

# CRITERIA FOR DECISION-MAKING IN KZN DEVELOPMENT BILL

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## Introduction

This short paper looks at the use of criteria (or 'lists') to guide decision-making in terms of the KZN Development Bill. The purpose of re-examining these lists here is to see how they can be amended to *better reflect the concerns and principles identified by the Steering Committee in June 2003.*

Although some concerns were expressed about the use of these criteria at all in such legislation, primarily on the grounds that they might unfairly restrict the discretion of municipal decision-makers, these concerns were allayed by Professor Hugh Corder's review conducted as part of a review done by a team chaired by me. Professor Corder decided that the criteria were

'both broad enough not to prescribe and to allow a municipal authority to do its work in the local circumstances with which it will be familiar, but also sufficiently detailed to provide an appropriate framework for the exercise of such discretion.'

## The principles

The principles identified by the Steering Committee were:

1. **Equity:** 'The new planning law must treat all citizens of the province equitably, and strive to redress the historic injustices perpetuated by the planning system.'
2. **Implementation:** 'Every provision of the new legislation must be implementable.'
3. **Decentralisation of decision-making:** 'Planning decisions should be taken by local government.'
4. **Development legislation vs. control:** 'The new planning law should reflect an approach that favours lawful land development.'
5. **Urban vs. rural needs:** 'There should be one uniform planning system for the province of KwaZulu-Natal, providing a fair and equitable standard of planning and development to everyone in the province, while accommodating diversity.'
6. **Maximise potential of indigenous knowledge:** 'A new planning law should build on good practices and approaches to land use management which have evolved outside of the formal planning system, and incorporate these practices and approaches into new law wherever possible.'
7. **Certainty:** 'The new planning law should not include provisions which perpetuate existing uncertainty within the planning system and all provisions included in the law should promote a clear and certain understanding of their impact and effect.'
8. **Appeals:** 'Planning appeals should be heard and decided by a provincial authority, provided that we are satisfied that it is constitutionally sound to adopt this approach.'
9. **Monitoring and evaluation:** 'The new law should provide for the provincial administrator to monitor and evaluate the implementation of the planning system on a regular basis.'
10. **Timeous decision-making:** 'The new planning law must require timeous action by planning decision makers.'
11. **Effective co-operative government:** 'New protocols, memoranda of understanding and institutional arrangements should be developed to address any lack of alignment between land use management legislation and other legislation.'
12. **Legislative restraint:** 'The least far-reaching method to achieve an objective of the Act must be adopted.'

Obviously these principles must be addressed in a range of different ways in the bill, and they do not all lend themselves to being addressed through the criteria for decision-making. The principles most applicable to the criteria are those that relate to the content and substance of planning decisions. Those which are most likely to be relevant to the compilation of criteria are those promoting:

- Equity;
- Development legislation vs. control;
- Indigenous knowledge; and
- Certainty.

## The criteria

The lists of criteria for decision-making are found in the following clauses:

- 3. Preparing a development scheme;
- 6. Amending a development scheme;
- 13. Considering a development application;
- 19. Amending a condition of approval for development;
- 31. Amending a condition of approval for subdivision;
- 40. Amending, suspending, removing a restrictive condition;
- 48. Permanent closure of a road or public place;
- 177. Exemption of a municipality.

Within these clauses there are basically five lists of criteria as the same lists are used for clauses 3 & 6 and clauses 19, 31 and 48. For purposes of clarity the five lists are referred to as:

- a. The schemes list (clauses 3 & 6);
- b. The development list (clause 13);
- c. The amendment and closure list (clauses 19, 31 & 48);
- d. The restrictive conditions list; and
- e. The exemption list.

I'll deal with each of these in turn.

### The schemes list

This is a list of criteria to be considered when either preparing or amending a development scheme.

- (a) existing developments, development rights and local customs;*
- (b) economic, social, environmental and amenity concerns;*
- (c) access to engineering services, public facilities and integration of developments;*
- (d) the protection of natural resources, unique areas or features and cultural resources;*
- (e) the efficient use of land and preservation of agricultural resources;*
- (f) the resources likely to be available for the implementation of the development scheme;*
- (g) its integrated development plan;*
- (h) development policies enacted by the Minister in terms of section 152(2); and*
- (i) any other relevant consideration.'*

In relation to this list I propose the following changes:

- Include the term 'local knowledge' after 'local customs' in sub-clause (a) to reflect better the indigenous knowledge principle.
- Remove the term 'amenity concerns' from sub-clause (b): amenity is a term that has a long history of being used to resist measures aimed at integrating towns and cities, in terms of class and race, and is thus likely to detract from the equity principle.

- Amend sub-clause (c) to insert a consideration of social justice issues: ‘the historical effects of racially discriminatory and segregatory legislation on land ownership and access to engineering services and public facilities.’ The integration of development could be dealt with under sub-clause (e), see below.
- Enhance sub-clause (e) to include the importance of integration: ‘the efficient use of land and the integration of development’.
- Include agricultural resources as part of natural resources: take ‘agricultural resources’ out of sub-clause (e) and insert into sub-clause (d) as follows – ‘the protection of natural resources, including agricultural resources, ....’.

### The development list

This list of criteria is to be considered when considering an application for development.

- (a) the written motivation for the development;*
- (b) the physical and natural qualities of the site;*
- (c) the layout of the development;*
- (d) existing developments, development rights, mineral rights<sup>1</sup> and local customs;*
- (e) economic, social, environmental and amenity concerns;*
- (f) access to engineering services, public facilities and integration of developments;*
- (g) the protection of natural resources, unique areas or features and cultural resources;*
- (h) the efficient use of land and preservation of agricultural resources;*
- (i) conformity with the provisions of the development scheme applicable to the land;*
- (j) compatibility with the provisions of the integrated development plan of the municipality;*
- (k) development policies enacted by the Minister in terms of section 152(2)*
- (l) any representations for or against the proposed development; and*
- (l) any other relevant consideration.<sup>1</sup>*

In relation to this list I propose the following changes:

- Amend sub-clauses (e), (f), (g) and (h) as per the schemes list.
- Include the term ‘local knowledge’ after ‘local customs’ in sub-clause (d) to reflect better the indigenous knowledge principle.

### The amendment and closure list

These criteria are for use when considering an application to amend a condition of approval, either for a development or a subdivision, or for the permanent closure of a road or public place.

- (a) the public interest;*
- (b) prejudice to any person, including a mortgagee, holder of a servitude right or lessee in terms of a registered lease;*
- (c) environmental and amenity concerns;*
- (d) any development policy on the amendment, suspension or removal of a restrictive condition enacted by the Minister in terms of section 152(2); and*
- (e) any other relevant consideration.<sup>1</sup>*

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<sup>1</sup> I’m not sure why mineral rights are required to be considered in relation to a development application but not a development scheme application?

The following amendments would make this list more reflective of the equity principle:

- The term public interest needs to be given more detail in sub-clause (a). I would suggest phrasing it as ‘the public interest in promoting integrated, sustainable and equitable human settlements.’
- The term amenity concerns should be removed from sub-clause (c), which clause should also be broadened to include economic and social concerns.

### The restrictive conditions list

The list of criteria set out here is for consideration by a municipality when assessing an application for the amendment, suspension or removal of a restrictive condition.

- (a) its development scheme;*
- (b) the public interest;*
- (c) prejudice to any person, including a mortgagee, holder of a servitude right or lessee in terms of a registered lease;*
- (d) environmental and amenity concerns;*
- (e) alternative means of managing the development of the land, including development legislation and development schemes;*
- (f) any development policy on the amendment, suspension or removal of a restrictive condition enacted by the Minister in terms of section 152(2);*
- (g) any other relevant consideration.’*

Sub-clauses (b) and (d) need to be amended in the same way as sub-clauses (a) and (c) in the ‘amendment and closure list’.

### The exemption list

This list sets out the criteria to be considered by the MEC when she or he considers an application by a municipality for exemption from various provisions of the bill.

- ‘(a) the resources and expertise at the disposal of a municipality;*
- (b) the record of the municipality in—*
  - (i) complying with the procedures of this Act, or a law repealed by this Act;*
  - (ii) aligning its development scheme with its integrated development plan;*
  - (iii) ensuring that its decisions to approve the development or subdivision of land are consistent with its integrated development plan; and*
  - (iv) complying with development policies.*
- (c) substantial compliance by the municipality with the provisions of this Act;*
- (d) legal certainty and administrative efficiency;*
- (e) the importance of norms and standards contained in this Act for the development of the province and the protection of the environment;*
- (f) the rights of applicants, including—*
  - (i) the right to be heard;*
  - (ii) the right to simultaneous applications;*
  - (iii) the right to simultaneous notice;*
  - (iv) the right to have their applications considered within a reasonable time;*
  - (v) the right to appeal to an independent tribunal; and*
  - (vi) the right to be compensated in appropriate circumstances;*
- (g) the rights of persons other than applicants including—*
  - (i) the right to be heard;*
  - (ii) the right to be notified of proposals and the right to comment on proposals;*

- (iii) *the right to appeal to an independent tribunal;*
  - (iv) *the right to be compensated in appropriate circumstances; and*
- (h) *the duty of the municipality to obtain technical advice before making decisions on—*
  - (i) *development schemes;*
  - (ii) *development;*
  - (iii) *the subdivision of land;*
  - (iv) *the amendments, suspension or removal of a restrictive conditions; and*
  - (v) *the permanent closure of a road or public place removal.'*

These criteria are, I think, sufficient for the purposes of this clause.