

**THE ROLE OF PROVINCIAL
AUTHORITIES IN STRENGTHENING
MUNICIPAL BYLAW-MAKING
CAPACITY**

**A COOPERATIVE GOVERNMENT
PERSPECTIVE**

INTRODUCTION

Legislative Power

- The major characteristic that distinguishes *government* from other forms of corporate organisation is its competence to make laws which then bind others.
- A municipality derives its competence for bylaw-making from the Constitution -
 - **original** - s 156(1)(a)
 - **assigned** - s 156(1)(b)
 - **incidental** - s 156(5)

- The power to make by-laws is **discretionary** – but effective governance is not possible without appropriate by-laws and the proper enforcement thereof.
- Bylaws effectively create the rules of the game so that everyone can play.

- There are some exceptions –the following bylaws are prescribed by law –
 - **Property Rates By-law** - s 6 Municipal Property Rates Act
 - **Tariff By-law** - s 75 of the Systems Act
 - **Credit Control and Debt Collection By-law** - s 98 of the Systems Act
 - **Water Services By-law** - s21(1) of the Water Services Act

BY-LAW-MAKING CAPACITY

WHAT IT ENTAILS

- A proper understanding of original, assigned and incidental legislative competencies which municipalities have, as reflected in the Constitution
- Interpretations of municipal competencies handed down by our courts from time to time
– see e.g. *Le Sueur v Ethekwini Municipality*, *Zondi v MEC for Traditional Affairs and LG Affairs*
KZN
- An understanding and application of the provisions of enabling and other legislation –
see e.g. Interpretation Act s10(3)

- Where a law confers a power to make rules, regulations or by-laws, the power shall, unless the contrary intention appears, be construed as including a power exercisable **in like manner** and subject to the like consent and conditions (if any) to **rescind, revoke, amend or vary** the rules, regulations or bylaws.

By-law making Capacity

What it entails

Also -

- necessity for a by-law – policy?
- drafting skills,
- an understanding of what substantive provisions should be included to ensure that subjects are clear on
 - what their rights and duties are;
 - what they are permitted to do; and
 - what is prohibited and met by sanction.
- procedures and processes that need to be followed to pass a valid by-laws See 160 of the Constitution and s 12 and 13 of the Systems Act

By-law-making Capacity

What it entails

- Important: "*What are the aims of the intended rules?*"
 - To confer and protect rights or privileges
 - To prescribe or prohibit conduct
 - To avoid or settle disputes
- If not, such rules constitute nothing more than a policy
 - see example of a notice published in a *Provincial Gazette* in August 2007

BY-LAWS PERTAINING TO THE DONATION OF LIBRARY MATERIAL

Notice is hereby given in terms of the provisions of Section 13 of the Local Government: Municipal Systems Act, 2000 (Act 32 of 2000) that **Council adopted the following By-laws pertaining to the Donation of Library Material** with effect from publication hereof.

DONATION OF LIBRARY MATERIAL TO THE LIBRARY BY-LAWS

1. The Library welcomes donations of library material (books, videos and CDs).
2. The selected books that are in a good condition will be included in the book collection according to the determined procedures.
3. All donors are required to sign a form renouncing all rights to the material that has been donated.
4. The donor may not place any limitations on location, handling or the use of the donated items.
5. Once the form has been signed the Library assumes immediate, perpetual and unconditional ownership of the donation.
6. A written letter of appreciation must be sent to all donors.
7. Donations that cannot be included in the book collection due to the selection criteria, will be donated to other institutions (libraries and schools) according to the recognised and established procedures.
8. Donations not suitable for the Library's or other institutions' collections, will be sold.
9. All the funds generated from the selling of donated material will be used to purchase library material according to the determined procedures.
10. Donations that are threadbare and mildewed are donated to a group of unemployed people who sell them for paper recycling.

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MUNICIPAL MANAGER

NEED FOR ASSISTANCE

- Good Bylaw-making requires **skills and expertise**
- Most municipalities – excluding metros and bigger towns – do not always have **competent staff** to suggest regulatory rules or draft bylaws that are needed to effectively govern.
- Very few municipalities have **experienced legal advisors** and often there is a high turnover of staff
- **Consultants** are often equally ill-equipped and expensive

Need for assistance

Examples

- Making bylaws on matters not constitutionally permitted, e.g. libraries Principle of legality in *Fedsure -case*
- Arbitrary re-enactment of old order bylaws
- Copying a bylaw of another municipality without considering the different and varying circumstances, e.g. municipal health
- Not being able to distinguish between *policy* and *bylaw*

FURTHER ASSISTANCE

- Municipal Bylaws do not always enjoy the **status** they deserve as being the enactment of the government of South Africa and
 - which is now an equal sphere of that government
 - often with the exclusive power to enact a bylaw over the subject matter in question, e.g. municipal planning
- Provinces can assist in -
 - orientation sessions with the SAPS and NPA
 - training of LEO's
 - establishing Municipal Courts

PROVINCIAL DUTY TO ASSIST

- A province's duty to assist municipalities in bylaw-making does not only stem from the principle of **co-operative government** –
..... provincial governments, by legislative and other measures, must support and strengthen the capacity of municipalities to manage their own affairs, to exercise their powers and to perform their functions
- Also the general **constitutional duty** –
..... promote the development of local government capacity to enable municipalities to perform their functions and manage their own affairs.

Provincial duty to assist

- The MEC for local government is furthermore obliged to **assess the support needed** by municipalities to strengthen their capacity to manage their own affairs, exercise their powers and perform their functions. See s 105 of the Systems Act
- The *Western Cape Monitoring and Support of Municipalities Act 2014* was enacted in the Western Cape to give effect to this constitutional duty

NATURE OF PROVINCIAL ASSISTANCE

In addition to the above –

- Drafting and publishing **Standard Draft By-Laws** for consideration and adoption by municipalities s 14 of the Systems Act
- Drafting of by-laws without publishing them as such, but rather as standards
- Translations
- Public participation facilitation
- Maintaining a Municipal Code s 15 of the Systems Act
- **Delegations**
- **Broadband access**

Will elucidate on some of the above

Standard Draft By-Laws

- The **MEC for LG** may make standard draft by-laws concerning any matter for which municipal councils may make by-laws, after **inviting public comment** and consult any affected **MEC colleague**
- A municipality must nevertheless follow a **public participation process** before adopting a standard draft by-law and it must be published in the *Provincial Gazette* after adoption.
- It may be more **convenient and less time consuming** to prepare a draft by-law without publishing it whereupon the municipality can follow the processes, thus averting a double public participation process

Drafting of by-laws

- Assistance rendered in the form of drafting must be undertaken together with representatives of the relevant municipality that requires assistance – there cannot be a *one size fits all* approach
- Intergovernmental *fora* should be approached for guidance and a sounding board e.g. –
 - Municipal practitioners
 - Speakers
 - Mayors

Delegation of Powers

- By-laws create numerous powers, duties and functions that are often '*conferred*' on the municipal council or municipality.
- Effective administration and expeditious execution of functions require that such powers, duties and functions be delegated
- Delegation is a rather **complex legal instrument** and it requires expert assistance to develop and maintain a system of delegation

Broadband connectivity

Constitution and Systems Act requires a municipality to –

- respond to people's needs
- encourage the public to participate in policy-making
- afford the public an opportunity to make representations with regard to a proposed by-law
- provide, on request, a member of the public with a copy of or an extract from its municipal code

In **modern day society** the execution of these duties require **effective e-communication**. Provinces could provide the necessary support

THE WESTERN CAPE EXPERIENCE



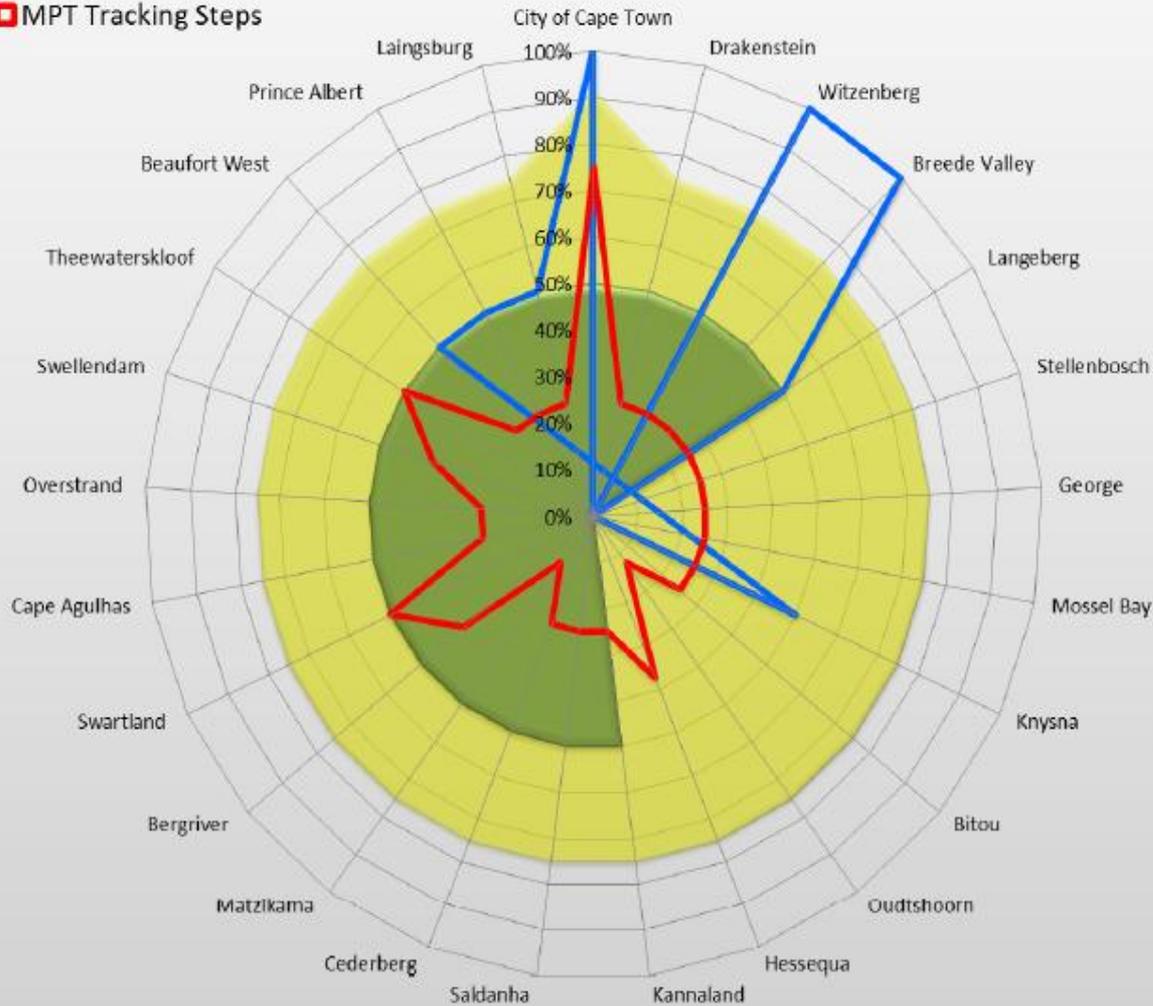
Drafting

- *IGR fora* are used to prepare and draft bylaws
 - Legal and Constitutional Task meet quarterly to discuss new developments, comment on proposed legislation and draft by-laws for general use
 - Speakers' and MM Forums are consulted
- Provincial *line departments* draft technical bylaws
 - Standard Draft Zoning Scheme By-law – published 2 weeks ago
 - Drafting a bylaw on land use planning in the light of SPLUMA which will become effective on 1 July 2015

MUNICIPAL TRACKING MAY 2015

Tracking of: MPT's, Bylaws, Tariffs & Delegations

- Bylaws Tracking Steps
- Tarrifs
- Delegations
- MPT Tracking Steps



The Western Cape Experience

Co-operative government

- Liaison with municipalities and other organs of state – the latest entailed enforcement of liquor trading between municipality, SAPS and the Liquor Authority
- **Training of LEO's** in terms of an IGR agreement between WCP and the City of Cape Town

The Western Cape Experience

Municipal codes

- A Code - compilation of active and repealed by-laws.
- Compilation of Codes involves a great amount of research and retrieving and extracting of by-laws.
- We have provided each of the 30 municipalities with a Code – a hard-copy as well as an electronic disc with hyperlinks, which allows direct access to the by-Law sought
- Codes are **updated** on a weekly basis
- We also assist municipalities in identifying by-Laws that need **to be rationalised**.

Some interesting by-laws repealed

Cape Town

- By-law relating to **brothels** P.N.170/1898
- By-law relating to **expectoration** P.N. 349/1905
- By-law relating to the prevention of danger from **whirligigs**, switchback railways, firearms P.N. 408/1911
- **Assize** by-law P.N. 210/1921
- By-law relating to **street trading by children** P.N. 19/1923
- By-law relating to **parking attendants** P.N. 294/1930

Simon's Town

- By-law relating to the **sale of goat meat** P.N./P.K. 116/1944

The Western Cape Experience

Laws and Judgments

- Copies of important judgments and laws applicable to local government are circulated to municipalities on a daily basis

Municipal Websites

- Currently assisting 15 municipalities in re-designing their websites

The Western Cape Experience

Broadband network service

WCPG vision - every town and village to have access to affordable high-speed broadband infrastructure and services

- free public WiFi of 250 mb per day for each user in George, Robertson, Atlantis and Delft areas - 80 000 residents now have access to free broadband and we will continue to roll this out
- WiFi hotspots at 384 WCGovernment sites
- Connecting +/- 2000 government offices, clinics, hospitals, schools and libraries to bns
 - 500 by 30/6/15
 - 1000 by 31/12/15
 - 2000 by 30/6/16

THE KWAZULU- NATAL EXPERIENCE



PROVINCIAL GOVERNMENT
PROVINCE OF KWAZULU-NATAL

Standard by-laws

- A **set of draft standard by-laws** was developed and distributed by province to all municipalities to adapt for their specific requirements and thereafter to adopt
- All draft standard by-laws are **being reviewed** to update them in line with amendments to legislation.

The KwaZulu-Natal Experience

A **municipal legal forum** under the auspices of CoGTA meets at least quarterly to –

- Discuss challenges with implementation of and exercise of powers in terms of municipal bylaws
- assist municipalities to revise the previous set of draft standard by-laws,
- **10 amended by-laws** prepared during 2015. After consultation and effecting amendments they will be published as draft standard municipal by-laws.
- Province and the Forum assist uncapacitated municipalities to adapt and adopt formal draft standard by laws for their specific needs.

The KwaZulu-Natal Experience

Several Municipalities have had some of their **by-laws challenged** e.g. the Informal Street Trading By-law of the *eThekweni Municipality* *Makwicana v eThekweni Municipality & Others*

- Some sections of the by-law were declared unconstitutional
- *eThekweni* Metro will have to go back to the drawing board

The KwaZulu-Natal Experience

Province is assisting *the Hibiscus Coast Municipality* regarding the proposed controversial **Naturist Beach**

- a **substantive opinion** obtained confirmed the municipality's competence to adopt by-laws to regulate such conduct
- permissible in terms of our criminal law if the beach were limited to persons 18 years and older

The KwaZulu-Natal Experience

SPLUMA challenge - operative on 1 July 2015

- DRD&LR has been **promoting by-laws** to supplement the deficiencies in SPLUMA, especially on planning processes
- **Legal perspective** -
 - the CC has on several occasions held that municipal planning is a municipal function subject to constitutional provisions, e.g. s155(6)(a) and (7)
 - national government and provinces have concurrent competence to regulate municipal planning
 - provincial legislation will prevail where SPLUMA exceeds the concept of framework legislation
 - various other considerations also find application, e.g. those in s 146 of the Constitution

The KwaZulu-Natal Experience

The publishing of by-laws is **extremely expensive**

- it will cost iNdaka municipality approximately R 400,000.00, excluding implementation costs, to publish a by-law for maybe one or two planning applications a year
- the total costs to KZN's 50 local municipalities and one Metro, will exceed **R 20 million** just to publish the by-law, before the process of implementation has even started

The KwaZulu-Natal Experience

- SPLUMA has confused the difference between ‘*municipal planning*’, and “*urban and regional planning*’,
- Sadly the decision of the Constitutional Court in the *Habitat*-case did not address this issue

Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v The Habitat Council and Others; Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v City of Cape Town and Others [2014] ZACC

The KwaZulu-Natal Experience

KZN is currently preparing a provincial Bill on the *Code of Local Government Law*

- a comprehensive guide to all local government institutions and practitioners
- contain all framework legislation, provincial specific legislation, draft standard by-laws & provincial acts enacted in accordance with s155(6)(a) and (7) to regulate exercise of municipal executive obligations
- contain '*sunset*' or '*grandfather*' clauses - provincial Act will become inoperable when municipalities enact by-laws compliant with provisions of provincial legislation, e.g. Pounds Act, enacted as a result of the *Zondi* judgment

CONCLUSION

- Appreciate its outside my brief, but the temptation was too great, so I would like to leave two thoughts.
- Municipalities should be more innovative and consider bylaws on matters other than the traditional, e.g
 - Payment of **building plan fees** by organs of state
 - Compulsory **solar energy** installations for new buildings
 - Compulsory **water collection** installations for new buildings
 - Fire brigade
 - Fencing and fences
 - Harbours, jetties, piers
 - Trees on roads
 - Advertising in or at undertakings that sell liquor to the public
- Municipalities should innovate and move away from the '*sub-ordinate*' older style of drafting bylaws.

Thank you



Heinz Kuhn and Koos Celliers