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Foreword to Senior Counsel Opinions Regarding the Provision of State-funded Services on Private Land in eThekweni Municipality

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Annexure A: SC Rosenberg Opinion 2018

Annexure B: SC Annandale Opinion 2019

1. Introduction

Two Senior Counsel (SC) legal opinions were obtained for eThekweni Municipality (in 2018 and 2019) in relation to the provision of municipal-funded, basic and essential services on privately-owned land in advance of land acquisition. This is a key issue for eThekweni Metro because 41% of the land upon which informal settlements in the City are located falls under private ownership (excluding land owned by the Ingonyama Trust which makes up an additional 18% of all land). Only 28% of the land is owned by government and only 18% is under the ownership of the Municipality. It is noted that there are more than 590 informal settlements in the City which are home to more than 316,000 informal settlement households and 79% of households reside in settlements which are to be upgraded in-situ (i.e. categorised as ‘B1’, which means incremental, in-situ upgrade, commencing with the provision of basic services and functional tenure security). Given this scale of settlement, it is not viable for the Municipality to first acquire all land upon which informal settlements are located prior to providing services, both in terms of how long it would take to acquire the land (whether by private treaty or expropriation) as well as the huge financial costs which would divert limited upgrading funding away from basic and emergency services provision (which cannot be delayed).

Historically (dating back to 2010) eThekweni Municipality has provided basic services on private land via its interim services programme based on provisions within the Local Authorities Ordinance of 1974 (sections 225 and 259) which enable the Municipality to intervene on private land on the basis of health and safety threats. Notices were served on private land owners on this basis and basic services were provided. There were few if any legal challenges from private landowners, presumably because most settlements are old and well-established, because landowners have lost control of their land and because owners are unable to

address the extensive health, safety and services problems on their land within their own resources and without state assistance.

The two legal opinions were obtained to ensure that the City's approach to dealing with the issue of private land within its incremental upgrading programme is resting on a solid legal basis, taking into account the prevailing constitutional and statutory frameworks and extensive relevant Constitutional and High Court precedents. The intention was to ensure an appropriate balancing of the constitutional imperatives relating to the rights of disadvantaged, low income households to basic services, land access and housing opportunities on the one hand, and the rights of private landowners on the other.

There has been significant interest in these legal opinions and the related incremental planning and alternative tenure solutions being developed in eThekweni Municipality. There have been numerous knowledge exchanges between the eThekweni Metro, other Metros, the National Department of Human Settlements and other civil society stakeholders and professionals assisting and supporting municipalities and communities with optimised, city-wide upgrading solutions. These exchanges have occurred principally with support provided by the iQhaza Lethu Incremental Upgrading Partnership Programme as well as the Cities Support Programme of National Treasury funded via the World Bank. It is principally because of this interest, numerous direct requests, and the potential for shared learning and optimised upgrading solutions, that the two legal opinions are now being made available.

2. Overview of key legal findings

The first opinion by Advocate Sean Rosenberg (a Senior Counsel of the Cape Town Bar) in 2018 confirmed the Municipality's rights and obligations to fund essential services provision for informal settlements on private land in advance of land acquisition, subject to a prescribed process being followed. The Opinion was procured by PPT for eThekweni Municipality via the iQhaza Lethu Incremental Upgrading Partnership Initiative¹. It was also informed by the Programme Management Toolkit for Informal Settlement Upgrading developed by PPT for the Cities Support Programme, and funded via the World Bank, which had already identified many of the key principles and legal precedents. Amongst other things the Opinion outlined various actions and measures necessary to enable the Municipality to provide services in such situations, including: categorizing all informal settlements in order to define their developmental pathway; designating or reflecting all informal settlements in the Municipality's Spatial Development Framework (SDF) in terms of their categorization; giving appropriate notices to landowners; commencing with the process of establishing an appropriate bylaw for affected areas (but this does not have to be completed before providing the services); and establishing a parallel land acquisition programme (land does not have to be acquired in advance of services provision, but there must be a programme in place which over time will address the issue of acquisition – whether by private treaty or expropriation). In terms of this Opinion, the principal defense against possible litigation from private landowners is in terms of the Constitution and related Constitutional and High Court precedents.

A second legal opinion by Advocate Anna Annandale (a Senior Counsel of the Durban Bar) was obtained in 2019. The Opinion was procured by eThekweni Municipality via its Legal Service and Compliance Unit. This Opinion suggested additional protection in the form of establishing statutory servitudes which would

¹ iQhaza Lethu is a collaboration between eThekweni Municipality and Project Preparation Trust of KZN co-funded by the European Union, eThekweni and PPT between 2018 and 2022.

confer rights in favor of the Municipality (as holder of the servitudes) over the portions of land in informal settlements on which municipal services are constructed or over which municipal access is required to manage, operate or maintain such services. Such statutory servitudes are not registered in the Deeds Office but are rather established by means of a municipal bylaw. This is as per precedent in the telecommunications sector (e.g. regarding the construction of cell phone masts on private land - Section 22 of the Electronic Communication Act). Amongst other things, it was found that the Municipality's current bylaws are not adequately tailored to incremental upgrading and essential services provision and that the Municipality would need to enact a new bylaw which will "expressly give it the right to enter upon private land and erect the services by way of the creation of a statutory or public servitude akin to that created by section 22 of the ECA and section 12 of the KwaDukuza Municipality Electricity Supply Bylaws". It was noted that the provision of such services is in public good. The creation of such rights of way would need to be exercised "respectfully and with due caution" which entails, amongst other things, appropriate selection of targeted properties and reasonable notices to landowners. It was also found that the funding of basic services on private land would not constitute fruitless and wasteful expenditure in terms of the MFMA provided the expenditure was duly authorized and noting the use of funding for the public good and the Constitutional and statutory duty of the Municipality to provide basic services, there being no alternative municipal-owned land and the Municipality not having the available funding to purchase all private land on which informal settlements are located.

3. Key points and extracts from Rosenberg Opinion 1

As indicated, the Opinion provided by Advocate Rosenberg SC in October 2018 confirmed the Municipality's rights and obligations to fund essential services provision in advance of land acquisition, subject to a prescribed process being followed. It also made suggestions as to how SPLUMA requirements can be met on land which is not yet owned by the Municipality and which is not yet formally proclaimed or zoned. The Opinion was commissioned by PPT working in tandem with eThekweni's Human Settlements and Legal Units and other government partners via the iQhaza Lethu Incremental Upgrading Partnership Programme. The Opinion is comprehensive and detailed (46 pages in length) and addresses a range of key issues and references relevant Constitutional and High Court precedents as well as the prevailing legislative context. The findings of this opinion are consistent with those of certain previous opinions as well with the Constitutional Court and High Court precedent (many of which are referenced in the Opinion). Please refer to the full Opinion for further detail. The findings of the Opinion include the following selected key points (in the form of direct quotes with bold emphasis added):

- ***"the general constitutional duty to render these services is imposed upon local government regardless of the identity of the landowner, and subject only to the limitations of the legislative and regulatory framework for local government"***
- ***"In principle, the constitutional and statutory framework which has been outlined above and which pertains to local government permits the installation of essential services for informal settlements, where there is an urgent need for such services, in the case of privately-owned land."***
- ***"The provision of services is part of (the municipality's) constitutional and statutory obligations and would constitute a normal restriction on property use or enjoyment as found in open and democratic societies. This would not in the ordinary course constitute a deprivation of property rights."***

- *“The purpose of the constitutional obligation placed on local government to render services is to promote the public interest and socio-economic development and the other objectives of local government which have been referred to above. **Given that the private property is already occupied and cannot be used by the owner for its intended purpose in the medium to long term, the extent of any further deprivation is limited.** The installation of services does not remove the right to use and enjoy the property. That has been forfeited as long as the land is occupied.”*
- *“This does not mean that incremental upgrades cannot be undertaken without expropriation having first taken place. What it does mean, however, is that **the provision of permanent infrastructural services on private property can in most instances only be justified where there is a recognition of the permanent status of the informal settlement and the consequent obligation on the local authority to acquire the land in due course.**”*

In respect of planning and land rights solutions, the eThekweni draft incremental planning protocols have been directly informed and guided by Advocate Rosenberg’s opinion in respect of: informal settlement designation within the SDF (as per categorisation – e.g. permanent category B1 versus deferred relocations category B2); notices to landowners in advance of land acquisition for essential services provision and planning designation; establishing a municipal informal settlement bylaw which can occur as a parallel process provided its principles are adhered to by the municipality in the intervening period. Some of the relevant extracts from the Opinion include the following:

- *“The preamble to SPLUMA records that informal and traditional land use development processes are poorly integrated into formal systems of spatial planning and land use management. Section 7 which sets out the SPLUMA development principles takes up this theme, in providing in s 7(a)(ii) that **spatial development frameworks and policies at all spheres of government must address the inclusion of persons in the areas that were previously excluded, with an emphasis on informal settlements, former homeland areas and areas characterised by widespread poverty and deprivation.***
- *“Section 7(a)(iv) provides that **land use management systems must include all areas of a municipality and specifically include provisions that are flexible and appropriate for the management of disadvantaged areas, informal settlements and former homeland areas.** Section 7(a)(v) provides that land development procedures must include provisions that accommodate access to secure tenure and the incremental upgrading of informal areas.”*
- *“The **designation in [the municipality’s] spatial development framework of areas where incremental upgrading approaches to development and regulation are to be applicable will serve to confer a planning status on the designated areas, and as a precursor to an envisaged or later rezoning of the land concerned.**”*
- *“The consultant has raised the question of local authority intervention for the purposes of incremental upgrading, in advance of the promulgation of a by-law. **The purpose of the by-law is to establish an appropriate statutory framework regulating and governing the circumstances and process of the intervention. However, the municipality’s duties and obligations in this context are derived from the Constitution and not from a by-law and the enactment of a by-law is not a prerequisite for a local authority to take action, where circumstances require it.**”*
- *“The by-law should incorporate the following:*
 - *The nature of the services which may be installed should be identified;*
 - *The criteria which must be satisfied before an informal settlement will be considered for such services;*

- *A requirement that prior to the installation of services the owner of the property be given notice of [the municipality's] intention and an opportunity to comment on the proposed services;*
- *Ownership of or infrastructure and service connections installed on the property shall remain vested in [the municipality];*
- *[The municipality] be given a right of access to install and maintain the services on the property."*
- *"It should be noted, however, that the mechanisms which are proposed to address incremental upgrading challenges, **namely a by-law and the introduction of appropriate zones and/or planning layers catering for the incremental upgrading of informal settlements, will find equal application to private and state-owned land.** First, the by-law will be directed at the effective administration of a matter which [the municipality] has the right to administer (irrespective of whether the land is private or state-owned). Second, state-owned land is like any other land also subject to the provisions of the Spatial Planning and Land Use Management Act 16 of 2013 (SPLUMA) including those pertaining to a zoning scheme (see s 26(1)(a) and spatial development frameworks (SDFs) (see s 7(s)(iii))."*

4. Key points and extracts from Annandale Opinion 2

A further Opinion was obtained in December 2019 from Advocate Annandale (SC) (commissioned by eThekweni Municipality Legal Unit), and also focusing on the provision of services on privates owned land. It is also a comprehensive and detailed opinion, some 73 pages in length. The registration of statutory servitudes based on an appropriate bylaw emerged as the main suggested solution for the Municipality in balancing various rights and obligations and also affording sufficient protection for the Municipality from legal challenges from landowners. It emerged that the prior occupation of the land (typically a long period prior to the provision of basic municipal services) is the event which resulted in the owners' loss of beneficial occupation/use of the land and the provision of basic, essential services by the Municipality in such cases would accordingly not necessarily amount to a deprivation of property as envisaged in section 25 of the Constitution. In respect of providing basic services on private land and based on precedence arising from the electronic communications sector, the Municipality would need to establish that it cannot fulfil its constitutional mandate without acting in this manner and that, whilst it would appear that the municipality would be able to justify its conduct in broad terms, each exercise of power would need to entail a site and fact specific enquiry or assessment. In respect of the MFMA, it was found that the funding of basic services within informal settlements would not be 'fruitless and wasteful' given the use for public and provided the expenditure was properly authorized. It was noted that the Municipality is under a Constitutional and statutory duty to provide basic services but does not have land of its own available and cannot afford to expropriate all of the land on which informal settlements are located. Refer to the full Opinion for further details. The findings of the Opinion include the following selected key points (in the form of direct quotes with bold emphasis added):

- In respect of the MFMA and concerns regarding 'fruitless and wasteful expenditure':
 - *"The municipality is concerned to ensure that its actions would not be viewed as contravening the Local Government Municipal Finance Management Act 56 of 2003 (the MFMA). eThekweni's concern is to ensure that the expenditure cannot be characterised as "wasteful and fruitless" by virtue of the fact that the municipality would be using public funds to improve private land." (s6)*

- *“Unlike the other issues upon which consultant seeks, this concern can be dealt with relatively simply.” (s7)*
- *“Wasteful and fruitless expenditure is defined in section 1 of the MFMA as expenditure that was “made in vain and could have been avoided had reasonable care been exercised”.” (s8)*
- *“Provided the **relevant expenditure is properly authorised it could not be said in my view to fall within the definition of fruitless and wasteful expenditure. The municipality is under a Constitutional and statutory duties to provide these basic services but does have land of its own upon which to house the settlers and cannot afford to expropriate the private land upon which the settlements stand.**” (s9)*
- Regarding Notice to landowners:
 - *“It is therefore difficult to imagine how the municipality would be able to contend that the process was fair when the landowner directly affected by it had no notice.”...” I therefore advise that **it would not be possible for eThekwini to “legislate out of” the giving of notice.**” (s81.4 & 82)*
 - *“The **court found that noted these notice provisions were designed not to enable the owner to dissuade Rand Water from laying the pipeline but to minimise any inconvenience**” (s85)*
 - *“I therefore remain of the view that **whatever notice procedure eThekwini devises should allow participation in the sense of being able to influence even the decision** on whether to exercise the power in relation to a specific piece of land so as to ensure that the deprivation is not substantively arbitrary. As discussed further below, **there will be many instances where the conduct would not even amount to a deprivation** but it would be prudent for a uniform notice procedure to be applied.” (s87)*
- Regarding compensation to landowners:
 - *“In my view however orders of constitutional damages or expropriation² have been granted due to the extent of the occupation of the property in question not the provision of services. Occupation, by a large number of persons, of a permanent nature was the reason for the orders in both Fischer and Modderklip. That triggering feature can and does exist even in the absence of the provision of municipal services. **Whilst the provision of such services might be used as evidence of eThekwini’s realisation that the settlements are of a permanent and significant nature, it is the occupation itself rather than the provision of services to the settlement that would cause a claim for expropriation or constitutional damages.**” (s103)*
 - *“In my view therefore, **the provision of services would not materially alter the municipality’s position if a case such as Modderklip or Fischer were brought against it.**” (s104)*
- In respect of deprivation:
 - *“That being said however, **any deprivation suffered by a property owner would appear to me to arise primarily from the occupation of the land itself not the provision of services to it.** As such, the impact of any deprivation would need to be determined with reference to the actual conditions on the site. It is in my view more than a little artificial to suggest that for example erecting electricity pylons and running safe electricity across the property would amount to a significant deprivation in and of itself.” (s108)*
- In respect of whether suitable provisions are already in place:
 - *“It follows from the exposition above that there is in my view at present no power or mechanism in the extant legislation which either provides [the Municipality] with the general servitude of the*

² I express no view as to whether the expropriation order in *Fischer* was proper given the principles articulated in *Modderklip*.

nature they require or a framework within which eThekweni can fulfil its constitutional mandate in the circumstances under consideration.” (s183)

- **“It follows then that it will be necessary for eThekweni to enact a new bylaw to fill these lacunae. It would in my view be wise if the new bylaw incorporated, either expressly or by reference, some of the existing provisions which apply in any event to the current situation because this conduces to clarity. I would also suggest that consultant consider incorporating in the bylaw provisions which would constitute adaptations of certain of the useful features in extant legislation to which I have referred above.” (s184)**
- In respect of statutory servitudes and related notices:
 - **“The creation of such a right by way of statutory servitude would need to be exercised respectfully and with due caution which includes:... selecting the premises upon which services are to be installed in a civil and reasonable manner; ...giving reasonable notice to the owner of the property; ...determining access to the property in consultation with the owner; ...the payment of compensation in the event that the exercise of the servitudinal rights amounts to a deprivation of property as envisaged in section 25 of the Constitution;... where disputes arise either regarding the manner of exercising the rights or the extension of compensation payable these must be determined before eThekweni may lawfully have access to the property” (s218).**
 - **“In order to ensure the constitutionality of a fit for purpose bylaw, the bylaw should include the following:**
 - (i) **The grant of a statutory servitude akin to that contained in section 22 of the ECA and section 12 of the KwaDukuza Municipality’s electricity bylaws**
 - (ii) **Provisions regarding how notice can be given and the relevant time periods which apply similar to section 328 of the Local Authorities Ordinance**
 - (iii) **Default provisions regulating how the rights accorded in terms of the statutory servitude will be exercised by eThekweni where notice has been given but the landowner has not responded;**
 - (iv) **Provisions creating a mechanism for the determination of disputes regarding access and compensation, possibly similar to section 10 of the KwaDukuza Electricity Supply bylaw which provides that differences will be determined by arbitration;**
 - (v) **Stipulations regarding the payment of compensation or otherwise;**
 - (vi) **A provision akin to section 24 of the ECA inclusive of section 24(2) which accords a right of the landowner to supervise the work being undertaken and an obligation on the person undertaking the work to pay all reasonable expenses incurred by such supervision;**
 - (vii) **Provisions providing that the infrastructure remains the property of the municipality, in the nature of those contained in section 23 of the Electricity Regulation Act and section 79 of the Water Services Act;”**
 - (viii) **An indemnification clause in the nature of that contained in section 122 of the draft Water Supply Bylaw.” (s220).**

5. Prescripts of SPLUMA w.r.t land use and spatial Planning

In terms of SPLUMA, municipalities are required to integrate informal settlements into their spatial systems and land use management. Incremental upgrading of informal areas receives special priority and principles of flexibility and incrementalism are emphasized. Municipalities are required to make provisions that permit the incremental introduction of land use management and regulation for “informal settlements,

slums and areas not previously subject to a land use scheme". The following extracts from SPLUMA are provided for reference purposes and to demonstrate the substantial emphasis on including informal settlements in an incremental and flexible fashion, amongst other things to enable the provision of services and more secure tenure (emphasis added):

- ▶ **Preamble:** "AND WHEREAS informal and traditional land use development processes are poorly integrated into formal systems of spatial planning and land use management".
- ▶ **Definitions:** "incremental upgrading of informal areas" means the progressive introduction of administration, management, engineering services and land tenure rights to an area that is established outside existing planning legislation, and may include any settlement or area under traditional tenure".
- ▶ **Development principles:** 7.(a) (ii) spatial development frameworks and policies at all spheres of government must address the inclusion of persons and areas that were previously excluded, with an emphasis on informal settlements, former homeland areas and areas characterized by widespread poverty and deprivation; (iv) "land use management systems must include all areas of a municipality and specifically include provisions that are flexible and appropriate for the management of disadvantaged areas, informal settlements and former homeland areas;"(v) "land development procedures must include provisions that accommodate access to secure tenure and the incremental upgrading of informal areas."
- ▶ **Preparation of spatial development frameworks:** 12. (1) (h) "include previously disadvantaged areas, areas under traditional leadership, rural areas, informal settlements, slums and land holdings of state-owned enterprises and government agencies and address their inclusion and integration into the spatial, economic, social and environmental objectives of the relevant sphere."
- ▶ **Content of municipal spatial development framework:** 21 (k) "identify the designation of areas in the municipality where incremental upgrading approaches to development and regulation will be applicable."
- ▶ **Land use scheme:** 24.1) "A municipality must, after public consultation, adopt and approve a single land use scheme for its entire area within five years from the commencement of this Act". The land use scheme adopted must amongst other things "include provisions that permit the incremental introduction of land use management and regulation in areas under traditional leadership, rural areas, informal settlements, slums and areas not previously subject to a land use scheme".
- ▶ **Amendment of land use scheme and rezoning:** 28. (1) "A municipality may amend its land use scheme by rezoning any land considered necessary by the municipality to achieve the development goals and objectives of the municipal spatial development framework. (2) Where a municipality intends to amend its land use scheme in terms of subsection (1), a public participation process must be undertaken to ensure that all affected parties have the opportunity to make representations on, object to and appeal the decision." (4) "Despite sections 35 and 41, any change to the land use scheme of a municipality affecting the scheme regulations setting out the procedures and conditions relating to the use and development of land in any zone in terms of section 25(2)(a) may only be authorized by the Municipal Council."

6. eThekweni Protocol for dealing with private land

On the basis of the above-mentioned legal opinions, eThekweni has developed an optimised approach or protocol for dealing with private land in advance of land acquisition. In terms of this protocol, the Municipality will continue to provide basic/essential municipal infrastructural services for informal settlements on private land in category B1 and B2 informal settlements in advance of land acquisition subject to:

1. **Settlements having been categorized** (which is complete).
2. **Categorisation having been reflected in the SDF** (which is complete).
3. **Notice having been served on landowner(s)**, a period for response given and any objections considered and noted (which is being implemented using an improved interim notice, with an updated notice to be utilised once the statutory servitude bylaw is in place).
4. **A land acquisition programme being in the process of establishment** (this is in progress with full documenting and possible refinement of the current approach required; land is currently being acquired as funding becomes available, and with full, conventional upgrades currently receiving the highest priority given the requirements of the formal housing subsidy programme regarding land ownership formal tenure; the rate of acquisition is however hampered by limited resources and guidance is also awaited from national government regarding possible changes regarding expropriation).
5. **A bylaw being under establishment** (this is in progress, specifically in the form of a bylaw for a statutory servitude which is already in draft form and which will hopefully be finalised during 2022/3 after which an updated notice to landowners will be utilised in terms of this new bylaw; a broader bylaw relating to temporary and incremental land use areas is also to be considered by the Municipality's Planning Unit as part of implementing the recently-adopted City-wide Incremental Upgrading Strategy).

It is emphasised that the Municipality already enjoys legal protection in terms of the legal opinion by Advocate Rosenberg SC (given that it is already complying with 1-6 above). The statutory bylaw, once in place, will add additional protection.

As noted, the development of incremental and temporary land use arrangements will commence soon following the mandates arising from the City-wide Strategy which was adopted by Council on 30th June 2022. Refer to section 8 for further details.

For category B1 settlements, consideration may be given at some point in the future to rates rebates for landowners once notices have been given and the 30-day notice period referred to below has elapsed (unless it can be shown that the landowner is directly deriving rentals from informal settlement residents). The reasons for consideration of possible rates rebates are as follows:

- the landowner typically no longer enjoys beneficial use of the land;
- the municipality has decided to upgrade the settlement over time and eventually acquire the land;
- land acquisition is being deferred to avoid delaying essential / emergency services provision;
- informal residents enjoy functional tenure security.

7. eThekwini City-wide Upgrading Strategy

On 30th June 2022, eThekwini's comprehensive and ground-breaking City-wide Incremental Upgrading Strategy and Programme Description was adopted by Council following a two-year process of strategy development. The Strategy was informed in part by the aforementioned legal opinions. This is the first Strategy of its kind in South Africa and it has received national acclaim. Amongst other things it addresses and articulates optimised approaches and arrangements relating to: city-wide planning based on categorisation of settlements (i.e. distinct developmental trajectories for settlements in different categories); spatial and land use planning; a differentiated pipeline planning and prioritisation framework; basic services provision including optimised solutions regarding sanitation, the installation of services frames and related partial re-blocking in best-located B1 settlements, solid waste management and fire management amongst others; land acquisition; tenure security; housing (including owner-driven, self-build); data management; coordination and partnerships; budget optimisation; operating and maintenance; managing future influx, settlement expansion and land invasions; livelihoods, job creation and the local economy; an action plan for implementation.

The Strategy will hopefully assist other Metros in developing similar strategies which are more effective, incremental, participative and city-wide in their orientation. The Strategy addresses a range of key innovations and also establishes mandates for key municipal line departments to take forward priority workflows necessary to enable effective implementation of the Strategy (e.g. relating to finalising incremental planning arrangements, alternative forms of individual tenure, optimised water and sanitation solutions, optimised solid-waste management solutions, differentiated pipeline planning etc.).

The Strategy was developed through a process of extensive engagement involving various Municipal line-Departments and with technical support provided by PPT via iQhaza Lethu and City Support Programme. It was also informed by extensive experience on prior pilot projects in eThekwini as well as by the National Programme Management Upgrading Toolkit of 2017 which forms part of the NUSP upgrading toolkits and which was developed by PPT for Cities Support with funding from the World Bank and which was informed by extensive research into local and international precedents, publications and experiences in respect of informal settlement upgrading.

8. eThekwini Incremental Planning framework

A framework for incremental planning and alternative tenure arrangements was developed as part of the City-wide Incremental Upgrading Strategy development process between 2019 and 2021. The related draft operating procedures form an annexure to the Strategy. The incremental planning arrangements are substantially informed by and in alignment with the above legal opinions. The framework enables all informal settlements to be included within municipal planning frameworks in an incremental manner (as required by SPLUMA). The framework addresses both spatial and land use planning. Amongst other things it addresses: categorisation (and related planning, servicing, land, tenure, building and social services approaches for each category); spatial planning; land-use planning and related norms; private land; notices to landowners; statutory servitudes and related bylaw; land acquisition; functional tenure security; social compacts.

As required by the Rosenberg Opinion, all informal settlements have been included as per their

categorisation Municipality's Spatial Development Framework (SDF). This was finalised early in 2022 for the 2022/23 SDF for the year commencing 01 July 2022. All settlements are now reflected as per their categorisation in the spatial plan of the SDF and there is inclusion in the related narrative report of related information including the description / definition of categorisation and main principles of incremental upgrading. This is a major achievement and a first in South Africa.

In terms of land use management, provision has been made for the development of incremental land use arrangements at three levels: incremental development areas at two levels (IDA1, IDA2) for incremental, in-situ upgrades (category B1 settlements) and a temporary development area (TDA) for deferred relocations (category B2 settlements). It is envisaged that incremental and temporary land use norms are to be upheld principally by means of social process and incentives as opposed to municipal regulation.

In addition to non-individual tenure security conferred via administrative recognition (as per settlement categorisation and inclusion in the SDF), alternative, locally-administered forms of individual tenure security have also been conceptualised for piloting (together with incremental planning arrangements). A preliminary framework has been developed for category B1 settlements consisting of a two-tier system along the following lines: a) possible municipal certificates of occupation (linked to a GPS point once IDA1 has been established); b) possible municipal tenure certificates once land has been acquired, re-blocking has occurred, site boundaries are definite and with the obligation that residents improve their structure, pay for services and adhere to other land use norms (e.g. responsible solid waste disposal).

**CONSULTANTS: THE PROJECT PREPARATION TRUST OF KZN AND
eTHEKWINI MUNICIPALITY**

**VARIOUS ISSUES RELATING TO INSTALLATION OF SERVICES AND
AMENITIES ON PRIVATELY HELD LAND**

O P I N I O N

S P ROSENBERG SC

Furnished to:

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Introduction

1. The Project Preparation Trust of KZN (PPT) and the eThekweni Municipality (eThekweni) jointly seek advice on the following:
 - 1.1. The powers of and obligations resting on local government to invest in the provision of essential municipal infrastructure services for residents of informal settlements on land which the local authority does not own (although, in some instances, it may opt to purchase the land or some portion thereof at a point in the future);
 - 1.2. A local authority's powers and obligations to finance or construct infrastructure improvements for early childhood development (ECD) at centres which are not owned by the local authority and where there may be no formal land tenure;
 - 1.3. The possibility of establishing appropriate zonings or overlay zonings in the eThekweni zoning scheme and/or layers in the spatial development framework, to facilitate incremental upgradings of informal settlements, particularly with a view to dealing with informally settled land which the local authority does not own;
 - 1.4. The extent to which reblocking, that is opening up appropriate access routes through informal settlements, and owner-driven improvements of shacks in order to address health and safety threats (amongst other things) may be dealt with as part of any proposed incremental upgrading process;

- 1.5. Certain further and related questions raised by eThekwini, including a consideration of eThekwini's existing notices to land owners.
2. In addressing these issues, I have faced certain unavoidable time constraints and this advice has had to be prepared within a relatively short period of time. In the result, there are matters addressed in this opinion which are not as comprehensively dealt with as would otherwise have been the case.
3. It is helpful to deal briefly with the context and key challenges in this regard, which have been usefully set out in the briefing document furnished to me by PPT.
4. Incremental, participative upgrading of informal settlements is national policy in South Africa. Amongst the main constraints faced in this regard are land ownership and land use restrictions. Many informal settlements are located on land not owned by the local authority and frequently they are well-established, with no alternative land being readily available. *In situ* upgrading is in many cases contemplated, when funding and resources permit. In other cases, although relocation is contemplated, this may not be achievable in the short to the medium term.
5. In this environment, local authorities not uncommonly provide a range of essential services on land not owned by them. This may occur by arrangement with the owner, where this can be done.
6. Processes for land acquisition and the requirements of spatial planning, land use and environmental legislation are generally exacting and time consuming

and necessarily lag the time frames necessary for intervention and supply of essential services.

7. I am advised that local authorities are required to categorise informal settlements within their jurisdiction, in respect of their developmental pathway. This is a requirement of the National Department of Human Settlements through its National Upgrading Support Programme (and in KwaZulu-Natal, the 2011 upgrading strategy of the KZN Department of Human Settlements). The categorisation framework broadly is as follows:

- Full upgrading (category A settlements), consisting of full services, top structures and formal tenure;
- Incremental in-situ upgrades (category B1 settlements) with interim basic services, leading to eventual formalisation or other permanent solution, where informal settlement sites are viable and settlements are viewed as being permanent, but where full upgrading is not imminent;
- Emergency basic services (category B2 settlements) for informal settlements areas where neither full nor incremental upgrading are viable or appropriate but where relocation is not immediately possible (i.e. a deferred relocation);
- Imminent relocations (category C settlements), being a last resort for settlements where there are urgent health or safety threats which cannot be mitigated and an alternative relocation destination is available.

8. Accordingly, and for the most part, local authorities will be aware which informal settlements are permanent and need to be fully incorporated on an incremental basis, and which settlements need to be treated as temporary or transitional.
9. Essential municipal services may conveniently be categorised as municipal infrastructure services, municipal operational services, and municipal social services. The principal focus of this advice is on essential infrastructure services and on ECD upgrades and improvements which in the main are of an infrastructural character.

The first issue: eThekweni's legal competence to install services on land not owned by it, and in particular private land

10. The question of land ownership here relates for the most part to privately held land. As to state-owned land, in terms of s 40(1) of the Constitution government is constituted as national, provincial and local spheres of government which are distinctive, interdependent and interrelated. In terms of s 40(2) all spheres of government must observe and adhere to the principles of co-operative government outlined in chapter 3 of the Constitution. Accordingly, state-owned land may be held either by national government, provincial government, or a local authority.
11. The issues raised in my instructions do not, for the most part, present themselves in the context of state-owned land. This is so because questions of property rights, expropriation and arbitrary deprivation of property do not arise in the context of state-owned land where such obstacles as they may be are of an administrative character (i.e. how the state-owned land is held and

how it may be transferred between spheres of government) rather than of a legal character.

12. It should be noted, however, that the mechanisms which are proposed to address incremental upgrading challenges, namely a by-law and the introduction of appropriate zones and/or planning layers catering for the incremental upgrading of informal settlements, will find equal application to private and state-owned land. First, the by-law will be directed at the effective administration of a matter which eThekweni has the right to administer (irrespective of whether the land is private or state-owned). Second, state-owned land is like any other land also subject to the provisions of the Spatial Planning and Land Use Management Act 16 of 2013 (SPLUMA) including those pertaining to a zoning scheme (see s 26(1)(a) and spatial development frameworks (SDFs) (see s 7(s)(iii))).
13. Aside from land directly held by the state, certain of the state-owned enterprises and in particular Transnet, have substantial land holdings. Here too particular challenges may arise, but the questions which present in respect of land held by state-owned enterprises have much in common with those arising in respect of privately owned land. For this reason and unless the context requires otherwise, eThekweni's legal competence to install essential services on private land will be addressed, this being the essence of the first issue as presented in my instructions.
14. At the outset, it must be noted that it is fundamental to the constitutional order that the spheres of government may exercise no power or perform any function

beyond that which is conferred by law. Hence, the question whether eThekweni has the power to install services on private land depends on whether it has the power to do so under the Constitution or by legislation.

15. Under the Constitution a local authority's position is very different to what it was in the pre-constitutional order. As pointed out by Cameron JA in CDA Boerdery (Edms) Bpk and Others v The Nelson Mandela Metropolitan Municipality and Others¹, under the pre-constitutional dispensation municipalities owed their existence to and derived their powers from provincial ordinances. Those ordinances were passed by provincial legislatures which themselves had limited law making authority, conferred on them and circumscribed by parliamentary legislation. Municipalities were at the bottom of a hierarchy of law making power: constitutionally unrecognised and unprotected, they were by their very nature *'subordinate members of the government vested with prescribed, controlled governmental powers'*.
16. Under the constitutional dispensation, local government derives its legislative and executive powers from the Constitution. It has original powers, listed in Schedule 4B and Schedule 5B of the Constitution. As pointed out by the Constitutional Court in City of Cape Town v Robertson:²

'A municipality under the Constitution is not a mere creature of statute otherwise moribund save if imbued with power by provincial or national legislation. A municipality enjoys "original" and constitutionally

¹ 2007 (4) SA 276 (SCA) at para [33]

² 2005 (3) BCLR 199 (CC) at para [60]

entrenched powers, functions, rights and duties that may be qualified or constrained by law and only to the extent that the Constitution permits.'

17. In terms of s 151(3) of the Constitution and s 4(1)(a) of the Local Government: Municipal Systems Act 32 of 2000 ('the Systems Act') a local authority has the right to govern, on its own initiative, the local government affairs of its community, subject to national and provincial legislation as provided for in the Constitution. In terms of s 8(1) of the Systems Act a local authority has all the functions and powers conferred by or assigned to it in terms of the Constitution, while in terms of s 8(2) it has the right to do anything reasonably necessary for, or incidental to, the effective performance of its functions and the exercise of its powers.
18. Section 11(3) of the Systems Act vests legislative or executive authority in local authorities to perform a number of functions, including '*developing and adopting policies, plans, strategies and programmes, including setting targets for delivery*';³ the '*promoting and undertaking [of] development*';⁴ the implementation of '*applicable national and provincial legislation*', as well as bylaws;⁵ the preparation, approval and implementation of budgets;⁶ the imposition and recovery of '*rates, taxes, levies, duties, service fees and surcharges on fees...*';⁷ and the doing of '*anything else within its legislative and executive competence*'.⁸

³ Section 11(3)(a)

⁴ Section 11(3)(b)

⁵ Section 11(3)(e)

⁶ Section 11(3)(h)

⁷ Section 11(3)(i)

⁸ Section 11(3)(n)

19. Section 156(1) of the Constitution provides that a local authority has executive authority in respect of, and has the right to administer the local government matters listed in part B of Schedule 4 and part B of Schedule 5, as well as any other matter assigned to it by national or provincial legislation. Section 156(5) provides that a local authority has the right to exercise any power concerning a matter reasonably necessary for, or incidental to, the effective performance of its functions.
20. In the context of the constitutional powers of a local authority regard must be had to the objects of local government as set out in s 152 of the Constitution, and the development duties of municipalities as set out in s 153 of the Constitution. Local government objects include ensuring the provision of services to communities in a sustainable manner, the promotion of social and economic development and the promotion of a safe and healthy environment.
21. As far as development planning and performance are concerned, s 153 of the Constitution requires a local authority to structure and manage its administration and budgeting and planning processes *inter alia* to give priority to the basic needs of the community, and to promote the social and economic development of the community.
22. In terms of s 23(1) of the Systems Act a local authority must undertake developmentally-oriented planning so as to ensure that it strives to achieve the objects of local government set out in s 152 of the Constitution and gives effect to its development duties as required by s 153 of the Constitution. Core components of an integrated development plan include a municipal council's

vision for the long term development of the local authority with special emphasis on the local authority's most critical development and internal transformation needs, an assessment of the existing level of development in the local authority (which must include an identification of communities which do not have access to basic municipal services), the council's development priorities and objectives for its elected term, including its local economic development aims and its internal transformation needs, and the council's development strategies.

23. Turning to the question of municipal services, one of the constitutional objectives of local government is to ensure the provision of services to communities in a sustainable manner.⁹ Schedules 4B and 5B of the Constitution contain a list of 38 functional areas that delineate the scope of services which a local authority may deliver. Schedule 4B includes 'childcare facilities', 'electricity and gas reticulation', 'stormwater management systems in built-up areas', and 'water and sanitation services limited to potable water supply systems and domestic waste - water and sewage disposal systems'. Schedule 5B includes 'cleansing', 'local amenities' and 'refuse removal, refuse dumps and solid waste disposal'.
24. Section 73(1) of the Systems Act sets out the duties of local government, which include ensuring that *'all members of the local community have access to at least the minimum level of basic municipal services'*.

⁹ See s 152(1)(b) of the Constitution and *Beja and Others v Premier of the Western Cape and Others* 2011 (10) BCLR 1077 (WCC) at para [142]

25. In Mkontwana v Nelson Mandela Metropolitan Municipality and Another 2005 (1) SA 530 (CC)¹⁰ Yacoob J held that ‘Municipalities are obliged to provide water and electricity to the residents in their area as a matter of public duty’. In Joseph and Others v City of Johannesburg and Others 2010 (4) SA 55 (CC) Skweyiya J affirmed this dictum, stating that:

‘The provision of basic municipal services is a cardinal function, if not the most important function, of every municipal government. The central mandate of local government is to develop a service delivery capacity in order to meet the basic needs of all inhabitants of South Africa, irrespective of whether or not they have a contractual relationship with the relevant public-service provider. The respondents accepted that the provision of electricity is one of those services that local government is required to provide. Indeed they could not have contended otherwise.’

26. What is clear is that the constitutional and statutory scheme provides for a broad sweep of municipal services, with municipalities being under an obligation to provide, as best they can, for these services. In the nature of things services may range from being urgent and essential on the one hand (for example, provision of water and electricity) to services which may be regarded as less of an acute priority. In my view, the general constitutional duty to render these services is imposed upon local government regardless of the identity of

¹⁰ Mkontwana v Nelson Mandela Metropolitan Municipality and Another Bissett and Others v Buffalo City Municipality and Others; Transfer Rights Action Campaign and Others v MEC, Local Government and Housing, Gauteng, and Others (KwaZulu-Natal Law Society and Msunduzi Municipality as Amici Curiae) 2005 (1) SA 530 (CC) at paragraph 38

the landowner, and subject only to the limitations of the legislative and regulatory framework for local government, elaborated upon below.

The Municipal Systems Act

27. In addition to the provisions referred to above, s 4(2) (d) and (f) of the Systems Act require local government within a local authority's financial and administrative capacity and having regard to practical considerations, to-

- '(d) strive to ensure that municipal services are provided to the local community in a financially and environmentally sustainable manner;...*
- (f) give members of the local community equitable access to the municipal services to which they are entitled.'*

28. In the same vein, s 73(2) of the Systems Act provides as follows:

- '(2) Municipal services must-*
- (a) be equitable and accessible;*
- (b) be provided in a manner that is conducive to-*
 - (i) the prudent, economic, efficient and effective use of available resources; and*
 - (ii) the improvement of standards of quality over time;*
- (c) be financially sustainable;*
- (d) be environmentally sustainable; and*
- (e) be regularly reviewed with a view to upgrading, extension and improvement.'*

29. These provisions make it plain that a local authority's obligations to provide municipal services are subject to reasonable capacity restraints. In this regard (and in the context of the right of access to adequate housing), the Supreme Court of Appeal noted as follows in City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another.¹¹

[1] Courts are increasingly being called upon to adjudicate disputes involving homeless persons, owners of land or buildings and local authorities. It was firmly established more than 15 years ago that the socio-economic rights enumerated in our Constitution are justiciable. The adjudication of the right of access to adequate housing more often than not presents intractable problems. The challenge is to forge a coherent jurisprudence.

[2] The right of access to adequate housing cannot be seen in isolation. It has to be seen in the light of its close relationship with other socio-economic rights, all read together in the setting of the Constitution as a whole. It is irrefutable that the State is obliged to take positive action to meet the needs of those living in extreme conditions of poverty, homelessness or intolerably inadequate housing. What is in dispute in the present case, as is frequently the case in disputes concerning housing, is the extent of the State's obligation in this regard. This usually telescopes into an enquiry concerning the State's resources to meet its constitutional obligations. That issue, amongst others, has come sharply into focus in this case. As stated in Government of the Republic of South

¹¹ 2011 (4) SA 337 (SCA)

*Africa and Others v Grootboom and Others, the precise form of the State's obligation to provide housing depends on the context within which the right is asserted by an aggrieved citizen.*¹²

30. In *Nokotyana v Ekurhuleni Metro Municipality* 2010 (4) BCLR 312 (CC) the Constitutional Court relied on the above provisions of the Systems Act to deny a claim made by the residents of an informal settlement for basic services including a toilet per household and high mast street lighting for the area, pending the decision of the MEC in respect of a proposal made under the National Housing Code for the area to be upgraded to a formal settlement.
31. In the High Court the municipality had accepted its obligation to provide water taps and refuse removal services and based on this attitude the court had ordered it to provide these basic services immediately.
32. During the hearing the municipality presented its new policy, for the supply of one chemical toilet per every ten families, which the applicants considered to be unreasonable. The court did not pronounce upon the reasonableness of the policy as these issues had not been canvassed in the court below.
33. However, the court considered an offer which was made by the MEC and director general to assist the municipality with the necessary finances to provide one chemical toilet per four families, which was made on the basis that the position of the community was exceptional and unique, given the delay of three years in determining the upgrade application. The municipality was opposed

¹² Paras [1] and [2]

to the offer as it was of the view that it would amount to discrimination against the many other similarly situated communities under its jurisdiction.

34. While the Constitutional Court was tempted to order the municipality to accept the provincial assistance, in order to improve the standard of the lives of the applicants (by describing their situation as exceptional and unique), it ultimately declined to do so. It reasoned that as there were 110 other similar informal settlements within its area of jurisdiction, and another 16 cases where the province had delayed taking a decision on an application for upgrading, it would not be just and equitable to make an order that would only benefit those who approach a court and cause sufficient embarrassment to provincial and national authorities to motivate them to make such a once-off offer.

35. Given the provisions of the Systems Act and the ratio of *Nokotyana* it appears that for present purposes:

35.1. There is no absolute obligation imposed on municipalities to provide municipal services – they must be provided in a financially and environmentally sustainable manner, which makes effective use of municipal resources;

35.2. Where the provision of municipal services, and in particular incremental services, are not financially or environmentally sustainable, i.e. where the cost of providing such services would be wasted (for example because the eviction of the community or an upgrade of the settlement is imminent) or the costs are prohibitive (for example because the settlement is on unsuitable land) or not environmentally sustainable (for

example where a settlement is on a detention pond or in a very low lying area which will be flooded in winter) and will detract from services being provided more generally to the local community in a financially and environmentally sustainable manner, the municipality is not required to provide such services. This principle is also consistent with the provisions of the MFMA which prohibit fruitless and wasteful expenditure i.e. expenditure made in vain which could have been avoided had reasonable care been exercised;

- 35.3. where the municipality does provide such services, they must be provided on a progressive and equitable basis to all similarly placed communities.
36. In principle, the constitutional and statutory framework which has been outlined above and which pertains to local government permits the installation of essential services for informal settlements, where there is an urgent need for such services, in the case of privately-owned land.
37. This must, however, be seen in context. In particular, the nature of required and appropriate municipal interventions will depend on the categorisation of the informal settlement in question. A central factor determining the nature and extent of a local authority's service delivery obligations in this regard is whether or not the informal settlement is to be regarded as permanent in character or whether (stated differently) there is no prospect of relocation of the informal settlement in the medium term.

38. I am instructed that the bulk of the 500 or more informal settlements in eThekweni fall within this category, where eThekweni recognises the permanent character of the settlements and presumably accepts a consequent duty to expropriate the privately owned land in question as and when this can be done. It is in this context that the problem presents itself: while the processes required for acquiring privately held property are cumbersome, slow and potentially expensive, there are municipal service delivery obligations which cannot be deferred while land acquisition processes take their slow course.
39. It is necessary here to have regard both to the provisions of s 25 of the Constitution, being the property clause, as well as certain of the provisions in SPLUMA which address the incremental upgrading of informal areas. The latter provisions are dealt with first.

The relevant provisions of SPLUMA dealing with incremental upgrading

40. The preamble to SPLUMA records that informal and traditional land use development processes are poorly integrated into formal systems of spatial planning and land use management. Section 7 which sets out the SPLUMA development principles takes up this theme, in providing in s 7(a)(ii) that spatial development frameworks and policies at all spheres of government must address the inclusion of persons in the areas that were previously excluded, with an emphasis on informal settlements, former homeland areas and areas characterised by widespread poverty and deprivation.
41. Section 7(a)(iv) provides that land use management systems must include all areas of a municipality and specifically include provisions that are flexible and

appropriate for the management of disadvantaged areas, informal settlements and former homeland areas. Section 7(a)(v) provides that land development procedures must include provisions that accommodate access to secure tenure and the incremental upgrading of informal areas.

42. Incremental upgrading of informal areas is defined in s 1 as meaning the progressive introduction of administration, management, engineering services and land tenure rights to an area that is established outside existing planning legislation, and may include any settlement or area under traditional tenure.
43. Section 12 deals with the preparation of spatial development frameworks. Section 12(1)(h) provides that spatial development frameworks must include previously disadvantaged areas, areas under traditional leadership, rural areas, informal settlements, slums and land holdings of state-owned enterprises and government agencies and address their inclusion and integration into the spatial, economic, social and environmental objectives of the relevant sphere. Section 21(k) which deals with the content of a municipal spatial development framework provides that such a framework must identify the designation of areas in the municipality where incremental upgrading approaches to development and regulation will be applicable.
44. Section 24 deals with zoning schemes, with s 24(2)(c) providing that a land use scheme must include provisions that permit the incremental introduction of land use management and regulation in areas under traditional leadership, rural areas, informal settlements, slums and areas not previously subject to a land use scheme. In terms of s 28(1) a municipality may amend its land use scheme

by rezoning any land considered necessary by the municipality to achieve the development goals and objectives of the municipal spatial development framework.

Section 25 of the Constitution – the property clause

45. Section 25 of the Constitution provides in relevant part as follows:

‘25. Property

- (1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.*
- (2) Property may be expropriated only in terms of law of general application-*
 - (a) for a public purpose or in the public interest; and*
 - (b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.*
- (8) No provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of section 36 (1).’*

46. Sections 25(1), (2) and (3) protect property rights, and in particular the right not to be arbitrarily deprived of property, and the right for property not to be

expropriated without just and equitable compensation, determined by agreement or approved by the court.

47. The distinction between property deprivation and expropriation of property is foundational to s 25. A deprivation of property is permissible if it is in terms of a law of general application, provided it is not an arbitrary deprivation. Expropriation is permitted only for a public purpose or in the public interest and must be subject to compensation, as agreed or determined by a court.
48. Whilst every expropriation will also be a deprivation, not every deprivation will amount to an expropriation.
49. The Constitutional Court has followed the approach that an expropriation '*involves acquisition of rights in property by a public authority*'.¹³
50. Reflect-All 1025 CC v MEC for Public Transport, Gauteng 2009 (6) SA 391 (CC) dealt with whether s 10(3) of the Gauteng Transport Infrastructure Act 8 of 2001, which had the effect of preventing an owner from laying services over or below a portion of the land in issue or changing the land use, amounted to an expropriation of the property concerned. Nkabinde J held as follows:

'Although it is trite that the Constitution and its attendant reform legislation must be interpreted purposively, courts should be cautious not to extend the meaning of expropriation to situations where the deprivation does not have the effect of the property being acquired by the State. It must be emphasised that s 10(3) does not transfer rights to

¹³ See Harksen v Lane N.O and Others 1998 (1) SA 300 (CC) at [33]

the State. What it does is this: it deprives the landowner of rights to exploit the affected part of the land within the road reserve and thus protects part of the planning process which has economic value and is in the long run in the public interest. Remarkably, while the applicants accepted the distinction drawn by the court in Harksen, they nevertheless contended that s 10(3), read with ss 8 and 9 of the Infrastructure Act, enables the State to 'acquire' land for the construction of public roads. As I have said, the State has not acquired the applicants' land as envisaged in ss 25(2) and 25(3) of the Constitution. For that reason, no compensation need be paid.

[65] I emphasise that the effect of either s 10(1) or s 10(3) does not, in my view, amount to expropriation. The Supreme Court of Appeal correctly stated in Steinberg, a case I find instructive, that a determination of claims under ss 25(2) and 25(3) does give rise to complex and difficult problems. Cloete AJA considered the possibility that there may be room to develop a narrow doctrine of constructive expropriation for the South African context, especially in cases where a public body utilises its power to regulate private property so excessively that it may be characterised as expropriation, in other words, when the regulation in a particular case goes too far. I am not sure whether this would be appropriate in our constitutional order. This in any event is not such a case. If regulation in cases such as the present were to be characterised as amounting to expropriation, government would be crippled in discharging its

obligations in regulating the use of private property for public good.'

(footnotes omitted)

51. When a local authority installs services on private land, there is no transfer of rights to the State, and thus it follows that it does not constitute an expropriation or give rise to a right to compensation under the Constitution. Both the Supreme Court of Appeal and the Constitutional Court have left open the question whether the concept of a constructive expropriation forms part of our law. However, I do not consider it necessary to consider that aspect any further herein.¹⁴
52. The Constitutional Court has held that not every interference with property rights constitutes a deprivation. *'Whether there has been a deprivation depends on the extent of the interference with or limitation of use, enjoyment or exploitation At the very least, substantial interference or limitation that goes beyond the normal restrictions on property use or enjoyment found in an open and democratic society would amount to deprivation.'*¹⁵
53. The provision of services is part of eThekweni's constitutional and statutory obligations and would constitute a normal restriction on property use or enjoyment as found in open and democratic societies. This would not in the ordinary course constitute a deprivation of property rights.

¹⁴ See *Steinberg v South Peninsula Municipality* 2001 (4) SA 1243 (SCA); *Reflect-All* (supra) and *Minister of Minerals & Energy v Agri SA* 2012 (5) SA 1 (SCA)

¹⁵ *Mkontwana v Nelson Mandela Metropolitan Municipality and Another; Bissett and Others v Buffalo City Municipality and Others; Transfer Rights Action Campaign and Others v MEC, Local Government and Housing, Gauteng, and Others* 2005 (1) SA 530 (CC) para [32]

54. In *Reflect-All* at para [33], Nkabinde J also held that:

'the protection of the right to property is a fundamental human right, one which for decades was denied to the majority of our society. However, property rights in our new constitutional democracy are far from absolute; they are determined and afforded by law and can be limited to facilitate the achievement of important social purposes. Whilst the exploitation of property remains an important incident of land ownership, the State may regulate the use of private property in order to protect public welfare, eg planning and zoning regulation, but such regulation must not amount to arbitrary deprivation. The idea is not to protect private property from all State interference, but to safeguard it from illegitimate and unfair State interference.'

55. In my view, the actual installation of essential services on private property where the informal settlement is to be regarded as being of a permanent or long term character will probably not amount to a deprivation of property rights. However, assuming that notwithstanding the authority referred to above, there is a deprivation of property where services are installed contrary to an owner's will, the installation of such services will be in terms of the provisions of the Constitution and the obligations it places on local authorities, as well as any by-law enacted, both of which are a law of general application for the purposes of s 25.

56. Again, assuming that there is a deprivation, the question then remaining is whether the installation is 'arbitrary', which means 'without sufficient reason'. In

First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance 2002 (4) SA 768 (CC) at [100], the Constitutional Court held that sufficient reason was to be established as follows:

[100] Having regard to what has gone before, it is concluded that a deprivation of property is 'arbitrary' as meant by s 25 when the 'law' referred to in s 25(1) does not provide sufficient reason for the particular deprivation in question or is procedurally unfair. Sufficient reason is to be established as follows:

- (a) It is to be determined by evaluating the relationship between means employed, namely the deprivation in question and ends sought to be achieved, namely the purpose of the law in question.*
- (b) A complexity of relationships has to be considered.*
- (c) In evaluating the deprivation in question, regard must be had to the relationship between the purpose for the deprivation and the person whose property is affected.*
- (d) In addition, regard must be had to the relationship between the purpose of the deprivation and the nature of the property as well as the extent of the deprivation in respect of such property.*
- (e) Generally speaking, where the property in question is ownership of land or a corporeal moveable, a more compelling purpose will have to be established in order for the depriving law to constitute sufficient reason for the deprivation than in the case when the property is something different and the property right something less extensive. This judgment is not concerned at all with*

incorporeal property.

- (f) *Generally speaking, when the deprivation in question embraces all the incidents of ownership, the purpose for the deprivation will have to be more compelling than when the deprivation embraces only some incidents of ownership and those incidents only partially.*
- (g) *Depending on such interplay between variable means and ends, the nature of the property in question and the extent of its deprivation, there may be circumstances when sufficient reason is established by, in effect, no more than a mere rational relationship between means and ends; in others this might only be established by a proportionality evaluation closer to that required by s 36(1) of the Constitution.*
- (h) *Whether there is sufficient reason to warrant the deprivation is a matter to be decided on all the relevant facts of each particular case, always bearing in mind that the enquiry is concerned with 'arbitrary' in relation to the deprivation of property under s 25.'*

57. As was explained in the *Reflect-All* case:

'The applicability of these considerations depends on the facts and circumstances of each case. Central to the arbitrariness enquiry is the relationship between the law in question, the ends it seeks to achieve and the impact restrictions have on the use and enjoyment of property. In some instances a deprivation will escape arbitrariness if a rational connection between the means adopted and the ends sought to be

*achieved is present. In other instances, however, the means adopted will have to be proportional to the ends in order to justify the deprivation in question. Marginal deprivations of property will ordinarily not be arbitrary if they are rationally connected to a legitimate purpose. More severe deprivations will ordinarily have to be shown to be proportionate. In this case, the deprivations are sufficiently serious to require a proportionality analysis.*¹⁶

58. The court accepted that marginal deprivations of property will ordinarily not be arbitrary if they are rationally connected to a legitimate purpose. More severe deprivations will have to be shown to be proportionate.

59. eThekweni will be installing services in order to comply with its constitutional obligations, on the understanding that such an obligation pertains to all persons regardless of the identity of the landowner in question. The decision to install services in such circumstances serves a legitimate purpose and cannot have been 'without sufficient reason', and therefore be arbitrary.

60. In relation to proportionality, the test was stated as follows in *Reflect-All*:

*'In determining that, a court must have due regard to the purpose of the law in question, the nature of the property involved, the extent of the deprivation and the question whether there are less restrictive means available to achieve the purpose in question.'*¹⁷

¹⁶ At paragraph 49

¹⁷ At para [49]

61. In my opinion, the deprivation would be proportional. The purpose of the constitutional obligation placed on local government to render services is to promote the public interest and socio-economic development and the other objectives of local government which have been referred to above. Given that the private property is already occupied and cannot be used by the owner for its intended purpose in the medium to long term, the extent of any further deprivation is limited. The installation of services does not remove the right to use and enjoy the property. That has been forfeited as long as the land is occupied.
62. Finally, there do not appear to be less restrictive means available to eThekweni, given that the community in question is unlikely to be moved from the property and the only alternative is not to provide the services, thereby creating a health hazard and all the other attendant consequences of having no services. In my view the deprivation is tailored to the legitimate governmental purpose which it seeks to serve and is thus proportionate.
63. In the result, it cannot be said that eThekweni's installing of services, contrary to an owner's wishes, constitutes an arbitrary deprivation of property or that it amounts to an expropriation. No compensation is required, nor is the registration of a servitude.
64. However, this does not mean that eThekweni can take the law into its own hands. Action by eThekweni must be properly authorised by law. While, as pointed out, eThekweni will be acting in terms of the provisions of the Constitution and the obligations it places on local authorities, the enactment of

a by-law will provide the necessary statutory framework and regulation for the provision of essential services for informal settlements located on private property. The by-law is dealt with further in a later section of this advice.

65. The consultant has raised the question of local authority intervention for the purposes of incremental upgrading, in advance of the promulgation of a by-law. The purpose of the by-law is to establish an appropriate statutory framework regulating and governing the circumstances and process of the intervention. However, the municipality's duties and obligations in this context are derived from the Constitution and not from a by-law and the enactment of a by-law is not a prerequisite for a local authority to take action, where circumstances require it.
66. However, a general word of caution is necessary in the context of local authority intervention. In Motswagae and Others v Rustenburg Local Municipality and Another 2013 (2) SA 613 (CC) the Constitutional Court warned as follows:

'[14] The municipality's defence is that it has a servitudinal right to enter property to perform work related to the provision of public services. The argument that a municipality can lawfully enter upon property on which a home is situated to carry out its duty, absent urgency or other exceptional circumstances, in the face of the objection of the home occupier without a court order is just wrong. For one thing, the common law requires that a servitude be exercised civiliter modo, that is, respectfully and with due caution. Patently this would not include non-consensual bulldozing. Indeed, it would be no more than the sanctioning

of self-help and the encouragement of the municipality to take the law into its own hands. Our society is based on the rule of law and the rule of law does not authorise self-help. There is little difference between a municipality forcibly entering upon a property to do its work and a person forcibly extracting a debt from another. Indeed, the municipality as an organ of state has the duty to protect its citizens in their homes rather than to invade their homes.'

67. Accordingly, while the existence of a by-law is not a necessary prerequisite for eThekweni to act where urgent intervention is required, s 156(2) of the Constitution does contemplate the promulgation of by-laws by a municipality for the effective administration of matters which it is required to administer.
68. Provided that eThekweni complies with the provisions of the contemplated by-law, the central elements of which I refer to below, including giving notice to the land-owner (and the affected community) and affording the owner an opportunity to comment, prior to the installation of services, it will not fall foul of *Motswagae*.

The obligation to expropriate where the informal settlement is regarded as being of a permanent character

69. The nature and extent of a local authority's obligations to provide services, and what services may be regarded as essential in the circumstances, will in large part be determined by the type of the informal settlement in question. In the case of informal settlements of a permanent character and where the provision of a broader range of essential services is accordingly justified, this would in

my view have to take place on the understanding that the local authority will in due course have to acquire the land, whether by expropriation or otherwise.

70. This does not mean that incremental upgrades cannot be undertaken without expropriation having first taken place. What it does mean, however, is that the provision of permanent infrastructural services on private property can in most instances only be justified where there is a recognition of the permanent status of the informal settlement and the consequent obligation on the local authority to acquire the land in due course.
71. This is so because if the land deprivation is of such a nature and scale that it in effect amounts to an expropriation, it is likely that a court will adopt the approach that what is in effect an expropriation should be approached as such, rather than being sanctioned as a lawful deprivation of property for which no compensation is payable.¹⁸

¹⁸ T Ngcukaitobi and M Bishop *The Constitutionality of Expropriation Without Compensation* provide a helpful analysis of the jurisprudence of the Constitutional Court in relation to arbitrary deprivations, as follows:

'First, there is both a substantive and a procedural component to the arbitrariness analysis. A deprivation is arbitrary "when the 'law' referred to in section 25(1) does not provide sufficient reason for the particular deprivation in question or is procedurally unfair".'

'Second, whether a deprivation is 'arbitrary' depends on an evaluation of the nature and extent of the deprivation, compared to the purpose of the deprivation. A deprivation of ownership of land will generally require a more compelling purpose than deprivation of lesser rights, in moveable or incorporeal property.'

'Third, the extent of the relationship between means and ends occurs on a sliding scale between mere rationality, and full proportionality. As Nkabinde J explained in Reflect-All:

"In some instances a deprivation will escape arbitrariness if a rational connection between the means adopted and the ends sought to be achieved is present. In other instances, however, the means adopted will have to be proportional to the ends in order to justify the deprivation in question. Marginal deprivations of property will ordinarily not be arbitrary if they are rationally connected to a legitimate purpose. More severe deprivations will ordinarily have to be shown to be proportionate."

'Fourth, a deprivation can be rendered non-arbitrary if some compensation – whether in money or in kind – is paid.'

Expropriation and compensation

72. There is a concern on the part of local authorities regarding the possible extent of liability for compensation in the event of expropriation. This question is not one which this advice is intended to address. Some limited comments may be of assistance, given the concerns articulated.
73. As pointed out, s 25(1) contemplates a loss of rights in land which does not amount to an expropriation. This constitutes a deprivation which must be in terms of law of general application, and must not be arbitrary. As to an expropriation, s 25(2) sets out three requirements. First, it must be in terms of the law of general application. Second, it must be for a public purpose or in the public interest. Third, compensation must be determined by agreement or it must be decided or approved by a court.
74. In terms of s 25(3) the amount of compensation must be just and equitable. In this regard, however, the Constitutional Court in *Du Toit*¹⁹ emphasised that s 25(3) does not give market value a central role:

‘Viewed in the context of our social and political history, questions of expropriation and compensation are matters of acute socio-economic concern and could not have been left to be determined solely by market forces.’²⁰

¹⁹ *Du Toit v Minister of Transport* 2006 (1) SA 297 (CC) at para [36]

²⁰ Para [37]. See further, *Uys NO and Another v Msiza and Others* 2018 (3) SA 440 (SCA). The Supreme Court of Appeal indicated that there was a two-stage approach to determining just and equitable compensation. First, market value of the property should be considered. Thereafter consideration must be given to whether that value should be adjusted up or down, in view of the remaining s 25(3) factors.

75. In *Du Toit Langa* ACJ went on to emphasise that the *'provisions of the property clause were carefully formulated to ensure that while protecting property on the one hand, the constitutional protection of property, important as it is, should not impede the important social and political purpose of land reform'*²¹ and that the calculation of compensation set out in s 25(3) requires that compensation reflect an equitable balance between the public interest and the interest of those affected. In so doing, the Constitution expressly avoided the approach to the calculation of compensation set out in the Expropriation Act, insisting upon a different approach which makes justice and equity paramount.²²

76. Section 25(8) of the Constitution is also of importance. It reads as follows:

'No provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of section 36 (1).'

77. The position with regard to compensation may be summarised as follows. First, if the property loss amounts to a deprivation, not an expropriation, justifiable in terms of s 25(1), no consideration of compensation arises. Second, in particular circumstances, expropriation without any compensation may be just and equitable under s 25(3). Of course, in a wider range of circumstances, expropriation with limited compensation falling short of the market value

²¹ Para [81]

²² Paras [83]-[84]

standard, is sanctioned by s 25(3). Finally, expropriation with no or very limited compensation may be justified by s 25(8), as a limitation of the rights in ss 25(1) and (3).

78. At present the question of expropriation without compensation, and whether or not s 25 of the Constitution requires to be amended in order to clarify the position in this regard, is the subject of parliamentary investigation and wide-ranging public debate and consultation. The legal position may well be altered in the future.

The enactment of an appropriate by-law

79. It is beyond the scope of the present advice to deal with the relevant statutory and policy framework in respect of the provision of particular services such as water, sanitation, waste management and electricity. Nor do I have available sufficient instructions regarding eThekweni's various by-laws in this regard.
80. If the example of the City of Cape Town (with whose legislative provisions in this regard I am more familiar) is anything to go by, it is likely that eThekweni's framework is materially premised upon a supply and demand contractual relationship with end users and which for the most part excludes (or at least does not deal with) the installation of services on privately owned land in the circumstances presently contemplated.
81. In these circumstances, the installation of basic services in informal settlements can best be dealt with in a separate by-law.

82. This by-law should be carefully tailored to address the situation of both semi-permanent and permanent informal settlements on private land, where essential municipal services are required because the removal of the occupiers is not contemplated in the short or medium term, and where eThekweni is not about to expropriate the land for settlement purposes.
83. The by-law should incorporate the following:
- The nature of the services which may be installed should be identified;
 - The criteria which must be satisfied before an informal settlement will be considered for such services;
 - A requirement that prior to the installation of services the owner of the property be given notice of eThekweni's intention and an opportunity to comment on the proposed services;
 - Ownership of or infrastructure and service connections installed on the property shall remain vested in eThekweni;
 - eThekweni be given a right of access to install and maintain the services on the property.
84. I have been furnished with a legal opinion dealing with the relevant provisions of the Local Authorities Ordinance 25 of 1974 (the ordinance) which may be implicated in eThekweni's incremental services programme. I have however been instructed not to deal with this opinion. Suffice it to say for present purposes that any consideration of the provisions of this ordinance must have

due regard to the fact that it is old order legislation, that under the Constitution a municipality's position is very different to what it was in the pre-constitutional order, and that under the constitutional dispensation, local government derives its legislative and executive powers from the Constitution and not from legislation such as the ordinance.

85. In short and as pointed out by Cameron JA in *CDA Boerdery*, the new constitutional order conferred a radically enhanced status on municipalities and the constitutional status of local government is materially different from the pre-constitutional era.²³
86. In these circumstances, and to the extent that any of the provisions of the ordinance may be construed as amounting to the prohibition of the installation of basic services without expropriation and compensation, this is at odds with the constitutional order and the enhanced status of municipalities, and to the extent necessary, must be regarded as having been impliedly repealed.²⁴
87. In any event, the framers of the ordinance would not appear to have contemplated the circumstances presently under consideration, and the system provided for in the ordinance is not designed for such purposes.

The second issue: Infrastructure improvements for ECD at existing centres

88. Schedule 4B of the Constitution includes childcare facilities amongst the functions, the effective performance of which is the responsibility of local

²³ Para [37]

²⁴ See para [44] of *CDA Boerdery*

government. Childcare facilities would on any reckoning include ECD and ECD centres.

89. The documents in my brief have been supplemented with additional material on ECD, and it will assist to set out some background in this regard.
90. I am advised that ECD is a Priority National Programme, in terms of the National Development Plan and the National ECD Policy. There are, so I understand, at least two million children in under-serviced communities in South Africa who lack access to adequate ECD care and education, and who frequently encounter a range of health and safety threats.
91. There are several hundred ECD centres in eThekweni within low income, under-serviced communities, including the more than 500 informal settlements. Most of these centres are under-resourced. Most are also on land which is not owned by either eThekweni or the ECD centres themselves. Generally, the land is not appropriately zoned or subdivided, and there are no approved building plans in terms of the provisions of the National Building Regulations and Building Standards Act 103 of 1977.
92. A key element of the strategic programme which has been adopted by eThekweni to incrementally upgrade informal settlements is the provision of essential social services such as ECD. The focus is mainly on infrastructure improvements, the purpose being first, to address health and safety threats facing young children and second, to enable centres to meet sufficient basic norms and standards to secure registration with the National Department of Social Development.

93. In many cases funding is provided to ECD centres by central government in terms of operational grants. Registration as a non-profit organisation with the Department of Social Development and the associated operational grants assist in improving the services which can be provided by ECD centres. Even where an ECD centre owner has capitalised the centre with personal funding, or where the centre does not meet all of the normal corporate governance requirements, the Department of Social Development often supports these community-based centres because of the essential services they provide.
94. Funding for ECD centres is also routinely provided by local authorities using municipal infrastructure funding such as the municipal infrastructure grant system or the integrated city development grant administered by the National Treasury. Generally, funding (both national and local authority) is not dependent upon the ECD centres being located on government owned land.
95. In short, the following would appear to be the relevant features of the funding of improvements for ECD at existing centres:
- 95.1. ECD is a local government matter in terms of part B of schedule 4 of the Constitution, and in the context of informal settlements ECD falls to be classified as an essential municipal (social) service.
- 95.2. There is well-established precedent for ECD funding, both at the national and local authority level, which is not dependent upon the ECD centre being located on government land.

- 95.3. Such funding may occur in circumstances where the ECD centres are mainly located on property where land tenure is uncertain or informal, and where appropriate zoning and building authorisation are absent.
96. I am of the view that the fact that the land may not be owned by eThekweni is of no particular significance in the context of eThekweni's power to allocate funds to the development or upgrade of ECD centres. The real question is whether the expenditure involved falls within the reach of the objects of local government and the development duties of local authorities, regard being had to the functional areas of local government executive competence which are listed in part B of schedule 4 and part B of schedule 5.
97. Section 67 of the MFMA is of significance in the present context. It deals with the transfer of funds to organisations and bodies outside government. Section 67(1) provides as follows:
- '(1) Before transferring funds of the municipality to an organisation or body outside any sphere of government otherwise than in compliance with a commercial or other business transaction, the accounting officer must be satisfied that the organisation or body-*
- (a) has the capacity and has agreed-*
- (i) to comply with any agreement with the municipality;*
- (ii) for the period of the agreement to comply with all reporting, financial management and auditing requirements as may be stipulated in the agreement;*

- (iii) to report at least monthly to the accounting officer on actual expenditure against such transfer; and*
- (iv) to submit its audited financial statements for its financial year to the accounting officer promptly;*
- (b) implements effective, efficient and transparent financial management and internal control systems to guard against fraud, theft and financial mismanagement; and*
- (c) has in respect of previous similar transfers complied with all the requirements of this section.'*

98. Section 67(1) could in my view be relied upon by eThekweni for transferring municipal funds to the operator of the ECD centre in terms of an agreement whereby the latter undertakes to construct the improvements in question and to comply with the other requirements of s 67(1). However, I am instructed that eThekweni mainly procures and builds the improvements for the centres – that is the basis upon which the various grants referred to above are administered.
99. Given that s 67(1) of the MFMA provides, for example, for the transferring of municipal funds to the operator of a ECD centre in terms of an agreement, it must be accepted (and it necessarily follows) that a local authority can itself cause the facilities to be constructed, by allocating funds for the conclusion of an ordinary building contract, to this end.
100. In the result, subject to ordinarily required compliance with the provisions of the MFMA, there is in my view no sound reason why a local authority may not invest funds in the development and upgrade of ECD centres.

101. I am instructed that eThekweni's ECD funding is at a modest level per centre, ranging from R50 000.00 to R250 000.00. This type of spend should be regarded and treated as an example of incremental upgrading of informal settlements, and may be justified on the same basis as other essential services, dealt with above.
102. It may be, in exceptional circumstances, that where major extensions or new builds are involved, consideration can be given to the conclusion of a notarial agreement with the registered owner, regulating the terms and conditions of the ECD use and development of the property. This would be the exception (particularly since, as the consultant has pointed out, there are a number of practical obstacles to following this course), and it is by no means a prerequisite for advancing funding.

The third issue: Establishment of an incremental developmental zone

103. A recurring problem facing local authorities dealing with informal settlements and necessary upgrades and interventions, is the obstacle of the zoning of the land. There are two measures which could be of assistance in this regard.
104. First, and as suggested by eThekweni, provision should be made in the relevant zoning scheme for a special incremental development zone or zones, designed to prescribe appropriate land use rights and limitations applicable to informal developments requiring to be upgraded or serviced. This is in line with what SPLUMA contemplates and requires.

105. By this means, the nature, extent, timing and trajectory of informal development interventions can be authorised and regulated by a local authority. Categories of informal settlement can be provided for, which in turn will determine whether full upgrading, interim basic services or emergency basic services are appropriately to be supplied.
106. Although not directly relevant to the issues under consideration, eThekweni should also give consideration (if this is not already provided for) to making provision in its zoning scheme to allow for limited departures from applicable zoning restrictions relating to a property, in circumstances of emergency and urgent need. This will assist where relocations are required and alternative relocation land is available, but is inappropriately zoned.
107. In principle, I do not consider that there is any obstacle to establishing such a zone or zones, although matters such as rezoning against an owner's objection and a notional loss of land value as a result of such a rezoning will have to be dealt with.
108. eThekweni should also give consideration to identifying the designation of areas in the municipality where incremental upgrading approaches to development and regulation will be possible. Section 21(k) of SPLUMA in terms requires a municipal spatial development framework to do so.
109. Section 12(2)(b) of SPLUMA provides that a spatial development framework must guide and inform the exercise of any discretion or of decision taken in terms of SPLUMA or any other law relating to land use and development of land by the sphere of government concerned. In terms of s 12(5) of SPLUMA, a

municipal spatial development framework must assist in integrating, co-ordinating, aligning and expressing development policies and plans emanating from the various sectors in the spheres of government as they apply within the municipal area. In terms of s 12(6), spatial development frameworks must outline specific arrangements for prioritising, mobilising, sequencing and implementing public and private infrastructural and land development investment in the priority spatial structuring areas identified in spatial development frameworks.

110. The designation in eThekweni's spatial development framework of areas where incremental upgrading approaches to development and regulation are to be applicable will serve to confer a planning status on the designated areas, and as a precursor to an envisaged or later rezoning of the land concerned.

The fourth issue: Reblocking and owner-driven improvements of shacks

111. The question raised under this issue is whether reblocking, that is a re-ordering of the layout of an informal settlement (or portions thereof) to open up access ways, and owner-driven improvements of shacks in order to address safety and health threats may form part of the incremental upgrading process as provided for in the contemplated by-law and the additional zoning or SDF planning designation.
112. This question must be addressed on the basis of the same principles which have been set out in dealing with the first two issues. The question in each case is whether the nature and extent of the incremental upgrade and the concomitant infringement of the land owner's property rights may be justified in the

particular circumstances. As pointed out, incremental upgrades which introduce infrastructure of a relatively wide-ranging and permanent character (for example, roadways and extending this to a reblocking process) could only be undertaken in the context of a permanently located informal settlement, and where the local authority accepts that it will have to acquire the land, through expropriation or otherwise.

113. The same principle holds good for owner-driven improvements of shacks, assuming that the local authority is involved in this process, whether through funding or otherwise.

The fifth issue: Various questions raised by eThekwini, including the formulation of the current notices to private land owners

114. I have been provided with copies of three notices used by eThekwini. Two of these are in terms of ss 225 and 229 of the ordinance. These have no bearing on the present matter. The third notice is one which is not given in terms of any particular provision of the ordinance or any other legislation. It is styled as being a notice of proposed incremental services to informal settlements. I suggest that such notice should as far as possible specify the services to be installed, and give the property owner an opportunity to comment on the proposed services. In addition, it should record that ownership of all infrastructure and service connections installed on the property shall vest in eThekwini, and that where necessary, the property owner shall afford eThekwini a right of access to install and maintain the services on the property.

115. The current notice includes a provision dealing with possible compensation. I suggest that the notice should go no further than recording that eThekweni will be assessing the need for compensation in the form of a property acquisition subject to the provisos contained in the last bullet point of the notice, alternatively a possible expropriation of the property.
116. As to eThekweni's risks or liability in relation to work being conducted on private property, the ordinary common law principles will continue to apply, as far as I can determine.
117. Insofar as the requirements of the MFMA are concerned, as well as an overview of the constitutional rights of property owners and local authorities are concerned, this has to the extent necessary and possible within the constraints of this advice, been dealt with above.
118. Turning to the question of the valuation and rating implications, the presence of what is in effect a permanent informal settlement on land zoned for other purposes will generally adversely affect the property's valuation and this in turn will affect the rating of the property. Clearly, if the property owner is obtaining no benefit from the land, which has effectively been given over for informal settlement, there is no justifiable ground for extracting or requiring payment of rates. As far as I can determine, these charges and consequences can be properly accommodated within the prevailing valuation and rating legislation.
119. eThekweni has also raised certain broad queries regarding how work on private property can be 'regularised' and the best way to deal with improvements which may be deemed to be immovable. As will be clear from what has been set out

above, there is no ready and short answer to questions of this nature, and much depends on the circumstances of each case. In my view, the most appropriate way to regularise or clarify the position in this regard would be for eThekweni to promulgate a by-law, as has been suggested.

120. Turning to the question of compliance with the MFMA, I have dealt with this, to the extent necessary. It is not however possible at this stage to conduct a full evaluation of the MFMA and the extent to which in various hypothetical scenarios there might be possible non-compliance. This is a technical area which can best be dealt with by eThekweni in consultation with the National or Provincial Treasury. In these circumstances, it would be a good idea for eThekweni to approach the National Treasury to raise the question of relief in terms of s 170 of the MFMA, to the extent that the National Treasury feels that this may be required.

121. I advise accordingly.

S P ROSENBERG SC

Chambers
Cape Town
31 October 2018

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EX PARTE: ETHEKWINI MUNICIPALITY

IN RE: PROVISION OF SERVICES ON PRIVATELY OWNED LAND

OPINION

A: COMPETING RIGHTS CREATING CHALLENGES FOR SERVICE DELIVERY

1. ETHEKWINI MUNICIPALITY seeks advice on how to discharge its Constitutional mandate¹ and obligation to provide basic electricity, water, sanitation and early childhood development services to its residents in a manner which is lawful and avoids challenge as far as possible when providing basic services to residents of informal settlements of a more or less permanent nature situate adjacent to or on privately owned land which has been occupied without the owner’s permission or consent.

2. The problem for the municipality is pressing. I am instructed that there are presently 553 informal settlements on private land within the municipality’s area of jurisdiction. I am further advised that there are roughly 500 structures per settlement in which the inhabitants of the informal settlements dwell.

¹ The Constitutional mandate of the municipality to provide such services is clear: *Mkontwana v Nelson Mandela Metropolitan Municipality* 2005 (1) SA 530 CC at [52] pre Yacoob J and [105] per O’Regan J. eThekwini has already an extensive opinion dealing with its obligations in terms of the Constitution and other legislation from Rosenberg SC. This makes it unnecessary to deal with the issue further, the focus is therefore how that mandate can be implemented and the obligations fulfilled.

3. The municipality's housing backlog exceeds 230 000 structures. The subsidies it receives from the province in order to discharge its housing obligations are sufficient only to enable it to construct 3 500 housing units per annum.
4. I am instructed that eThekweni does not have land of its own or access to land owned by other tiers of government to which these settlers could be relocated. Nor does the municipality have a sufficient budget or subsidy funds to consider expropriating the land on which the large informal settlements are situated.
5. eThekweni thus wishes to discharge its constitutional obligations by doing the following on privately owned land occupied by large numbers of informal settlers:
 - 5.1 lay pipes to provide water standpipes for potable water to the residents of the informal settlements and facilitate connection to the municipal sewage system;
 - 5.2 erect prefabricated containerised ablution blocks and utilise the connections to the municipal sewage system to provide basic sanitation;
 - 5.3 remove dangerous and illegal electricity connections;
 - 5.4 erect poles, stays and the necessary wiring to provide a proper and safe supply of electricity and lighting to the roads and common areas of the informal settlement;

- 5.5 construct basic roads where required to enable the access of vehicles and equipment to construct and erect the necessary infrastructure for provision of the services;
- 5.6 make safe buildings used in the settlements as early childhood development centres, which buildings are being utilised on a commercial basis for the provision of child minding services but the construction of the building in question has generally not been authorised by the municipality and in all likelihood no building plans for the structure exist at all.
6. The municipality is concerned to ensure that its actions would not be viewed as contravening the Local Government Municipal Finance Management Act 56 of 2003 (the MFMA). eThekweni's concern is to ensure that the expenditure cannot be characterised as "*wasteful and fruitless*" by virtue of the fact that the municipality would be using public funds to improve private land.
7. Unlike the other issues upon which consultant seeks, this concern can be dealt with relatively simply.
8. Wasteful and fruitless expenditure is defined in section 1 of the MFMA as expenditure that was "*made in vain and could have been avoided had reasonable care been exercised*".
9. Provided the relevant expenditure is properly authorised it could not be said in my view to fall within the definition of fruitless and wasteful expenditure. The

municipality is under a Constitutional and statutory duties to provide these basic services but does have land of its own upon which to house the settlers and cannot afford to expropriate the private land upon which the settlements stand.

10. The installation of the services would however need to occur in a manner which avoids challenges by the private property owners including interdicts and claims for compensation and the main focus of this opinion is on how to achieve that.
11. eThekwini has already received a legal opinion² advising that expropriation or negotiating servitudes would be necessary. I am however instructed that expropriation is not financially possible and the process of registering individual servitudes over the properties or concluding long term leases is not only too costly but will take a long time to achieve³.
12. I have therefore been requested to advise on other means by which eThekwini might lawfully discharge its obligations whilst ensuring, as far as possible, that it acts in a manner which avoids challenge by private landowners and incurring liability to them.
13. eThekwini's desire to rise to rise to the challenges it faces and discharge its constitutional mandate on private land brings into play a number of competing and complex considerations.
14. The fundamental issue is an extremely complex one given the nature and interplay of competing rights at stake which include:-

² From Singh SC

³ eThekwini obtained an opinion by Singh SC which deals with expropriation and servitudes.

- 14.1 the rights of the informal settlers to basic services and early childhood development facilities under sections 27 and 28 of the Constitution;
- 14.2 the rights of the landowners under section 25⁴ of the Constitution not to have their property expropriated except under a law of general application and subject to compensation and protection against arbitrary deprivation of property;
- 14.3 the rights of property owners to privacy under section 14 of the Constitution;
- 14.4 the prohibition against self-help and the guarantee of access to courts enshrined in section 34 of the Constitution
- 15. Given the nature of competing rights and obligations, challenges to eThekweni could emerge on a number of fronts. Those which appear most likely and which doubtless occasion eThekweni the greatest cause for stem from the following:
 - 15.1 The municipality is concerned that what it wants to do may amount to a deprivation or expropriation of the privately-owned property and thus be subject to challenge and/or the payment of compensation. This concern is understandable because our courts have held that “*deprivation*” of property as

⁴ Section 25(1) provides that “*no-one may be deprived of property except in terms of a law of general application, and no law may permit arbitrary deprivation of property*”. Section 25(2) of the Constitution goes on to provide limits subject to which property may be expropriated. These limits include that expropriation may only occur in terms of a law of general application for public purposes or in the public interest and subject to compensation.

envisaged in section 25(1) of the Constitution includes the limitation of use and control over the property and any interference with the use, enjoyment or exploitation of private property involves some deprivation⁵.

15.2 The fact that the municipality is at present contemplating providing services only to larger settlements of a more permanent nature, might be alleged to indicate that the municipality is using private land to fulfil its obligations to provide housing without expropriating the property and paying the owners compensation for the *de facto* complete loss of the owners' property rights. These considerations also bring into focus the spectre of claims for constitutional damages or orders compelling expropriation⁶.

15.3 The fact that ownership of property encompasses a basket of rights, including the right to exclude others from using it,⁷ means that ordinarily an owner's consent is required for what the municipality wants to do.

15.4 The fact that our law does not countenance self-help⁸ means the municipality cannot enter upon the land and provide the services unless there is a legal empowering provision entitling it to do so and even then this might require a court order. Even where a servitude is registered over the property in favour

⁵ *Minister of Minerals & Energy v Agri South Africa* 2012 (5) SA 1 SA at [12] ff

⁶ Such as was ordered in the cases of *Modderklip* and *Fischer* which I discuss further below.

⁷ *Geysers & Another v Msunduzi Municipality & Others* 2003 (3) BCLR 235 (N) at 249

⁸ *Chief Lesapo v North West Agricultural Bank* 2010 (1) SA 409 (CC) at [17] : the court found that resorting to self-help violated Section 34 of the Constitution which provides for access to courts for disputes to be resolved.

of the municipality, it is not entitled to enter the property in the face of an objection⁹.

16. These features mean that owners of private property might mount claims against eThekweni on various grounds such as:-

16.1 the municipality lacked authority to act in a particular manner;

16.2 the municipality had been guilty of self-help even if it had statutory or other authority to act as it did but had not obtained a court order before exercising that power;

16.3 a challenge to the legislation pursuant to which the municipality acted on the basis that it was unconstitutional because it infringed the owner's property and/or privacy rights or was otherwise disproportionate;

16.4 claims for injury and damage which might be suffered by residents of the informal settlement using the illegal structures from which childcare services are provided where the municipality had effected improvements to these structures.

17. As is apparent from the above exposition, eThekweni's concerns are understandable and cover a number of areas on broad fronts. I shall cover the ground as follows:-

⁹ *Motswagae v Rustenburg* 2013 (2) SA 613 (CC) at [14]

- 17.1 first, by considering whether the municipality has the power to act as it wishes to in the absence of express statutory provisions;
- 17.2 next, identifying the type of mechanism which will best enable the municipality's plans viewed in the light of the legal principles governing the possibility of exercising power over private land and how these powers interplay with private land ownership rights;
- 17.3 then turning to consider whether eThekweni already has such specific powers in terms of extant legislation and bylaws;
- 17.4 Finally, considering what would be necessary in order to enable the municipality to discharge its obligations in a lawful fashion both in the drafting of a suitable bylaw and in its implementation. In this regard I have been specifically requested to advise on the adequacy or otherwise of various notices currently used by eThekweni.

B: DOES THE MUNICIPALITY HAVE AN ORIGINAL POWER TO ACT?

18. There is a statement in one of the opinions furnished to the municipality with which I was briefed¹⁰, that the power given to municipalities under section 156 of the Constitution to govern of its own initiative is an original power and thus no additional law is required for eThekweni to act although it was suggested that nonetheless a bylaw would be desirable.

¹⁰ By Rosenberg SC

19. The first and most obvious question then, is whether eThekweni is entitled to act as it wishes as matters presently stand, or whether something more is required.
20. Section 156(1) of the Constitution gives municipalities executive authority and the right to administer various local government matters which include childcare facilities¹¹, water and sanitation services limited to pottable water supply systems and domestic wastewater and sewage disposal systems¹², municipal roads¹³ and street lighting¹⁴.
21. Whilst it is so that this is an original power and that section 156(2) of the Constitution make it plain that municipalities are entitled to administer these matters as of right¹⁵ and that bylaws are there to make that administration effective, that original constitutional power has to be exercised subject to the Constitution and to law¹⁶. In the exercise of its original administrative powers under the Constitution therefore, the municipality could not disregard or infringe the Constitutional rights at play as set out above.
22. In those circumstances, it cannot be said that municipalities' administrative powers accorded under section 156 of the Constitution in and of themselves entitle municipalities to enter upon privately owned land without notice to or permission from the owners and erect basic services thereon.

¹¹ Which is in Part B of Schedule 4

¹² Also in part B of Schedule 4

¹³ Part B of Schedule 5

¹⁴ Part B of Schedule 5

¹⁵ See also *DA v Ethekewini Municipality* 2012(2) SA 151 SCA at [17] – [20]

¹⁶ Cf *Fedsure* 1999 (1) SA 374 (CC)

23. It follows that powers of a particular nature would need to be specified in national or provincial legislation or a municipal bylaw in order for eThekweni to comply with the legality principle. As the discussion below will demonstrate, any such power accorded in a statute or a bylaw would still need to be constitutionally compliant.
24. It is perhaps best then to consider in broad terms the type of power the municipality would need and the constraints to which such powers are subject before considering whether there exists in eThekweni's current bylaws or the Local Authorities Ordinance provisions which could be used for this purpose.

C: A STATUTORY SERVITUDE COULD SERVE THE PURPOSE

25. As explained above, eThekweni does not view it as practical to obtain individual servitudes in respect of specific parcels of land.

C1: The nature of statutory servitudes

26. Our law has however long recognised the concept of "*a statutory servitude*" which creates servitudinal rights in favour of the holder without the need for registration of servitudes in the traditional way.
27. Since shortly after the turn of the last century various statutes in this country afforded general servitudinal rights for the laying of pipelines and the installation of

communication and other networks for the public good¹⁷. In some instances, these statutes provided specifically that no compensation would be payable by the State when exercising its servitudinal rights.

28. Statutory servitudes are found in a number of contexts from which eThekweni can usefully draw for its present purposes. Importantly, the validity and ambit of such servitudes have recently been considered by the Constitutional Court and the Supreme Court of Appeal and found to be consistent with the Constitution.

C2: Section 22 of the ECA: a useful example of a statutory servitude

29. The most useful example for purposes of this opinion, is section 22 of the Electronic Communications Act 36 of 2005 (“the ECA”) as its constitutional validity has recently been endorsed.

30. Section 22 of the ECA reads in relevant part as follows:

“22. Entry upon and construction of lines across land and waterways

(1) An electronic communications network service licensee may –

(a) Enter upon any land, including any street, road, footpath or land reserved for public purposes, any railway and waterway of the Republic;

(b) Construct and maintain an electronic communications network or electronic communications facilities upon, under, over, along or across

¹⁷ *Tshwane City v Link Africa and Others* 2015 (6) SA 440 (CC) at [101]

any land, including any street, road, footpath or land reserved for public purposes, any railway and any waterway of the Republic; and

(c) Alter or remove its electronic communications network or electronic communications facilities, and may for that purpose attach wires, stays or other kinds of support to any building or other structure.

(2) In taking any action in terms of sub-section (1), due regard must be had to the applicable law and the environmental policy of the Republic.”

31. Whilst section 22 applies to private entities who have been licensed to provide an electronic communications network, the conduct is permitted by section 22 for the public good. In my view an analogous provision to section 22 of the ECA is the best possible option for eThekweni by virtue of the historical use of such servitudes and the nature of the rights they accord.
32. The constitutionality and ambit of section 22 and the limitations to which it is subject have been considered in five important cases in the Supreme Court of Appeal and the Constitutional Court over the past few years. It is necessary to consider these judgments because they show how judicial thinking on the matter has evolved and apparent differences between the judgments need to be resolved as far as possible for eThekweni to be able to understand just how far a provision such as section 22 can take it in its quest.
33. I deal with these cases below. A short history lesson is however necessary so that the cases can be appreciated in context.

34. A provision similar to section 22 of the ECA had existed for many years. Section 70(1) of the Telecommunications Act 103 of 1996 gave a fixed-line operator the right to enter upon land without requiring that compensation be paid to the owner. The purpose of this older section was to eliminate all possible constraints on the State in the provision of communication services¹⁸.
35. Those provisions in the Telecommunications Act were considered to be compliant with the Constitution by the Supreme Court of Appeal in *Telkom v MEC for Agriculture*¹⁹ because:
- “...to lay cables on land would require permission or servitudes from a huge number and variety of owners. Hence the need for an all-embracing permission such as is contained in section 70 [now 22]”.*
36. Against that background I turn to consider the nature and ambit of the rights conferred by section 22 and the limits our constitution imposes upon or reads into such rights. That is best done by tracing the judicial approach to this question which has unfolded through four cases in our highest courts.

¹⁸ *MTN supra* at last paragraph in [11]

¹⁹ *Telkom SA Ltd v MEC for Agricultural and Environmental Affairs, KwaZulu-Natal and Others* 2003 (4) SA 23 (SCA) at [30]

C3: The nature and ambit of rights accorded by a statutory servitude in the context of the Constitution

C3.1 MTN

37. Section 22 of the ECA was considered by the Supreme Court of Appeal in *MTN*²⁰.
38. In *MTN*, one of the issues was whether the provision in section 22(1) that in exercising its powers the licensee had to have “*due regard ... to the applicable law*” meant that a licensee still needed a legal basis such as a lease or servitude to be entitled to act in terms of the section²¹.
39. Having made it clear that “*any land*” in section 22(1) included private land, the Supreme Court of Appeal held that the consent of the landowner did not have to be obtained before the rights could be exercised. As it explained²²:
- “I find this interpretation ‘unduly strained’. It cannot be correct simply because the reason for the powers given by s22(1) would fall away if consent of the owners were to be a requirement. Section 22(1) specifically dispenses with the need to obtain the owner’s consent”.*
40. Thus, the power to enter upon land for the purposes of constructing and maintaining the network was granted by the statute independently of the property owner.

²⁰ *Mobile Telephone Networks (Pty) Ltd v SMI Trading CC* 2012 (6) SA 638 (SCA)

²¹ *MTN*, second unnumbered paragraph of [13]

²² *MTN* at [15]

41. A provision such as section 22 of the SCA would therefore be extremely useful to eThekwini. It would however provide eThekwini with a so-called “*blank cheque*” or entitle it simply to enter onto private property and do the works necessary to supply the services without anything more.
42. The court in *MTN* stressed that section 22 required that in taking the actions due regard must be had to applicable law. In context, that imposed a duty on the licensee to consider and submit to the applicable law²³. The SCA however stressed that “*a fortiori (applicable law) cannot limit the very action that is authorised by s22(1)*”²⁴.
43. So, a provision such as section 22 of the ECA does away with the need to obtain consent of the landowner and a court order to act. However, the court stressed that the property rights in section 25 of the Constitution relating to expropriation and compensation are part of the applicable law which must be complied with²⁵.
44. In one of the opinions already furnished to eThekwini²⁶ the difference between deprivation of property and expropriation has been explained at some length. It is therefore sufficient for present purposes to state the position in succinct summary:
- 44.1 the Constitution distinguishes between expropriation and deprivation of property;

²³ *MTN* at [15]

²⁴ *MTN* at [15]

²⁵ *MTN* at [16] and [17]

²⁶ By Rosenberg SC : paras 45 to 65

- 44.2 expropriation involves the acquisition of all rights in a property by a public authority for a public purpose²⁷.
- 44.3 deprivation occurs when there is substantial interference or limitation that goes beyond the normal restrictions on property use and enjoyment in an open and democratic society²⁸;
- 44.4 deprivation may not be arbitrary and can only occur in terms of a law of general application;
- 44.5 compensation is required for an expropriation but not for a deprivation²⁹ although an offer of compensation may well take a deprivation of property out of the realm of arbitrariness³⁰.
45. The rights accorded to a licensee under section 22 of the ECA were found in *MTN* not to “*involve an acquisition or ‘taking’ of rights*”. Instead the section concerned “*deprivation by regulatory measures to enable the State to regulate the use of property for public good without the fear of incurring liability to owners of property affected in the course of such regulation*”³¹ and would thus not be subject to compensation.

²⁷ *Harksen v Lane NO & Others* 1998 (1) SA 300 CC at [32] and [33]

²⁸ *Mkontwana* at [32]

²⁹ *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government and Another* 2009 (6) SA 391 CC (*Reflect-All*) at [64]

³⁰ *MTN* at [18] with reference to section 25(2)(b) of the Constitution

³¹ *MTN* at [18], quoting from *Reflect-All* at [63]

46. Thus, rights such as those accorded under section 22 do not mean that the person in whose favour those rights are granted can “*enter upon and encroach on any land ... of its own will or own behest, without a fair process and without taking into account the rights of the owner of that land*”³². MTN stressed that the regulation of property to protect the common good must not amount to arbitrary deprivation³³.
47. For the deprivation not to be arbitrary then it needs to be both procedurally and substantively fair³⁴. But what does that mean for consultant?
48. Actions taken pursuant to such an empowering provision constitute administrative action and would thus need to comply with the provisions of the Promotion of Administrative Justice Act 3 of 2000 (“PAJA”)³⁵.
49. Procedural fairness is ensured by following an *audi* process. PAJA and the constitutional protection against arbitrariness would require eThewini to do the following before taking action was taken under a provision analogous to section 22:
- 49.1 give advance notice of any proposed administrative action; and
- 49.2 accord the party to be affected by such decision the right to be heard before it is taken.

³² Coppin J in the court below in *MTN*, quoted by the SCA at [23]

³³ *MTN* at [20]

³⁴ *Mkontwana* at [65] and *Reflect-All* at [44] and following

³⁵ In *MTN* there is a consideration of this question by virtue of the fact that the licensees are private actors and not organs of State. eThekweni is obviously an organ of State and if powers such as those accorded to licensees under section 22 were accorded to the municipality its conduct would plainly constitute administrative action.

50. The process by which this is done can be fashioned by eThekweni in any manner provided it is fair in the circumstances³⁶. Ordinarily, a fair process requires the person to be affected by the administrative action an opportunity to participate in a manner which accords them a chance of influencing the outcome of the decision³⁷. The fact that section 22 does away with the need for consent may suggest at first blush then that notice need not be designed to allow the person who will be affected an opportunity to dissuade the servitude holder from exercising the power. However, that opportunity should still be inherent in any process eThekweni devises so as to ensure that its actions in respect of any particular piece of land are not substantively arbitrary.
51. Ensuring there is no substantive arbitrariness entails a rationality and, in some cases a proportionality analysis as to whether the means chosen to achieve the objective can be said to be reasonable³⁸.
52. This is because, as the Constitutional Court explained in *Reflect-All*:-

“Central to the arbitrariness enquiry is the relationship between the law in question, the ends it seeks to achieve and the impact restrictions have on the use and enjoyment of property. In some instances a deprivation will escape arbitrariness if a rational connection between the means adopted and the ends sought to be achieved is present. In other instances, however, the means adopted will have to be proportional to the ends in order to justify the deprivation in question. Marginal deprivations of property will ordinarily not

³⁶ *Zondi v MEC for Traditional and Local Government Affairs and others* 2005 (3) SA 589 (CC) at [114]

³⁷ *Joseph and Others v City of Johannesburg and Others* 2010 (4) SA 55 (CC) (*Joseph*) at [42]

³⁸ *MTN* at [14] and [20] and [35]

*be arbitrary if they are rationally connected to a legitimate purpose. More severe deprivations will ordinarily have to be shown to be proportionate*³⁹.

53. In the context of provision of basic services on privately owned land, this enquiry would of course assume great importance. The nature and extent of the services sought to be constructed would in some instances, such as the erection of a standpipe near the boundary not constitute deprivations or all. Other constructions could constitute marginal deprivations justified simply by demonstrating rationality as explained above. However, the creation of a road across a property, the construction of ablution block of a more formal nature and electricity pylons would plainly be more severe and would thus have to be shown to be proportional in the sense explained in *Reflect-All*.

54. I consider these matters in more detail below but mention them here in the context of the *MTN* judgment because a proportionality analysis of sorts featured in the judgment:-

54.1 *MTN* had constructed a base station on SMI's land on a portion some 110 square metres in extent on a farm 1 090 hectares in extent⁴⁰. The base station comprised a mast container room and equipment and was originally erected pursuant to a lease with the previous owner of the farm.

³⁹ *Reflect-All supra* at [49]

⁴⁰ Despite the size of the farm in relation to the base station, the Constitutional Court in *Link Africa* which I discuss in detail below was of the view that the base station constituted a significant deprivation.

54.2 The Supreme Court of Appeal found that there was no evidence that the objects of the ECA could not be achieved without depriving SMI of its property⁴¹. This in and of itself was found to be an abuse of statutory power which rendered *MTN*'s conduct arbitrary.

55. It follows then that if eThekweni were to rely on a provision analogous to section 22, it would nonetheless need to be able to establish in cases of more severe deprivation that:

55.1 it cannot fulfil its constitutional mandate without acting in this particular manner;

55.2 it is necessary for the services to be supplied by the construction or erection on the particular land in question in that particular manner.

56. On the basis of what was disclosed to me in consultation and the capacity constraints discussed above it would appear that the municipality would be able to justify its conduct in broad terms but each exercise of power would entail a site and fact specific enquiry.

⁴¹ *MTN* at [23]

C3.2 Msunduzi

57. The ambit of the requirement that the licensee had to have “*due regard to applicable law*” arose again for consideration by the Supreme Court of Appeal in *Msunduzi*⁴².
58. The Supreme Court of Appeal explained that the provision meant that law must be complied with, provided however that compliance with the applicable law could not be taken to mean that the actual right given to the licensee under section 22(1) was defeated or eviscerated⁴³.
59. In *Msunduzi* a licensee had contended it did not need the municipality’s consent to trench its roads whilst the municipality in question had flatly refused to grant the licensee a wayleave to do its work.
60. Dambuza AJA held⁴⁴ that the finding in *MTN* that specific actions were authorised by section 22(1) of the ECA did not mean that licensees did not have to comply with applicable laws. The court however held that the municipality’s complete refusal to permit the laying of cables by means of its moratorium fell foul of the principle articulated in *MTN* that the applicable law may not be used to limit the very act authorised.

⁴² *Msunduzi Municipality v Dark Fibre Africa* [2014] ZASCA 165

⁴³ *Msunduzi* at [11]

⁴⁴ At [11] to [14]

C3.3 Dark Fibre

61. Dealing with section 22 of the ECA yet again, the Supreme Court of Appeal has recently held in *Dark Fibre*⁴⁵ that the legal implications of a power such as section 22 of the ECA are that⁴⁶:
- 61.1 it grants a licensee general authority to enter land and construct a network;
- 61.2 such authority stands alongside any other authority that must be given by an owner or under a bylaw to do the work in a way that is determined by a municipality or other landowner;
- 61.3 the right of a licensee under the ECA does not trump other rights, it exists alongside them and none overrides the other.
62. The details of the parameters within which such a power would need to be exercised, particularly insofar as they relate to property owner's rights was brought into sharp focus by the Constitutional Court when it considered section 22 of the ECA in the case of *Link Africa*⁴⁷.

⁴⁵ *Dark Fibre Africa (Pty) Ltd v City of Cape Town* 2019 (3) SA 425 (SCA) decided on 30 November 2018

⁴⁶ *Dark Fibre II* at [37]

⁴⁷ *Tshwane City v Link Africa and Others* 2015 (6) SA 440 (CC)

C3.4 Link Africa

63. In *Link Africa*, Tshwane City sought to have sections 22 and 24⁴⁸ of the ECA declared inconsistent with the Constitution and invalid on the grounds that they permitted an arbitrary deprivation of property contrary to the Constitution.
64. The Constitutional Court split 6:4 on this question. The minority declared the provisions unconstitutional on the basis that they sanctioned the arbitrary, unjustified and unconstitutional deprivation of property. The majority however found that the application of our common law in relation to servitudes applied also to public servitudes such as those in section 22 and that this feature saved the provisions from constitutional invalidity.
65. The fact that the Constitutional Court diverged so fundamentally, and that the minority judgment was not that of a lone voice, underscores how contentious provisions such as these can be and how carefully any analogous provision would need to be drafted and implemented.
66. Importantly for eThekweni's purposes, the majority judgment stressed that the decision of the minority proceeded from an outdated, over rigid and absolute notion of ownership that property ownership under common law afforded an owner an absolute bar to entry without consent. The majority rejected this as alien and contrary to our law.

⁴⁸ The provision is similar to s 22 but deals specifically with roads

67. Whilst the majority accepted that the language of section 22 was broad and on the face of it appeared to confer wide powers to licensees and clearly limit property rights, it held that the section itself ensured that the power was not unhindered by making the exercise of the powers subject to applicable law which includes the common law and the Constitution⁴⁹.
68. Drawing on our common law of servitudes, the majority found that the common law requirement that a servitude be exercised *civiliter modo* or, to translate it as did the Constitutional Court “*respectfully and with due caution*”⁵⁰, provided the necessary safeguards to ensure that section 22 did not unduly trench on the property rights clause of the Constitution.
69. Servitudes such as those created by section 22 are in the nature of forced servitudes in the sense that they are not created by agreement between parties. They are also general servitudes as they can be enforced against anyone. At common law, the principles applicable to such servitudes are that:
- 69.1 the holder of the right of general servitude may select the essential incidental rights to exercise the servitude, like the premises needed and the access thereto;
- 69.2 that selection must be exercised in a civil or reasonable manner;

⁴⁹ *Link Africa* at [125] to [126]

⁵⁰ *Link Africa* at [143]

69.3 disputes about this choice must also be determined in court if no agreement between the parties can be reached;

69.4 an enforced servitude must be exercised in a manner that occasions the least inconvenience to the servient owner⁵¹.

70. Whilst the majority in *Link Africa* endorsed the finding in *MTN* that requiring a landowner's consent to exercising the powers would thwart the very action authorised by section 22⁵² it found that our common law constituted part of the "*applicable law*" subject to which the powers must be accessed.

71. In context, given the general and enforced nature of the servitude, this meant that⁵³:

71.1 licensees could select the premises and have access to them;

71.2 the selection needed to be done in a civil and reasonable manner;

71.3 this included giving reasonable notice to the owner of the property where the works were intended to be located;

71.4 proposed access to the property had to be determined in consultation with the owner;

⁵¹ *Link Africa* at [150]

⁵² *Link Africa* at [126] and [127] and [130]

⁵³ *Link Africa* at [152]

- 71.5 compensation in proportion to the advantage gained by the licensee and the disadvantage suffered by the owner was payable in respect of the exercise of the servitude granted by section 22(1);
- 71.6 where disputes arose about the manner of exercising the rights or the extent of compensation payable, these were to be determined by way of dispute resolution to the extent that was possible or adjudication.
72. Importantly, the majority found that access to the property in the absence of resolution of the above matters would be unlawful⁵⁴.
73. Of further importance for consultant was the majority's finding that any deprivation was entirely reasonable because of the landowner's multiple safeguards both substantive and procedural⁵⁵. The majority therefore found that the public compelling need for the provisions in issue together with the common law protections that governed the exercise of the power they conferred saved sections 22 and 24 of the ECA from arbitrariness⁵⁶.
74. eThekweni would thus be obliged by the principles articulated in *Link Africa* to plan and execute any works so as to minimise the impact on the owner and the property.
75. The court found that while section 22(1) did not expressly provide for notice and compensation, these nonetheless flowed from the common law of servitude and the

⁵⁴ *Link Africa* at [152] and [155]

⁵⁵ *Link Africa* at [174]

⁵⁶ *Link Africa* at [184]

cardinal presumption of statutory interpretation that legislation does not alter the common law any more than is necessary⁵⁷.

76. The finding regarding compensation is interesting given the constitutional differentiation between expropriation and deprivation and what was held in *MTN*⁵⁸ which enforced that differentiation and made it plain section 22 was a deprivation.
77. The finding by the court in *Link Africa* means that the general constitutional provisions in section 25 are still subject to additional common law compensation requirement even though the Constitution doesn't require the payment of compensation for a deprivation.
78. This understanding of the judgment is reinforced by the majority's observation⁵⁹ that the legislation could have included provisions expressly stating that notice and compensation were not required: in other words it could have expressly altered the common law.
79. The statement may be *obiter* but it has important implications for consultant that require further consideration. It was made whilst considering whether section 22 as formulated was consistent with the Constitution or permitted arbitrary deprivation of property. The statement may therefore simply be intended to contrast the section with which the court was concerned with different wording which might have rendered the section unconstitutional. Or it may have been intended to indicate that the court

⁵⁷ *Link Africa* at [153] to [155]. Notice would in any event be required given that the exercise of the rights is administrative action as discussed above.

⁵⁸ At [18] as discussed in paragraph 37 above

⁵⁹ *Link Africa* at [155]

thought that provisions excluding notice and compensation such as exist in other legislation for the installation of services could validly have been included in the ECA but the legislator had chosen not to incorporate them.

80. I consider whether notice and compensation could be dispensed with in measures such as these below as in my view this statement should not be taken at face value to mean that legislation could exclude notice and compensation as it saw fit and always pass constitutional muster. It is therefore necessary to consider the extent to which a statutory provision could validly dispense with notice and compensation in the light of what was said in *Link Africa*.

D: NOTICE

81. Insofar as notice is concerned the statement by the Constitutional Court in *Link Africa* it should not be understood as an indication that eThekweni could validly promulgate a bylaw or apply an analogous provision already existing which excluded notice. I say this for the following reasons:

81.1 There can be no doubt that in acting in a manner similar to that envisaged by section 22 of the ECA pursuant to an analogous provision the municipality's conduct will constitute administrative action.

81.2 PAJA is national legislation which applies to all administrative action and a bylaw would be invalid if it conflicted with national or provincial legislation⁶⁰.

⁶⁰ Section 156 (3) of the Constitution

81.3 Section 33 of the Constitution and PAJA specifically require a fair administrative process. Notice of intended action and an opportunity to comment as discussed more fully above in the discussion on *MTN* is foundational to procedural fairness in administrative decision making and specifically required by PAJA.

81.4 It is therefore difficult to imagine how the municipality would be able to contend that the process was fair when the landowner directly affected by it had no notice. The Constitutional Court expressly turned its face against provisions dispensing with notice in *Joseph*⁶¹.

82. I therefore advise that it would not be possible for eThekweni to “*legislate out of*” the giving of notice.

83. It is however necessary to make one further observation about the purpose of such notice, given the decision of the Supreme Court of Appeal in *Big Cedar*⁶², which I discuss further regarding the question of compensation below.

84. *Big Cedar* concerned legislative provisions regarding the laying of water pipelines by the Rand Water Board which required “*at least seven clear days’ notice, except in the case of urgent repairs, shall be given to the authority under whose management or*

⁶¹ See footnote 37 above, at [66] – [70]

⁶² *Rand Water Board v Big Cedar Trading 22 (Pty) Ltd* 1 ALL SA 698 (SCA) / (1038/15) 2016 [ZASCA] 177

control the said public land or road may be, or to the owner or occupier of any private land or road, before making any such entry as aforesaid”.

85. The court found that noted these notice provisions were designed not to enable the owner to dissuade Rand Water from laying the pipeline but to minimise any inconvenience⁶³. That is very different to the approach required by the majority in *Link Africa* of notice and an opportunity to participate meaningfully in the decision regarding whether the property in question would be utilised for the erection or installation of network services.

86. There appear to me to be at least two reasons for this difference:-

86.1 First, the statute under consideration in *Big Cedar* was old order legislation. The court observed⁶⁴ that the procedures for exercising the power may now be different under the Water Services Act and may require the expropriation of servitudinal rights over the land in terms of section 81 of the Water Services Act.

86.2 Second, the location of pipelines needing to be laid for the provision of water services is ordinarily determined by a number of factors which are invariable such as the location of pump stations and other pre-existing infrastructure, the need to connect a number of different sites to an existing network or to create a new network which will function from an engineering perspective and is optimally cost-effective given that this is the provision of a public service from public funds. The need to lay pipes over a particular property is therefore

⁶³ *Big Cedar* at [23]

⁶⁴ At [8]

predetermined by its location and cannot in most instances be avoided. The choice by private network licensees regarding where to locate electronic communication network infrastructure is different. Much of the infrastructure could be installed almost anywhere and the choice of where it has to go is therefore not limited in the same way as the choice regarding water and electricity infrastructure. Also, the licensee is a private actor in its own commercial interest.

87. I therefore remain of the view that whatever notice procedure eThekweni devises should allow participation in the sense of being able to influence even the decision on whether to exercise the power in relation to a specific piece of land so as to ensure that the deprivation is not substantively arbitrary. As discussed further below, there will be many instances where the conduct would not even amount to a deprivation but it would be prudent for a uniform notice procedure to be applied.

E: COMPENSATION

88. The observation in *Link Africa* that the ECA could have excluded must be understood in context, both historical and case specific.
89. Since shortly after the turn of the last century various statutes in this country afforded general rights by way of statutory servitudes for the laying of pipelines and the installation of communication and other networks for the public good⁶⁵. In some

⁶⁵ *Link Africa* at [101]

instances these statutes provided specifically that no compensation would be payable by the State when exercising its rights under the servitude⁶⁶.

90. Provisions excluding any claim for compensation were common in statutes dealing with the laying of pipelines and the power under consideration in *Big Cedar* was of this type. The power had been contained in the Rand Water Board Statutes (Private) Act 17 of 1950⁶⁷. The Supreme Court of Appeal in *Big Cedar*, writing after the judgment of the Constitutional Court in *Link Africa*, observed that the purpose of that provision was to generously endow Rand Water with powers in order to enable it to perform its functions in the most cost effective way possible⁶⁸.
91. Provisions dispensing with any form of compensation in statutes providing for the laying of pipelines are understandable and consistent with our Constitutional order⁶⁹. Pipelines are laid underground and damage from trenching is made good after the pipelines are laid. The laying of the pipelines themselves does not deprive the owner of any use and enjoyment in and to the property nor does it cause any damage.

⁶⁶ The Local Authorities Ordinance contains such measures which are discussed further in section H below
⁶⁷ The section reads in relevant part as follows: “(j) Lay or carry through, over, on or across any land, public or private, and any public road, public place or outspan, within the Republic, and from time to time repair and maintain any pipes for the supply of water with any necessary valves, cocks, meters or other accessories in connection with the same, and enter upon any such land, road or place for such purpose as aforesaid: Provided that- (i) At least seven clear days’ notice, except in the case of urgent repairs, shall be given to the authority under whose management or control the said public land or road may be, or to the owner or occupier of any private land or road, before making any such entry as aforesaid; (ii) on the completion of such works the Board shall forthwith restore the surface of such land, road or other place to the same condition as near as may be as it was in before the commencement of such works, and in executing the same the Board shall do as little damage as may be to such land, road or other place and shall make full compensation for all damage done by it (iii) All proper and necessary precautions shall be taken to prevent injury to the persons or property of all persons using or being upon such land, road or place”.

⁶⁸ *Big Cedar* at [32]

⁶⁹ Although the Water Services Act 1997 does not contain such a provision

92. It would therefore be competent in my view for a legislative instrument to provide that no compensation would be payable for the laying of pipes, provided, like the Rand Water Board Act, the statute in question also made provision that the pipes would be laid by doing as little damage as possible to the property and that any damage done would be made good thereafter and the actual installation did not amount to an arbitrary deprivation.
93. When however it comes to the erection of services above ground the position is in my view somewhat different.
94. Historically, statutes relating to the provision of electricity supply which involved the installation of pylons and other infrastructure on private land ordinarily required the payment of compensation or the negotiation of a lease in order to justify the intrusion of these services⁷⁰.
95. In this regard, further observations by the Constitutional Court in *Link Africa*, is of importance. *Link Africa* was concerned with the installation of fibre optic cables using the existing underground infrastructure of the City⁷¹. The Constitutional Court found that there was no evidence that this impaired the City's infrastructure or could cause harm or prejudice and thus found that the conduct was not such as to trigger a deprivation of property⁷².

⁷⁰ See for example *Eskom v Grundy* 2018 (4) SA 242 (KZP) where Eskom was ordered to remove pylons when it could not prove any form of contractual entitlement to have them on the property of a successor-in-title of an erstwhile lessee

⁷¹ *Link Africa* at [170]

⁷² *Link Africa* at [171] – [172]

96. Importantly for consultant, the majority in *Link Africa* found that the position of the farm owner on whose land the base station had been erected in *MTN* was different. The majority noted that the *MTN* base station was very large and took up 110 square meters. On this basis it observed⁷³:

“That provides the court with a basis for finding intrusiveness. That kind of construction, and the activity it necessitates, may indeed amount to substantial interference. So circumstances may arise where a licensee’s activities may interfere so sharply with the property owner’s rights that there is a deprivation”.

97. Whilst I accept without expressing any firm view for present purposes that it might be possible for national legislation to preclude compensation in certain circumstances, the validity of that national legislation would still be tested against the provisions of section 25 of the Constitution. It could not therefore validly disentitle a person to compensation in the event of expropriation and would need to contain provisions to guard against arbitrary deprivation.
98. The same limitations would apply to any bylaw purporting to exempt the municipality from the payment of compensation for any deprivation of property and in addition such a provision would create a conflict between the bylaw in question and the Expropriation Act⁷⁴ which would again render that particular provision of the bylaw invalid.

⁷³ *Link Africa* at [173]

⁷⁴ See *Link Africa* at [157] which held that the Expropriation Act was part of the applicable law in this context.

F: CONSTRUCTIVE EXPROPRIATION AND CONSTITUTIONAL DAMAGES

99. eThekweni must be alive to the fact that the nature of services and their extent might in certain instances be said to be so extensive as to deprive the owner of all meaningful use of the property.
100. I refer to this as a theoretical possibility at this stage without any information as to the size of the sites, the likely proportional area on those sites that infrastructure will occupy and other detail which would be necessary to make such a determination in any given case.
101. I mention this prospect notwithstanding this lack of detail however because consultant would need to understand that in such cases an owner might well contend that the municipality's conduct amounts to a "*constructive expropriation*"⁷⁵ or is such as to evidence that the municipality is using private land to fulfil its public obligations and should therefore compensate the owner by payment of constitutional damages equivalent to what would be payable on expropriation or to expropriate the property such as happened in *Modderklip*⁷⁶ and *Fischer*⁷⁷.
102. Such orders are made in extraordinary circumstances where the scale of the occupation and the owner's previous conduct in protecting its property are of particular significance⁷⁸. Any enquiry in this regard would therefore be site specific.

⁷⁵ Our courts have raised but not decided whether the concept of constructive expropriation forms part of our law. Thus far both the Supreme Court of Appeal and the Constitutional Court have referred to the doctrine but left it open : *Minister of Minerals and Energy v Agri SA* 2012 (5) SA 1 (SCA) and *Reflect-All supra*.

⁷⁶ *President of the RSA v Modderklip Boerdery (Pty) Ltd* 2005 (5) SA 3 at [44]; [47] to [51] and [68]

⁷⁷ *Fischer v Unlawful Occupiers* 2018 (2) SA 228 (WCC) at [192]

⁷⁸ See for example *Modderklip* at [3], [4], [6], [8], [11], [28], [29], [47]

103. In my view however orders of constitutional damages or expropriation⁷⁹ have been granted due to the extent of the occupation of the property in question not the provision of services. Occupation, by a large number of persons, of a permanent nature was the reason for the orders in both *Fischer* and *Modderklip*. That triggering feature can and does exist even in the absence of the provision of municipal services. Whilst the provision of such services might be used as evidence of eThekweni's realisation that the settlements are of a permanent and significant nature, it is the occupation itself rather than the provision of services to the settlement that would cause a claim for expropriation or constitutional damages.
104. In my view therefore, the provision of services would not materially alter the municipality's position if a case such as *Modderklip* or *Fischer* were brought against it.

G: DEPRIVATION

105. In one of the opinions already furnished to eThekweni⁸⁰ the view was expressed that as the provision of services is part of eThekweni's constitutional and statutory obligations this would constitute a normal restriction on property use and enjoyment as found in open and democratic societies and would therefore probably not amount to a deprivation⁸¹. These views are expressed on the basis of the dictum of the Constitutional Court in *Buffalo City*⁸² which held that in order to constitute a

⁷⁹ I express no view as to whether the expropriation order in *Fischer* was proper given the principles articulated in *Modderklip*.

⁸⁰ Rosenberg SC at [53]

⁸¹ Rosenberg SC at [55]

⁸² *Buffalo City Municipality and Others; Transfer Rights Action Campaign and Others v MEC, Local Government and Housing, Gauteng and Others* 2005 (1) SA 530 (CC) at [32]

deprivation as envisaged in section 25 of the Constitution what was required was “*at the very least, substantial interference or limitation that goes beyond the normal restrictions on property use or enjoyment found that an open and democratic society*”.

106. I am in respectful disagreement with the view contained in the opinion to the extent it expresses a blanket proposition.
107. Whilst it is so that private persons may bear positive and public obligations in certain circumstances⁸³, the need for eThekweni to install services on private land arises because the State is unable to discharge its duties to provide housing. The Constitutional Court made it clear in *Modderklip*⁸⁴ that it is unreasonable for a private entity to be forced to bear the burden of providing land which rests on the state. In light of these principles in my view it cannot be said that the installation of the services, necessary because of illegal occupation, constitutes a normal restriction on the use of the property.
108. That being said however, any deprivation suffered by a property owner would appear to me to arise primarily from the occupation of the land itself not the provision of services to it. As such, the impact of any deprivation would need to be determined with reference to the actual conditions on the site. It is in my view more than a little artificial to suggest that for example erecting electricity pylons and running safe electricity across the property would amount to a significant deprivation in and of itself.

⁸³ *Daniels v Scribante and Another* 2017 (4) SA 341 CC at [38] and [49]
⁸⁴ At [44]

109. However, as discussed above when considering compensation, other service installations may well amount to deprivations and need to meet the standard set in section 25(2) of the Constitution.

110. It would therefore in my view be wise for eThekweni to approach matters on the basis that it may well be required to justify its conduct with reference to the standard set in section 25(1) of the Constitution.

H: ARE SUITABLE PROVISIONS ALREADY IN PLACE?

111. I turn then to consider whether the Local Authorities Ordinance, eThekweni's bylaws or other legislation binding the municipality contain any provision analogous to section 22 of the ECA which consultant could use with or without modification thereby obviating the need to draft a completely new bylaw.

112. In the course of this analysis I also deal with various pieces of framework legislation which must inform the municipality's actions and refer to provisions in other legislation upon which consultant may usefully draw in its own drafting or amendment process if it so wishes.

H1: Local Authorities Ordinance 25 of 1974

113. In one of the opinions previously obtained by eThekweni⁸⁵, the view was expressed that the Local Authorities Ordinance might have been repealed by implication as old

⁸⁵ From Rosenberg SC

order legislation⁸⁶ if it prevents the fulfilment of the municipality's constitutional obligations⁸⁷.

114. Whilst it is correct that the Local Authorities Ordinance is old order legislation, designed to confer specific powers on municipalities in the era before this level of government had original constitutional power, the Ordinance has not been repealed and is still utilised by the municipality. For present purposes I therefore confine my enquiry as to whether any of its provisions assist consultant as if they do assist they cannot be said to be subject to an implicit repeal on the basis that they prevent the fulfilment of eThekweni's obligations.
115. In embarking on this enquiry I do however sound a word of caution. At various places in the Ordinance powers are granted to what were then local authorities to act without the payment of compensation. Such provisions must now be measured against section 25 of the Constitution and viewed in the light of the discussion above.
116. Various provisions of the Ordinance refer to powers being exercised only after the person to whom they have been accorded has "*acquired the necessary rights*". In certain instances, the "*necessary right*" refers specifically to a right obtained in terms of section 190 of the Ordinance which deals with expropriation. In other instances, there is no specificity as to how the right could be obtained.

⁸⁶ The Ordinance refers in various places to "*Council*", which references must be read as references to the municipality.

⁸⁷ This view was expressed without the author considering any of the provisions of the Local Authorities Ordinance and is a statement of principle based on what was stated in *CDA Boerdery* at [44] : Rosenberg SC opinion at [84] to [86]

117. I mention this because:

117.1 If a specific bylaw were enacted which accorded a right analogous to section 22 of the ECA, the rights could be acquired by way of the bylaw itself.

117.2 Thus, eThekweni would need to be cautious in enacting a new bylaw so as not to create a conflict between the bylaw and the Ordinance where the Ordinance required a specific form of acquisition of rights to be mandatory. Such a conflict ought to be avoided as far as possible because of both the uncertainty and potential challenges it creates.

117.3 However, this concern need not straight jacket eThekweni in devising its plan as it would notionally be possible⁸⁸ for eThekweni to argue that such conflict would trigger an implied repeal or render the Ordinance itself susceptible to challenge as being in conflict with section 151(4) of the Constitution⁸⁹.

118. There are five provisions in the Ordinance which require consideration in the present context.

Section 225 : Ruinous and unsafe buildings and other dangerous things on premises

119. Section 225 of the Ordinance reads as follows:

⁸⁸ Subject to the notion that the Ordinance is not framework legislation

⁸⁹ which stipulates that the “national or a provincial Government may not compromise or impede a municipality’s ability or right to exercise its powers or perform its functions”.

“If any building or wall or anything affixed thereto, or any hole, well, swimming bath, pond, stack, tree or other thing on any premises is deemed by the Council to constitute a potential source of danger to the public or to the occupiers of such premises or of neighbouring property, it may cause a notice to be served upon the owner and occupier (if any) of the premises, requiring them within a stated period which is reasonable in the circumstances to execute such work as it may deem necessary in order to ensure the removal of such potential source of danger, and upon any failure to comply with such notice or in any event in any case of emergency, the Council may itself cause any work to be carried out which it considers necessary to achieve the same object”

120. Section 1 of the Ordinance defines premises as meaning *“any building together with the land on which the same is situated and adjoining land used in connection therewith, and any land without buildings”*.
121. For the reasons I explain below, in my view section 225 does not confer a power for the municipality to erect poles, dig trenches or establish other infrastructure in the ordinary manner of the provision of basic services to which this opinion relates. It does however provide a vehicle for the municipality to make safe illegal electricity connections which are dangerous⁹⁰.

⁹⁰ I understood from the consultation that was envisaged was removing illegal connections altogether. If what is envisaged is the making safe of those connections without connecting the residents to a form of pre-paid metering with the result that they would be receiving a supply of electricity for free whilst others have to pay, that would obviously offend against the equality provisions in the Constitution as well as the Electricity Supply Bylaws.

122. Section 225 does not require the consent of the owner for the municipality to remove the potential source of danger but does require notice. That renders the section constitutional compliant⁹¹. This notice is of the type referred to in *Big Cedar*, not notice in the sense of an opportunity to dissuade the municipality from exercising its powers.
123. Significantly, section 225, unlike other provisions in the Ordinance to which I will turn momentarily, does not stipulate that the danger has to have been caused by the owner. Thus, the fact that the illegal dangerous electricity connections are ordinarily effected by informal settlers so as to procure a supply of electricity and not by the owner of the land itself is not a bar to the municipality exercising its powers under this section.
124. I therefore conclude that it is not strictly necessary for eThekweni to promulgate or amend a bylaw in order for it to deal with making safe dangerous and/or illegal electricity connections.
125. Section 225 refers specifically to things of various types which constitute a potential source of danger. Those things are not of the type that would comfortably fit with the construction of sewers and laying of pipelines. This reading is reinforced by the fact that section 249 of the Ordinance makes specific provisions for sewage and drainage works.

⁹¹ Cf. *Joseph* footnote 37 above at [69]

126. An attempt to stretch the language of this section in order to justify the use of this section for the creation of sewers and water pipelines as well as other structure is problematic. It would require an interpretation of section 225 to the effect that the informal settlement itself constituted a “*thing*” and that its lack of services meant that it was dangerous. That in my view strains the language of the section well beyond its intended purpose and would certainly create fertile and unnecessary scope for challenge.

Section 249 : Sewage and drainage works

127. Section 249(1)(a) of the Ordinance provides that the municipality may “*establish, construct and carry out sewage or drainage works*” within the municipal area.
128. Section 249(2) provides in relevant part that:

“For the purpose of carrying out any scheme of sewage disposal or drainage the council may - ...

- (b) carry sewers, drains or pipes through, across or under private streets (without payment of compensation) and public streets and public places;*
- (c) Subject to the acquisition of the necessary rights, carry sewers, drains or pipes through, across or under private property ...”*

129. It follows that section 249 goes some way towards creating a framework for the municipality to lay pipes across and under private property but does not entitle it to do

so as of right and instead envisages that rights would need to be acquired independently of the Ordinance.

Section 251 : Execution of sewage and drainage works on private property

130. Section 251 of the Ordinance has further provisions in relation to the execution of sewage and drainage works on private property. It however envisages the carrying out of such work as the municipality considers necessary and for the recovery from the owner the reasonable costs of supervising such work or the cost of the work itself. This is because section 251 is concerned with situations where the obligation to carry out the work is that of the owner. Where a municipality carries out that work itself it is because the owner has failed to do what the law required of him.
131. As discussed above, the law does not require private property owners to provide basic services to persons who have unlawfully occupied their property. Section 251 of the Ordinance therefore does not seek to serve the purpose of the provision of services as under discussion in the present context⁹².

Section 259 : Nuisance

132. In relevant part Section 259 of the Ordinance reads as follows:

“(i) *Whenever the Council or the medical officer of health is satisfied of the*

⁹² Section 251(4) reinforces my view that section 251 is not intended to serve the purpose presently under discussion.

existence of a nuisance, as defined, within the area, it or he may serve or cause to be served –

- (a) On the author of such nuisance;*
- (b) If such author cannot be found, on the occupier of the property on which such nuisance exists; or*
- (c) If there is no such occupier or such occupier cannot be found, on the owner of such property;*

an order in writing requiring such author, occupier or owner as the case may be to remove the cause of and to abate such nuisance to the satisfaction of the Council within a reasonable period specified in such notice.

- (ii) If any person on whom an order has been served in terms of sub-section (i) fails to comply therewith or if the author of the nuisance concerned and the owner and occupier of the property on which such nuisance exists are not known and cannot be found, the Council or the medical officer of health may forthwith take or cause to be taken all measures which it or he may consider to be necessary or desirable for the abatement of such nuisance and any expenses incurred in that connection shall be recoverable by the Council”*

133. Nuisance is defined in section (1) of the Ordinance in the following terms:

“Nuisance’ means any condition, thing, act or omission which is offensive or injurious or which tends to prejudice the safety, good order, peace or health of the

area of any local authority or part thereof or the rights or reasonable comfort, convenience, peace or quiet of any neighbourhood within the area of any local authority and includes any act, exhibition or publication contrary to public decency or morals”.

134. The fact that a large informal settlement has no access to sewage or running water might well create a condition prejudicial to the health of the area in which the informal settlement is located. A lack of electricity might conceivably also create a condition prejudicial to the safety of that area. Thus, although the difficulties which arise from a lack of sanitation in informal settlements are not instances of nuisance in the traditional sense⁹³ they can constitute nuisance as defined in the Local Authorities Ordinance if one simply looks at the definition. The difficulty I have however is in the broader context of section 259 itself which tends in my view to limit the nuisance, despite the definition, to instances where nuisance is of that more traditional sort brought about through wrongful conduct of a particular person and capable of abatement by the author of the nuisance.
135. I say this because the section imposes the primary obligation to remove the nuisance on its author and provides for the author to remove the cause of and abate the nuisance. The fact that the municipality is entitled to recover its costs if it takes steps to abate the nuisance underscores this view.
136. Residents of informal settlements are constrained to live in circumstances which produce the “*nuisance*” through no fault of their own. They are not in a position to

⁹³ Such as over-hanging branches, noisy equipment or sloping ground causing landslide, erosion and flooding

“*remove the cause of and to abate such nuisance*” unless they are given access to basic services at the very least. It is the duty of the State to provide those basic services and the notion that the costs of providing them should be recovered from the unlawful occupiers direct in the manner envisaged in this section is incompatible with our constitutional framework.

137. Similarly, owners of property illegally occupied by large numbers of people cannot abate the nuisance and our law as discussed above does not require such owners to bear the costs of rendering services to those who occupy their land against their will.
138. In my view therefore, section 259 is not aimed at situations such as those with which this opinion is concerned either. Attempts to utilise this provision to install basic services would in my view be subject to potential challenge not only on the basis of the interpretational difficulties referred to above, but more fundamentally on grounds that the real “*author of the nuisance*” is the Government’s failure to provide the services in the first place.
139. The fact that the municipality would not under any circumstances attempt to recoup the costs of the provision of services, nor could it do so under the constitutional scheme, aptly demonstrates that the section is not a neat fit for the municipality’s present purposes.
140. In addition, I have concerns about the application of this section in a manner consistent with PAJA.

141. I have already referred above to the requirements that a person affected by administrative action must be given notice of the intended action and an opportunity to influence the outcome thereof. The notice envisaged in section 259(1) is only a notice requiring the person to remove the cause of and abate the nuisance. It does not specifically require that the person be notified that, in the event that the cause of the nuisance is not removed and the nuisance is not abated, the municipality will do specific things in order to achieve this end. If eThekweni were so minded despite my concerns above to utilise section 259 then it would need to amend its notices under section 259(1) to render them consonant with the provisions of PAJA.
142. More fundamentally however consultant would need to bear in mind that even if the rights accorded to the municipality under section 259(2) are construed as a statutory servitude, those rights would still need to be exercised in the manner and subject to the principles articulated in *Link Africa*.
143. In summary, attempting to shoehorn the provisions of section 259 into the current context is uncomfortable and problematic. Any temptation which might arise to employ this provision by virtue of the fact that it is already extant is best avoided.

H2: The Nuisance Bylaw

144. My concerns about applying this bylaw to deal with the situation under consideration echo those made above with regard to using section 259 of the Ordinance.

145. In any event, the Nuisance Bylaw does not give the municipality remedial powers sufficient enough for it to do the work necessary to provide the services. Although section 16 of the nuisance bylaw prohibits owners, occupiers and persons in control of land or premises from using or allowing the use of the land or premises in a manner which creates or is likely to create a nuisance, the powers of authorised officials in terms of section 20 of the nuisance bylaws are limited to the issue of a warning notice instructing the offender to cease the conduct within a reasonable period⁹⁴.

H3: Public Health Bylaw (1911)

146. Section 2 of the Public Health Bylaw makes it an offence for a person to occupy premises in a condition which is injurious to public health.
147. Section 3(1)(c) requires owners of property to keep it clean and tidy even if it is occupied by “*squatters or vagrants*” to use the language of the bylaw. If the owner does not comply with these obligations the municipality must serve a notice on the owner to comply and failing that can do the necessary itself and recoup the costs. In terms of section 3 (*bis*) of the Public Health Bylaw, if a stand is not provided with drinking water for domestic purposes the municipality can enter on the site and carry out the work and recover the costs.
148. Section 10 of the bylaw goes on to require owners of premises to provide suitable and effective means of drainage and disposal of all waste, liquids and storm water.

⁹⁴ Section 20(3)

149. It is difficult to conceive of any of these obligations applying to owners whose premises are being occupied against their will and without their permission under the current constitutional dispensation given that owners are frequently unable to enforce evictions of the occupiers as the state has no land to which they can be moved.
150. For all the reasons applicable to the nuisance bylaw it is my view that this bylaw would not comfortably be construed as according to the municipality the necessary powers for present purposes.

H4: The Sewage Disposal Bylaw

151. There are various provisions in the Sewage Disposal Bylaw namely sections 14, 16, 44, 46 and 47 all of which appear to go some way towards assisting consultant but none goes far enough or provides a proper framework for what eThekweni has in mind.

H5: Water Services Act 108 OF 1997

152. Section 3 of the Water Services Act applies to the municipality as it is a water services authority as defined⁹⁵.
153. Section 3 of the Water Services Act reiterates the right of persons of access to basic water supply and basic sanitation and imposes duties on water services providers to

⁹⁵ Section 1 of the Water Services Act.

make these services available within the framework of the Act which takes account of capacity and other constraints⁹⁶.

154. The Water Services Act is in the nature of framework legislation and therefore binding on the municipality regarding the manner in which it fulfils its duties. Whatever the municipality might devise as an independent measure must therefore be consistent with this statute.

155. The provisions of section 11 of the Water Services Act have significant implications for consultant particularly in the implementation of a basic services bylaw in that it imposes upon the municipality the obligation to ensure the equitable allocation of resources to all consumers and potential consumers within its area of jurisdiction and regulate access to water services in an equitable way⁹⁷. This means that the municipality would need to ensure that the criteria by which stands are selected for the provision of water services is equitable as envisaged in the statute. This consideration is of course inherent in any event in the equality provisions of the Constitution⁹⁸.

156. Section 79(1) of the Water Services Act creates a protection similar to that created by Section 23 of the Electricity Regulation Act discussed below insofar as the ownership of water services works are concerned⁹⁹.

⁹⁶ Section 11 of the Water Services Act

⁹⁷ Section 11(2)(b) and (c)

⁹⁸ Section 9

⁹⁹ “Water services work” is defined in section 1 to mean “a reservoir, dam, well, pump house, borehole, pumping installation, purification work, sewage treatment plant, access road, electricity transmission line, pipeline, meter, fitting or apparatus built, installed or used by a water services institution - (i) (to provide water services)”

157. Section 79(2) of the Water Services Act however goes somewhat further than section 23 of the Electricity Regulation Act, in that it limits the rights of owners of occupiers of property on which water services works have been erected when these are removed. Their claims are limited to requiring the institution concerned to restore any physical damage caused to the property by the removal as far as that may be reasonably possible but precludes any other claim against the water services institution. Consultant may well wish to include such a provision in a new bylaw where the equipment and infrastructure to which the protection relates could be suitably defined.

H6: Water Supply Bylaw (1996)

158. Unfortunately this bylaw is unhelpful for present purposes.

159. The closest the bylaw comes to having any provisions which might be useful is in section I- 13 which accords officers as defined a power of entry and inspection for any purpose connected with the implementation or enforcement of the bylaws. If, as a result of such inspection or otherwise the authorised delegate as defined in that bylaw considers it necessary that work be performed to enable an officer properly and effectively to implement a function referred to in sub-section (1) (that is inspection, examination and enquiry as well as the operation of any component of the water installation) various provisions are made as to how this can be achieved and the costs recovered from the owner or occupier of the premises. None of these provisions assist consultant as they relate to existing installations, not the provision of new services.

160. Nor do the provisions of II - 20 to which I was referred as these deal with the temporary supply of water from a fire hydrant.

H7: Draft Water Supply Bylaw (2014)

161. eThekweni has been in the process of revising its Water Supply Bylaw and a 2014 draft bylaw in this regard is on the municipality's website although it has yet to be adopted and promulgated. I am not aware as to whether there are any specific reasons why the bylaw has yet been made law.

162. Chapter 2 of the draft bylaw deals specifically with informal settlements. It is therefore necessary to consider these provisions in the event that the draft comes into law whilst eThekweni is considering how best to deal with the present challenge because any measures it adopts will then need to be in accordance with the bylaw. Given that the bylaw is still in draft form, should eThekweni come to the view that it wishes to deal with matters differently than is presently prescribed in the draft then the draft will need to be amended accordingly.

163. Of particular importance are the provisions of sections 5 and 6 of the draft bylaw.

164. Section 5 prescribes that pottable water may be supplied for domestic purposes only via certain specified supply systems. These systems include a manually operated standpipe and an individual household yard supply which supplies 300 litres per day either via a ground tank or a yard tap. From the basis of what was explained to me

during consultation my understanding is that what the municipality envisages supplying is consistent with these provisions.

165. Section 6(1) of the draft bylaw sets a minimum level of supply of pottable water to informal settlements as a water dispenser or standpipe within 200 metres of every household.

166. I have no instructions as to how this provision would affect the nature of services to be installed but I was advised that the informal settlements to which services are to be provided are relatively large. I am therefore concerned that on various sites it may not be possible for eThekweni to comply with the obligation to supply a source of water within 200 metres of every household whilst at the same time ensuring that the provision of section 6(2) that the water dispenser or standpipe must be located on the boundary of the settlement or, where it exists, along an established road. My impression was that the sites are of such a size that there would need to be standpipes within the various sites if the proximity requirement in section 6(1) is to be met. If this impression is correct, there may be a need to amend section 6(2) unless it is possible to meet the proximity requirement by erecting dispensers or standpipes at various places around the boundary.

167. These considerations aside, given that section 6 envisages the water dispenser or standpipe being erected on the boundary of the settlement and not in the property itself, it is plain that the draft bylaw also does not accord the municipality the kind of powers it needs. It would also create a conflict if the municipality were given powers

in terms of a new fir for purpose bylaw that conflicted with this bylaw once it came into force. The two provisions would need to be harmonised.

168. Helpfully however, section 122 of the draft bylaw contains an indemnity which reads:

“The Municipality and any authorised official are not liable to any third party for any damage caused by anything lawfully done or omitted by the Municipality or the authorised official in carrying out any function or duty in terms of this by-law”

169. The municipality would be wise in my view to include such an indemnity in any bylaw it may ultimately draft to deal with the present situation.

H8: Electricity Regulation Act 4 of 2006

170. The provisions of any bylaws regarding electricity need to be considered and understood in the light of the provisions of the Electricity Regulation Act.

171. Section 7 of the Electricity Regulation Act requires that certain activities may not be performed without a licence. These activities include generation, transmission and distribution of electricity as well as being involved in trading which is defined as buying and selling electricity as a commercial activity. Trading is in turn part of reticulation as defined and municipalities are responsible for reticulation¹⁰⁰.

¹⁰⁰ See Section 27 of the Electricity Regulation Act which in turn refers to the Municipal Systems Act.

172. As such, eThekwinini must be a licensee under the Electricity Regulation Act and is obliged to exercise its powers in accordance with the conditions stipulated in that licence¹⁰¹. I have not had sight of the licence but consideration would need to be given to its terms so as to avoid any form of conflict when bylaws are drafted or amended.
173. Section 21 of the Electricity Regulation Act provides that a licence issued under the Act empowers and obliges the licensee to exercise its powers and perform its duties set out both in the licence and the Act¹⁰².
174. Section 22 of the Electricity Regulation Act envisages that a licence might authorise a licensee to enter on premises. Unfortunately that is of no assistance to consultant in the present context because the powers relate to premises to which electricity is or has been supplied by the licensee and restricts the purpose of the inspection in similar fashion to the municipality's own electricity bylaws.
175. It follows that there is no specific power granted to the municipality in terms of the Electricity Regulation Act which authorises it to perform the acts necessary to supply electricity on private land in the circumstances currently under consideration, nor could such powers be validly accorded in terms of any licence issued under that legislation.

¹⁰¹ In accordance with Section 7 of the Electricity Regulation Act
¹⁰² Section 21(1)

176. The Electricity Regulation Act does however contain certain provisions which are useful to consultant. These provisions would apply regardless but consultant may also wish to include similar provisions in a new bylaw. The relevant provisions are:

176.1 Section 23 which provides that “*any asset belonging to a licensee that is lawfully constructed, erected, used, placed, installed or affixed to any land or premises not belonging to that licensee, remains the property of that licensee notwithstanding the fact that such an asset may be of a fixed or permanent nature*”. Such assets are therefore accorded certain protection from attachment and dispossession in terms of section 23(2) of the Electricity Regulation Act;

176.2 Section 24 accords licensees the right to do all such things over, in or along the roads and streets and associated infrastructure as may be necessary to carry out their licenced activities;

176.3 Section 30 creates a mechanism for resolution of disputes arising under the Act by the Regulator and similar dispute resolution provisions could be included in a new bylaw.

H9: Electricity Bylaw 2006

177. The electricity bylaws focus, as their full title explains, on “*regulating the imposition of surcharges on electricity supplied to occupiers of municipal property*”. It is therefore of no assistance to consultant for present purposes in its current form.

178. I mention however that in considering how best to deal with the present challenges and in drafting new or amending existing bylaws, consideration could be given to the amendment of this bylaw.
179. By way of example, KwaDukuza Local Municipality has provisions in its Electricity Supply Bylaws¹⁰³ that create a statutory servitude in favour of the KwaDukuza Municipality of the type that consultant both needs and requires. The manner in which that provision in the bylaw has been formulated might well be of assistance to consultant when drafting its own bylaw or amending any existing legislation. It reads as follows:

“12. Statutory Servitude

- (1) Subject to the provisions of sub-section (3) the Municipality may within its municipal area:*
- (a) Provide, establish and maintain electricity services;*
 - (b) Acquire, construct, lay, extend, enlarge, divert, maintain, repair, discontinue the use of, close up and destroy electrical supply mains;*
 - (c) Construct, erect or lay any electricity supply main on, across, through, over or under any street or immovable property and the ownership of any such main shall vest in the Municipality;*
 - (d) Do any other things necessary or desirable for or incidental, supplementary or ancillary to any matter contemplated by paragraphs (a) to (c).*

¹⁰³ Published under NN9 in KwaZulu-Natal Provincial Gazette 6381 of 17March 2005

(2) *If the Municipality constructs, erects or lays any electrical supply main on, across, through, over or under any street or immovable property not owned by the Municipality or under the control of or management of the Municipality it shall pay to the owner of such street or property compensation in an amount agreed upon by such owner and the Municipality or, in the absence of agreement, be determined either by arbitration or a court of law.*

(3). *The Engineer shall, before commencing any work other than repairs or maintenance on or in connection with any electricity supply main on immovable property not owned by the Municipality or under the control or management of the Municipality, give the owner or occupier of such property reasonable notice of the proposed work and the date on which it proposes to commence such work”.*

180. The resemblance to the structure and mechanism together with the safeguards of section 22 of the ECA read in light of *Link Africa* will be immediately apparent from the formulation of this provision in the KwaDukuza bylaw.

181. The municipality’s rights in this regard are underscored by section 15 of the KwaDukuza bylaw which provides that:

“No person shall wilfully hinder, obstruct, interfere with or refuse admittance to any duly authorised official of the municipality in the performance of his duty under this by-law or of any duty connected therewith or relating thereto”

H10 : Conclusion On Existing Bylaws And Other Legislation

182. It follows from the exposition above that there is in my view at present no power or mechanism in the extant legislation which either provides consultants with the general servitude of the nature they require or a framework within which eThekwini can fulfil its constitutional mandate in the circumstances under consideration.

183. It follows then that it will be necessary for eThekwini to enact a new bylaw to fill these *lacunae*. It would in my view be wise if the new bylaw incorporated, either expressly or by reference, some of the existing provisions which apply in any event to the current situation because this conduces to clarity. I would also suggest that consultant consider incorporating in the bylaw provisions which would constitute adaptations of certain of the useful features in extant legislation to which I have referred above.

184. I was requested, in the event that I came to the view that a new bylaw would be necessary, to render such advice as I thought might be helpful to eThekwini both in the drafting of that bylaw and in its implementation. It is to that subject then that I now turn.

I: A FIT FOR PURPOSE BASIS PURPOSES BYLAW**I1: Drafting considerations**

185. A fit for purpose bylaw should contain the following:

- 185.1 The grant of a statutory servitude akin to that contained in section 22 of the ECA and section 12 of the KwaDukuza Municipality's electricity bylaws;
- 185.2 Provisions regarding notice. These need to deal not only with how notice can be given and the relevant time periods which apply but also set out a process which allows opportunity for meaningful participation by the landowner. Section 328 of the Local Authorities Ordinance makes provision for the service of documents and process which is useful and applies whenever any notice or other document is required to be served. The provision applies to bylaws made under the Ordinance but of course all post constitutional bylaws are not made under authority of the Ordinance. The provisions of section 328 do not automatically apply so analogous provisions ought to be included in the draft bylaw. Essentially section 328 stipulates what service is sufficient and section 329 provides that a defect in form of the notice will not invalidate it.
- 185.3 Default provisions regulating how the rights accorded in terms of the statutory servitude will be exercised by eThekweni where notice has been given but the landowner has not responded;
- 185.4 Provisions creating a mechanism for the determination of disputes regarding access and compensation. In this regard, provisions such as section 10 of the KwaDukuza electricity supply bylaws which provide that differences will be determined by arbitration may be useful because of the finality attaching thereto and the relative speed by which finality can be reached;

- 185.5 Stipulations regarding the payment of compensation or otherwise;
- 185.6 A provision akin to section 24 of the ECA inclusive of section 24(2) which accords a right of the landowner to supervise the work being undertaken and an obligation on the person undertaking the work to pay all reasonable expenses incurred by such supervision;
- 185.7 Provisions providing that the infrastructure remains the property of the municipality, in the nature of those contained in section 23 of the Electricity Regulation Act and section 79 of the Water Services Act;
- 185.8 An indemnification clause in the nature of that contained in section 122 of the draft water Supply Bylaw.
186. All these features are in my view necessary to ensure that the bylaw is constitutionally compliant and does not unnecessarily expose the municipality to challenge whilst at the same time endowing eThekweni with the powers necessary to provide services on the privately occupied land.
187. Provisions such as those set out above would be sufficient to meet the majority of grounds upon which a challenge could be mounted as alluded to earlier in this opinion.

188. The municipality might wish to consider stipulating the criteria according to which sites would be selected for servicing in the bylaw itself. Given that these criteria would need to be somewhat flexible and allied to the municipality's policies in place at any given time, it is my view that the criteria might more conveniently be dealt with in municipal policy documents. Although these do not have the force of law¹⁰⁴ they legitimate guides for decision-making¹⁰⁵ and would serve to ensure that the municipality's powers are exercised in an equitable as already explained above.

I2: Considerations for implementation

I2.1 Ensuring the actions are not arbitrary

189. First and foremost the municipality would need to ensure that in selecting the sites to be serviced it is acting in a rational and reasonable way and that, unless compelling reasons exist, the selection criteria accord with its policy. Any departure from the policy would need to be on justifiable grounds and for clearly articulated reasons¹⁰⁶

I2.2 Compliance with title deed restrictions and zoning controls

190. Consideration needs also to be given to any restrictive conditions in the title deeds attaching to the property so identified which might require additional authority or the removal of the restrictive condition depending on its nature¹⁰⁷.

¹⁰⁴ *Akani Garden Route (Pty) Ltd v Pinnacle Point Casio (Pty) Ltd* 2001 (4) SA 501 (SCA) at [7]

¹⁰⁵ Once adopted policy cannot be ignored: *Bato Star Fisheries(Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 (4) SA 490 (CC) at [100]

¹⁰⁶ *MEC Agriculture v Sasol Oil* 2006 (5) SA 483 (SCA) at [19]

¹⁰⁷ This is easily achieved by a search of the title deed of the property and ought to occasion no particular difficulty to the municipality in most instances.

191. I have been specifically requested not to deal with problems which might arise from the zoning of the properties upon which the informal settlements exist and therefore do not expand on how this features in the implementation of a basic services bylaw.
192. Suffice it for present purposes to mention that consultant would need to be aware of the principle articulated by the Supreme Court of Appeal in *Educated Risk*¹⁰⁸ which considered whether a municipality's provision of services by the construction of sewage and water reticulation infrastructure and the erection of toilets was compatible with the zoning of the property.

I2.3 Notice

193. The manner in which the municipality gives the necessary notices in terms of the new bylaw will be extremely important.
194. I have been briefed with specimen notices which eThekweni has been using thus far in an effort to obtain the consent of owners to supply the necessary services and asked to advise whether they require modification
195. The letters effectively seek to obtain the consent of owners to the municipality's proposed conduct and of course if consent is obtained then the municipality is perfectly at liberty to act as long as that consent is properly informed which I discuss further below.

¹⁰⁸ *Educated Risk Investments 165 (Pty) Ltd v Ekurhuleni Metropolitan Municipality* [2016] ZASCA 67 (20 May 2016)

196. The notices take various forms and it is not entirely clear to me why there has not been a consistency of approach. It is necessary by virtue of the letters being of different types to discuss what might be best done to insulate the notice process against procedural challenges in respect of each category of letter.

(i) *The request for affirmation letter*

197. One of the *pro forma* letters with which I was briefed refers to eThekweni's interim services to informal settlements programme and advises the owner of the property (whose details are to be filled in in the *pro forma* notice) that the municipality requires immediate access to facilitate the provision of services especially electricity. It then requests affirmation from the landowner of various matters relating to the municipality's access the last of which is that "*any compensation in the form of a property purchased by the Municipality shall be concluded with the owner subject to the property being feasible for permanent housing development*".

198. The approach of this letter is sound in principle but in order for it to align properly with PAJA the letter should stipulate the kind of works which will be undertaken. My concern is that the explanation which is that access is required "*to facilitate the provisions of such services especially electricity*" is too broad to serve as a proper notification of the action which is intended which is what PAJA requires.

199. The specimen letter in my brief does go on to record that "*this particular service will be installed along emergency access roads and footpaths – which in turn will*

incorporate the necessary storm water controls”, but even this gives the property owner no idea really of what works are to be effected. The requirement that proper notification of the intended action be given is important not only to ensure compliance with PAJA but also so as to ensure that the municipality can contend that informed consent was given. Failing this, it is open to a landowner to argue that it had not consented to the particular conduct undertaken by the municipality and had not waived its right to make any claim against the municipality¹⁰⁹.

200. The provisions in this letter regarding compensation are also of concern to me. Whilst the paragraph is undoubtedly intended to ensure that the municipality has not, simply by rendering the services to the property, undertaken to expropriate it, it does not either purport to or in fact actually deal with the question of compensation. It makes no mention of whether compensation is payable for any deprivation which might be occasioned by the provision of the services nor does it purport to include a recordal that the services to be installed will not constitute a deprivation and that the property owner agrees to this.

201. It would therefore be prudent for eThekweni to amend this form of letter to:

201.1 specify the type of services which will be constructed;

201.2 specifically record the owner’s agreement consenting to the erection of such services;

¹⁰⁹ A waiver is only valid if it is an informed one: *Laws v Rutherford* 1924 AD 261 at 263

- 201.3 record an agreement as between eThekweni and the owner that such services will not amount to a deprivation of the owner's property;
- 201.4 record an agreement that not compensation will be payable (if the work is of such a nature that this is reasonable) or recording an amount of compensation payable;
- 201.5 provide express timelines for response and recordal of consent and the mechanism by which this consent will be evidenced.

(ii) *The "no objection" letter*

202. A variation of the request for affirmation letter is the "*no objection statement*" letter.
203. It is devoid of much detail and in nature the same as the permission to occupy letters which I discuss further below. The no objection statement letters are even more problematic than the request for affirmation letters for the reasons discussed below in relation to permission to occupy letters.

(iii) *Permission to occupy letters*

204. This is a variation of the first two types of letters discussed above but requires property owners to evidence their acceptance of granting the municipality immediate occupation for the construction of interim services by the signature of an attached "*permission to occupy*".

205. The permission to occupy letters do not specify the nature of the actual services to be installed although the project to which the permission relates is recorded on the permission to occupy form. This recordal is however in broad terms which are insufficient for the reasons described in connection with the request for affirmation letter above. By way of example, in the example furnished to me the project is simply described as “*provision of water and sanitation services to informal settlements in eThekweni*”. This gives the owner no idea of the nature of the services to be supplied on its land or the impact thereof.

206. The permission to occupy letters are also deficient in that they do not deal with costs, risks, indemnification or compensation in any way and in this regard will create serious difficulties.

207. My suggestion would be that the municipality not attempt to use permission to occupy letters and instead amend the request for affirmation letter as suggested and modify the permission to occupy form to include a description of the nature of services so that the request for affirmation letter makes provision for the signature of that amended form.

(iv) The public health letter

208. These are notices in terms of the public health bylaws and section 259 of the Local Authorities Ordinance.

209. I understand that the municipality was utilising this mechanism simply because it had none other readily available but I have already expressed my concerns about utilising these provisions.
210. The public health bylaw letters give a vivid illustration of my concerns. The letter purports to place upon the owner of the property the duty to provide adequate sanitation to the informal settlement on their property. It creates a reverse onus on the property owner to show cause why they are unable to comply with the requirements within the thirty-day period specified in the notice. Even then the cause which will be considered is expressly limited.
211. These notices are objectionable and subject to challenge in that they are arguably an abuse of the municipality's power under section 259 of the Local Authorities Ordinance and seek to impose duties upon private landowners which do not exist. I urge that their use be discontinued forthwith.

(v) *The nuisance letters*

212. I have also been furnished with a variation of the public health bylaw letters which rely on the nuisance provisions in section 259 of the Local Authorities Ordinance alone. These are likewise problematic for the reasons already discussed and their use should be discontinued.

(vi) *Notices in terms of Section 225 of the Local Authorities Ordinance*

213. The same observations are not true of the specimen letters with which I was furnished which purport to rely on section 225 of the Local Authorities Ordinance for reasons already explained. The only question would be whether the seven-day period afforded to the landowner to remedy the danger would be sufficient in the circumstances.
214. Given that the provision invoked by eThekweni in these letters allows for the municipality to recover the costs of removing the danger but it is not eThekweni's intention to seek to recover these costs by virtue of the fact that they are occasioned by the illegal occupiers in question, it would in my view be preferable for the section 225 letters to expressly disavow any right to reclaim the costs of removing the danger.

J: SUMMARY AND CONCLUSION

215. If eThekweni is able to secure properly informed consent of landowners to erect services on their land, no difficulty arises. eThekweni should however ensure that the nature of the consent obtained deals with all relevant matters including the payment of compensation. This should preferably be in the form of a recordal of an agreement between the municipality and the landowner that no compensation is payable for the works in question.

216. Where eThekweni is not able to secure such consent, there is no provision in its current bylaws or in national legislation which gives the municipality the right to enter upon privately owned land and construct the services or creates a framework for so doing. There are however individual provisions in various pieces of legislation which do assist but these do not in and of themselves go far enough to enable consultant to fulfil its constitutional mandate as it seeks to do.
217. It is therefore necessary for consultant to enact a new bylaw which will expressly give it the right to enter upon private land and erect the services by way of the creation of a statutory or public servitude akin to that created by section 22 of the ECA and section 12 of the KwaDukuza Municipality Electricity Supply Bylaws.
218. The creation of such a right by way of statutory servitude would need to be exercised respectfully and with due caution which includes:
- 218.1 selecting the premises upon which services are to be installed in a civil and reasonable manner;
 - 218.2 giving reasonable notice to the owner of the property;
 - 218.3 determining access to the property in consultation with the owner;
 - 218.4 the payment of compensation in the event that the exercise of the servitudinal rights amounts to a deprivation of property as envisaged in section 25 of the Constitution;

- 218.5 where disputes arise either regarding the manner of exercising the rights or the extension of compensation payable these must be determined before eThekwini may lawfully have access to the property.
219. The creation of such a statutory servitude does not and cannot override section 25(1) of the Constitution and thus, if the nature of the services erected is of such an extent that it amounts to a “*constructive expropriation*” eThekwini may be at risk of constitutional damages. In such circumstances it would be better advised to follow the formal expropriation route if services of that nature need to be provided in a manner which amounted to such extensive deprivation.
220. In order to ensure the constitutionality of a fit for purpose bylaw, the bylaw should include the following:
- 220.1 The grant of a statutory servitude akin to that contained in section 22 of the ECA and section 12 of the KwaDukuza Municipality’s electricity bylaws;
- 220.2 Provisions regarding how notice can be given and the relevant time periods which apply similar to section 328 of the Local Authorities Ordinance;
- 220.3 Default provisions regulating how the rights accorded in terms of the statutory servitude will be exercised by eThekwini where notice has been given but the landowner has not responded;

- 220.4 Provisions creating a mechanism for the determination of disputes regarding access and compensation, possibly similar to section 10 of the KwaDukuza Electricity Supply bylaw which provides that differences will be determined by arbitration;
- 220.5 Stipulations regarding the payment of compensation or otherwise;
- 220.6 A provision akin to section 24 of the ECA inclusive of section 24(2) which accords a right of the landowner to supervise the work being undertaken and an obligation on the person undertaking the work to pay all reasonable expenses incurred by such supervision;
- 220.7 Provisions providing that the infrastructure remains the property of the municipality, in the nature of those contained in section 23 of the Electricity Regulation Act and section 79 of the Water Services Act;
- 220.8 An indemnification clause in the nature of that contained in section 122 of the draft Water Supply Bylaw.
221. Criteria for the selection of property upon which services are to be installed need to be determined in advance. These need not be specified in the bylaw itself but should for the sake of clarity and certainty be contained in a municipal policy document and applied unless exceptional circumstances warrant a departure from that principle.
222. In implementing the new bylaw eThekwinini must have due regard for:

- 222.1 proper compliance with the notice procedures in PAJA and ensure that its procedure is fair and allows meaningful participation;
- 222.2 the nature of the services to be installed does not offend the zoning restrictions applicable to the property or contravene any restrictive conditions of title;
- 222.3 an appropriate mechanism is created for the resolution of disputes regarding compensation preferably by an out of court mechanism so as to expedite finalisation of such disputes. This will entail the creation of necessary structures and panels depending on the nature of the solution eThekwin chooses.

A.M. ANNANDALE SC
CHAMBERS, DURBAN
26 July 2019