to fair and more or less customised local environmental governance and service provision within a province. The role of bylaws (and by implication SDBs as mother documents) in moving towards sustainability at the local level, should not be underestimated.

4 Environmental legislation

This section explores some of the National Environmental Acts that have a bearing on local environmental governance. Some of these Acts elaborate on the original environmental functions and duties of local government as per the Constitution whilst others assign additional functions and duties to local and/or district municipalities. It has to be considered whether local authorities regulate or can regulate these functions and duties by virtue of environmental bylaws. The Acts under consideration include: NEMA, *National Environmental Management: Protected Areas Act 57 of 2003 (NEM:PAA)*, *National Environmental Management: Biodiversity Act 10 of 2004 (NEM:BA)*, *National Environmental Management: Air Quality Act 39 of 2004 (NEM:AQA)*, *National Heritage Resources Act 25 of 1999 (NHRA)*, *National Environmental Management: Waste Act 59 of 2008 (NEM:WA)*, *National Disaster Management Act 57 of 2002*, *National Water Act 36 of 1998 (NWA)* and the *Water Services Act 108 of 1997*. As will become evident below, the nature of the duties and objectives of these laws also serve to underline the need for effective local environmental bylaws.

4.1 National Environmental Management Act (NEMA)⁹³

The environment is included under Schedule 4A to the Constitution as an area of concurrent national and provincial competency.⁹⁴ Still, some of the services rendered by local government are directly dependent upon, and affected by, the integrity or quality of natural resources.⁹⁵

It also so happened that national legislation imposes environmental duties on the entire government, including local authorities. One such Act is NEMA.

This study does not intend to engage in a full blown discussion of NEMA, but because it is the most significant environmental framework law in South Africa, it is necessary to extrapolate from it at least, the environmental principles directly applicable to local government and some pertinent legal duties of local authorities regarding sustainable environmental governance. These principles serve as guidelines which all organs of state must take into consideration when taking any decision in terms of NEMA or any statutory provision concerning the protection of the environment. The same holds true for municipalities' design and promulgation of environmental bylaws or other bylaws that may have a bearing on the environment.

The NEMA has as its aim to provide *inter alia*, for cooperative environmental governance by establishing principles for decision-making on matters affecting the environment, institutions that will promote cooperative governance, and procedures for coordinating environmental functions exercised by organs of state, to provide for certain aspects of the administration and enforcement of other environmental management laws, and to provide for matters connected thereto.⁹⁶ It outlines a set of national environmental management principles which provide a framework for

93 107 of 1997.

94 See 2.1.

95 Bosman and Kidd "Water Pollution" 418.

96 See long title of the Act.

environmental management across South Africa.⁹⁷ For purposes of this study, all of the principles with a direct bearing on local government are briefly discussed.⁹⁸

The first principle of relevance to local government provides that "environmental management must place people and their needs at the forefront of its concern, and serve their physical, psychological, developmental, cultural and social interests equitably".⁹⁹ This principle compels environmental management at the local level to be human centered.¹⁰⁰ Du Plessis¹⁰¹ opines that, "this principle seems to be in harmony with the environmental and developmental mandates of local government in terms of the Constitution and local government statute law, which are similarly focused on people and equality".

Furthermore, "development must be socially, environmentally and economically sustainable".¹⁰² This is a reiteration of the need for sustainable development in the local government sphere.¹⁰³ To ensure that development is sustainable, environmentally relevant factors to be considered include, *inter alia*, those relating to ecosystems and biodiversity,¹⁰⁴ pollution and degradation of the environment,¹⁰⁵ disturbance of landscapes and cultural heritage sites,¹⁰⁶ the use and exploitation of non-renewable natural resources,¹⁰⁷ risk averse and precautionary approaches¹⁰⁸ and the prevention of negative impacts on the environment.¹⁰⁹

97 Bray 1999 *SAJELP* 7. See also Strydom and King *Fuggle and Rabie's Environmental Management* 198-201.

98 However, all of the NEMA, principles are applicable to local government generally, and those not mentioned are not regarded as less important.

99 S 2(2) of NEMA.

100 Du Plessis 2009 *SA Public Law* 63.

101 Du Plessis *Fulfilment of SA's Constitutional Environmental Rights* 275.

102 S 2(3) of NEMA.

103 See 2.1 above.

104 S 2(4)(a)(i) of NEMA.

105 S 2(4)(a)(ii) of NEMA.

106 S 2(4)(a)(iii) of NEMA.

107 S 4(a)(v) of NEMA

108 S 4(a)(viii) of NEMA.

109 S 4(a)(viii) of NEMA.

The NEMA states that there must be intergovernmental coordination and harmonisation of policies, legislation and actions relating to the environment.¹¹⁰ This requires the alignment of functions and duties between different state organs in laws and policies, and similarly, the establishment of external bodies such as intergovernmental forums mandated to facilitate co-operation among state organs in different spheres.¹¹¹ This could mean that development must be done collectively, by all spheres of government, to ensure sustainable environmental governance and where there is a lack in terms of bylaw-making capacity, for example, support and monitoring be provided through the promulgation of SDBs.

"Environmental management must be integrated and take into account the effects of decisions on all aspects of the environment and all people in the environment by pursuing the selection of the best practicable environmental option."¹¹² Du Plessis¹¹³ holds that "the principle calls for an integrated approach at local government level". Essentially, it means that there must be a move to approach environmental issues in a multi-faceted integrated approach in the local sphere. It could refer to an amalgamation of human and financial resources to tackle environmental challenges by local authorities.

"The participation of all interested and affected parties in environmental governance must be promoted, and all people must have the opportunity to develop the understanding, skills and capacity necessary for achieving equitable and effective participation, and participation by vulnerable and disadvantaged persons must be ensured".¹¹⁴ In terms of this principle, local government should ensure the participation of communities in its environmental decision-making.¹¹⁵ This participation arguably does not refer to political participation as encapsulated in the idea of participatory democracy but rather direct participation in

110 S 2(3) of NEMA. See also Bray 1999 *SAJELP* 7.

111 Du Plessis 2010 *SA Public Law* 277.

112 S 2(4)(b) of NEMA.

113 Du Plessis 2009 *SA Public Law* 67.

114 S 2(4)(f) of NEMA.

115 Du Plessis 2009 *SA Public Law* 66.

environmental matters.¹¹⁶ Kotzé¹¹⁷ opines that "this principle may also refer to government officials in the ranks of government whose skills, understanding and capacity must be developed in such a way as to promote effective participation in government tasks".

Environmental justice must be pursued so that adverse environmental impacts shall not be distributed in such a manner as to discriminate.¹¹⁸ This principle essentially requires of local government to respect the constitutional right to equality¹¹⁹ in the provision of access to water and sanitation, for example.

Environmental justice has been described to mean:¹²⁰

Social transformation directed towards meeting the basic human needs and enhancing our quality of life-economic quality, health care, housing, human rights, environmental protection and democracy. It seeks to challenge the abuse of power which results in poor people having to suffer the effects of environmental damage caused by greed of others.¹²¹

The idea of environmental justice resonates also in the Systems Act where it is stated that it is the duty of a local council to give all members of the local community equitable access to the municipal services to which they are entitled.¹²²

The environment is held in public trust for the people, the beneficial use of environmental resources must serve the public interest and the environment must be protected as the people's common heritage.¹²³ This means that local authorities

116 Du Plessis 2009 SA Public Law 66.

117 Kotzé *A Legal Framework for Intergrated Environmental Governance in SA and the NWP* 105.

118 S 2(4)(c) of NEMA.

119 S 9 of the Constitution.

120 Glazewski *Environmental Law in SA* 17.

121 Glazewski *Environmental Law in SA* 17.

122 S 4(2)(f) of the Systems Act.

123 See Kidd *Environmental Law* 10. Also see S 2(4) (o) of NEMA and S 3(1) of NWA

must in terms of this principle use and distribute water, soil and air, *inter alia*, in a way beneficial to all the people in the country.¹²⁴

Another NEMA principle that has a bearing on the local authorities in the context of sustainable environmental governance in the local sphere, provides that, "the cost of remedying pollution, environmental degradation and consequent adverse health effects and of preventing, controlling or minimising further pollution, environmental damage or adverse health effects must be paid for by those responsible for harming the environment".¹²⁵ This principle entrenches the internationally established "polluter pays principle." Its meaning for local government is evident, namely that where local government causes pollution, it should pay.

As was indicated above,¹²⁶ NEMA also provides for MEBs. Whilst the NEMA principles and other provisions in the act impose duties on local government, provision is made for sufficient support on the side of national environmental authorities. MEBs are valuable as they are made nationally to strengthen local bylaw-making capacity in a common way. The focus of this discussion is however, on SDBs and the provincial government's role in fortifying environmental bylaw-making capacity.

4.2 *National Environmental Management: Air Quality Act (NEM:AQA)*¹²⁷

The aim of NEM:AQA is to provide for national norms and standards regulating air quality management and for air quality control by all spheres of government.¹²⁸

The application of NEM:AQA must be done in line with the principles in section 2 of NEMA as discussed above.¹²⁹

124 See Kidd *Environmental Law* 10 for a brief discussion of the public trust doctrine. On the polluter pays principle see Kotzé and Du Plessis 2007 *Stellenbosch Law Review* 161-193.

125 S 2(4)(p) of NEMA. See also s 28 of NEMA and s 19 of the NWA.

126 See 3.4.

127 39 of 2004.

128 Preamble of NEM:AQA. On NEM:AQA see Van Blottniz, Fedorsky and Bray "Air Quality" 583- 605.

129 See 2.2.3.1.

The obligations imposed on local government include that local authorities should generally seek to promote and ensure that the quality of air in its area is in accordance with the NEMA environmental principles,¹³⁰ abide by the national norms and standards contained in the national framework on air quality and to give effect to the national framework when exercising a power or a duty assigned to the municipality.¹³¹

Furthermore, a municipality should, by means of a bylaw, identify substances in ambient air which present a threat to health, well-being or the environment in the municipality and establish local standards for emissions from point, non-point or mobile sources in its municipality.¹³² If national or provincial standards have been established, local authorities may not alter standards except for establishing stricter standards.¹³³ With regard to controlled emitters, no person may sell, or use any appliance declared as controlled emitter unless such appliance complies with standards established in this regard.¹³⁴ This position applies nationally in respect of appliances declared by the Minister, or in the relevant province by the Member of Executive Committee (MEC) in that province.¹³⁵

The above should be read in light of the fact that the MEC in a province can draft air quality SDBs for the province. Air quality SDBs could be a vehicle for sustainable environmental governance locally, because such SDBs could be remodelled and adapted by municipalities to be able to effectively address poor air quality's impact on human health and well-being. It is submitted that bylaws are critical to achieve the objectives of the NEM:AQA.

130 Ss 3 and 5 of NEM:AQA.

131 S 7(3) of NEM:AQA.

132 S 11 of NEM:AQA. Also see Von Blottziz, Fedorosky and Bray "Air Quality" 389.

133 Ss 9 and 10 of NEM:AQA.

134 S 25(1) of NEM:AQA.

135 S 25 of NEM:AQA.

The implementation of the NEM:AQA at the local government level is in line with Schedule 4B of the Constitution. However, according to Du Plessis,¹³⁶ "it is expected to generate problems". This is so because the capacity and infrastructure of *inter alia* district municipalities, to take up the task of licensing authorities is still questionable. It is argued though that a SDB on air quality management can already go a long way in assisting local authorities with bridging challenges in relation to local standard setting and the enabling local framework for air quality monitoring.

4.3 National Environmental Management: Biodiversity Act (NEM:BA)¹³⁷

The NEM:BA is aimed at the conservation and sustainable use of biodiversity in South Africa. The Act binds all organs of state including local government.¹³⁸ Local authorities should interpret this act in combination with the section 2 environmental management principles in NEMA.¹³⁹ The duties of municipalities include that they should align their municipal environmental conservation plans with the norms and standards contained in the national biodiversity framework.¹⁴⁰ They should also ensure alignment of their integrated development plans (IDPs) with any biodiversity management plan and must show in their IDPs, how biodiversity framework plans can and will be implemented by the municipality.¹⁴¹

Municipalities must further take into account in their IDP processes the need for protection of listed ecosystems,¹⁴² refrain from carrying out a restricted activity involving a specimen of a listed threatened or protected species without a permit,¹⁴³ and should prepare as part of their IDPs an invasive species monitoring,

136 Du Plessis 2009 SA Public Law 76.

137 10 of 2004.

138 S 4 of NEM:BA.

139 Ss 7 and 6(1) of NEM:BA.

140 S 39(2) of NEM:BA.

141 S 48(2) of NEM:BA.

142 S 54 of NEM:BA.

143 S 57 of NEM:BA.

control and eradication plan for land under their control.¹⁴⁴ In section 48(2)(c) the NEM:BA requires of municipalities to implement bylaws relating to biodiversity.

Local authorities accordingly incur mandates in terms of the biodiversity law of South Africa despite nature conservation not being listed as one of the areas of competence of local government in Schedules 4B or 5B of the Constitution. But the implementation of the NEM:BA locally, could be challenged by factors such as the lack of clear indicators as to the shared and divided responsibilities of local and district municipalities. Du Plessis,¹⁴⁵ when affirming to this point, states that "the lack of clear indicators as to the shared and divided responsibilities of local and district municipalities and the specialised knowledge on the content of the national biodiversity framework as well as listed ecosystems, could challenge the implementation of this Act". This means that locally, there is no clarity as to the exact roles of local municipalities and district in terms of biodiversity, and this eventually leads to blurred roles and responsibilities. This in the process delays bylaw-making as the district and local authorities roles are not clearly defined.

In light of the above and taking into account the vulnerability of biodiversity in South Africa, it is suggested that a biodiversity SDB published at provincial level could go a long way in assisting municipalities with realising the objectives of NEM:BA and with clarifying duties and roles in biodiversity management at the local level. A biodiversity SDB will likely have to be adapted locally due to the uniqueness of biodiversity rich areas in different parts of South Africa.

4.4 *National Environmental Management: Protected Areas Act (NEM:PAA)*¹⁴⁶

NEM:PAA provides for the protection and conservation of ecologically viable areas, including natural landscapes and seascapes.¹⁴⁷ In addition, it aims to promote

144 S 67 of NEM:BA.

145 Du Plessis 2009 SA Public Law 74.

146 57 of 2003.

147 See the long title of NEM:PAA.

sustainable utilisation of protected areas for the benefit of all people,¹⁴⁸ and promote participation of local communities in the management of protected areas.¹⁴⁹ Moreover, it aims at the establishment of a national register of all national, provincial and local protected areas as well as the management of those areas in accordance with norms and standards for intergovernmental co-operation.¹⁵⁰

The objectives of the Act are to *inter alia*, establish local protected areas and provincial protected areas,¹⁵¹ to provide a framework for declaration of management of protected areas,¹⁵² as well as for co-operative governance in the declaration and management of protected areas.¹⁵³

The obligations imposed on local governments include *inter alia*, taking account of any norms or standards that apply in the jurisdiction of a municipality,¹⁵⁴ take part in consultation processes regarding declaring a protected area,¹⁵⁵ monitor a protected area against set indicators,¹⁵⁶ and draft bylaws for the restriction of activities in local protected areas.¹⁵⁷ The Minister or the MEC can declare an area as a protected environment, and the Minister may assign the management of any kind of protected area to an organ of state such as a municipality.¹⁵⁸

In keeping with the principle of cooperative government,¹⁵⁹ NEM:PAA states that the MEC, may also in writing, assign the management of a nature reserve to any organisation or organ of state,¹⁶⁰ and such assigned authority is the management

148 S 2(e) of NEM:PAA.

149 S 2(f) of NEM:PAA.

150 S 1 read with s 8 of NEM:PAA.

151 S 8 of NEM:PAA.

152 S 2(a) of NEM:PAA.

153 S 2(b) of NEM:PAA.

154 S 11 of NEM:PAA.

155 Ss 31 and 32 of NEM:PAA.

156 S 43 of NEM:PAA.

157 S 46 of NEM:PAA.

158 S 38 of NEM:PAA.

159 Chap 3 of the Constitution.

160 S 28 of NEM:PAA.

authority.¹⁶¹ Local authorities may, for instance, become assigned functionaries in this regard that could necessitate the adoption and implementation of related bylaws. This means that a local authority, should it be assigned a management role, may request the MEC in a province to draft SDBs on protected areas or nature reserves.

When an assignment to local government has been made, a local authority should prepare a management plan for the protected area and must send it to the Minister or the MEC for approval.¹⁶² The local authority must manage local protected areas in accordance with municipal bylaws.¹⁶³ This may necessitate the municipality to have a suitable protected area bylaw in place.

It is submitted that, since local protected areas generally fall outside the constitutional functional area of local government, local authorities could otherwise be involved by drafting bylaws on restriction of activities in local protected areas, and monitor such an area against set indicators where applicable, and could further request province to draft SDBs, and remodel and adopt such bylaws. A problem that could occur is that protected areas often transcend municipal boundaries. It is therefore important to have clarity on shared municipal functions and duties as well as the role division of regulatory powers among district and local municipalities. A SDB on protected areas could assist local authorities when relevant functions are assigned to local government. It could also compel provincial authorities to think about how to deal with areas that cross municipal boundaries in relation to the division of regulatory powers and geographical boundaries.

161 S 38 of NEM:PAA.

162 S 39(1) of NEM:PAA.

163 S 39(2) of NEM:PAA.

4.5 National Heritage Resources Act (NHRA)¹⁶⁴

The NHRA is the central act regulating the management of South Africa's heritage resources.¹⁶⁵ The Act aims, *inter alia*, to introduce an integrated system for the management of national heritage resources, lay down general principles for governing heritage resources, promote good governance at all levels, set norms and maintain essential national standards for the management and protection of heritage resources and for the protection and conservation-worthy places and areas by local authorities.¹⁶⁶

The Act establishes two institutions to manage heritage resources at the national level. These are the South African Heritage Resources Agency (SAHRA) and the South African Heritage Agency at provincial level. Any activities of local government in relation to cultural heritage must be aligned with the activities of these bodies.

The obligations imposed on local authorities include, *inter alia*, to abide and consult the general framework and recommendations for heritage resources in South Africa,¹⁶⁷ ensure local management of heritage resources,¹⁶⁸ furnish a heritage resource authority with information, advice to ensure public sensitivity towards and awareness of the need for management of national estate,¹⁶⁹ and that heritage management not be used for sectarian purposes or political gain.¹⁷⁰

If a municipality is owner of a heritage site, it must maintain such a site according to minimum standards and according to the procedures prescribed.¹⁷¹ It should also notify SAHRA and the provincial heritage resources authority when a place

164 25 of 1999.

165 See preamble of the Act.

166 See the title of the Act.

167 S 4 of the Act.

168 Ss 5 and 6 of the Act.

169 S 25(a) of the Act.

170 S 5(a)(d) of the Act.

171 S 27 of the Act.

within a municipal area has been listed by the province, is destroyed.¹⁷² Local government should further see to local management of heritage resources,¹⁷³ be competent to manage heritage resources and maintain and conserve the heritage resources under its control in accordance with SAHRA's regulations. A local authority must also after publication of a heritage site in the provincial register, make provision for the local protection of such heritage through its planning and bylaws.¹⁷⁴ The provincial government could assist local authorities in relation to bylaws specifically, by drafting SDBs on the topic.

In the environmental context, heritage resources is a Schedule 4A functional area of concurrent national and provincial competence, while local authorities should manage heritage resources and maintain them, among other things. Provincial government could accordingly usefully draft heritage resource SDBs for the province, and local authorities could subsequently remodel and adapt these to ensure sustainable use and protection of cultural heritage resources. Glazewski¹⁷⁵ opines that "there may be difficulties distinguishing which heritage resources fall under which sphere". This would of course have to be factored in when designing heritage resource SDBs.

4.6 *Disaster Management Act*¹⁷⁶

The aim of the Disaster Management Act is to provide for an integrated and co-ordinated disaster management policy that focuses on preventing or reducing the risk of disaster,¹⁷⁷ mitigating the severity of disasters, emergency preparedness and post disaster recovery. The Act seems to be of particular importance due to increased occurrence of natural disasters such as droughts and floods, across South Africa.

172 S 30(10) of the Act.

173 S 4 of NHRA.

174 S 30(1) of NHRA.

175 Glazewski *Environmental Law in SA* 516.

176 57 of 2002.

177 See Preamble of the Act.

The obligations imposed on local authorities include that municipalities should co-operate with provinces in preparing a Disaster Management Plan,¹⁷⁸ and that each local and district municipality should establish and implement a framework for disaster management,¹⁷⁹ with the aim of ensuring an integrated uniform approach to disaster management.¹⁸⁰

Each municipal entity indicated in the national, provincial or municipal disaster management framework must prepare a disaster plan setting out how the concept and principles of disaster management are to be applied in its functional area,¹⁸¹ its role and responsibilities in terms of national, provincial or municipal disaster frameworks¹⁸² and the review and update of its planning, among others.¹⁸³ A national disaster management framework must provide a coherent, transparent and inclusive policy on disaster management appropriate for the Republic as a whole.¹⁸⁴ Irrespective of whether or not a local state of disaster has been declared, the council of a municipality is primarily responsible for the co-ordination and management of local disasters that occur in its area.

Nonetheless, national and provincial governments have concurrent original competence on disaster management, since it is a Schedule 4A competence. Due to the very nature and proximity of disasters such as floods to build up areas it is possible for disaster management to be delegated to local authorities as is evident from the Disaster Management Act. Local government is assigned certain roles and should prepare a disaster management plan for its area.¹⁸⁵ Therefore, by implication, local and districts municipalities could draft bylaws on disaster management. SDBs could assist municipalities in the province to deal with the

178 S 39(3) of the Disaster Management Act.

179 S 42(1) of the Disaster Management Act.

180 S 52 of the Disaster Management Act.

181 S 52(1)(a) of the Disaster Management Act.

182 S 52(1)(b) of the Disaster Management Act.

183 S 52(1)(c) of the Disaster Management Act.

184 Mokale and Scheepers *Developmental Local Government* 160.

185 S 52 (1)(a) of the Disaster Management Act.

planning, assessment of vulnerabilities and the mitigation of damages that may accompany disasters. A SDB can similarly be used to ensure the kind of alignment necessary in disaster risk reduction planning at local, provincial and national levels. All of these issues may be regarded as important for effective local environmental governance and reducing human and ecosystem vulnerability at the local level.

4.7 *National Environmental Management: Waste Act (NEM:WA)*¹⁸⁶

The NEM:WA aims to regulate waste management by *inter alia* minimising the consumption of natural resources and to secure sustainable ecological development as compelled by section 24 of the Constitution. As is true for the other environmental acts, the application of this Act should be read in combination with the section 2 environmental management principles in NEMA.¹⁸⁷

The National Waste Management Strategy, that has been established,¹⁸⁸ binds all municipalities.¹⁸⁹ Local authorities are further bound by waste management standards in the course of environmental justice in as far as nationally applicable standards must be established by the DEA, *inter alia*, for the classification of waste planning, operation, treatment and waste disposal facilities.¹⁹⁰

The NEM:WA obliges the MEC in a province to ensure the implementation of the waste management strategy and national norms and standards.¹⁹¹ The norms and standards must facilitate planning and provision of waste management services,¹⁹² minimisation, reuse and recycling of waste, as well as for the treatment and disposal of waste.¹⁹³

186 59 of 2008.

187 Long title of NEM:WA read with s 2(1) of NEM:WA.

188 GN 34 in GG 32189 (10 March 2009).

189 S 6(3) of NEM:WA.

190 S 7(2) of NEM:WA.

191 S 8(1) of NEM:WA.

192 S 8(1)(a) of NEM:WA.

193 S 8(c) of NEM:WA.

The clear obligation imposed on local government is that each municipality must prepare a waste management plan,¹⁹⁴ which must be included in its IDP.¹⁹⁵ Such plan must be co-ordinated and aligned with programmes of DEA. Local authorities are expected to set standards for the minimisation, reuse and recycling of waste.¹⁹⁶

Also, municipalities should, in terms of a bylaw establish service standards and levels of service for the collection of waste,¹⁹⁷ provide for requirements in respect of separation, compacting and storage of waste and avoidance of the generation of waste and its recovery, reuse and recycling.¹⁹⁸ Each municipality must submit in its IDP, an integrated waste management plan (IWMP) to the MEC for approval.¹⁹⁹ National and provincial departments must provide in their IWMPs for measures that will be implemented to support municipalities in giving effect to all of their obligations in terms of the Act.²⁰⁰

Municipalities are obliged in terms of section 9 of the act to pass a bylaw on waste management services in a manner allowed by section 156(2) of Constitution, as a listed Schedule 5B activity. In terms of the Constitution, municipalities however enjoy exclusive competence over the following functional areas indirectly relating to waste: cleansing, refuse dumps and solid waste disposal. These are important areas for pollution control in South Africa and one can imagine that SDBs on waste management generally and on these issues specifically, could be of great benefit for local waste management in the instances where municipalities in a province have no or outdated waste bylaws.

194 S 5(i) of NEM:WA.

195 S 11(4)(a)(i) of NEM:WA.

196 Du Plessis 2009 *SA Public Law* 77.

197 Ss 9(1) and (2) read with s 9(5).

198 S 9(3) of NEM:WA.

199 S 11(4) of NEM:WA.

200 S 12(c) of NEM:WA.

4.8 National Water Act (NWA)²⁰¹

The NWA applies to water as a national resource.²⁰² This means the NWA is the primary legislation regulating the "management of water resources in South Africa, including water quality concerns".²⁰³ The NWA aims to *inter alia*, provide for fundamental reform of the law relating to the protection of water resources.²⁰⁴ The obligations imposed on local government include, acquainting itself with the content, scope and obligations of local government in terms of the National Resource Strategy,²⁰⁵ the rights to respect and fulfil the rights of a community to use water from a water resource for purposes of such reasonable domestic use,²⁰⁶ as well as taking measures to prevent pollution of water resources which it owns, controls, occupies or uses.²⁰⁷

The NWA requires scientific indivisibility of water resources.²⁰⁸ This means that the NWA recognises the national government, acting through the Minister of Water Affairs, as the public trustee of this resource, and is responsible for ensuring that decisions do not adversely affect the integrity of water resources.²⁰⁹ The Minister must ensure that water is allocated, managed, controlled, protected and conserved in a sustainable manner for the benefit of all persons.²¹⁰ Water is a national competence and local government does not have any original powers to make bylaws in this respect, except where provision of water services is at stake.

As was indicated earlier,²¹¹ local government is both governor and the governed in the environmental context. This means that even though the powers of local

201 Act 36 of 1998.

202 Scheepers *A Practical Guide to Law and Development* 85.

203 Bosman and Kidd "Water Pollution" 653.

204 See Preamble of NWA.

205 Ss 7-11 of the NWA.

206 S 4 of the NWA.

207 Ss 18 and 19 of NWA.

208 Bosman and Kidd "Water Pollution" 653.

²⁰⁹ Kidd *Environmental Law* 70

210 S 3(1) of NWA.

211 See 2 above.

government in relation to water as governor are limited, it is possible for local government to incur duties as a 'governed' organ of state that must be regulated by bylaws. Some of these duties of local government include, *inter alia*, taking reasonable measures to prevent any pollution from occurring,²¹² cease, modify any act or process causing pollution²¹³ and remedy the effects of pollution.²¹⁴ Local authorities must further control emergency incidents and take measures to contain the effects of the incidents,²¹⁵ undertake clean up procedures²¹⁶ and remedy the effects of the incident.²¹⁷

4.9 Water Services Act (WSA)²¹⁸

The WSA aims to provide, *inter alia*, for the rights of access to basic water supply and sanitation,²¹⁹ and sets standards and norms in respect of water services.²²⁰ The act therefore deals with water as an environmental service as opposed to water as a natural resource. It aims to establish a regulatory framework for water services institutions and the monitoring of water services.

The Act obliges municipalities, *inter alia*, as water services authorities, to ensure access to water services,²²¹ provide measures to realise access to basic water supply and sanitation,²²² develop bylaws on promotion of water services,²²³ and to set conditions for determining a structure of tariffs, conditions of payment, water conservation and demand.²²⁴ Municipalities should further develop, as part of their

212 S 19(1)(b) of NWA.

213 S 19(2)(a) of NWA.

214 S 19(2)(c) of NWA.

215 S 20(4)(a) of NWA.

216 S 20(4)(b) of NWA.

217 S 20(4)(c) of NWA.

218 108 of 1997.

219 S 2(a) of WSA.

220 S 2(b) of WSA.

221 Ss 3 and 4 of WSA.

222 S 3 of WSA.

223 S 21 of WSA.

224 S 5 of WSA.

IDPs, a water services development plan.²²⁵ Section 27 obliges a local authority to monitor the performance of water services providers within its area.

Since local authorities are charged with the fundamental duty of ensuring water services supply and sanitation as a water user to the public, it is evident how important suitable and effective water services bylaws are. SDBs on water services may be particularly important to assist from provinces' side, municipalities in determining fair water access, service levels and prescribed charges for water services, for example. This is underscored by two recent judgments before the South African courts.

In the case of *Mazibuko and Others v City of Johannesburg*,²²⁶ the court noted that "section 27 of the Constitution imposes a duty on local authority as water service provider to take measures to achieve the progressive realisation of this right".²²⁷ This is in line with sections 3 and 4 of the WSA as discussed above. The court further noted that constitutional rights (including section 27), "are understood as imposing an obligation upon a state,"²²⁸ to supply water and sanitation to the public.

This fact was subsequently echoed by the court in *Nokotyana and Other v Ekurhuleni Metropolitan Municipality and Others*,²²⁹ where the court remarked that "the Water Services Act imposes upon a water service authority to take reasonable measures to realise these rights, and to provide for measures to realise these rights in its Water Service Development Plan".²³⁰ This is understood to mean municipalities are obliged to provide water services to the public in line with

225 S 3(2) of the WSA.

226 2010 3 BCLR 239 (CC).

227 2010 3 BCLR 239 (CC) at par 40.

228 2010 3 BCLR 239 (CC) at par 47.

229 2010 4 BCLR 312 (CC) at par 45.

230 2010 4 BCLR 313 (CC) at par 29.

WSA,²³¹ and to take progressive measures, which may include drafting, passing and implementing policies and bylaws to achieve this right.

4.10 Summary

From the discussion of the environmental laws above it is evident that local government incurs environmental duties and powers from the Constitution itself (original powers) as well as from national law (delegated powers). The table below sets out to show those environmental duties of local government that even though it is repeated in national law, also fall within the original (constitutional) powers of local government. It also reflects on the duties that have been delegated to local government and that ordinarily fall within the ambit of provincial or national government's powers.

The aim of this table is to show specifically those duties of local government for which bylaws must be drafted or may be needed and to indicate subsequent to that, whether SDBs at provincial level or MEBs at national level would be most useful to support the environmental bylaw-making capacity of municipalities.

231 Ss 3 and 4 of WSA.

Table 1:

Table A

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Area of competence	National Legislation			Constitution				Delegated	Area suitable for (provincial) SDBs	Area suitable for (national) MEBs
	Applicable law	Sec(s)	Duties and functions of municipalities	4A	4B	5A	5B			
Water Services	Water Services Act	Ss 3 & 4 S 21 S 5 S 3(2) S 27	<ul style="list-style-type: none"> Municipalities to provide access to water supply and sanitation Develop bylaws on promotion of water services Set conditions for tariffs, payment and conservation Develop a water service development plan in IDP Monitor performance of water services 		X				X	X
Water Resource Management	NWA	S 19(i)(b) S 19(1)(c) S 20(4)(a) S 20(4)(b)	<ul style="list-style-type: none"> Take measures to prevent pollution Remedy effects of pollution Control emergency incidents Undertake clean-up procedures 	X				X		X
Waste Management	NEM:WA	S 5(1) S 7(2) S 11(4)(a) S 9 S 11(4)	<ul style="list-style-type: none"> Municipality to prepare a waste management plan Local authority bound by standards established by DEA, for planning, operation, treatment and waste disposal Municipality to include a waste management plan in IDP To draft bylaws on waste management and set standards Submit an IWMP to MEC for approval 				X		X	X

Area of competence	National Legislation			Constitution				Delegated	Area suitable for (provincial) SDBs	Area suitable for (national) MEBs
	Applicable law	Sec(s)	Duties and functions of municipalities	4A	4B	5A	5B			
			•							
Air Quality Management	NEM:AQA	S3 S 11	<ul style="list-style-type: none"> Declare standards for air quality Local authority, by means of a bylaw identify substances in ambient air which presents threats in its area 		X				X	X
Noise Control	NEM:AQA	S 11	<ul style="list-style-type: none"> Local authority to draft bylaws on noise 				X		X	X
Protected Areas	NEM:PAA	S 11 Ss 31 & 32 S 43 S 46	<ul style="list-style-type: none"> Local authority to take into account any norms and standards in its jurisdiction To take part in consultation process declaring a protected area To monitor a protected area against set indicators To draft bylaws for restrictions of actions in local protected area 	X				X	X	X
Biodiversity Management	NEM:BA	S 39(2) S 48(2) S 54 S 52(1) S 48(2) S 57	<ul style="list-style-type: none"> Align municipal conservation plans with norms and standards in national biodiversity framework Align IDP with national biodiversity management plan Take into account the need for protection of listed ecosystems Local authority to implement bylaws relating to biodiversity Refrain from carrying out a listed activity without a permit 	X				X	X	X

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Area of competence	National Legislation			Constitution				Delegated	Area suitable for (provincial) SDBs	Area suitable for (national) MEBs
	Applicable Law	Sec(s)	Duties and Functions of Municipalities	4A	4B	5A	5B			
Disaster Management	Disaster Management Act	S 39(3) S 42(1) S 52 S 52(1)(b) S 52(1)(c) S 52	<ul style="list-style-type: none"> Municipalities to prepare a disaster management plan Each district and local authority to establish a framework for disaster management Municipality to ensure uniform integrated approach management To prepare its role and responsibilities in terms of national, provincial or municipal disaster framework To review and update its planning of such a plan By implication to draft bylaws on disaster management 	X				X	X	X
Heritage Resources	NHRA	S 5 & 6 S 4 S 3 S 10 S 27 S 30(1)	<ul style="list-style-type: none"> Municipalities to ensure local management of heritage resources Local authorities to abide by general framework for heritage Municipalities to protect local heritage resources Municipalities to align IDPs with heritage resources Maintain local heritage site according to national standards Municipalities to make bylaws for protection of heritage 			X		X	x	X

4.11 Conclusion

Looking at the table above,²³² some Acts depict duties that are delegated to local government although they ordinarily (as per the Constitution) fall within the ambit of provincial or national government powers. These Acts include the WSA, NWA, NEM:PAA, NEM:BA, the Disaster Management Act as well as the Heritage Resources Act. This means that the national government and provincial government may have to support and strengthen local government capacity and bylaw making by drafting SDBs and MEBs, for example. Some of the Acts listed in the table show that the regulatory powers transcend all spheres of government and are not confined to provinces. These Acts include the Disaster Management Act, NEM:AQA and the NHRA. Some acts compel local government to draft bylaws, for example waste management bylaws but other Acts impose other types of duties on local government that can only be executed effectively when a municipality has a bylaw in place, for example in the case of disaster management. The meaning of the analysis above is explained below with reference to the North West Province.

232 See 4.10.

5 Environmental SDBs for the North West Province

Local authorities across South Africa still experience considerable challenges relating to increased environmental degradation and threats to human health and well-being.²³³ These challenges range from air pollution, water and sanitation services, control of nuisance, heritage resource management as well as waste management. In the NWP specifically, some of the challenges in relation to the environment, include *inter alia*, air quality, water services and provision of waste management services.

Firstly, air quality in the NWP remains a challenge. Some of the challenges relate to pollution incidents and growing road traffic which causes localised air quality problems.²³⁴ Furthermore, air quality in some urban areas and industrialised areas shows deterioration.²³⁵ Secondly, water resources in the NWP are increasingly stressed due to population growth, development, agriculture and mining. Moreover, mining and industrial activities, agriculture and domestic use increasingly cause water pollution.²³⁶

Thirdly, biodiversity management strategies need to be implemented since the capacity to achieve this on a provincial scale seems inadequate.²³⁷ The control of trading in alien species in the NWP is a challenge due to the potential of their

233 See, the Green Drop Report 2009 Version 1. *South African Waste Quality Management Performance* 93. The report also indicates that in the NWP, only 8 local municipalities, representing nearly a 67% of the Waste Water Treatment Works (WWTW) participated in the Green Drop Certification Programme. The report also shows that most of the municipalities and their WWTWs had relatively low scores. Accordingly, this report confirmed that the situation with regard to waste treatment and compliance with respect to Water Act must be addressed as a matter of urgency. See also *State of The Environment Law Report* 2002. North West Province www.nwpg.gov.za/./toc.html. 20110515

234 www.agency/enquiries@environment-agency.gov.uk 20110515

235 *State of the Environmental Law Report 2001, North West Province.*
www.environment.gov.za/soer/reports 20110515

236 *State of the Environmental Law Report 2001, North West Province.*
www.environment.gov.za/soer/reports 20110515

237 See, the Green Drop Report 2009 Version 1. *South African Waste Quality Management Performance* 93.

introduction into the natural ecosystems with disastrous results on natural ecosystems, if accidentally released.²³⁸ Fourthly, there is a challenge to recover materials that are discarded as waste in the province.²³⁹ Fifthly, heritage resources are also at risk as evidence shows that there has been a considerable destruction of many of the NWP's cultural resources. This is as a result of vandalism, poor management and degradation due to natural causes.²⁴⁰ Lastly, disaster management planning does not receive enough attention and not enough staff is appointed to deal with the matter. There is also lack of co-ordination between the implementation of national and local disaster management plans.²⁴¹

Satisfying basic needs and providing basic services relating to environment is an important mandate of the local government sphere.²⁴² Sustainable service delivery in the municipalities of the NWP in particular, seems to be compromised by many factors, and these are acknowledged by the provincial authorities.²⁴³

238 *State of the Environmental Law Report 2001, North West Province.*
www.environment.gov.za/soer/reports/20110515

239 *State of the Environmental Law Report 2001, North West Province.*
www.environment.gov.za/soer/reports/20110515

240 *State of the Environmental Law Report 2001, North West Province.*
www.environment.gov.za/soer/reports/20110515

241 *State of Disaster in 33 Municipalities.* www.allafrica.com/./html. 20110515

242 Ss 152 and 153 of the Constitution.

243 The NWP in 2009 saw a need to commission research to address the challenges related to environmental governance in the province. The Faculties of Law and Centre for Environmental Management (CEM) of the NWU were granted project funding to undertake a study on local environmental governance, specifically on designing environmental SDBs for local government in the province. The overall aim was to strengthen the legislative and executive functions and powers of municipalities in the NWP as part of the drive to improve service delivery, generally. The project team consisted of Louis Kotzé (project leader), Anél du Plessis, Watsie Ramogola, Phindi Simelane, Olivia Lefenya, Themba Ndongeni, Willemien du Plessis and Esmé Snyman. Watsie Ramogola, Phindi Simelane and the writer (henceforth the research team) conducted site visits to various local authorities in the province, and gathered empirical evidence and information by way of semi-structured questionnaires, informal interviews and workshops with local government officials in different municipal departments. Two districts as well as seven local municipalities were visited for this purpose. The districts being Dr Kenneth Kaunda and Dr Ruth Momati and the local municipalities being Rustenburgh, Moses Kotane, Ramotshere Moiloa, Mafikeng, Maquasi Hills, Kagisano and the Greater Taung Local Municipality. The team also conducted desktop studies of environmental bylaws that existed at the time in other municipalities in South Africa. Watsie Ramogola, Phindi Simelane and the writer presented papers on their research findings at the North West Research Committee's Showcase in Rustenburg in September 2009 as well as at the

These factors include lack of sufficient and comprehensive environmental bylaws and adequate enforcement of existing environmental bylaws.²⁴⁴ There seems to be little to no cooperation and coordination among different environmentally relevant government structures and spheres such as the provincial government and district and local authorities. There are further insufficient human resources as well as financial capacity to draft and implement suitable environmental bylaws in most NWP municipalities.²⁴⁵

The research team established that the municipalities in the NWP²⁴⁶ have a single (generic) legal department, headed by a chief legal officer. These departments are responsible for all legal matters within their municipalities and do not necessarily have the time or sometimes the skills to draft environmental bylaws, specifically. The legal advisors of some municipalities formed a NWP Legal Task Team to draft concept bylaws on various matters for their municipalities to adopt. By November 2009 the Task Team had however not yet drafted any environmental bylaws. During the workshops of the NWU project, members of the Task Team expressed their interest in the environmental bylaws specifically a biodiversity and protected areas bylaw, local environmental framework bylaw, air quality and noise pollution

Environmental Law Association's Conference in 28 May 2009 in Muldersdrift, Gauteng. The project was divided into four distinct phases. The first phase involved determining the *status quo* of environmental bylaws in the NWP. The aim was to interview local government officials and to estimate which environmental bylaws existed where and what the needs of municipalities were in relation to environmental bylaw-making. Thereafter the results of the field work were communicated to affected and interested parties during two workshops of which the results were recorded in the report which was submitted to the Provincial Government (Faculties of Law and CEM *Status Quo Report on Standard Draft Bylaws of the North West Province* (June 2009)). The second phase involved a desktop review of the environmental bylaws of other municipalities in South Africa that could be of use in drafting SDBs for the NWP. The aim was to identify and determine best practices in relation to environmental bylaws elsewhere in South Africa that could feed into the SDB drafting for the NWP. The third phase involved the actual drafting of six generic environmental SDBs of relevance for the environmental challenges and conditions prevalent in the NWP. The final phase involved the invitation of comments from the side of expert reviewers who were approached to critically review the content of the six draft environmental SDBs. The comments were used in finalising the draft SDBs where after the set of SDBs was handed over to the provincial government – the Office of the Premier (Faculties of Law and CEM *Draft Standard Environmental Bylaws Compendium and Guideline* (November 2009)).

244 Based on the *Status Quo Report on Standard Draft Bylaws of the North West Province* 24.

245 *Status Quo Report on Standard Draft Bylaws of the North West Province* 24.

246 Those municipalities visited and those attending the workshops.

control bylaw, waste management bylaw, cultural heritage management bylaw as well as water services bylaws, which they considered of great importance and of direct relevance to their work.

The NWP had not issued any environmental legislation or environmental SDBs by July 2011. In 2009, all the municipalities visited, half of them had some environmental bylaws. While most municipalities had bylaws generally, Kagisano Municipality did not have a single bylaw. In many municipalities, the bylaw management system seemed to be haphazard with different municipal departments having their own different bylaws without any integrated implementation or enforcement effort. The majority of environmental bylaws (either drafted or promulgated) that were identified covered issues relating to water sanitation, refuse removal and cemeteries.²⁴⁷ It seems that municipalities do not have a separate division dealing with environmental issues but that different divisions such as Community Services, Planning and Development, Infrastructure and Engineering and Environmental Health take responsibility for them.²⁴⁸

Most local officials interviewed were aware that the MEC for Local Government in the NWP can draft SDBs. The municipalities involved in the project indicated that environmental bylaws were needed in the areas of air quality management, waste management, water management, pollution control, protection of ridges and disaster management (flooding) amongst others. Based on the workshops conducted in Potchefstroom,²⁴⁹ as well as the field work by the research team, the team drafted six preliminary environmental SDBs seemingly suitable for the NWP's conditions and environmental challenges. The bylaws drafted addressed as far as possible the known shortcomings of the environmental bylaws and bylaw-making

247 See *Status Quo Report on Standard Draft Bylaws of the North West Province* 16.

248 Based on the *Status Quo Report on Standard Draft Bylaws of the North West Province* 16-17.

249 Conducted by the team in Potchefstroom on 29 May and June 2009 respectively.

capacity that existed in the NWP at the time and was submitted to the Premier's Office by the end November 2009. The six draft bylaws consist of the following:²⁵⁰

- Draft Standard Local Environmental Framework Bylaw
- Draft Standard Biodiversity and Protected Areas Bylaw
- Draft Standard Air Quality and Noise Pollution Control Bylaw
- Draft Standard Waste Management Bylaw
- Draft Standard Cultural Heritage Management Bylaw
- Draft Standard Water Services Bylaw.

By July 2011, the research team could not manage to establish what the position of the NWP is with regard to the legislature's adoption of the SDBs. Still, local government has various statutory and constitutional duties relating to the environment on Schedules 4B and 5B of the Constitution, and must realise the right of people in their area of jurisdiction, which relate to the environment. Since required environmental bylaws, in many instances, have not been drafted yet in the municipalities of the NWP, there seems to be a legal obligation on the provincial government to draft environmental SDBs as well as on the national government to assist by drafting MEBs, as soon as possible.²⁵¹ This legal position should be viewed against the background of the environmental challenges currently experienced in the NWP.

Once SDBs have been adopted at the provincial level, municipalities have to follow a process to adopt and enforce them locally.²⁵² Section 14 of the Systems Act determines this process. In terms of this section, the MEC for Local Government may make SDBs or amend such SDBs concerning any matter for which municipal councils in that province may make bylaws.

250 Faculties of Law and CEM *Draft Standard Environmental Bylaws Compendium and Guideline*.

251 See 3.4 and 5

252 S 14 of the Systems Act.

It should be done on request by organised local government in the province or after consulting the Minister of Local Government and by notice in the *Provincial Gazette*.²⁵³

Again proper publication of the bylaws and consultation with the MECs in the province are required.²⁵⁴ As per section 14(2)(a) and (b) of the Systems Act, publication of bylaws must promptly be done in the relevant *Provincial Gazette*, and when feasible, also in a local newspaper or in any other practical way in order to bring the contents of the bylaw to the attention of the local community. An SDB is only applicable in a municipality, to the extent that, and subject to any modification and qualifications have been adopted by the council of that municipality.²⁵⁵ The SDB can thus not be enforced on a municipal council and only serves as a concept on which a municipality can finalise its more detailed bylaws, if it so wishes.

Despite its value, the legal framework for and process of drafting and adopting environmental SDBs and subsequently, local environmental bylaws, are not perfect and some legislative, institutional and political challenges remain. The next concluding section of this study makes recommendations in this regard.

6 Conclusion and recommendations

6.1 Concluding remarks

This study aimed to estimate to what extent the constitutional and legislative environmental duties of local government should be translated in environmental bylaws and specifically, how provincial environmental SDBs could provide support in this regard.²⁵⁶ The study looked briefly at the NWP as an example province²⁵⁷ after having reviewed the environmental duties of local government in terms of the

253 Bekink *Local Government Law* 233.

254 S 14(2)(a) and (b) of the Systems Act.

255 S 14(3)(a) of the Systems Act.

256 See chapter 3.4 above.

257 See chapter 5 above.

Constitution and legislation.²⁵⁸ Attention was paid to the bylaw-making powers of local government and the potential of environmental SDBs as tools in local environmental governance, generally.²⁵⁹

It is clear that local government has a duty to protect people's environment in South Africa. This duty stems from the Constitution,²⁶⁰ as well as environmental and local government legislation set to contribute to local environmental governance.²⁶¹ The core provisions relating to the Constitution include, among others, sections 152 and 153 which state that the objectives of the local government include to ensure provision of services in a sustainable manner and to promote a safe and healthy environment. Moreover, a municipality has executive authority and has the right to administer matters listed in Schedules 4B and 5B of the Constitution.²⁶² These matters also comprise of environmental matters. The Constitution further empowers local authorities to draft bylaws.²⁶³ The above should be understood to mean that there is a positive duty on local authorities to give basic priority to the basic needs of the communities. This duty includes enacting bylaws that protects the environment.

It was shown that the legislation that empowers local authorities to contribute to local environmental governance includes, amongst others, the Systems Act, NEMA, NEM:WA, NWA, NEM:AQA, NEMBAA and NEMPAA.²⁶⁴ The regulatory authority of the provincial authorities is evident in the provision that is made for the drafting of SDBs which are aimed to strengthen local authorities' bylaw-making capacity.²⁶⁵

258 Refer to 4 above.

259 Refer to 3.2 and 3.4 above.

260 See 2. 1.

261 See 2.2.

262 S 156(1) of the Constitution. See also 2.1.

263 S 156 (2) of the Constitution. See further 2.1.

264 Refer to 4 above.

265 S 14(1)(ii) of the Systems Act. See 3.4.

This study proposes that to protect people's environment, local government must employ its law-making power that is provided for in section 156(2) of the Constitution as well as in section 14 of the Systems Act. The law-making powers of local government must in principle result in the passing of bylaws. The objective of a bylaw must be to set rules and standards, to regulate the conduct of community members and industries and should be used as regulatory tools in so far as they are enforceable within the jurisdiction of the municipality. The bylaw-making capacity of local government is influenced by its original and derivative powers. From the schedules of the Constitution it is clear that there lies the functional area for which local government may make bylaws. These areas include *inter alia*, air pollution, water and sanitation services, control of nuisance and waste management.

However, from environmental statute law, one learns that these acts elaborate on the original environmental functions and duties of local governance as per the Constitution whilst others assign functions and duties to local and or district municipalities.²⁶⁶ A case in point is NEMA, to which the environment is included as a concurrent national and provincial competency.²⁶⁷ The Act empowers municipalities bylaw making capacity by the intervention of the national government's drafting of the MEBs.²⁶⁸ The nature and duties as well as objectives of these environmental duties are aimed at effective local environmental bylaws.

The notion of SDBs and MEBs is provided for in South African local government and environmental law. As was shown above, SDBs are valuable in that they are drafted nationally to strengthen local bylaw-making capacity and MEBs are drafted by the provincial governments to ensure its role in fortifying environmental bylaw making-capacity. The focus of this study however fell on SDBs specifically.

266 See 4.10 for the discussion of the table

267 See 4.1.

268 S 46 of NEMA.

The strengths and weaknesses of environmental SDBs are returned to below but it merits emphasising that the NWP case study has proven that environmental bylaw-making capacity is severely limited in this province.²⁶⁹ The reasons for this include a lack of sufficient and comprehensive bylaws and inadequate environmental bylaws as well as inadequate enforcement of existing environmental bylaws.²⁷⁰ It is however also possible for less obvious reasons that have not featured in the NWP case study to be involved.

This means that, when read together with the duty of provinces to support local government,²⁷¹ at least in the NWP, the provincial government has but little choice to support local government in the bylaw-making process. This view is also supported by the various environmental duties of local government derived from the Constitution and environmental law that can only be functionally executed through the implementation and enforcement of bylaws.²⁷²

From the NWP case study and the data reflected in the table above,²⁷³ it seems as if it is of utmost importance that local government translates at least some of its environmental law duties into local bylaws. This is of importance for provincial government in as far as the exact duties should at least then be covered in environmental SDBs once a province decides to go that route.

Typical duties of municipalities that a bylaw can be used for include, for example, setting conditions for tariffs, payment and conservation, taking measures to prevent pollution, develop waste management practices and set waste standards, to set bylaws on disaster management, to protect local heritage resources, identify substances in ambient air which presents threats in municipalities, set standards

269 See 5 above for a discussion on NWP.

270 See *Status Quo Report on Standard Draft Bylaws of the North West Province* 24.

271 See also 3.3 above.

272 Ss 155(6) of the Constitution, 14 of the Systems Act, 46 (1) of NEMA. See also 3.3 above.

273 See 5.

for noise, monitor a protected area against set indicators and for protection of listed ecosystems.²⁷⁴

Moreover, from the table above, it is clear that all of local government's environmental duties would benefit from the design of environmental SDBs (provincial) or MEBs (national). One may however, argue that in some cases it would make more sense to have provincial SDBs that can be tailored for province-wide challenges and features, for example, in the case of NEM:AQA, noise control, NEM:WA, disaster management, NWA, WSA, and the heritage resources. In some cases, it may be useful to look even more holistically at the environmental issue and to have national MEBs to regulate a certain cross-provincial environmental issue such as water resource management, heritage resources, protected areas, biodiversity, and pollution control, generally.

The second part to the research question of this study asked how SDBs could assist in translating local government's environmental duties into bylaws. The answer may lie in looking at the strengths of SDBs which is considered below.

6.2 *Findings: strengths and weaknesses of SDBs*

The way in which SDBs can be of use in local government's making provision for its environmental duties in local bylaws can best be described by outlining the strengths in relation to the way in which SDBs are provided for in law, the way in which they should be made and their subsequent adoption by local authorities:

6.2.1 Strengths

SDBs are provided for in terms of local government legislation. Bylaw-making powers of municipalities are provided for in section 156 of the Constitution as well

274 Refer to table in 4.10 above.

as section 14 of the Systems Act. Municipalities should exercise their original authority conferred on them by the Constitution in relation to all matters under section 156 of the Constitution and listed in Schedules 4B and 5B.

Additionally, the Systems Act provides that a provincial government may design and adopt SDBs on environmental affairs listed in Schedules 4B and 5B of the Constitution, upon request by organised local authority in the province.²⁷⁵ Municipalities are free to adopt the SDBs. A council of a municipality may decide to adopt or amend an SDB to fit local conditions and unique circumstances. SDBs can never be imposed on local authorities; however, they are crucial in that they establish a supportive, voluntary mechanism by provincial authorities.

In order to become enforceable, SDBs must first be transformed into ordinary bylaws through an adoption process. A public comment process and council decision-making process are necessary. This is important as SDBs allow for transparency of decisions involving public opinion as well as the public as part of decision making process. SDBs should first be approved through a process of consultation as well as by resolution of the municipal council. This is important because an SDB cannot be imposed on the municipality, without the municipality taking a decision on it, which will obviously relate to the question whether the municipality does need such an SDB.

An important strength of the SDB relate to the fact, the Member of Executive Committee (MEC) responsible for local government affairs in a province must publish the proposed bylaw or the amendment thereof in the *Provincial Gazette* for public comment and consult the relevant cabinet member if the bylaw or amendment is to affect a particular area of his or her of responsibility.²⁷⁶ Again here, the public is involved and transparency is the order of the day.

²⁷⁵ S 14 of the Systems Act.

²⁷⁶ S 14(1)(b) of the Systems Act.

Co-operative governance is further strengthened due to the fact that the MEC responsible for local government affairs in a province must consult the concerned cabinet member if the bylaw concerns an area that forms part of his or her responsibility. The entire SDB process makes provision for consultation and co-operative governance among different spheres of government and among different government departments. SDBs cannot be enforceable without first being published in a *Provincial Gazette* for public comment and their actual implementation and enforcement remains within the power of individual local authorities.

6.2.2 Weaknesses

There are a number of pitfalls to the SDBs which translate into the weaknesses of SDBs. SDBs can be a cumbersome administrative strategy. A lot of consultation is going on at the provincial level before the drafting and eventual adoption of SDBs. At the outset, SDBs need time and careful drafting. The procedure for adopting SDBs is long, and provincial governments take time before adopting SDBs. This is evident with the six draft standard bylaws submitted by the research team in 2009 to the NWP. By July 2011, the draft bylaws have not yet been adopted by the provincial government in the NWP.

Perhaps most importantly, even a simple amendment to a SDB means going through the procedure again, which includes publication and community inputs. This can be costly in terms of money as well as time and effort. It also indirectly defeats the intended purpose of SDBs in as far as any unnecessary delay compromises service delivery and communities' sense of government's efficiency. Besides, without the actual implementation and enforcement of SDBs the real-life use and value of SDBs are limited.

6.3 Recommendations

The Constitution requires provincial governments to play an important role in monitoring and supporting local government.²⁷⁷ One of the ways in which provincial government can assist local government to strengthen the capacity of municipalities to manage their own affairs is to take supportive legislative and other measures, which include the drafting of SDBs.

It is recommended in general that a holistic and co-operative approach will shorten the drafting of the SDBs and will avoid unnecessary delays in the adoption of the SDBs in the NWP. An intergovernmental structure should be established to coordinate the legislative efforts of provincial and local government. It is proposed that such a structure in the NWP should comprise of the MEC for Local Government, the legal officers from districts and local authorities in the province as well as non-governmental organisations. By so doing, all the spheres of government will be represented and could be the vehicle for the co-ordination with regard to regulatory initiatives. Officials with technical know-how from different municipalities should identify the bylaws needed in their respective municipalities and should also propose the most suitable structure and core content. The intergovernmental structure could create a platform for the co-ordination of legislation and actions of provincial and local government and provide a vehicle for communication, in the form of a committee between the province and local government in the NWP.

Service delivery in the NWP and bylaw making capacity are still key challenges in the NWP.²⁷⁸ Therefore, in addition to the intergovernmental structure proposed above, the following specific recommendations are made:

²⁷⁷ Refer to 3.3 and 3.4.

²⁷⁸ See *Status Quo Report on Standard Draft Bylaws of the North West Province* 24.

- Environmental SDBs should be drafted and adopted by the NWP as soon as realistically possible;
- The Premier of the provincial government must establish an integrated environmental bylaw-making committee in terms of the *Intergovernmental Relations Framework Act 13 of 2005*:
 - The aim of such committee should be to identify the need for specific environmental SDBs;
 - The task of the proposed committee is essentially to undertake the drafting of SDBs;
 - The proposed committee should liaise with the necessary national government departments in drafting the SDBs in order to avoid any statutory conflict;
 - The proposed committee should inter alia consist of members of the Provincial Department of Environmental Affairs and Tourism, representatives of district and local municipalities and members of South African Local Government Association (SALGA);
 - Other technical committees must be appointed to assist the proposed committee in the drafting of SDBs;
- A fast-track procedure must be developed to ensure the adoption of SDBs in the NWP;
- A procedure must be developed to involve the public in the drafting of SDBs and to ensure effective public participation throughout the process;
- Environmental education programmes should be established to ensure effective public participation at the local level;

- Local government must be made aware of its environmental responsibilities in terms of the Constitution by way of training and workshops organised by provincial government;
- The capacity of municipalities to draft environmental bylaws should be strengthened; and
- Environmental SDBs for the NWP should address the specific environmental needs of the province;

SDBs could serve a particularly important role in regulating and ultimately, fortifying service delivery and achieving sustainable development in the local government sphere. SDBs could be used by provincial governments to strengthen the capacity of municipalities to manage their own affairs and to exercise their functions. SDBs could be used by the NWP to initiate the necessary legislative measures to see to the effective performance by municipalities of their environmental functions outlined in the Schedules to the Constitution and local government and environmental law.

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