

Author: T Humby

LOCALISING ENVIRONMENTAL GOVERNANCE:

THE *LE SUEUR* CASE

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LOCALISING ENVIRONMENTAL GOVERNANCE: THE *LE SUEUR* CASE**T HUMBY*****1 Introduction**

In the matter of *Le Sueur v Ethekewini Municipality*,¹ Gyanda J considered a challenge launched by a private property owner² against the Ethekewini Municipality (the municipality) in respect of certain amendments introduced by the municipality to the Ethekewini Town Planning Scheme. The amendments included upgrading the legal status of the Durban Municipality Open Space Systems (D-MOSS), a management plan for the protection of biodiversity and ecosystem services in and around the municipal area. Formerly a policy directive, the D-MOSS identifies a viable network of open spaces, comprising some 74 000 ha of land and water and incorporating areas of high biodiversity.³ The D-MOSS extends over both public and privately owned land and cements an additional layer of regulation for areas included in the system. For private property owners, the primary implication is that notwithstanding the underlying zoning, development on land included within D-MOSS may not take place

* Tracy-Lynn Humby. BMus (UPE), BProc, LLB LLM (UNISA) PgDip Tertiary Education (Wits) PhD (Wits). Associate Professor, School of Law, University of the Witwatersrand. Email: Tracy-Lynn.Field@wits.ac.za. The research for this note was supported by funding provided by the Department of Science and Technology under the Urban Resilience Assessment for the Gauteng City Region project based in the School of Architecture and Planning at the University of the Witwatersrand, in cooperation with the Gauteng City Region Observatory.

¹ *Le Sueur v Ethekewini Municipality* [2013] ZAKZPHC 6 (henceforth "Le Sueur (KZP)").

² RA Le Sueur also launched the application in his *nomine officio* capacity as trustee of a trust.

³ Ethekewini Municipality date unknown http://www.durban.gov.za/City_Services/development_planning_management/environmental_planning_climate_protection/Durban_Open_Space/Pages/-What-is-the-Durban-Metropolitan-Open-Space-System.aspx. The municipality maintains that the D-MOSS contributes to the attainment of national and provincial biodiversity targets. Specific threatened ecosystems and species protected by the D-MOSS include the endangered Sandstone Sourveld grasslands, the critically endangered *Brachystelma natalense* (a small herbaceous plant endemic to South Africa the habitat of which has been systematically destroyed by urban expansion, crop cultivation and overgrazing), and the endangered Oribi, Spotted Ground Thrush, and Pickersgill's Reed Frog. Identified ecosystem goods and services provided by this system of open spaces to the residents of Durban include "the formation of soil, erosion control, water supply and regulation, climate regulation, cultural and recreational opportunities, raw materials for craft and building, food production, pollination, nutrient cycling and waste treatment".

without an environmental authorisation or support from the Environmental Planning and Climate Protection Department of the municipality.⁴

One of the grounds on which *Le Sueur* attacked the municipality's incorporation of the D-MOSS as an overlay to the Ethekewini Town Planning Scheme was that the municipality lacked authority in terms of either the *Constitution of the Republic of South Africa, 1996 (Constitution)* or in terms of any other law of general application to legislate on environmental issues.⁵ In a groundbreaking judgment, Gyanda J dismissed this argument, holding that municipalities do in fact have power to legislate on environmental matters such as biodiversity and conservation.

After outlining the facts and judgment in this case pertaining to the local authority's constitutional mandate to legislate on environmental issues, this note aims to contextualize the *Le Sueur* decision in terms of the principles relating to municipal governance previously articulated by the Constitutional Court in *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal*⁶ and *Maccsand (Pty) Ltd v City of Cape Town*.⁷ It then goes on to situate this particular judgment within the emerging frame of social-ecological resilience.

2 The judgment

The D-MOSS was introduced as an overlay to the Ethekewini Municipality Town Planning Scheme in order to resolve the legal uncertainty that arose from its previous status as a policy directive.⁸ The municipality advertised a general scheme

⁴ Ethekewini Municipality date unknown http://www.durban.gov.za/City_Services/development_planning_management/environmental_planning_climate_protection/Durban_Open_Space/Pages/MOSS_FAQ.aspx.

⁵ The applicant in this matter also argued that the introduction of the D-MOSS amendments was also unconstitutional in that the resolution to introduce the D-MOSS had been taken in terms of repealed legislation – specifically, the Natal *Town Planning Ordinance 27* of 1947, which at the time that the resolution was taken had already been repealed and replaced by the *KwaZulu-Natal Planning and Development Act 6* of 2008 (PDA). The applicant further argued that the resolution was not saved by the transitional provisions of the latter Act. This note does not canvass or critique these aspects of the matter.

⁶ *Johannesburg Municipality v Gauteng Development Tribunal* 2010 2 SA 554 (SCA) (henceforth "Gauteng Development Tribunal (CC)").

⁷ *Maccsand (Pty) Ltd v City of Cape Town* 2012 4 SA 181 (CC) (henceforth "Maccsand (CC)").

⁸ Ethekewini Municipality date unknown http://www.durban.gov.za/City_Services/development_planning_management/environmental_planning_climate_protection/Durban_Open_Space/Pages/MOSS_FAQ.aspx.

amendment in the press on a number of occasions in 2009. It held a number of public meetings throughout the city and served notice by post on some 18,000 landowners.⁹ After carefully analysing and considering the comments received, the municipality formally adopted the resolution to integrate the D-MOSS into the existing town planning scheme as a control area or overlap on 9 December 2010.¹⁰

2.1 *The arguments*

Apart from maintaining that the municipality had not taken a "resolution" to integrate the D-MOSS into the town planning scheme prior to the advertisement of the general scheme amendment, the applicants argued that the municipality had no power to legislate in the functional area of the environment.¹¹

In as much as the amendments to the town planning scheme were legislative instruments, the applicants proceeded, they were unconstitutional and illegal because Schedule 4, Part A of the *Constitution* identifies "environment" as a functional area of concurrent national and provincial legislative and executive competence, thus excluding the local sphere of government from legislating or exercising executive authority in this area, except by way of legislative assignment.¹² The functions of the national and provincial environmental authorities are distinct and different from those of municipalities, the applicants held. Notwithstanding that the *Constitution* identifies as one of the objects of local government the promotion of a "safe and healthy environment",¹³ municipalities have no authority to legislate in respect of matters such as "environment", "nature conservation" or "biodiversity protection". The applicants pointed out that a municipality has executive authority and the right to administer only those matters set out in Parts B of Schedules 4 and

⁹ Ethekwini Municipality date unknown http://www.durban.gov.za/City_Services/development_planning_management/environmental_planning_climate_protection/Durban_Open_Space/Pages/MOSS_FAQ.aspx.

¹⁰ Ethekwini Municipality date unknown http://www.durban.gov.za/City_Services/development_planning_management/environmental_planning_climate_protection/Durban_Open_Space/Pages/MOSS_FAQ.aspx.

¹¹ *Le Sueur* (KZP) para 4(b).

¹² *Le Sueur* (KZP) para 16.

¹³ S 152(1)(d) of the Constitution of the Republic of South Africa, 1996.

5 respectively.¹⁴ This in turn also restricted the scope of its authority to make by-laws.¹⁵ In the *Gauteng Development Tribunal* case the Constitutional Court had "decreed" that municipalities hold the functional power of "municipal planning"¹⁶ to the exclusion of other spheres of government, and in the Supreme Court of Appeal judgment in the same matter the court had affirmed that "municipal planning" entails "the control and regulation of land use at a municipal level, the zoning of land and establishment of townships".¹⁷ The environmental aspects of both municipal planning, and the meaning of "safe and healthy environment" in s 152(1)(d) of the *Constitution* could be determined by having regard to the other functional areas listed in Parts B of the Schedules such as air pollution, storm water management services, water and sanitation services, and refuse removal, amongst others.¹⁸

While the *Constitution* affords municipalities executive authority in respect of any other matter assigned to it by national or provincial legislation,¹⁹ the applicants pointed out that the *National Environmental Management Act*²⁰ made no reference to municipalities exercising authority over environmental impact procedures, thus supporting the claim that environment, biodiversity protection and nature conservation remained the exclusive preserve of the national and provincial spheres of government.²¹

The municipality (the first respondent) together with the KwaZulu-Natal MEC for Co-operative Governance and Traditional Affairs opposed the application and the applicants' interpretation of local authorities' power in respect of the environment as unduly narrow and incorrect.²² The City of Cape Town, admitted by the court as an *amicus curiae*, led evidence substantially in support of the municipality.²³ The Minister of Environmental Affairs and the KwaZulu-Natal MEC for Agriculture and

¹⁴ S 156(1)(a) of the *Constitution*.

¹⁵ S 156(2) of the *Constitution* provides that "[a] municipality may make and administer by-laws for the effective administration of the matters which it has the right to administer".

¹⁶ Located in Part B of Schedule 4 to the *Constitution*.

¹⁷ *Le Sueur* (KZP) para 16.

¹⁸ *Le Sueur* (KZP) para 16.

¹⁹ Section 156(1)(b) of the *Constitution*.

²⁰ National Environmental Management Act 107 of 1998 (NEMA).

²¹ *Le Sueur* (KZP) para 16.

²² *Le Sueur* (KZP) paras 2, 19.

²³ *Le Sueur* (KZP) para 2.

Environmental Affairs had filed notices indicating their intention to abide by the decision of the court, a stance that the court interpreted in favour of the first and fourth respondents.²⁴

The applicants additionally maintained that insofar as the introduction of the D-MOSS amendments had not provided for any form of compensation to landowners, they amounted to an unconstitutional "expropriation by stealth". However, this argument had only been raised in reply and was thus ignored by the court as the impermissible submission of a new matter.²⁵

2.2 Judgment and reasons for judgment

Gyanda J roundly dismissed the applicants' arguments, holding that municipalities are in fact authorised to legislate in respect of environmental matters in order to protect the environment at the local level.²⁶ This power to legislate, the judge held, in no way transgressed or intruded upon the "exclusive purview" of national and provincial governance in respect of environmental legislation.²⁷ This conclusion was based on an elaborate argument that can be dissected in terms of five distinct, yet interlocking and mutually supporting themes, namely: (1) state obligations imposed by the right to environment in s 24 of the *Constitution*; (2) the scope of municipal executive and legislative power in terms of s 156 of the *Constitution*; (3) the constitutional model of co-operative governance; (4) the meaning of "municipal planning"; and (5) national and provincial support for local environmental governance. A brief summary of the judge's deliberation in respect of each of these themes follows.

2.2.1 State obligations in terms of s 24

Gyanda J framed his consideration of the municipal power to legislate on the environment in terms of the Bill of Rights and specifically, the constitutional

²⁴ *Le Sueur* (KZP) para 2.

²⁵ *Le Sueur* (KZP) para 17.

²⁶ *Le Sueur* (KZP) para 40.

²⁷ *Le Sueur* (KZP) para 40.

injunction upon the state to protect, promote and fulfill constitutional rights.²⁸ Since the government of the Republic is constituted as national, provincial and local spheres of government,²⁹ the "state" in this regard clearly includes local government in the form of the municipality. The functional areas of competence in Schedules 4 and 5 are further not exhaustive of the ambit of the state's duties and must be read, the judge implied, in conjunction with the Bill of Rights and s 24 in particular.³⁰ There was nothing in s 24 to suggest that the obligation to promote ecologically sustainable development, or to promote conservation, is binding only upon the national and provincial spheres of government.³¹ These protections are binding also upon a municipality when it exercises its powers and performs its functions as delineated in Parts B of Schedules 4 and 5 or gives effect to the obligation to promote a "safe and healthy environment" in s 152(1)(d). The judge then went on to quote from the first certification judgment,³² in which the Constitutional Court had observed that at a very minimum socio-economic rights must be negatively protected from improper invasion.³³ Gyanda J did not elaborate on this line of thought, but he could have meant either that municipalities must exercise their powers with restraint, in a manner that does not invade s 24 rights, or that municipalities must act in a manner that protects such rights against improper invasion from third parties.

2.2.2 Municipalities' legislative powers in terms of s 156

It was within the context of s 24, the judge held, that the meaning of "municipal planning" in Part B of Schedule 4 needed to be assessed and interpreted. Before delving into the more extended meaning of this term, however, the judge turned to

²⁸ *Le Sueur* (KZP) para 19.

²⁹ S 40 of the *Constitution*.

³⁰ After providing that everyone has a right to an environment not harmful to health or well-being, s 24 of the *Constitution* goes on to state that "everyone has the right to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other mechanisms that (i) prevent pollution and ecological degradation; (ii) promote conservation; and (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development".

³¹ *Le Sueur* (KZP) para 19.

³² Ex Parte Chairperson of the Constitutional Assembly: In re Certification of The Constitution of the Republic of South Africa 1996 4 SA 744 (CC) para 78.

³³ *Le Sueur* (KZP) para 19.

the source of municipalities' legislative authority in respect of the environment. He relied primarily on s 156(1)(b) (allowing for national or provincial legislation to assign any matter to municipalities) and s 156(4) of the *Constitution*, which indicates that matters reserved for national and provincial legislative authority in Parts A of Schedules 4 and 5 *must* be assigned to a municipality (by agreement and subject to conditions) if the matter necessarily relates to local government, would be administered most effectively locally, and the municipality has the capacity to administer it. Whilst not identifying, at this point, the exact assignment in terms of which municipalities may be exercising legislative authority in respect of the "environment", Gyanda J preliminarily situated this power within the ambit of s 156(1)(b) by noting that:

although matters relating to the environment may be said, in terms of the Constitution, to be the primary concern or sphere of National and Provincial responsibility ... Local governments in the form of Municipalities are in the best position to know, understand and deal with issues involving the environment at local level.³⁴

Prefacing his arguments relating to the model of co-operative government established by the *Constitution*, he pointed out that the framers of the *Constitution* had not intended to allocate the functional areas in the constitutional schedules in terms of "hermetically sealed, distinct and water tight compartments".³⁵ The *Constitution* has a unitarian focus in establishing the Republic of South Africa as "one, sovereign democratic state"³⁶ while at the same time constituting national, provincial and local spheres of government. The capacity for the local sphere to exercise legislative authority within this model is confirmed by s 43 of the **Constitution**, which vests such authority in municipal councils.

Highlighting a source of legislative authority apart from assignment, he also pointed to s 156(5) of the *Constitution*, which states that a municipality has a right to

³⁴ *Le Sueur* (KZP) para 20.

³⁵ *Le Sueur* (KZP) para 20.

³⁶ S 1 of the *Constitution*.

exercise *any power* concerning a matter reasonably necessary for, or incidental, to the effective performance of its functions.³⁷

2.2.3 Model of co-operative government

The third pillar of the judge's reasoning was centered on the concept of co-operative government. Quoting liberally from the *Gauteng Development Tribunal* (CC) and *Maccsand* (CC) cases, in addition to the Constitutional Court's decision in *Wary Holdings*³⁸, Gyanda J laid emphasis upon multiple areas of control and overlapping powers. Echoing the Constitutional Court, the judge pointed out that the functional areas in Schedules 4 and 5 are allocated to the three spheres on the basis of what was considered appropriate to each sphere. These areas are not contained in hermetically sealed compartments. Overlaps of power are not impermissible and do not constitute an illegal veto of the powers of one sphere by another. When this occurred the government agencies involved needed to co-operate and coordinate their actions with one another. However, the functional areas remain distinct from one another on the basis of the perspective from or level at which a power is exercised, even when a similar wording was employed.³⁹ The environment, Gyanda J held, was an "ideal example" of an area of legislative and executive authority that had to reside in all three spheres of government and that accordingly had to be inserted into Part A of Schedule 4.⁴⁰

2.2.4 Meaning of "municipal planning"

Moving to the core of his judgment, Gyanda J then focused on the meaning of "municipal planning" and its relationship to the "environment", summarising his thesis thus: "Municipalities under the banner of "municipal planning" have historically

³⁷ *Le Sueur* (KZP) para 20.

³⁸ *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd* 2009 1 SA 337 (CC).

³⁹ *Le Sueur* (KZP) para 20.

⁴⁰ *Le Sueur* (KZP) para 20. What Gyanda J seems to imply in this passage is that the logic imposed by the division between an A and B part in the Schedules did not comfortably accommodate the environment, which was functionally appropriate to allocate to all three spheres. Inserting "environment" into Parts B of Schedules 4 and 5 would have been unduly restrictive if "environment" was then interpreted – in a fashion similar to "municipal planning" – as an area reserved to the municipal sphere (albeit with the possibility of national and provincial legislative oversight).

always exercised legislative responsibility over environmental affairs within a municipal area. The drafters of the *Constitution* were aware of this fact and recognised this "... in the manner in which the newer Constitutional dispensation was formulated."⁴¹ Both at the time that the *Constitution* was drafted, and since then, the judge continued, national and provincial legislation and policies have allocated to municipalities a legislative and executive mandate with respect to environmental matters, "*placing such matters squarely within the concept of municipal planning*".⁴²

As evidence for this position, Gyanda J pointed to the manner in which the *Local Government Transition Act*⁴³ defined the powers of transitional metropolitan councils (which powers extended to "metropolitan environment conservation") and later, the powers of metropolitan councils and metropolitan local councils (which extended to "the co-ordination of environmental affairs" and "the management and control of environmental affairs" respectively). Councils were required to exercise these powers through the development and implementation of an integrated development plan, which had to be mindful of the land development principles articulated in the *Development Facilitation Act*.⁴⁴ The latter required policy, administrative practice and laws to promote "sustained protection of the environment".⁴⁵ Gyanda J saw in these provisions a "specific environmental mandate" on the part of municipalities at the time when the *Constitution* was enacted in February 1997.⁴⁶ The framers of the *Constitution* must accordingly "be taken to have been aware of the fact that the matters for which [m]unicipalities would be responsible, involved environmental considerations".⁴⁷

Since then, the *Municipal Systems Act*⁴⁸ had extended the environmental role of municipalities, requiring that their integrated development planning contribute to the progressive realization of the fundamental rights in s 24 of the *Constitution*. The

⁴¹ *Le Sueur* (KZP) para 21.

⁴² *Le Sueur* (KZP) para 22 (my emphasis).

⁴³ Local Government Transition Act 209 of 1993.

⁴⁴ Development Facilitation Act 67 of 1995.

⁴⁵ *Le Sueur* (KZP) para 22.

⁴⁶ *Le Sueur* (KZP) para 23.

⁴⁷ *Le Sueur* (KZP) para 23.

⁴⁸ Local Government: Municipal Systems Act 32 of 2000 (MSA).

careful balancing that the MSA effects between national, provincial and local powers rests upon the requirement that integrated development plans (which always include a spatial development framework) must be compatible with national and provincial development plans and planning requirements binding upon the municipality in terms of legislation.⁴⁹ The applicant had not disputed that the D-MOSS amendments were introduced consistently with the municipality's integrated development plan, nor had it suggested that the provisions of the D-MOSS conflicted with any relevant national or provincial legislation or policies.⁵⁰

Turning to the Town Planning Ordinance, as the specific legislative instrument used by the municipality to effect the D-MOSS amendments to the Ethekeeni Town Planning Scheme, Gyanda J noted that the matters to be dealt with by schemes included "[t]he preservation or conservation of ... places of natural interest or beauty".⁵¹ Further, the courts had recognised the zoning of land for conservation purposes introduced by town planning schemes as imposing a legally enforceable encumbrance.⁵² This additionally supported the conclusion that prior to the *Constitution* "municipal planning" involved the power to regulate land use while taking into account, amongst other factors, the need to protect the natural environment.⁵³

2.2.5 National and provincial support for localised environmental governance

As a final support for the cogency of his argument, Gyanda J presented evidence of national and provincial support for local environmental governance as an aspect of municipal planning.

He first emphasised that none of the respondents (particularly those that had indicated their intention to abide by the decision of the court) supported the applicant's contention that the municipality's "transgression" into the field of

⁴⁹ *Le Sueur* para 25.

⁵⁰ *Le Sueur* para 27.

⁵¹ *Le Sueur* para 31.

⁵² *Le Sueur* para 31. Gyanda J mentions specifically in this regard the judgments in *Port Edward Town Board v Kay* 1996 3 SA 664 (AD) and *Hangklip Environmental Action Group v MEC Environmental Affairs* 2007 6 SA 65 (C).

⁵³ *Le Sueur* para 33.

environmental law-making by way of the enactment of the D-MOSS amendments was unconstitutional and unlawful. Neither the Minister of Environmental Affairs, nor the MEC: Agricultural and Environmental Affairs, KwaZulu-Natal nor the MEC: Co-operative Governance, KwaZulu-Natal, had contradicted the municipality's view or standpoint.⁵⁴ There was, on the contrary, evidence to show that local government plays an integral role in the overall scheme of environmental management in South Africa. In this regard Gyanda J highlighted:

- The KwaZulu-Natal Environmental Implementation Plan, which lists "municipal planning" as a functional area of competence with environmental relevance.⁵⁵
- The *NEMA* Environmental Management Framework Regulations of 2010, which state that spatial development frameworks must, *inter alia*, inform conservation of both the natural and built environment, indicate areas in which particular types of land use should be encouraged and others discouraged, and indicate areas in which the intensity of land development could be either increased or reduced.⁵⁶
- The *National Environmental Management: Biodiversity Act* 10 of 2004, which requires co-ordination and alignment of biodiversity plans with integrated development plans adopted by municipalities.⁵⁷
- The National Biodiversity Framework, which, whilst recognising that municipalities do not have biodiversity conservation as their core business, ascribes a key role to the local sphere in terms of co-ordinating and integrating the management of biodiversity resources.⁵⁸

Gyanda J was thus able to conclude that (i) municipalities had traditionally been involved in regulating matters at an environmental level; (ii) that their functions at this level had been recognised by the drafters of the *Constitution* and (iii) that national and provincial environmental legislation recognized the part to be played by

⁵⁴ *Le Sueur* para 29.

⁵⁵ *Le Sueur* para 35.

⁵⁶ *Le Sueur* para 36.

⁵⁷ *Le Sueur* para 38.

⁵⁸ *Le Sueur* para 38.

the local sphere in managing and controlling the environment. As such it was inconceivable that municipalities were to be excluded from legislating in respect of environmental matters, notwithstanding the listing of "environment" in Part A of Schedule 4.⁵⁹

3 Discussion

The discussion in this note focuses on two questions: Is this judgment consistent with recent Constitutional Court jurisprudence on municipal planning? And secondly, is the court's affirmation of local environmental governance a welcome development?

3.1 Consistency with jurisprudence on municipal planning

This section focuses on the *Le Sueur* judgment's consistency with the Constitutional Court's earlier pronouncements in *Gauteng Development Tribunal* and *Maccsand*.⁶⁰

⁵⁹ *Le Sueur* para 39.

⁶⁰ Although this is the function of this section, it should be noted that this court had already examined the obligations of town planning and provincial environmental authorities in *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province* 2007 6 SA 4 (CC) (*Fuel Retailers*). In *Fuel Retailers* the court rejected the argument that consideration of the social and economic aspects of a development were reserved for consideration by the local authority (under the mantle of "need and desirability" when determining applications for rezoning), while the provincial authorities were restricted to a consideration of environmental impacts. Rejecting this compartmentalized vision of the allocation of functional powers, which would have excluded the provincial sphere from examining social and economic impacts from the vantage point of their impact upon and relationship with environmental impacts, the court decided that the local authority's consideration of "need and desirability" could not be equated with the province's consideration of the social, economic and environmental impacts of a proposed development in terms of the *National Environmental Management Act* 107 of 1998 (para 85). As such, the court affirmed a complex, interconnected and layered understanding of the functional areas vesting in the different spheres of government. There is one paragraph in the *Fuel Retailers* judgment, however, that could lend support to the applicants' argument that environmental considerations are reserved to the national and provincial spheres. For the court had held: "Need and desirability are factors that must be considered by the local authority in terms of the Ordinance. ...The local authority is not required to consider the social, economic and environmental impact of a proposed development *as the environmental authorities are required to do by the provisions of NEMA*" (my emphasis). In my view, however, it is unlikely that by this statement the court intended to exclude local authorities from exercising legislative and executive authority over the environment as an incident of municipal planning. Firstly, the environmental competence of the local authority was not at issue in this case. Secondly, as the Constitutional Court noted, in both the decisions in the High Court and Supreme Court of Appeal it had been held that the local authority had to consider need, desirability and sustainability when making a rezoning decision (paras 25 and 27). The Constitutional Court did not dispute this or expressly state that local authorities do not have a mandate to consider issues of

In the *Gauteng Development Tribunal* case, which dealt with the constitutionality of the *Development Facilitation Act*⁶¹ empowerment of provincial development tribunals to make land development decisions in parallel with local authorities, the meaning of the term "municipal planning" became more settled after both the Supreme Court of Appeal and the Constitutional Court held that it incorporates the regulation of land use, and not simply "forward planning" as some had maintained. The judgment of the Supreme Court of Appeal⁶² pointed out that the principal tool for regulating land use is through the introduction and enforcement of a town planning scheme, and noted that the provincial land use planning ordinance in question allowed local authorities to prepare a town-planning scheme for all or any land within its municipal area, and thereafter to amend, extend and substitute the scheme.⁶³ Commenting later on the structure of government authority under the present constitutional dispensation, the Supreme Court of Appeal remarked that original constitutional powers are conferred directly upon the lower tiers of government, with the implication that no other body or person may be vested with such powers.⁶⁴ Linking this notion of original constitutional power with the provisions of s 156(1) of the *Constitution*, the court remarked that it was apparent that while national and provincial government may *legislate* in respect of the functional areas in Schedule 4, including the areas listed in Part B, "the *executive* authority over, and administration of those functional areas is constitutionally reserved to municipalities" (my emphasis).⁶⁵ The Constitutional Court, in similar vein, confirmed that municipal planning refers to the control and regulation of the use of land,⁶⁶ and that municipal planning is an original constitutional power conferred on municipalities in terms of s

environmental sustainability. Finally, it would be strange for the court to endorse a layered, polycentric approach to the issue of need and desirability/socio-economic factors and not, at the same time, allow room for a similarly layered approach to be followed in respect of issues of environmental sustainability. Given this, the *Le Sueur* judgment appears to be consistent with the Constitutional Court's reasoning in *Fuel Retailers*.

⁶¹ Development Facilitation Act 67 of 1995.

⁶² *Johannesburg Municipality v Gauteng Development Tribunal* 2010 2 SA 554 (SCA) (henceforth "Gauteng Development Tribunal (SCA)").

⁶³ *Gauteng Development Tribunal (SCA)* para 6.

⁶⁴ *Gauteng Development Tribunal (SCA)* para 24.

⁶⁵ *Gauteng Development Tribunal (SCA)* para 28.

⁶⁶ *Gauteng Development Tribunal (CC)* para 57.

156(1).⁶⁷ These decisions accordingly associate the distinctiveness of municipal planning as an original constitutional power reserved to the local sphere with executive authority, and this executive authority extends to both the preparation/introduction of a town planning scheme, as well as the subsequent enforcement, amendment, extension and substitution thereof.

The issue in *Gauteng Development Tribunal* focused on what is a fairly unambiguous executive power – the authority to rezone land or to establish townships or "land development areas". The issue of rezoning was also central to the *Maccsand* case, but here the question was whether legislation governing and mandating municipal planning could apply alongside national legislation. This case was thus simultaneously about executive authority (the municipality's) and legislative authority (the province's) and the possibility of both co-existing with the exclusive national competence to regulate mining. In contrast with the *Gauteng Development Tribunal* case where the court was at pains to underscore the distinctiveness of municipal planning and its reservation to the local sphere to the exclusion of the provincial sphere (as an executive authority), the *Maccsand* case allowed the court to emphasize municipal planning as an overlapping power, manifesting as both executive and legislative authority. The legislative authority of the municipality in respect of municipal planning, much less environment, was not at issue, however.

In the light of this context (municipal planning as an original constitutional power manifesting as executive authority) what are we to make of Gyanda J's holding that municipalities are authorised to legislate on environmental matters?⁶⁸

Bronstein explores this apparent anomaly in her recent critique of the *Le Sueur* case.⁶⁹ Tracking the uneasy characterisation of town planning schemes in South African law⁷⁰ and commentary, and referencing a string of authorities in the United States of America, she argues that town planning schemes, zoning schemes, land

⁶⁷ *Gauteng Development Tribunal* (CC) para 45.

⁶⁸ *Le Sueur* (KZP) para 40.

⁶⁹ Bronstein 2014 *SALJ*. I am grateful to Professor Bronstein for making the final draft of this article available to me.

⁷⁰ According to Van Wyk there is no unanimity on the topic of the classification of a town planning scheme. See Van Wyk "Planning Law" para 58.

use planning schemes, spatial development plans and the like are legislative in character. In this she relies on Van Wyk's classification of municipal planning into the elements of (i) spatial planning, being tools or instruments used to determine specific types of land uses such as integrated development plans, spatial development frameworks, and town planning or land use schemes;⁷¹ (ii) land use management, which comprises procedures to amend land use where developments others than those proposed in the original plan are proposed;⁷² and (iii) land development management, which concerns procedures to facilitate development on land that has been zoned or rezoned, such as township establishment, subdivision or waiver of building regulations.⁷³ While the second and third of these categories lie in the "heartland" of municipal planning,⁷⁴ the spatial planning instruments contemplated in Van Wyk's first category, Bronstein argues, are legislative in character.⁷⁵ Citing Van Wyk and a line of North American authorities, she highlights the following salient features of town planning schemes in particular: their impersonal application to members of a particular community; promulgation and the need for notices and formalities to bring them into force; their implementation of policy in the public interest, prospective operation, and continuation in force for an indefinite period;⁷⁶ the fact that town planning schemes can be amended by the bodies that creates them (i.e. the author of the town planning scheme is not *functus officio* after the promulgation of the scheme);⁷⁷ and their capacity to affect multiple unrelated properties based on a policy principle.⁷⁸

The reason this characterization matters, Bronstein holds, is that legislative decisions are treated more deferentially than administrative decisions by the courts (at least in the United States of America), and are thus more effectively insulated from judicial

⁷¹ Van Wyk *Planning Law* 128-129.

⁷² Van Wyk *Planning Law* 131.

⁷³ Van Wyk *Planning Law* 132.

⁷⁴ Bronstein points out that the illustrative examples of land use planning decisions discussed in the Supreme Court of Appeal's decision in the *Gauteng Development Tribunal* matter dealt with rezoning or township establishment applications, falling within Van Wyk's second and third categories (Bronstein 2014 *SALJ* 15).

⁷⁵ Bronstein 2014 *SALJ* 24.

⁷⁶ Bronstein 2014 *SALJ* 15.

⁷⁷ Bronstein 2014 *SALJ* 16.

⁷⁸ Bronstein 2014 *SALJ* 26.

review.⁷⁹ She also voices a concern for the "democratic guarantees" legislative processes afford.⁸⁰ She agrees with Gyanda J that the D-MOSS amendments are legislative in character, which means, however, that the power to pass such legislation has to be based in legislative assignment (s 156(1)(b) of the *Constitution*).⁸¹ The main weakness of the *Le Sueur* case, she argues, is that there was no attempt on the part of the court to analyse the "origin and pedigree" of the legislative power exercised in bringing the D-MOSS amendments into force.⁸² None of the legislation cited (including the *NEMA* and the *NEMBA*) indicate that the power to make the D-MOSS amendments was validly assigned to the municipality.⁸³

The characterization of the D-MOSS amendments as the outcome of the exercise of legislative authority may well matter for the reasons Bronstein identifies.⁸⁴ A closer reading of the ambit of municipal, provincial and national legislative power should, however, dispel any disquiet in this regard as well as dismiss the argument that the environmental aspects of town-planning schemes should be based in legislative assignment. This requires an understanding of the scope of municipal legislative power, and the distinctions between original, assigned and delegated powers.

Bronstein proposes but then dismisses ss 156(2)⁸⁵ and 156(5)⁸⁶ of the *Constitution* as the sources of municipal legislative authority over "municipal planning". Interpreting s 156(2), Bronstein aligns herself with the commentators who view a municipality's by-law making power in very restricted terms, as being necessarily

⁷⁹ Bronstein 2014 *SALJ* 21.

⁸⁰ Bronstein 2014 *SALJ* 27.

⁸¹ Bronstein 2014 *SALJ* 27.

⁸² Bronstein 2014 *SALJ* 28.

⁸³ Bronstein 2014 *SALJ* 28.

⁸⁴ Apart from the division of powers between national/provincial and local spheres of government, the proper characterisation of town planning schemes could be significant for the argument (raised but not considered in the judgment) that the amendments constitute "expropriation by stealth" (*Le Sueur* (KZP) para 17). The D-MOSS amendments, or municipal planning instruments of a similar nature, could be vulnerable to the claim that they constitute an unconstitutional deprivation or expropriation of property. Constitutionality in both instances requires, after all, the existence of a "law of general application" (s 25, *Constitution*). If large-scale amendments to town-planning schemes in the nature of the D-MOSS amendments are characterised as executive authority then they would surely fall foul of the constitutional property right.

⁸⁵ According to 156(2), "[a] municipality may make and administer by-laws for the effective administration of the matters which it has the right to administer".

⁸⁶ S 156(5) provides: "A municipality has the right to exercise any power concerning a matter reasonably necessary for, or incidental to, the effective performance of its functions".

confined to the "effective administration of the matters which it has the right to administer".⁸⁷ An alternative interpretation (acknowledged by Bronstein⁸⁸) is that municipal by-law making power should not be regarded as subservient and instrumental to its administrative role. Steytler and Visser espouse this view, grounding it in the unequivocal recognition – both in the *Constitution*⁸⁹ and by the courts – that the constitutional status of a municipality is materially different from what it was when Parliament reigned supreme.⁹⁰ In *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council*,⁹¹ for instance, the Constitutional Court held that a municipal council is a deliberative legislative assembly with legislative and executive powers recognised in the *Constitution* itself.⁹² This underlines the importance of original constitutional powers, which as the Constitutional Court in both *Gauteng Development Tribunal* and *Maccsand* confirmed, includes municipal planning. In *City of Cape Town v Robertson*⁹³ the Constitutional Court held that original powers are not dependent on enabling national legislation.⁹⁴ If this is the case, how would the breadth and depth of original powers be exercised if municipal by-law making powers were necessarily restricted to matters of "effective administration"?

Could s 156(2) serve as the source of a municipality's legislative authority in respect of environmental matters? Rejecting this possibility, Bronstein cites the recent Supreme Court of Appeal decision in *JDJ Properties CC v Umngeni Local Municipality*,⁹⁵ in which the court had occasion to deliberate upon the legal nature of a town planning scheme (interestingly, in the context of a particular scheme passed

⁸⁷ Bronstein cites as authority in this regard the LLM thesis of A E Nortje (*Nortje Local Government's Executive Authority*) and the *obiter dictum* of Yacoob J in *Swartbooi v Brink* 2006 1 SA 203 (CC); see Bronstein 2014 SALJ 5-6.

⁸⁸ Bronstein 2014 SALJ 7.

⁸⁹ Key provisions in this regard include ss 151(3) and 151(4) of the *Constitution*, as discussed further below.

⁹⁰ Steytler and De Visser "Local Government" 43.

⁹¹ *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 1 SA 374 (CC) (henceforth "Fedsure (CC)").

⁹² *Fedsure (CC)* para 26.

⁹³ *City of Cape Town v Robertson* 2005 2 SA 323 (CC) (henceforth "*Robertson (CC)*").

⁹⁴ *Robertson (CC)* para 60.

⁹⁵ *JDJ Properties CC v Umngeni Local Municipality* 2013 2 SA 395 (SCA) (henceforth "*JDJ Properties (SCA)*"). This particular aspect of the judgment was concerned with whether or not the appellants had exhausted all internal remedies in a dispute with the municipality in terms of s 9(1)(c) of the *National Building Regulations and Building Standards Act* 103 of 1977.

in terms of the same provincial ordinance as that used to effect the D-MOSS amendments). After describing the process for the approval of a town planning scheme, the court concluded that "although it is a legislative instrument (on account of its general application), it is not a regulation made by the MEC and it is also not a bylaw passed by the municipality".⁹⁶ The true character of a town planning scheme, the court continued, is that "[i]t is a hybrid form of legislation created by resolution in the local sphere of government, and approval and promulgation in the provincial sphere of government, with a public-participation process sandwiched between the two".⁹⁷ This accords with Davis J's contention in *Van der Westhuizen v Butler*⁹⁸ that zoning scheme regulations are not sourced in a bylaw.⁹⁹

These precedents would seem to dispense with s 156(2) as a candidate for the legislative authority in question. It also quashes the argument that a municipality's legislative authority in respect of environmental matters is embedded in its executive authority over municipal planning;¹⁰⁰ i.e. for a town planning scheme to be viewed as a form of subordinate legislation.

Are we forced then to conclude that the power to pass an instrument such as the D-MOSS amendments must be based in legislative assignment? If this is so, then it is because the power to undertake municipal planning must be based on legislative assignment. It is here that this argument goes off track and where the decision in *Le Sueur* is also arguably over-stated. The precedent established by Gyanda J's reasoning is not so much that municipalities are authorised to legislate on environmental matters, but that they are authorised to do so as an incident of municipal planning, an original constitutional power.

An assigned power is not the same as an original constitutional power.¹⁰¹ Steytler and De Visser make this clear when they state that the local government affairs of a

⁹⁶ *JDJ Properties* (SCA) para 49.

⁹⁷ *JDJ Properties* (SCA) para 49.

⁹⁸ *Van der Westhuizen v Butler* 2009 6 SA 174 (C) (henceforth "Van der Westhuizen (C)").

⁹⁹ *Van der Westhuizen* (C) 187G-H.

¹⁰⁰ Steytler and De Visser point out that executive authority includes the power to enact subordinate legislation. See Steytler and De Visser "Local Government" 52.

¹⁰¹ An assigned function is also not the same as a delegated function. As Steytler and De Visser point out, an assignment contemplates a taking over of power, entailing the complete transfer of

community embrace both original and assigned functions, and that the subsidiarity principle articulated in s 156(4) applies only to Schedule 4A and 5A functional areas.¹⁰² The non-core nature of assigned functions is underlined by the statutory requirements relating to the assignment of functions or powers to municipalities generally¹⁰³ or to municipalities in particular.¹⁰⁴ These assignment procedures obviously find no application to the functional area of municipal planning.

The nature of national and provincial legislative power in respect of original and assigned functions also differs. In particular, national and provincial power over original municipal constitutional powers must be read in the light of s 151(3)¹⁰⁵ and 151(4)¹⁰⁶ of the *Constitution*. These provisions ground the claim that national and provincial legislative authority over Schedules 4B and 5B are in fact not held "concurrently" with local government, because they are constrained.¹⁰⁷ Although there are subtle differences between the scope of national and provincial powers in this regard, in general they are constrained by the mandate of framing the governance of municipal functions, and not of determining the detail of those functions.¹⁰⁸ The Supreme Court of Appeal has confirmed this understanding in *CDA Boerdery (Edms) Bpk v The Nelson Mandela Metropolitan Municipality*¹⁰⁹ when it rejected the requirement that a municipality obtain the Premier's approval for the imposition of property rates, required in terms of the Cape Ordinance 20 of 1974. More recently, in *Habitat Council v Provincial Minister of Local Government, etc, Western Cape*¹¹⁰ Davis J held that the provincial government exercises its legislative

final decision-making power in individual matters. A delegated function allows for the final say in individual matters to be left to the national or provincial government. See Steytler and De Visser "Local Government" 59.

¹⁰² Steytler and De Visser "Local Government" 59-60.

¹⁰³ Governed by s 9 of *MSA*.

¹⁰⁴ Governed by s 10 of *MSA*.

¹⁰⁵ S 151(3) of the *Constitution* provides that "[a] municipality 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".

¹⁰⁶ S 151(4) provides that "[t]he national or a provincial government may not compromise or impede a municipality's ability or right to exercise its powers or perform its functions".

¹⁰⁷ Steytler and De Visser "Local Government" 50.

¹⁰⁸ Steytler and De Visser "Local Government" 50ff.

¹⁰⁹ *CDA Boerdery (Edms) Bpk v The Nelson Mandela Metropolitan Municipality* 2007 4 SA 276 (SCA)

¹¹⁰ *Habitat Council v Provincial Minister of Local Government, etc, Western Cape* 2013 6 SA 113 (WCC) (henceforth "*Habitat Council* (WCC)"). This case dealt with the constitutionality of s 44 of the (Cape) *Land Use Planning Ordinance* 15 of 1985.

and executive authority in a manner that regulates or "broadly" manages or controls the exercise of municipal planning by municipalities rather than through a direct authorisation function.¹¹¹ This is an approach, Davis J held, that ensures provincial authority is not destructive of or conflated with municipal powers.¹¹²

It is therefore inaccurate to claim that "[l]egislative assignment is an important source of municipal legislative power in the area of 'municipal planning'".¹¹³ Since the national and provincial spheres of government exercise only a framing legislative authority over the functional area of municipal planning, it would be impossible for them to assign the legislative authority for determining the detailed arrangements in this regard to the municipal sphere.

If the enactment and amendment of town planning schemes is then a "hybrid form of legislation" that is neither an exercise of executive authority (as subordinate legislation), nor a bylaw, the obvious candidate for the source of municipal legislative authority in this regard is s 156(5) of the *Constitution*.¹¹⁴ The "incidental power doctrine"¹¹⁵ that this provision invokes was applied in the case of *Ex Parte, Western Cape Provincial Government: In re: DVB Behuising (Pty) Ltd v North West Provincial Government*,¹¹⁶ in which the court held that the exercise of incidental powers is constitutionally acceptable if the legislative provisions are inextricably linked and foundational to powers allocated in terms of the *Constitution*. As this case demonstrates, incidental powers may include legislative powers.¹¹⁷ Steytler and De Visser argue that s 156(5) requires a purposive approach to interpreting local government power that (i) should be linked to local government's developmental

¹¹¹ *Habitat Council* (WCC) 122C-E.

¹¹² *Habitat Council* (WCC) 122F.

¹¹³ Bronstein 2014 *SALJ* 8-9. A further statement illustrative of a conflation of original and delegated functions reads: "The power to make and administer town planning schemes was typically delegated to municipalities by provincial ordinances. The power to make spatial development plans has also been delegated to municipalities by the national legislature in terms of the Municipal Systems Act" (Bronstein 2014 *SALJ* 6).

¹¹⁴ Bronstein states that there appears to be "no prospect" for this provision's grounding the kind of legislative powers exercised in the *Le Sueur* case, but her reasons for dismissing this source of authority are not clear. See Bronstein 2014 *SALJ* 20.

¹¹⁵ Steytler and De Visser "Local Government" 48.

¹¹⁶ *Ex Parte, Western Cape Provincial Government: In re: DVB Behuising (Pty) Ltd v North West Provincial Government* 2001 1 SA 500 (CC).

¹¹⁷ Steytler and De Visser "Local Government" 48.

mandate and (ii) should not increase the functional ambit of local government but rather enhance the efficacy of an existing functional area.¹¹⁸ It is difficult to see how the legislative authority to enact a town planning scheme (including its environmental aspects) could *not* be seen as "necessary for" or "incidental to" developmentally-oriented planning, given that the courts in the *Gauteng Development Tribunal* have now confirmed that municipal planning includes land use control. This incidental power does not increase the functional ambit of local government but rather enables it to conduct municipal planning effectively. As the court in *JDJ Properties* remarked, this legislative authority is *sui generis*, involving a hybrid allocation of power between the local and provincial spheres, but not in a manner that denudes municipalities of all legislative authority whatsoever.

This interpretation of the source of municipal legislative authority in respect of municipal planning, and by extension, to environmental matters as an incidence of municipal planning, does throw up some unevenness in the Supreme Court of Appeal and the Constitutional Court's decisions in *Gauteng Development Tribunal* and *Maccsand*, but only to the extent that executive authority in respect of municipal planning is assumed to include the introduction and amendment of a town-planning scheme¹¹⁹ – a position that does not accord with the decision in *JDJ Properties*. An interpretation that locates municipal legislative authority for the introduction and amendment of a town planning scheme in s 156(5) of the *Constitution* is in line with the latter decision and also solves the potential problem of non-compliance with the constitutional property clause. Town planning schemes are clearly laws of general application, enacted on the basis of a municipality's power to exercise any power necessary for or incidental to the effective performance of municipal planning as an original constitutional power. It is only in this sense, therefore, that municipalities have authority to legislate on environmental matters.

This conclusion does mean that Gyanda J was wrong to locate the source of municipal legislative authority in respect of environmental matters in ss 156(1)(b)

¹¹⁸ Steytler and De Visser "Local Government" 48.

¹¹⁹ Other aspects of municipal planning, the decision to rezone areas of land or establish townships, for instance, would remain "executive" in nature.

and 156(4) of the *Constitution*, as these provisions relate to assigned powers, not original constitutional powers. However, it does not preclude the possibility of national and provincial government assigning legislative and executive authority for the functional area of the environment to the municipal sphere. The object of the local sphere's powers in this instance would not be limited to the consideration of the environment as an incident of municipal planning. Possible examples of such powers could include legislative and executive authority over environmental impact assessments, or the development of bylaws on the treatment of acidic mine water, for instance.

3.2 *Justifying local environmental governance*

Is Gyanda J's affirmation of environmental governance as an incidence of municipal planning a welcome development? The notion of local environmental governance is hardly a new concept, both internationally and nationally. At an international level, the importance of regional and local actors in environmental governance in the European Union is well known.¹²⁰ Richardson, however, has highlighted the importance of local environmental governance regimes in postcolonial societies, although he stresses the importance of such regimes' being coordinated with institutions at national and global levels.¹²¹ Closer to home, Du Plessis has been a leading proponent of the concept of "local environmental governance" and for local government's role in realizing the constitutional environmental right.¹²² Although not cited in the judgment, Du Plessis had already observed a few years ago that local government is co-responsible, together with national and provincial government, for the realization of section 24 of the *Constitution*.¹²³ Like others, Du Plessis justifies local environmental governance on the basis of the principle of subsidiarity, which encapsulates the idea that functions must be allocated to the level of government at which they will be most effectively executed and fulfilled.¹²⁴ The subsidiary nature of governance, as Beabout points out, actually applies to the higher or central levels of

¹²⁰ See for instance Longo 2011 *U Tas LR*.

¹²¹ Richardson 2000 *Colo J Int'l Env'tl L & Pol'y*.

¹²² Du Plessis 2010 *Stell LR*.

¹²³ Du Plessis 2010 *Stell LR* 266.

¹²⁴ Du Plessis 2010 *Stell LR* 265.

government since the principle constrains their authority to those tasks that cannot be performed effectively at a more immediate or local level.¹²⁵ The principle of subsidiarity therefore accommodates the notion of overlapping centres of power in respect of particular functions of government, although its conceptual richness may be hampered by the focus on "effectiveness".

This note concludes by proposing that the notion of social-ecological resilience serves as an alternative conceptual frame for justifying local environmental governance.¹²⁶

3.2.1 The theory of social-ecological resilience

The theory of social-ecological resilience has been developed in response to the need for understanding how linked social-ecological systems operate under conditions of complexity. With its roots in the work of ecologist C.S. Holling during the 1970s, resilience theory reflects a paradigm shift in ecology, natural resources management and environmental law away from believing that social-ecological systems operate around an equilibrium that can be maintained by "optimizing" the use of particular natural resources.¹²⁷ Instead, there is now an understanding that the various elements that constitute social-ecological systems impact upon and change each other such that the system can both maintain a steady state (for as long as the type of relationships and feedbacks between the various elements are maintained) as well as adapt and change over time in response to various anthropogenic and non-anthropogenic shocks.¹²⁸ "Resilience" has thus been defined as "the capacity of a system to absorb disturbance and still maintain its basic structure and function",¹²⁹ while later definitions have emphasized the capacity of a

¹²⁵ Beabout 2008 *U St Thomas LJ* 211.

¹²⁶ For a recent literature review on the relationship between law and resilience, see Humby 2014 *Seattle Environmental Law Journal*.

¹²⁷ The idea of determining a "total allowable catch" of marine resources on an annual basis is an example of this "optimization" philosophy.

¹²⁸ An oft-cited example of this is how the natural characteristics of the Florida Everglades are changing in response to large-scale water diversions and conversions of marshland to agricultural land. An example closer to home is how the natural system of dolomitic springs on the Witwatersrand has been irreversibly transformed by more than a century of gold mining into a system capable of generating large-scale acid mine drainage.

¹²⁹ Walker and Salt *Resilience Thinking* iii.

system to self-organise and the quality of that self-organization as well as the degree to which a system can build and increase the capacity for learning and adaptation.¹³⁰ Later theoretical developments in resilience theory have highlighted the importance of biodiversity in processes of reorganization and regeneration.¹³¹ While only a small number of species are responsible for keeping an ecosystem within a certain "domain of attraction" (ie with the same kind of structure, form and feedbacks) at any one time, the existence of species groupings in terms of the functions they perform has been highlighted as playing a critical role in how well a system is able to reorganise and regenerate after a disturbance.¹³² This highlights redundancy as a valuable attribute in ecosystem functioning. There is also an emerging understanding that social-ecological systems operate at different scales (local-regional-national-global) and that cross-scale dynamics can affect the rate at which different systems adapt and transform over time.¹³³ Change at a local scale can frequently drive changes in larger systems, as when the cumulative effect of many individual land use changes (from undisturbed natural vegetation to agriculture, for instance) drives changes in the manner in which groundwater operates in an entire region,¹³⁴ or affects the turbidity of freshwater lakes.

New understandings of the complexity of linked social-ecological systems has led to the proliferation of new governance models for responding to and dealing with such complexity. The concept of "adaptive governance", in particular, has been proposed as a form of governance that incorporates the reflexive, iterative and scientifically based forms of management necessary to understand the dynamic nature of social ecological systems, at the same time as it extends the function of governing to a broader range of actors operating on a wider spatial and temporal scale.¹³⁵ Adaptive governance is thus polycentric in nature, extending the ambit of governance not only to the private sector, but also to sub-national spheres of governance such as local

¹³⁰ Carpenter *et al* 2001 *Ecosystems* 765.

¹³¹ Folke 2006 *Global Environmental Change* 257.

¹³² Folke 2006 *Global Environmental Change* 258.

¹³³ This insight is connected with the notion of "panarchy" proposed by Gunderson and Holling in 2002, which for practical reasons cannot be further explored in this note.

¹³⁴ See in this regard Walker and Salt *Resilience Thinking* and their discussion of agriculture in the Goulburn-Broken catchment in Australia.

¹³⁵ Humby 2014 *Seattle Environmental Law Journal* 15.

government. In her discussion of the aspects of adaptive governance that facilitate resilience in social-ecological systems, Cosens highlights for instance, the importance of multiple, overlapping levels of control and local capacity-building, amongst others.¹³⁶

3.2.2 *The promise of adaptive governance in South Africa*

The way in which the South African *Constitution* constitutes local government and the manner in which the concept of "municipal planning" has been developed by the South African courts of late (including in the *Le Sueur* case) are remarkably suited to these particular aspects of adaptive governance, ie multiple and overlapping levels of control that include capacitating local government. The D-MOSS amendments themselves fit comfortably within the paradigm of social-ecological resilience, given their emphasis upon a systemic protection of biodiversity and ecosystem services and thereby the entire social-ecological system that depends on them. The value of the resilience frame, as opposed to the principle of subsidiarity, lies in the extended range of values that come into play when considering the integrity of a social-ecological system. Instead of asking which level of government could most effectively govern ecosystem function, for instance, one would need to understand how the integrity of a social-ecological system extends over multiple scales and what different roles and responsibilities different kinds of actors (including different levels of government as well as the private sector) have in relation to maintaining that system's integrity. This places great emphasis on the values of working together (through coordination, the exchange of information, and so on) and continuous learning. These values are very much in line with the values of co-operative government set out in s 41 of the *Constitution*.

If Gyanda J had decided against the municipality in *Le Sueur*, the decision would have significantly strained the potential for adaptive environmental governance in South Africa. Fortunately, his decision has strengthened the hand of local government, enabling it to rise to the challenge of its co-responsibility for realising

¹³⁶ Cosens 2012 *Environmental Law* 256.

section 24. How different local governments respond, and how in particular they are able to overcome capacity and resource constraints and the contortions of local politics, will require careful observation in the future.

4 Conclusion

The precedent in the *Le Sueur* matter is essentially that municipalities have authority to legislate upon environmental matters as an incident of municipal planning, which is an original constitutional power. The note has suggested that characterising town planning schemes as the exercise of legislative authority is important for purposes of meeting the requirements of the constitutional property right but has argued that contrary to both the judgment and recent commentary, the source of such legislative authority is not based on legislative assignment (invoking ss 156(1)(a) and 156(4) of the *Constitution*), but in s 156(5) – the provision that allows a municipality to exercise any power reasonably necessary for or incidental to the effective performance of its functions. This argument is based on understanding the distinction between original and assigned powers, and the nature of the control that the national and provincial spheres exercise over Schedule 4B powers. Notwithstanding this inaccuracy in the judgment, it has been argued that the precedent is a welcome one that can be justified not only on the basis of the principle of subsidiarity, but also in terms of the emerging and increasingly important theory of social-ecological resilience.

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LIST OF ABBREVIATIONS

Colo J Int'l Env'tl L & Pol'y	Colorado Journal of International Environmental Law and Policy
D-MOSS	Durban Municipality Open Space Systems
MSA	Municipal Systems Act
NEMA	National Environmental Management Act
NEMBA	National Environmental Management: Biodiversity Act
SALJ	South African Law Journal
Stell LR	Stellenbosch Law Review
U St Thomas LJ	University of St Thomas Law Journal
U Tas LR	University of Tasmania Law Review

LOCALISING ENVIRONMENTAL GOVERNANCE: THE *LE SUEUR* CASE**T HUMBY*****SUMMARY**

In the matter of *Le Sueur v Ethekewini Municipality* the KwaZulu-Natal High Court decided that municipalities had the power to legislate on environmental issues such as biodiversity and conservation. This note argues that the precedent established in this case is that municipalities have authority to legislate upon environmental matters as an incident of municipal planning, which is an original constitutional power. In contrast to both the judgment and recent commentary, it argues that the source of municipal legislative authority over municipal planning is not based in legislative assignment but in s 156(5) of the *Constitution* (the "incidental power" provision relevant to local government). This argument is based on understanding the distinction between original and assigned powers, and the nature of the control that the national and provincial spheres exercise over Schedule 4B powers. Notwithstanding this inaccuracy in the judgment, it is argued that the precedent is a welcome one that can be justified not only on the basis of the principle of subsidiarity but also in terms of the emerging and increasingly important theory of social-ecological resilience.

KEYWORDS: local government; environment; resilience.

* Tracy-Lynn Humby. BMus (UPE), BProc, LLB LLM (UNISA) PgDip Tertiary Education (Wits) PhD (Wits). Associate Professor, School of Law, University of the Witwatersrand. Email: Tracy-Lynn.Field@wits.ac.za. The research for this note was supported by funding provided by the Department of Science and Technology under the Urban Resilience Assessment for the Gauteng City Region project based in the School of Architecture and Planning at the University of the Witwatersrand, in cooperation with the Gauteng City Region Observatory.