ENVIRONMENTAL PLANNING & CLIMATE PROTECTION DEPARTMENT
MARCH 2010

REPORT TO TOWN PLANNING COMMITTEE

PROPOSED SPLIT REZONING TO CONSERVATION ZONE AND SPECIAL RESIDENTIAL 3600 ON THE KLOOF WATERFALL PLATEAU AND ESCARPMENT AREAS – PHASE 2.

File Reference**:**

1. EXECUTIVE SUMMARY & BACKGROUND

In an effort to protect the endangered KwaZulu-Natal Sandstone Plateau Sourveld grasslands and Scarp Forests, the majority of which is already included in the DMOSS layer, and in order to provide for a variety of environmental goods and services for eThekwini Municipality citizens, it is proposed to rezone certain additional areas in the Western Suburbs of the Outer West and flanking Pinetown comprising Phase 2 of an earlier such rezoning that comprised Phase 1, *viz.* in the St Helier/Giba Gorge area, along the Winston Park escarpment, in the Stockville Valley, on portion of the Kloof escarpment and in areas flanking both the Springside Nature Reserve in Hillcrest and Ipiti Nature Reserve in Gillitts. This is similarly seen as a proactive or up-front action to clearly define limits for the community at large, whereas for a number of years these limits have only individually been tested by some owners and developers, often after considerable expense, and who have, once environmental aspects have also been considered, not been able acquire the full potential that they simplistically understood the existing zoning to allocate to them. The action also seeks to address a problem which has arisen because schemes were largely prepared without environmental considerations. Prevailing environmental policy and law largely dates from about 1998 onwards whilst the schemes are several decades old. Thus in many cases if potential town planning rights were fully utilised this would lead to serious environmental damage.

This initiative supports the South African Constitutional environmental mandate as contained in Section 24(b) and observes compliance with the National Environmental Management Act (NEMA) principles as contained in Chapter 1 of Act No 107 of 1998. The rezoning in most cases envisages a new split zoning that would comprise Special Residential 3600 on the upper levels and Conservation Zone on the lower levels. (The latter was originally to be designated as Conservation Reserve in Phase 1). It should be noted that the residential density was reduced primarily so as to ensure that no

deleterious impact occurs on the downstream environmentally sensitive areas from sewage soak pits with high nutrient loads.

It is further proposed that the original Special Residential 3600 zone controls, as originally adopted for Phase 1 be amended to enable subdivision down to 1800 m2 in certain circumstances. This follows scientific research into the potential deleterious effects. This amendment will affect existing erven in both the Phase 1 and Phase 2 areas.

It should be noted that the Town Planning Committee was previously apprised in late 2009 of the new research on minimum erf size and then agreed to the alternative approach in the event of an appeal hearing or Section 48 inquiry, but as Council was then *functus offico* and the KwaZulu-Natal Planning and Development Commission ruled that there was no valid appeal in terms of Section 47*bis* A read with Section 47bis C and furthermore did not hold a Section 48 inquiry when the Council's change of approach could have been introduced, this amendment did not occur. The matter is now proposed to be formally introduced via section 47*bis* A in the Phase 2 rezoning.

It is accordingly proposed that the proposed rezoning and scheme amendments be advertised for comment in terms of Section 47*bis* A (2) read with Section 74 *ter* (Giving Public Notice) of the Town Planning Ordinance No 27 of 1949, as amended. In this regard it is proposed that at least one public meeting be held in the area.

2. DECISION REQUIRED

A decision is required to approve the notification of the public in terms of Section 74 *ter* (Public Notification) of Council's intentions to amend the Consolidated Outer West and Pinetown town planning schemes in terms of Section 47*bis* A of the Town Planning Ordinance No 27 of 1949, as amended.

3. BACKGROUND

The following extract from the introduction of Plan 1 "Sustaining Our Natural and Built Environment" of the eThekwini Integrated Development Plan (IDP) is worth quoting as it gives a clear understanding of the motivation for the proposed rezoning.

> *"Scientists produce daily evidence that the health of our planet is at risk and will soon be in crisis if humankind continues to deplete its resources at the current rate. At the municipal level, sustaining our natural and built environments means that we must make responsible decisions that balance social, environmental and economic goals.*

Our natural systems, or open space assets, provide services that either have no human substitute or that require costly human intervention to substitute. Those services that have no human substitute include clean air, climate stabilisation, rainfall, marine resources and fertile soils.

We rely on nature for our most basic needs - air, food and water. All fuel, fibre and construction material is also derived from the natural resource base. In both the urban and rural contexts, low-income people are most dependent on these free services, and particularly in rural areas where these services are generally more abundant. The more protection we offer the natural environment, the more it will offer support to the poor. The open space asset also provides services that, if destroyed or degraded, require costly replacement interventions such as storm water protection measures, mechanized processing of wastes, beach sand replenishment schemes, water purification schemes."

With the above in mind it is proposed to protect the endangered KwaZulu-Natal Sandstone Plateau Sourveld grasslands and Scarp Forests in the Western Suburbs of the Outer West and in order to provide for the variety of environmental goods and services that they and other associated undeveloped areas provide. In this regard it is proposed to rezone certain additional areas on the Kloof Waterfall Plateau, i.e. the Western Suburbs. This is seen as a proactive or up-front action to clearly define limits for the community at large, whereas for a number of years these limits have only individually been tested by some owners and developers, often after considerable expense, and who have, once environmental aspects have also been considered, not been able acquire the full potential that they simplistically understood the existing zoning to allocate to them. This would constitute Phase 2 of a larger project that will be extended in time to similar areas in the Outer West and throughout the city where the environment is threatened.

4. RECENT HISTORY OF PHASE 1 REZONING

At a meeting of the eThekwini Executive Committee held on 27 March 2009 the following resolutions, amongst others, were adopted in terms of Section 47*bis* A (4) of the Town Planning Ordinance No 27 of 1949, as amended: -

(1) That the Consolidated Outer West Town Planning Scheme in course of preparation be amended by the adoption in terms of Section 47*bis* A (4) of the Town Planning Ordinance No 27 of 1949, as amended, of the rezoning of various sites: -

- In Chelmsfordville, Gillitts, St Helier and Winston Park generally from Special Residential 1800 to Special Residential 3600 and Conservation Zone
- In Kloof generally from Special Residential 3600 to Special Residential 3600 and Conservation Zone, and
- In Stockville generally from Low Impact Residential: District 1 (1400 m^2), Low Impact Residential: District 2 (4000 m^2) and Medium Impact Mixed Use to Low Impact Residential: District 1 (1400 m^2) and Environmental Management (Conservation Zone).

The Head of Department: Local Government and Traditional Affairs and the various objectors were duly notified in early April 2009. Following thereafter some 37 appeals to the rezoning were lodged with the KwaZulu-Natal Planning and Development Commission of which at least 2 were late. The majority of the appeals were lodged by the legal representatives of the respective appellants.

The Council's town planning legal advisor was of the view that an appeal hearing in terms of Section 47*bis* C was not applicable when the Council, an exempted authority, initiates a rezoning or scheme amendment in terms of Section 47*bis* A. This view was eventually confirmed by the legal advisor to the Planning and Development Commission.

The Council was finally advised in two separate letters dated 8 December 2009 of the following resolutions taken by the Planning and Development Commission on 28 October 2009, but initially considered by the Commission on 30 September 2009, as follows: -

Resolution 41264

(1) That in the light of law advice that the Commission has received from the DLGTA's Law Advisor, that there is no appeal by objectors in an exempt Municipality when an amendment to the scheme is initiated by Council, which is properly before the Commission;

(2) That all parties be advised accordingly.

Resolution 41266

(1) That the Commission, having considered the papers before it as well as Council's thorough response, has no objection to the adoption of Council and does not intend invoking its powers in terms of Section 48(1).

The Council's town planning legal advisor on this matter was subsequently contacted in late February 2010 by the legal representative of a number of unsuccessful appellants, who advised that they were considering taking legal opinion from Senior Counsel regarding the issue of whether or not a

right of appeal, was enjoyed by the objectors and, if the opinion was favourable, to challenge the decision of the KwaZulu-Natal Planning and Development Commission on review before the High Court. They had, however, in the interim somehow obtained a copy alleged to be the relevant minutes of the Commission's meeting of 28 October 2009 claiming that the above resolutions (Resolution 41266 was not included) only partly reflected the views of the Commission. These alleged minutes further suggested that the Council's prior adoption of the Phase 1 rezoning was void/voidable based on a technical defect in the rezoning advertising. The Commission has since been requested to respond urgently in writing to these matters, confirming the actual situation. (It should be noted, however, that the comment that the Commission expressed the opinion that the advertising of Phase 1 was flawed was an opinion only and did not form part of the final resolution.)

Nevertheless for the reasons that follow, and in order to achieve consistency in the proposed rezoning in both Phases, it is proposed to readvertise the new proposals in respect of both Phase 1 and Phase 2. Effectively, this will bring to an end the issue of whether or not the Commission made a positive finding that the original advertising of Phase 1 was defective. It will not, however, dispose of the issue of whether there is a right of appeal available to the objectors. This is a hurdle that, inevitably, Council must face and deal with at some stage.

5. STUDY UNDERTAKEN BY WSP ENVIRONMENTAL

Of the 179 objections and representations finally received to the Phase 1 rezoning a substantial proportion revolved around the loss of subdivisional potential, loss of development potential for multi-unit development, and associated financial loss (46% of objections raising a loss of development potential, 11% a loss of subdivisional potential and 37% specifically raising a financial loss). It was therefore deemed likely that in the event of a hearing being held by the KwaZulu-Natal Planning and Development Commission in terms of a Section 47*bis* C appeal or in terms of Section 48, when the Minister or his delegate may refer at any time a matter to the commission for their consideration, the Council would be requested to defend the proposition why a minimum subdivisional area of 3600 m2, rather than any other size, had been selected in place of the currently zoned 1800 m2 lot size.

In order to be able to defend this position meaningfully, which was based largely on relevant literature research, it was deemed essential to undertake scientific field studies in the same soil types where the rezoning had taken

place. Accordingly, WSP Environmental was appointed in early May 2009 to conduct such field research.

In a report "Nitrification Assessment: Outer West Area" dated May 2009 WSP Environmental came to conclusions that were ambiguous, in that while disturbance zones could be detected in grassland in close proximity to existing development, the expected nitrate and phosphate plumes, as reported in all the literature research, were not evident in the Natal Group Sandstone derived soils, even when in very close proximity to the soak pits, i.e. within the evapo-transpiration areas. This suggested that these residuals were percolating down directly into the water table, rather than migrating laterally downstream. However, simultaneous sampling of water from the streams again had not detected an overly high presence of nitrates and phosphates. These studies were, however, very limited in extent and location and it was subsequently deemed appropriate to conduct further studies.

WSP Environmental were therefore requested to undertake further investigation and not to confine themselves purely to the current rezoned areas but also to look beyond these at other developed areas flanking KwaZulu-Natal Sandstone Plateau Sourveld grasslands and furthermore to investigate the issues where higher developed densities had occurred, i.e. multi-unit developments at higher density.

These further studies, in Clifton Hill, Waterfall and Forest Hills, were dealt with in a report "Nitrification Assessment: Phase II Outer West Area" dated August 2009, again confirmed the lack of any nitrate and phosphate plumes; however, areas of disturbance were still consistently to be found. These disturbance zones were found to extend for distances of up to 25 metres from the soak pits or building and/or garden envelopes.

After careful consideration, it is therefore proposed that the original requirement for a blanket minimum erf size of 3600 m2 for the Special Residential areas flanking environmentally sensitive areas be abandoned, and that in its place, a requirement for a 25 metre buffer from the edge of the Conservation Zone/Special Residential split zoning line be put in place. While this relaxation of the Department's position will positively affect many of the properties from a subdivisional potential perspective where no subdivision was previously possible under normal Special Residential 3600 controls, it will unfortunately negatively impact on a limited number of properties.

Because of the difficulties of applying this 25 metre buffer provision on a *carte blanche* basis due to unique circumstances that may arise on individual erven, and because of circumstances where some parties, as

found above, may be worse off with the 1800 m2 minimum area and a 25 metre buffer than with an unencumbered 3600 m2 minimum area, it is now alternatively proposed that the existing Special Residential 3600 m2 zoning be retained, HOWEVER that, by Special Consent (or its equivalent in terms of the new Planning & Development Act) subdivision down to 1800 m2 may be allowed, subject to appropriate conditions. The degree of flexibility afforded by the consent procedure should ensure that the minimum impact occurs on the environment while still ensuring that parties, where subdivision is possible under one or other of the scenarios, i.e. 1800 m2 minimum area with a 25 metre buffer or 3600 m2 minimum area without a buffer, is still so able to subdivide, albeit that their overall subdivisional potential may be more limited that may originally have been achievable under an unencumbered Special Residential 1800 zone.

It should be noted that no buildings or structures, including septic tanks, will be permitted within the 25 metre buffer, however the evapo-transpiration areas will be allowed to encroach into same.

6. ATTACHMENTS

- Annexure 1 – Extracts From The Constitution Of The Republic Of South Africa, 1996
- Rezoning Map(s) 20 for consideration (On display at meeting)

7. RECOMMENDATIONS

1) That the intention to amend the Consolidated Outer West and Pinetown Town Planning Schemes in course of preparation, by rezoning various environmentally sensitive sites on the Kloof Waterfall Plateau and escarpments, comprising Phase 2 of a larger project and as indicated on Map(s) 20, generally from Special Residential 1800 to Special Residential 3600 and Conservation Zone (Reserve), and Environmental Conservation Reserve be advertised in terms of Section 74*ter* (Giving Public Notice), with a view to its eventual adoption in terms of Section 47bis A of the Town Planning Ordinance No 27 of 1949, as amended.

2) That the Special Residential portion of any site so zoned Special Residential 3600 (whether in Phase 1 or Phase 2) may, following an application for special consent, be capable of being subdivided to minimum erven size of 1800 m2 each; provided that an additional non-user conservation servitude of a width of 25 metres

above the Conservation Zone be set aside within which no building, septic tank or soak pit may be erected or developed; and provided further that the Head: Development Planning and Environment may at his/her sole discretion relax this requirement upon reasonable proof that no deleterious effect will occur to the adjacent conservation area by virtue of such a relaxation.

3) That Clause 5.2(1)(ii) and Table D of the Consolidated Outer West (and Pinetown) Town Planning Scheme(s) in course of preparation be simultaneously amended to reflect such an arrangement which will then apply, other than in the Abrey Road Special Residential 3600 area of Kloof, to all Special Residential 3600 zoned erven within the town planning schemes located in juxtaposition to either Environmental Conservation Reserves, Conservation Zones or similar reservations or zones.

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ANNEXURE 1 - EXTRACTS FROM THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, 1996

Environment

24. Everyone has the right –

(a) to an environment that is not harmful to their health or well-being; and

(b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that –

(i) prevent pollution and ecological degradation;

(ii) promote conservation; and

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

Property

25. (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.

(3) The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including –

(a) the current use of the property;

(b) the history of the acquisition and use of the property;

(c) the market value of the property;

(d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and

(e) the purpose of the expropriation.

(4) For the purposes of this section –

(a) the public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources; and

(b) property is not limited to land.

(5) The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.

(6) A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.

(7) A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress.

(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).

(9) Parliament must enact the legislation referred to in subsection (6).