IN THE HIGH COURT OF SOUTH AFRICA

[WESTERN CAPE HIGH COURT, CAPE TOWN]

CASE NO. 23827/2010

REPORTASBLE

In the matter between:

HOUT BAY & LLANDUDNO ENVIRONMENT CONSERVATION GROUP	**APPLICANT**
And	
MINISTER OF LOCAL GOVERNMENT, ENVIRONMENTAL AFFAIRS & DEVELOPMENT PLANNING, WESTERN CAPE	**FIRST RESPONDENT**
HEAD OF THE DEPARTMENT OF ENVIRONMENTAL AFFAIRS & DEVELOPMENT PLANNING IN THE PROVINCIAL ADMINISTRATION OF THE WESTERN CAPE	**SECOND RESPONDENT**
PREMIER OF THE WESTERN CAPE	**THIRD RESPONDENT**
CITY OF CAPE TOWN	**FOURTH RESPONDENT**
MINISTER OF HUMAN SETTLEMENTS, WESTERN CAPE	**FIFTH RESPONDENT**

JUDGMENT DELIVERED ONTHURSDAY, 22 MARCH 2012

DLODLO, J

INTRODUCTION

[1] This application concerns the lawfulness of planning approvals for the development of land on the edges of the existing community in Imizamo Yethu, Hout Bay. The impugned approvals were purportedly granted by the First and Fifth Respondents ("the Provincial Ministers") in accordance with various provisions of the *Less Formal Township Establishment Act* 113 of 1991 ("LEFTEA") and the *Land Use Planning Ordinance* 15 of 1985 ("LUPO"), and were conveyed to interested people in a letter from the Second Respondent of 5 May 2010. The impugned planning approvals were sought by the Fourth Respondent ("the City"), which owns the development land and is the main proponent of the development. The Applicant ("the ECG") is an umbrella body representing a range of civic, ratepayers, heritage and environmental organisations in Imizamo Yethu and the greater Hout Bay community. The ECG and its constituent organisations (as I am told) support the desperate need to appropriately develop and extend Imizamo Yethu, so as to provide much needed housing, community services and schools. The ECG, however, opposes aspects of the proposed development which are, according to it, both inappropriate and unlawful.

[2] That there is a pressing need for further development of Imizamo Yethu to be undertaken without further delay cannot be doubted at all. The ECG asserts that the land use authorisations obtained by the City in respect of the development of Imizamo Yethu are unlawful, and thus liable to be reviewed and set aside. It asked the Court to review and set aside the authorisations obtained in respect of the entire proposed development, on all three sites, on three grounds, namely:

"(a) The layout plan envisages a "service road", with a width of 19.8 metres, running parallel to Main Road, Hout Bay. The alignment of this road violates conditions attached to a pre-existing environmental authorisation granted by the First Respondent ("the Minister") in April 2010 under the National Environmental Management Act 107 of 1998 ("NEMA"). The environmental authorisation was required because the proposed development of IY will entail various activities listed in terms of NEMA. This environmental authorisation required that the development had to accommodate a broad band of pine trees between Main Road and IY, and the remnants of the historic Kronendal Furrow. The trees are the successors to those planted in the seventeenth century by early settlers and the VOC, and farmers in the eighteenth and nineteenth centuries. The proposed road will decimate these environmental and heritage resources, explicitly protected in terms of the environmental authorisation.

(b) The environmental authorisation provided for processes to shape the proposed development including a specialist arbourculturalist report. The layout plan was however finalised before this took place. The proposed development and all the permissible land uses for every square metre has thus been framed without any consideration of the need to retain trees (as required by the environmental authorisation). This cannot be corrected once an arbourculturalist's report is eventually finalised.

(c) The applicable development parameters were unlawfully imposed. In respect of land parcel 7a in site 3 (which is subject to LUPO), the rezoning and departures were granted without complying with

the requirements under LUPO. In respect of land parcel 6a in site 1, the requirements of LUPO were ignored completely (even though they should have been applied). In respect of the rest of the area regulated under LEFTEA (but not yet subject to LUPO), the impugned decision introduced development parameters which had not been tested in a fair procedure (as required in terms of PAJA).”

[3] In the alternative to the above, the ECG contended that the Provincial authorities did not have the constitutionally permissible power to determine development parameters for Imizamo Yethu. According to the ECG such development parameters constitute an element of “*municipal planning*” in terms of schedule 4B to the Constitution, and as such could only be lawfully considered and imposed by the City. The application is of cause resisted by the Provincial Ministers and the City. Mr Borgström (assisted by Ms Adhikari) appeared for ECG – whilst Mr Farlam (assisted by Ms Bawa) and Mr Budlender SC (assisted by Ms Van Huyssteen) appeared for the Provincial Ministers and the City respectively.

BACKGROUND FACTS

[4] When Imizamo Yethu was established in February 1991, promises were made that services would be supplied and that measures would be put in place to avoid the further “*influx*” of people into the area. At first the community comprised 2000 people on 445 plots, on 8 hectares. They were promised title to their properties and community facilities. On 17 July 1992 the first 8 hectares were designated for development under the *Black Local Authorities Act* 102 of 1982 and LEFTEA. On 25 September 1992 the area designated under LEFTEA was extended to 21.5 hectares. This included what is now site 1 and most of site 3. At this early stage the

Hout Bay community was promised that the "*stone pine forest and other treed areas and existing screening*" would remain. On 23 July 1993 the area designated under LEFTEA was extended to 34 hectares, with the conditions that only 18 hectares could be developed for residential purposes; and that a layout plan had to be submitted for approval for the imposition of land usage controls. This included what is now site 2. The imposition of these controls was necessary as, under section 3(5) of LEFTEA, normal planning laws (including LUPO) did not apply.

[5] As indicated above, layout plans were approved in 1993 and 1994 for the 18 hectare area which could be developed for residential purposes. No layout plan was approved for the remaining 16 hectares of designated land. This included the sites which the City now seeks to develop. By 1997 there were 1882 structures in Imizamo Yethu, many of which lacked basic services. By January 2000 this had escalated to 2200 structures, accommodating 2400 families; and in 2002 Imizamo Yethu accommodated almost 16000 people. In 2001-2002 the City attempted to take action to interdict people from invading land outside of the 18 hectares of land which could be used for residential purposes. However, by 2004 the City indicated that it planned to allow the 16 hectares set aside for non-residential use to be utilised as a "*relocation site*". This caused local community bodies in Imizamo Yethu and Hout Bay to seek an interdict preventing the City from felling trees or allowing people to occupy the protected areas.

[6] By 2006 the Imizamo Yethu community had grown to approximately 30000 people, with informal dwellings in the buffer zones with Hughenden and Penzance Estates, and above Imizamo Yethu (known as

Dontse Yakhe). These areas were unserviced and resulted in pollution and health hazards. In 2008 the City counted 2083 informal structures in Imizamo Yethu. In order to deal with the crisis, the IJR process was initiated. By mid-2008 four development options were presented to the Hout Bay community by the City, proposing different combinations of housing and community facilities. Having received comment from the community, the City presented a fifth option ("option 5") in late 2008. This provided for 46 single residential units; 1000 apartments (of 40m² each). It included a primary school but excluded a high school. Option 5 was considered an unacceptable compromise. Of particular relevance for the current case, the plan retained a service road adjacent to Main Road leading to an informal trading area and taxi-rank. The Imizamo Yethu community (led by SANCO, Hout Bay) favoured a circular drive leading to the centre of the community. A circular drive would not only promote orderly traffic flow, but would avoid commuters having to walk up and down the mountain side to get to the taxi-rank. This would also maintain the belt of trees along Main Road, as indeed required by the applicable environmental authorisation.

[7] In February 2009 the ECG and other community organisations prepared an alternative plan, known as option 6. In the same period community organisations met with the City's executive mayor (then Ald. Zille), who confirmed that the IJR principles would be ratified by the City's Council; everything would be done to avoid losing trees; and lower densities would be encouraged on sites 1 and 3. Despite these indications that the City took the consultative process seriously, in May 2009 the City prepared a planning application, which included an updated draft of the layout plan. This substantially reflected the City's preferred development (option 5) – particularly in relation to the alignment of the proposed

service road parallel to the Main Road. The application documents noted that the type of buildings to be provided was not yet clear, but that it was "*proposed to apply*" for several "*departures*" on a blanket basis. The "*departures*" related to set-backs, coverage, subdivision sizes, frontages, height and density requirements, and were explained in relation to the extent to which they differed from permissible land uses in the applicable zoning scheme under LUPO. The use of this word "*departures*" also appeared to relate to section 15(1) (a) of LUPO, which specifically relates to applications for "*departures*" from the usual strictures of the applicable zoning scheme. This would have required a separate process to be followed in terms of section 15(2) of LUPO, which required notice of the particular departures to affected neighbours and a period for filing objections.

[8] In August 2009, the City issued notice which set out the planning approvals it sought in formal terms; and invited comment on its planning application – copies of which were available at public buildings. The advertisements listed the approvals which would be sought. These referred to, *inter alia*, the approval of amended and extended layout plans in such a manner as to allow for the creation of approximately 1100 residential units and community facilities. However, these notices did not contain any reference to any immediate application for the proposed "*departures*". On 2 October 2009 the City's officials placed an internal report before its own Spatial Planning Evaluation and Land Use Management Committee ("SPELUM") for recommendation, which in essence accorded with its option 5. This report now states that "*departures*" are applied for in terms of the applicable zoning scheme (under LUPO). A document attached to the report, entitled "*annexure A*", set out the approvals which would be sought. Unlike the notices of

August 2009, this document now explicitly added several "*departures*" which were sought in terms of the zoning scheme and section 15 of LUPO. The City now acknowledges that the language used in this report and annexure A was confusing. This is because the "*departures*" were not actually sought in terms of LUPO, in that LUPO did not apply to the bulk of the development area. The "*departures*" were in fact merely "*development parameters*" designed to give effect to the layout plan under LEFTEA, which for the sake of convenience were compared to the usual development rights as expressed in the zoning scheme applicable to the rest of Hout Bay. The importance of this distinction is that as the "*development parameters*" were not subject to LUPO, they did not have to be advertised in terms of section 15 of LUPO before being approved. The City further appears to suggest that the process by which the approval of these "*development parameters*" was introduced was fair, in that any interested person would have been aware of them if he or she studied the planning application; and that some interested people did object to aspects of the development parameters.

[9] The matter came before SPELUM on 14 October 2009. At this meeting SPELUM refused to grant the ward councillor or objectors an opportunity to speak. SPELUM recommended the approval of all the planning approvals sought in terms of LEFTEA (relating to the amendment of the designation conditions and the approval of the new layout plan) and LUPO (relating to the rezoning of land parcel 7a in site 3). It also recommended the approval of the "*departures*"/"*development" parameters*" in respect of the entire area designated under LEFTEA. SPELUM forwarded the matter to the Provincial authorities at this point, but noted that the matter would also be considered by the City's Council. In particular, the Council could decide whether it wished to deal finally

with the approval under LUPO relating to land parcel 7a in site 3, which the City was empowered to consider under a delegation in terms of LUPO. The Council did not, however, have power to decide the approvals sought under LEFTEA, which the provincial authorities could consider immediately. At the same time as pressing on with the planning approvals, the City conducted a parallel process to obtain the required environmental authorisation under NEMA. The City explains that this was necessary as the development triggered a number of identified activities necessitating a "basic assessment" under the (then applicable) regulations in Government Notice R386 of 21 April 2006 under NEMA. In a record of decision ("ROD") of 18 November 2009, the delegated authority granted this authorisation subject to conditions. The "executive summary" of the application for environmental approval is attached as annexure "CJH48", to the Founding papers. The environmental authorisation was upheld on appeal by the Minister on 4 May 2010.

[10] One of the conditions of the environmental authorisation was that the recommendations in a Heritage Assessment Report ("HAR") "*must be implemented*". These recommendations, as endorsed by Heritage Western Cape ("HWC") in a letter dated 27 February 2009, supported the development in option 5 in principle, provided that:

(a) A substantial number of the stone pine trees along Main Road and in the old forestry station (i.e. site 2) must be retained. They were recognised as a "*key heritage resource*". The HAR referred to the "*wooded character*" of the area as part of its "*genius locus*" (viz. its defining characteristic), and that part of the "*rural illusion*" of the valley was the "*Main Road corridor with its heavily lined edges*". The ROD itself recognised that the reason for retaining these trees was to "*reduce the impact of the cultural sense of place associated with the*

current road" and to maintain the "*visual intactness of the general area*". (b) A "*detailed tree survey*" be undertaken by an arbouriculturalist relating to the health of trees on sites 2 and 3 and their viability, and that this be a "*key informant of the site development plan*". The arbouriculturalist also had to prepare a "*tree management plan*" to allow for the succession of trees along Main Road. (c) The remnants of the Kronendal Furrow must be retained. (d) The "*key heritage resources*" (being the Kronendal Furrow and the trees) be listed in the heritage register in terms of section 30 of the National Heritage Resources Act 25 of 1999 ("NHRA") – i.e. the City had to ensure that the resources were appropriately listed by HWC in the Provincial heritage register. The ROD also recorded that the proposed development would "*conserve these key heritage resources*". The layout plan came before SPELUM again on 14 January 2010. At this stage an internal report from the City recognised that the "*proposed departures*" (or "*development parameters*" as they are now called) had not been advertised and the details of the development had not been provided. A revised version of the "*annexure A*" document was thus provided – which excluded the departures/development parameters. This was confirmed by the responsible director in the City (Mr Richard Walton) who stated that the departures would be dealt with in a separate process. SPELUM deferred consideration and referred the matter to the Good Hope sub-council in whose jurisdiction the Hout Bay area falls. On 18 January 2010 the sub-council interviewed objectors, and recommended several recommended amendments to SPELUM. These included a recommendation that the proposed development in site 2 should not be supported, based primarily on the undesirability of the proposed alignment of the service road and taxi rank; and the failure to include a high school. The sub-council

favoured a road leading into the centre of the community (as suggested by the community), using an extension of the existing NR Mandela Road. The sub-council also recommended that the proposed development in site 3 should not be supported. Instead, a 10 metre wide buffer zone should be provided next to Penzance Estate, lined with single residential dwellings. The sub-council further recognised the need for a tree survey. The matter returned to SPELUM on 21 January 2010. SPELUM elected to recommend that all the required planning approvals should be approved as shown in a document entitled "*amended annexure A*". This essentially approved the layout plan favoured by the City, subject to amendments. These included that the service road, taxi rank and informal trading area would not continue until a traffic assessment report ("TIA") had been conducted of NR Mandela Road as an alternative. If this resulted in changes to the layout plan, these would be submitted to SPELUM for recommendation to the provincial authorities. This slightly amended layout plan was in turn recommended by the City's executive mayor (then Ald. Plato), and the City's Council. On 8 February 2010 the City informed the provincial authorities of developments and that the applications had been "*duly advertised*". The changes required under amended Annexure A were expressed in a revised layout plan provided by the City on 12 March 2010. (It was this same plan which was ultimately approved in the decision under review.)

[11] The housing conditions in Imizamo Yethu are intolerable, and result in the breach of the rights of residents. Imizamo Yethu is overcrowded, and adequate services are not provided. There is an acute housing crisis in Cape Town generally, and in Hout Bay in particular. The proposed development will provide approximately 1 100 housing units. It is a key step in addressing the City's constitutional obligation to provide housing,

to improve the living conditions of the poor, and to improve service delivery in in Imizamo Yethu. It provides for residential development, community facilities and economic opportunity. It is the product of extensive and rigorous community engagement and public participation during a process which has taken many years. The views of all interested and affected parties were taken into account. It is however not possible to satisfy all of the needs and points of view. I accept that it is and shall never be possible to satisfy all of the needs and points of view which must have been expressed within the constraints imposed by the availability of resources and the realities of the situation in Imizamo Yethu.

THE MINUTE RE INSPECTION *IN LOCO*

[12] The parties made three stops at which observations of particular areas as depicted on the layout plan were made. The first stop was at the highest point of the Mount Rhodes area, off Victoria Road (known as the Suikerbossie Hill). The parties observed the Imizamo Yethu area as a whole across the Hout Bay valley, and this was photographed. The parties observed the following areas as marked on the photograph:

The proposed development area known as "site 1", between Imizamo Yethu and Hugheden Estate, which is currently used for informal housing; the proposed development area known as "site 3", between Imizamo Yethu and Penzance Estate, which is currently treed; the proposed development area known as "site 2", in the middle of Imizamo Yethu, in which the following aspects were observed:

The new primary school which is currently under construction; the Main Road, running at the base of Imizamo Yethu; and the band of pine trees referred to in the environmental authorization, at the bottom of the primary school site adjacent to the Main Road.

The second stop was on the site of the new primary school. The parties walked over the construction site to a point near the eastern boundary of the primary school, overlooking the band of pine trees adjacent to the Main Road. The point at which the parties stopped was identified on the diagrams and photographs in the record:

Annexure "RW18" being a diagram entitled "proposed subdivision plan" and dated 2 March 2010 (with reference 05.1537/CAD/SUBD/REV 2). This was the "layout plan" approved by the First and Fifth Respondents, on which the following aspects are noted:

The primary school property; the point at which the parties made observations;

The Main Road; and the treed area between the observation point and the Main Road.

Annexure "RW 21b" being an aerial photograph of Imizamo Yethu forming part of a tree survey from 2008, on which the following aspects are noted:

The point at which the parties made observations; the Main Road; and the treed area between the observation point and the Main Road. **Annexure "A"** being a composite diagram by Mr. Dodds containing a cross-sectional diagram at the top of the page and a layout diagram on the rest of the page. With reference to the cross-sectional diagram the following aspects were noted:

The point at which the parties stopped, being at the apex of a retaining wall which supports filled material forming part of a playground/field for the primary school; the Kronendal Furrow, at the base of the retaining wall; and the treed area through which the proposed service road would pass.

The observations made from the viewing point are recorded in photographs attached as **"Photograph 2"** to **"Photograph 3"**, which I

have made part of the record of proceedings and they depict the following:

In **"Photograph 2"**, the band of pine trees between the school site and the Main Road, through which the proposed service road would pass; and

In **"Photograph 3"** portions of Kronendal Furrow at the base of the retaining wall, partly obstructed by building material and partly unobstructed. The third stop took place on Hout Bay Main Road, adjacent to "site 2" and the new primary school site, this was also photographed. The following features were pointed out by the parties:

The band of pine trees; the proposed site for the construction of the service road; the road reserve adjacent to Main Road.

THE DECISIONS/ APPROVALS UNDER ATTACK

[13] An impression must not be created that there was only one decision/approval.

(a) there was an approval, in terms of section 3A(a) of LEFTEA, of an amendment of a condition of an earlier designation of land in in Imizamo Yethu under LEFTEA – in terms of which a condition limiting residential development to 18 hectares of the total designated area was replaced with a condition which provided that a total of 21 hectares could be used for residential development (and the remaining 13 hectares for roads (including reserves), open spaces, roadside fringes, thoroughfares, public spaces, and/or public-service facilities; (b) there was an approval, in terms of section 3(1) read with section 3(3) and section 4(1) of LEFTEA, of an amendment of an approved layout plan on Portion 1 of the Remainder of Erf 6355, Hout Bay (a portion of land adjacent to Hughenden Estate); and (c) there was the approval of new layout plans for two portions of the Remainder of Erf 2848 (a portion of land abutting Penzance Estate and

the Main Road) and the Remainder of Erf 7309, Hout Bay (a portion of land occupied by the Old Fire Station).

Those approvals related, in total, to the land referred to as parcels 4a, 4b, 4c, 4d and 4e, 6a, 6b and 7b. The land in question, and the position of the various parcels, can be seen on a map ("RW2"), annexed to the City's Answering Affidavit. That map indicates:

The Imizamo Yethu area as a whole; the phases which have already been developed (i.e. phases 1, 2 and 3); the three sites to which this application relates (i.e. sites 1, 2 and 3) and the different parcels of land which comprise those sites.

Both the approval of the Minister of Environmental Affairs and Development Planning and the approvals of the Minister of Human Settlements ("the impugned approvals") were granted subject to comprehensive conditions.

THE LEGISLATIVE FRAMEWORK

[14] A development of this kind is regulated by a number of legislative instruments.

LEFTEA

First, the land concerned must be designated for such a development in terms of LEFTEA. According to the long title of LEFTEA, its purpose is to "*provide for shortened procedures for the designation, provision and development of land, and the establishment of townships, for less formal forms of residential settlement*…" To that end, section 3(1) of LEFTEA provides for the designation by the competent authority of land for less formal settlement when the authority is satisfied that "*in any area persons have an urgent need to obtain land on which to settle in a less formal manner*". The authority may impose conditions on the designation. The administration of LEFTEA was assigned to the Provinces by

Proclamation R159 in GG 16049 of 31 October 1994. On 7 November 2007 LEFTEA was amended by the Western Cape Less Formal Township Establishment Amendment Act 2007 (PG 6479 of 12 November 2007).That Act inserted section 3(3A), to provide for the amendment of a notice of designation if it is a condition of such a notice that "*any part of the designated land may be used for certain purposes only or may not be used for certain purposes*". Section 3(5) of LEFTEA exempts designated land from the provisions of a range of laws. They include laws on physical planning, town planning, and building standards. This is consistent with the underlying purpose of LEFTEA, which is to ensure that designated land may be developed and settled in an expedited and less formal manner in order to meet an urgent need for settlement and housing. The exemption is subject to section 3(6), which provides that the competent authority may declare a provision of such legislation applicable to designated land.

LAYOUT PLANS

[15] While LEFTEA does not explicitly require this, the practice in the Western Cape is to require a layout plan for the proposed development as one of the conditions of designation of land in terms of LEFTEA. A layout plan indicates the outlines of the proposed development in general terms. It is similar to the subdivision plan which is required for more formal developments. Upon approval of a layout plan by the competent authority, development parameters for the development – such as zoning, permissible erf sizes, erf coverage, building height, etc., may be imposed. These parameters are imposed in terms of LEFTEA, although they may be similar to the parameters which are created by the land use planning legislation to which I refer below.

GENERAL PLANS

Section 5 of LEFTEA provides that after land has been designated, the developer must cause a general plan to be prepared and submitted to the surveyor-general for approval. After the general plan has been approved by the surveyor-general, it must be filed at the deeds registry for registration by the registrar of deeds. The general plan is more detailed than, and follows on, the layout plan.

LUPO

[16] Section 6 of LEFTEA provides that, after the general plan has been filed at the deeds registry, the registrar of deeds must open a township register in respect of the designated land concerned. The consequence of opening the township register is that the designated land "*shall, subject to the provisions of this Act, be deemed to be a township established in accordance with the law governing the establishment of townships in force in the area in which the designated land is situated*".

The law which governs the establishment of townships in the Western Cape is LUPO. Accordingly, once a general plan has been filed and a township register opened in respect of designated land in the Western Cape, the area is deemed a township established in accordance with LUPO. The provisions of LUPO then become applicable to that area, subject to the provisions of LEFTEA and any conditions imposed by that designation. LUPO does not apply to that land until the general plan has been filed and the township register opened. Thereafter, LUPO applies subject to any conditions imposed by the competent authority (such as the zoning imposed on the area by the competent authority and any other development parameters which have been imposed, for example as to permissible erf sizes, erf coverage and building height in the area). It is only once the general plan has been filed and the township register has

been opened, that the designated land consists of separate erven which are legally recognized as such.

Environmental authorization

A development of this nature is also subject to environmental legislation, particularly the National Environmental Management Act 107 of 1998 ("NEMA") and regulations thereunder. If the development includes activities which require authorization from the competent authority in terms of NEMA, environmental authorization for those activities must be obtained.

THE PLANNING PROCESS UNDER LEFTEA

[17] As has already been indicated, the ordinary LUPO planning and approval processes do not apply where a development takes place under LEFTEA. That does not mean, however, that the development of less formal residential settlements takes place in an unregulated and incoherent, haphazard way. First, the Administrator may attach conditions to his or her designation of land under LEFTEA. See Section 3 (1) of LEFTEA. (In the Western Cape, the administration of LEFTEA has been assigned to the Minister of Human Settlements – he is the *"*Administrator*"*.) Those conditions may be designed to ensure compliance with sound town and land use planning requirements. (For example, when the land in issue in this review was designated under LEFTEA, one of the conditions of designation was that a layout plan be submitted to the Administrator for approval and for the imposition of *"land usage control measures"*.) Secondly, the planning and development of designated land must take place in accordance with requirements considered necessary by the Administrator *"to make the speedy and orderly settlement of persons … possible"*, as well as in accordance with any conditions attached to the land designation. See Section 4 (1) of LEFTEA. Thirdly, the

Administrator must ensure that the planning and development of the land takes place in a way which takes account of future service needs in that area. He must ensure that the planning and development takes place in such way that "the subsequent upgrading of the service" on the land is possible. See: Section 4 (2) of LEFTEA.

Public participation under LEFTEA

Because applications for rezoning, departures and subdivision in terms of LUPO are not required where a development takes place on land designated under LEFTEA, the obligation to comply with the public participation processes prescribed in LUPO does not arise. LEFTEA was, as submitted, designed *inter alia* to achieve that consequence. Parliament has permitted the ordinary processes to be by-passed so that housing can be developed more quickly. Section 29 of LEFTEA supports the argument that the by-passing of ordinary processes was one of the key reasons for promulgation of the Act. It reads –

"Except where the provisions of this Act expressly make provision therefor, the Administrator shall not, in applying this Act, be compelled, in respect of a proposed step or act or the consideration of an application, to give notice thereof in public or otherwise, or to hear or consider any objection or representation in connection therewith."

Section 3 (3A) is an example of a provision which does expressly provide for a public participation process. Importantly, land may be designated as land for less formal settlement only where *"the Administrator is satisfied that in any area persons have an urgent need to obtain land on which to settle in a less formal manner"*. (Emphasis supplied)

[18] The Housing Act of 107 of 1997 obliges every Provincial Government to *"do everything in its power to promote and facilitate the provision of adequate housing in its province within the framework of national*

housing policy" (Section 7 (1)) and also imposes specific housing-related obligations on municipalities (Section 9). LEFTEA provides an accessible form of land tenure and makes provision for the development of less formal settlements and townships and provides among other things, "for shortened procedures for the designation, provision and development of land, and the establishment of townships [and] for less formal forms of residential settlement" (Section 3 (5) (e)). It provides that laws regulating townships development and planning are not applicable. In the case of less formal townships it provides for the exclusion of such laws if their application "will have an unnecessary dilatory effect on the establishment of the contemplated township or will otherwise be inappropriate in respect of the establishment of the township" (Section 19 (5) (a)). See also WC Prov. Govt.: In re ***D v B Behuising (Pty) Ltd v NW Prov. Govt.*** 2001(1) SA 500 (CC) at paras [66] – [67].

[19] The attempted and expedited process for establishing townships and less formal settlements which is contemplated by LEFTEA is critical to enable the State to provide land for housing or less formal settlements at short notice, as well as to regularize or ameliorate situations where land invasions have occurred. It was intended by the legislature that the legislative framework of LEFTEA should serve to provide urgent powers, necessary to deal expeditiously with the plight of the homeless – by the very nature of these powers implementation of decisions cannot be allowed to be delayed forever. See ***Modderklip Boerdery (Edms) Bpk v President van die Republiek van Suid-Afrika en Ander*** [2003] 1 ALL SA 465 (T) at 507-508; ***Diepsloot Residents' and Landowners' Association v Administrator, Transvaal*** 1994 (3) SA 336 (A) at 348 H-349D. The present application as shown above under background facts was preceded by an extensive process which included public

participation. Because this is of cardinal importance in the determination of this application I deem it necessary to set out *infra* such activities in the form of a chronology – this despite the fact that it may be a repetition of what has been said *supra*.

[20] CHRONOLOGY OF PROCESS UNDERTAKEN PRIOR TO PRESENT APPLICATION

DATE	EVENT / DOCUMENT	REFERENCE
17.07.1992	Designation of a portion of Erf 2848, Hout Bay, ± 8 ha in extent, for less formal establishment, by Administrator of Cape Province [PN351/1992]	"CJH7"
25.09.1992	PN 465/1992 establishes an "informal zone" in all zoning scheme regulations	538 par 46
25.09.1992	Designation of a portion of Erf 2848, ± 21.05 ha in extent, a portion of Erf 1830, ± 0.230 ha in extent, and a portion of Erf 1833, ± 0.2686 ha in extent, for less formal establishment, by Administrator of Cape Province [PN 468/1992] [Designation of land subject to following condition: the submission of the proposed layout plan to the Administrator for approval, and the imposition of land usage control measures.] [Designated land includes what is now sites 1 and 3: p537 par 43.2]	"CJH8"
Oct. 19992	Layout plan approved, containing 550 plots	21 par 34
23.07.1993	Designation of portions of Erf 2848 and 1830, 12.5309 ha in extent, for less formal establishment, by Administrator of Cape Province [PN 383/1993] [Designation of that land, together with the land designated in PN 468/1992, subject to following conditions: (1) that only 18 ha of the total area shall be used for residential purposes; and (2) submission of the proposed layout plan to the Administrator for approval and the imposition of land usage control measures] [Designated land includes what is now site 2: p537 par 43.3]	"CJH9"
19.11.1993	Layout plan approved for phase 1 (in terms of s4 of LEFTEA) [residential zones to be informal zones]	22 par 38, "RW3" & 537 par 44
21.07.1994	Layout plan approved for phases 2 and 3 (again in terms of s4 of LEFTEA) [residential zones to be informal zones] [Layout plan as approved in June 1994 at "RW5"]	22 par 38, "RW4" & 537 par 45
17.02.2004	Interim order (*per* Bozalek J) under Case No. 1094/04	"CJH13"
17.05.2004	Final order (*per* Allie J) under Case No. 1094/04	
30.05.2007	IJR Consensus Principles (on Greater Hout Bay Housing Crisis)	"CJH15"

30.04.2008 & 04.06.08	City sought comments on the various development options	29 par 63
Late 2008	City proposes a fifth development option	29 par 67
12.02.2009	SANCO comments on fifth option	"CJH21"
24.02.2009	ECG and other community organisations propose sixth development option	"CJH22" & 32 par 71
Jan. 2009	Final Heritage Impact Assessment by Aikman Assocs.	"CJH50" & 222 par 27
26.02.2009	Letter from Residents' Association of Hout Bay to Chand Env. Consultants re Draft Basic Assessment Report	"CJH51" & 223 par 32.1
27.02.2009	Heritage Western Cape endorses recommendation in Heritage Impact Report, and comments that it in principle supports Option 5, subject to the results of public participation and various conditions	150 ["A" to "CJH28"]
May 2009	Visual Impact Assessment (VIA) by H van der Hoven	"CJH49" & 221 par 21
May 2009	Land use application prepared by CNdV Africa on behalf of City [Attached as annexure I is a Traffic Impact Assessment dated 18 September 2009. Layout plan attached at Figure 5.3]	"RW10" & "RW11", & 549 par 72
19.06.2009	Final Basic Assessment Report (BAR) by Chand	"CJH48" & 221 par 21
31.07, 01.08, 03.08 & 06.08.2009	Advertisements in regional and local newspapers re planning approvals to be sought for Hout Bay (i.e. amendment of condition of designation; designation of new land; rezoning and subdivision; and street names) in terms of LEFTEA and LUPO [Advert refers to Final BAR for EIA being out for review prior to consideration by DEA&DP]	"CJH66" & 231 par 49
05.08.2009	Letter from City to I&APs re (i) proposed amendment of a condition of designation of land under LEFTEA, (ii) approval of new layout plans (conditional upon amendment of condition of designation), (iii) proposed rezoning and subdivision, and (iv) approval of street names	"CJH25" & 33 par 74
07.08.2009	Notice in Provincial Gazette referring to planning application for Imizamo Yethu and in particular (i) the amendment of the condition of designation, (ii) the designation of additional land for less formal township development (in accordance with a proposed layout plan) under s3 of LEFTEA, and (iii) proposed rezoning and subdivision in terms of ss17 and 24 of LUPO [Objections to be lodged by 8 September 2009] [Notice refers to Final BAR for EIA being out for review prior to consideration by DEA&DP]	"CJH65" & 231 par 47
11.08 & 13.08.2009	Letters from Hout Bay & Llandudno Heritage Trust and Residents' Association of Hout Bay to Chand re Final BAR	"CJH52" & "CJH53", & 224 par 32

03.09.2009	Comments on planning application from Hout Bay & Llandudno Heritage Trust	"RW13" & 551 par 78
06.09.2009	Comments on planning application from Sinethemba Civic Association	"RW13" & 551 par 78
08.09.2009	Comments on planning application from Residents' Association of Hout Bay	"RW13" & 551 par 78
08.09.2009	Comments on planning application from Tommy Brümmer Town Planners	"RW13" & 551 par 78
08.09.2009	Comments on planning application from Penzance Assoc.	"RW13" & 551 par 78
08.09.2009	Memorandum of objection from Hout Bay Ratepayers Association and Sinethemba Civic Association	"RW13" & 551 par 78
02.10.2009	Report submitted by City officials to SPELUM referring to objections, comments etc, and responding thereto	"CJH67" & 552 par 80
04.11.2009	Application for planning approvals submitted by the City (Planning & Building Development Management) to DEA&DP (with copies of press adverts, notices etc) [City states that Council will only be dealing with the LUPO aspects, and that the LEFTEA issues can be addressed now]	463 (in "CJH70"), & 554 par 84 & "RW15"
18.11.2009	DEA&DP granted environmental authorisation to the City re Imizamo Yethu (the "ROD") [Condition 7 provides that the "recommendations in the Heritage Assessment Report [HAR] dated January 2009 that was compiled by Aikman Associates … and endorsed by Heritage Western Cape ('HWC') must be implemented] (attached as Appendix A)"]	"CJH28" & 34 par 78
10.12.2009	Appeal by Tommy Brummer (on behalf of residents of surrounding areas)	372-373 (in "CJH55") & 546
17.12.2009	Appeal by Hudson, on behalf of Hout Bay & Llandudno Heritage Trust against the ROD	373 & 546
23.12.2009	Appeal by Hout Bay Ratepayers Association against the ROD	373
28.12.2009	Appeal by Residents Association of Hout Bay against the ROD	373
18.01.2010	Good Hope Sub-Council considers planning application	"CJH34", 38 par 92 & 556 par 90
21.01.2010	Report on Sub-Council meeting prepared for SPELUM	"CJH35" & 556 par 91
21.01.2010	SPELUM considers Sub-Council report and report of 13.01.2010 and makes recommendations to Mayor	"CJH36", 40 par 95 & 557 par 92
25.01.2010	Recommendation from Mayor	"CJH37" & 557 par 93
27.01.2010	City Council accepts recommendation by SPELUM and Mayor:	"CJH38", 41

	namely, to proceed with option 5, as amended by "Amended Annexure A"	par 99 & "CJH36"
08.02.2010	Letter from City (Director: Planning & Building Development Management) to DEA&DP confirming that planning application duly advertised in terms of LEFTEA and LUPO and objections were received; and that the full Council resolved to recommend that the applications be approved, subject to the conditions on Amended Annexure A (attached)	"CJH70" & 234 par 60, & 557 par 95
12.03.2010	Letter from City (Director: Planning & Building Development Management) to DEA&DP attaching amended layout plan ["RW18"] (reflecting changes approved by City on 27.01.2010)	"CJH71" & 234 par 61-62, & 558 par 96, & "RW18"
22.04.2010	Memorandum submitted by DEA&DP to Minister of EA&DP and Minister of Human Settlement re planning approvals	"CJH72" & 235 par 65, & 558-560 par 98-99
22.04.2010	Memo from DEA&DP to Minister of EA&DP outlining appeals against the environmental authorisation	"CJH55" & 225 par 35
28.04.2010	Approval by Minister of EA&DP of rezoning and subdivision of parcel 7a (under LUPO)	"CJH72", & 560 par 100
28.04.2010	Decision by Minister of EA&DP dismissing appeals against the environmental authorisation (i.e. the ROD)	"CJH55" & 225 par 35
03.05.2010	Approval by Minister of Human Settlements of amendment of conditions of designation, an amended layout plan for parcel 6a, and new layout plans for parcels 6b, 4a-4e, and 7b (under LEFTEA)	"CJH72", & 560 par 100
04.05.2010	Letter from Minister of EA&DP to Hudson (as representative of Hout Bay & Llandudno Heritage Trust), confirming dismissal of appeal against the environmental authorisation, and the amendment of the authorisation in two respects (to deal with changed buffer zones in sites 1 and 3) Amended ROD	"CJH46" & 218 par 10, & 547 par 70 "RW9"
05.05.2010	Letter from DEA&DP to City re City's application in terms of LEFTEA and LUPO	"CJH2", & 560 par 101
26.05.2010	Letter from ECG to Minister of EA&DP and City re approval in letter of 5 May ("copied to the community organisations and individuals who submitted comments")	"CJH39" & 41 par 101
06.07.2010	Letter from Minister of EA&DP to Chairman, ECG	"CJH4"
20.07.2010	Letter from ECG to Minister of EA&DP and City	"CJH40" & 43 par 104
23.07.2010	Response from City to ECG	"CJH41" & 43 par 105
08.09.2010	Letter from ECG to Minister of EA&DP and City	"CJH43" &

		43 par 107
15.09.2010	Letter from Minister of EA&DP to ECG	"CJH44" & 43 par 107

DISCUSSION

[21] Mr Borgström preceded his submissions with the following rather bold statement:

> *"The City and the Provincial Ministers make the gratuitous allegations that the ECG is 'bent on delaying the proposed development' or imposing its own will. The insinuation also appears to be made that the ECG represents a retrogressive elite. These allegations are as unfortunate as they are incorrect. The ECG accepts and supports the City's constitutional duty to provide access to adequate housing. In particular, the ECG supports the City's efforts to improve access to housing in IY, where there is a severe backlog of adequate 'housing opportunities'. This duty does not, however, excuse or elevate decisions which are otherwise unlawful."*

This statement deserves some attention. I deal with and consider same *infra*. In 2004, an interdict was granted to enforce the then condition of designation of the land, that only 18 of the 34 hectares of the land in question could be used for residential purposes. The ECG states that it supports the 2006/2007 IJR principles, which it purportedly seeks to enforce in this application. It is common cause that the IJR principles record that the remaining 16 hectares of the designated land is a zone of opportunity for mixed use, including housing. It is also common cause that in 2010 the conditions of designation were amended, to permit residential development on 21 hectares of the land. The ECG does not challenge this decision. Despite this, in October 2010 the ECG launched this application in which it sought in effect to enforce the 2004 interdict.

The consequence of this would clearly be to prohibit any further residential development at Imizamo Yethu at all, not just the particular aspects to which the ECG has raised objection in this application.

[22] When the City contended that the 2004 interdict had fallen away as a result of the subsequent events, or (to the extent necessary) should be set aside, the ECG neither disputed this nor opposed it. This raises questions as to what the true motive of the ECG is in this application: Why did it seek in effect to enforce the 2004 interdict, when the result of that would be to prevent any further residential development at all at Imizamo Yethu – despite the fact that the designation now permits 21 hectares of the land to be used for residential purposes? The question becomes even more pointed when one has regard to the fact that the ECG then abandoned this ground of review. The question that comes to mind is why it was raised at all, as Mr Budlender concerningly asked in his submissions. The question becomes yet more pointed when one has regard to the fact that in June 2011 the ECG demanded an undertaking from the City that it would not call for, consider or adjudicate *"any"* tender to provide *"any"* services for the implementation of the disputed development plans. The ECG indicated its intention to approach this Court for an urgent interdict if the City refused to give this undertaking. The ECG thus attempted to stop the City even issuing a tender for the appointment of a professional team. Why did the ECG not want the City even to call for a tender for the provision of professional services for the development? What was it trying to achieve? These are rhetoric and yet concerning questions that are not only troubling Mr Budlender, but they equally bother the Court. Mr Budlender in this regard contended as follows:

"Even now, the ECG attempts to stop this development on the extraordinary ground that proper notice was not given of the proposed

development parameters – even though the proposed parameters did come to its attention, and it did make representations in that regard. Again, one is driven to ask: what is the reason why ECG raises this ground of review? - even if there was a defect in the process (which is disputed), it plainly has not affected the ECG at all."

[23] The ECG has not brought this application "without unreasonable delay", as required by section 7(1) of PAJA. PAJA requires that an application for judicial review must be instituted without unreasonable delay, and not later than 180 days after the date on which the person affected became aware of the decision and the reasons for it, or might reasonably have been expected to have become so aware. This is a project which is an urgent necessity to address a dire situation, and to meet the needs of thousands of vulnerable people. In its Founding Affidavit, the ECG stated that it had *"waited until almost the 180th day to institute these proceedings".* This was pertinently raised in the City's Answering Affidavit. In reply, the ECG still provided no explanation for its delay, except to say in general terms that it *"sought to have the issues dealt with extracurially"* and that it *"does not enjoy the luxury of unlimited resources to embark on litigation"* and the fact is that the ECG did embark on litigation. Again Mr Budlender contended as follows:

"The most reasonable inference from the ECG's course of conduct is that notwithstanding its denials, it is in fact attempting to delay the development. As part of that course of conduct, it has delayed unreasonably in bringing this application. It has not shown any reason why this unreasonable delay should be condoned."

It is indeed tempting to consider the ECG as having been somewhat obstructive. However, I make no finding in this regard. It is always best to consider the merits of the application. I do so hereunder.

CONFLICT BETWEEN LAND USE AUTHORISATION AND THE ENVIRONMENTAL ROD (RECORD OF DECISION)

[24] In undertaking this development, the City will have to comply with the conditions of two approvals which have been granted: the environmental approval (the ROD), and the land use authorizations. Each authority makes its own decisions, and the City must comply with each of them. The chief complaint is focused on the proposed service road. This road was approved as part of the approval given by the relevant Provincial Ministers in the environmental ROD. In January 2009, the Heritage Management Consultant reported in his "Final Heritage Assessment" that stated that "the layout as depicted in Option 5 makes provision for the conservation of the key heritage resources identified viz. the band of trees along the Main road boundary and the remnants of the Kronendal Furrow". He accordingly recommended "That Option 5 as depicted in Annexure 1 be supported in principle as the key heritage resources of the site viz. the band of trees along the Main road boundary and the remnants of the Kronendal Furrow are conserved". He recommended, too that a "detailed survey to establish the health and viability of retention of the trees on Portions 2 should be undertaken and be a key informant of the site development plan". On 27 February 2009 Heritage Western Cape "endorsed the recommendations in the Heritage Impact Report". It stated that in principle it supported Option 5, as depicted in Annexure 1 of the HIA report, subject to the conditions which were stated. The environmental ROD requires that the recommendations in the heritage assessment report, endorsed by Heritage Western Cape, be implemented. A distinction must always be drawn between a layout plan and a site development plan. The existing layout plans are consistent with and take express account of the ROD. It is not disputed that the development plans

must comply with conditions contained in the ROD and once the more detailed site development plans are developed (a process I am told is currently underway) those will also have to comply with the conditions contained in the ROD.

THE POSITIONING OF THE SERVICE ROAD

[25] What emerges from this is the following:

(a) Option 5, which includes the service road, is not inconsistent with the requirements of the Heritage Report. To the contrary, the Report found that it makes provision for the conservation of the band of tress along the Main Road and the remnants of the Kronendal Furrow. That is why the Report recommended that Option 5 be supported in principle. (b) The heritage consultant, and Heritage Western Cape, had seen the layout, which included the road. They were satisfied with it. They required that an arbouriculturalist's survey be undertaken, and that it be a key informant of the site development plan. They could not have thought that the site development plan was the layout plan. The layout had already been completed, and they knew that was the case. The site development plan was yet to be prepared. The land use authorizations require the City to undertake a Traffic Impact Assessment with regard to the alignment of the service road. It is correct, as the ECG contends, that the TIA does not consider compliance with the ROD. That is not its function: it is a transport enquiry, to consider the possible road alignments. It may lead to the conclusion that the desired road alignment will require that the layout plan should be changed in order to comply with the ROD. If that is the result, then application will need to be made for amendment of the layout plan. The Minister was aware of this when he granted the land use authorization. He said that:

"Subsequent possible amendments to the attached layout plan ... as a result of the findings of the TIA, will be dealt with by the Provincial Government on application by the Municipality."

[26] Annexures "CJH28" and "CJH55" make it clear that the impact of the service road on the band of trees was explicitly considered when the ROD was issued and in the appeal process. Thus the impugned planning approvals were granted with full awareness of the service road, the terms of the ROD and the possibility that the service road may need to be repositioned. The objection relating to the proposed service road is not new at all and was raised even during the appeal process and Annexure "CJH55" records that the Applicant was informed that *"the preferred alternative proposes the retention of the majority of the trees along Hout Bay main road, including trees along the "service" road running parallel to it. This parallel road was realigned in order to avoid the majority of the mature trees in the tree fringe. The Applicant has committed itself to planting new trees along this fringe and furthermore intends compiling a landscape plan and submitting it for approval before construction commences. This plan will also address any visual impact the proposed project might have"*. Perhaps one needs to repeat that the actual impact of the development and of the service road in particular, on the band of trees referred to by the Applicant cannot be categorically determined at this stage. It is only when the more detailed site development plan is prepared that the precise layout of the service road will be known.

[27] It indeed does appear though that the ECG was rather quick to launch this challenge, that is, in respect of the routing of the service road. If it emerges, after the TIA and the arbouriculturalist's report have been completed, that the development cannot be implemented in a manner

which meets the requirements of both the environmental ROD and the land use authorizations – in other words that they are mutually inconsistent - that does not make the land use authorizations invalid. If that is the case, the result will be that the development may not be implemented unless either the land use authorizations or the environmental ROD are amended. That arises from the now trite principle that each authority has to make its own decision according to its own *criteria*, and each must be complied with. An authority is, however, not permitted to take the approach that another authority has already decided the matter. That is what the Province did in the ***Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province, and Others*** 2007 (6) SA 4 (CC) case. When it considered the application for environmental authorization, it did not consider the need for and desirability of a filling station, because that had already been considered by the local authority when it considered the land use application. The Constitutional Court held that the decision of the Province had to be set aside, because it had not considered the need for and desirability of the filling station. It had to make its own decisions, in accordance with the requirements of its own legislation and criteria.

[28] The consequence of this was demonstrated in ***Wary Holdings (Pty) Ltd v Stalwo and Another 2009 (1) SA 337 (CC)***. There, permission for the subdivision of agricultural land had to be granted by both the local government and the national government. Again, the Constitutional Court held that each had to make its own decision, in terms of its own legislation and criteria – and that it was quite possible that one government would give permission, and the other would refuse. In that

event, the subdivision could not take place – because the owner had to comply with the requirements of both the national and the local government in order to be able to subdivide the land. So the decision of one could "veto" the decision of the other. The result is that in order to implement the development, the City has to comply with both the environmental authorization and the land use authorization. It may not act inconsistently with either. If a condition of one of the approvals makes compliance with the other approval impossible, then the project cannot be implemented. The only way to do so will be to apply for the amendment of the conditions of one of the authorizations. I thus fully agree with Mr Budlender that the inconsistency between the two approvals thus does not make one of the approvals invalid. (In any event, it is not clear which of the approvals should be considered invalid - and particularly where the two authorization processes are run at the same time, as in this case.) The Constitutional Court has clearly and repeatedly said that mutually inconsistent decisions are not objectionable: to the contrary, they are to be expected, as each authority must make its own decision in terms of its own legislation and criteria.

[29] The repeated refrain that the service road contemplated in the layout plan "does not fit" the space available in terms of the ROD therefore takes the matter no further. But it is in any event not shown on the papers, for two reasons:

(i) First, the question whether the service road "fits" depends in part on how wide it is. If a road which is 19.8 meters wide "will not fit", a simple solution is to make it less wide – for example, by removing the cycle lanes which flank it. This can be considered when the site development plan is prepared. (ii) Second, the question whether the road "fits" in the available land depends on

what the boundaries of the available land are – between the school site on the one side, and the Main Road on the other. There is no evidence as to the status of the perimeter fences on both sides, which Mr Dodds used as markers for his measurements. On the school side, it is presumably a fence put up for construction purposes: there is no evidence that the site has been properly surveyed and demarcated on that side. The same applies to the fence on the other (road) side. These are matters which would have to be determined in the preparation of the site development plan.

If this evidence of Mr Dodds had been introduced in the founding or supplementary founding papers, as it should have been, the City would have had the opportunity to deal with it in its Answering Affidavit.

IS THE REMEDY MISCONCEIVED?

[30] If the authorizations cannot both be complied with as they currently stand, that does not make either of them invalid. It means that to the extent of the inconsistency, the City may not proceed with the development as currently conceived. If there is evidence that the City nevertheless intends to proceed with the development in breach of a condition of the environmental ROD, then the remedy is to interdict the City from acting in breach of that condition - not to set aside the land use authorizations. The City has stated in terms, and repeatedly, that it will comply with the conditions which have been imposed. It has undertaken to do so. It has stated that it remains committed to the undertaking which Mayor Zille gave. If the ECG believes that it can prove that the City is lying, and intends to act unlawfully, then it can apply for an interdict to prevent the City from acting unlawfully. In this respect I agree with the contention advanced by Mr Budlender.

THE COMPLAINT ABOUT THE TREE SURVEY

[31] The condition relating to the appointment of an arbouriculturalist to establish the health of the trees and the viability of their retention with reference to option 5 as depicted on the plan clearly intended no more than that the recommendations of the arbouriculturalist be a key informant of the site development plan. That stage has not been reached. The environmental ROD requires that an *arbouriculturalist's report* is to be a key informant of the site development plan. What has been approved so far is a layout plan. This is a high-level plan. A layout plan indicates the outlines of the proposed development in general terms, on a large scale. This includes, for example, the zoning of different portions, which will come into effect once the general plan is filed and township register opened. I am driven to accept that a site development plan is a much more detailed and specific three-dimensional plan of, for example, the placement of buildings on erven. It contains detailed terrain layouts. It can be termed "*a comprehensive plan indicating structures, uses, access, parking etc*". It is on a different scale to that of the layout plan. In ***eThekwini Municipality v Tsogo Sun Kwazulu-Natal (Pty) Ltd*** 2007 (6) SA 272 (SCA) at para 26 the Supreme Court of Appeal described a site development plan as one which "*reflects, according to scale, the scope and location of buildings which are to be erected on the site*". The site development plan has not yet been formulated, much less approved. The arboriculturalist's report will indeed be a key informant of the site development plan.

[32] The Environment Minister knew that the site development plan was different from the layout plan. It was when he granted environmental authorization on the basis of the layout plan which was before him, that he imposed the condition that an arbouriculturalist's report must be a key

informant of the site development plan. He could hardly have intended that the arbouriculturalist's report must inform the layout plan – he already had that. He knew that the site development plan was still to come. As mentioned earlier on Heritage Western Cape also had no doubt about this when it proposed this condition. It recommended approval of the Option 5 layout, which it had before it – and it recommended that the arbouriculturalist's report should inform the site development plan, which was still to come. It is only when the site development plan has been prepared, that it will be possible to say whether the City will implement the development in a manner which is consistent with this requirement of the ROD. The arboriculturalist's report has not been completed, and the site development plan has not been prepared. This ground of challenge is self-evidently premature. I do not understand the City to have suggested that the 2008 tree survey constitutes adequate compliance with the condition of the 2010 environmental authorisation, as the ECG appears to believe.

[33] The complaint based on the fact that Mr Walton will approve the site development plan is also without foundation. If Mr Walton approves a site development plan which is inconsistent with the conditions of the environmental ROD, and the City seeks to implement it, it will act unlawfully. It may be interdicted from doing so. It is the courts, not Mr Walton, which will decide whether the City has acted lawfully – in the proper proceedings in which the proper relief (an interdict) is sought. On behalf of the ECG it was argued that it "makes no sense" to have the arbouriculturalist's report after the layout plan has been approved. But that is what the Minister decided in the environmental ROD. If that "makes no sense", then the ECG should have challenged the environmental ROD, which imposed that requirement. The claim that a

provision in the environmental authorisation "makes no sense" does not provide a basis for asserting that the land use authorization should be set aside. Even if the complaint about the arbouriculturalist's report is valid, the ECG has misconceived its remedy. If the City is about to implement the development in a manner which is inconsistent with the environmental authorization (ROD), the remedy is not to set aside the land use authorization. That would be entirely illogical. The remedy is to interdict the City from acting in breach of the environmental authorization.

FAILURE TO GIVE PROPER NOTICE OF DEVELOPMENT PARAMETERS OR "DEPARTURES"

[34] There are indeed two grounds of attack in the above regard, namely (i) a failure to comply with the requirements of LUPO in respect of the land which is governed by LUPO, and (ii) a failure to act fairly in accordance with PAJA, principally in respect of land which is not governed by LUPO. LUPO applies only to those parts of Imizamo Yethu in respect of which general plans have been registered and a township register opened, namely land parcel 7a in Site 3. Section 15(2)(a) of LUPO provides that an application for departures must be advertised if, in the opinion of the town clerk or secretary, "*any person may be adversely affected thereby*". Section 2 of LUPO provides as follows in relevant part:

"*'advertise', in relation to a matter under this Ordinance, means to serve a notice on every owner of land who in the opinion of the director or a town clerk or secretary has an interest in the matter and whose address he knows or can obtain and, if the director or the said town clerk or secretary, as the case may be, so decides, to publish in the Provincial Gazette and in the press a notice-*

(a) specifying the place where and the hours during which particulars of the matter will be available for inspection, and

(b) stating that objections may be lodged with a person specified in the notice before a date likewise specified, being not less than 21 days after the date on which the notice is so served or is so published, and 'advertisement' has a corresponding meaning;…"

As explained above, it is correct that the departures proposed in terms of LUPO were not mentioned in the press advertisements which invited comments from interested and affected parties. LUPO currently applies only to parcel 7a in site 3. This is the only part of the land in respect of which a general plan has been approved and a township register has been opened. As a result, LUPO applies because of section 6(a) of LEFTEA. The ECG asserts that LUPO also applies to parcel 6a, because of the conditions imposed by the Minister in the LEFTEA designation. That, however, is not correct. Section 3(5)(a) of LEFTEA states that laws relating to township establishment and town planning shall not apply to designated land. Section 3(6) states that the Minister may, by notice in the Official Gazette, declare those laws to be applicable to designated land. No such notice has been published.

[35] I ask myself a question rhetorically what the ECG hopes to achieve by the claim that LUPO is applicable to parcel 6a. If LUPO is applicable, the residential land has been zoned "informal" in terms of Provincial Notice 465/1992. The effect would be to remove the careful LEFTEA development parameters which the Minister has imposed in the interest of residents, in the interests of neighbours, and in the public interest. LUPO requires that where application is made for a departure from the town planning scheme, and in the opinion of the town clerk or secretary any

person may be adversely affected thereby, the application must be advertised. I cannot faulter Mr Budlender's submission that LUPO has been complied with in that the press advertisements invited public comment on the land use application which lay open for inspection and that the departures and development parameters were apparent from that application. I gather from the papers in any event that members of the ECG did in fact inspect the land use application and commented on the departures and development parameters. The most that could be said in support of the Applicant's case is that there was what one can call a technical procedural defect in relation to parcel 7a in that, although the application for the rezoning and subdivision of parcel 7a was advertised, as required, the advertisements did not expressly state in relation to parcel 7a that the application included an application for departures in terms of LUPO. Notably, the Provincial Respondents argue that that is a technical, formal defect and not a substantial or substantive defect. I agree.

[36] The ECG's complaint is not that it was prejudiced. The ECG does not also dispute that its members were aware of the exact nature of the approvals being sought and commented in respect thereof. Advertising is not an abstract, procedural requirement. Its purpose is to alert interested and affected parties to the proposed application. The harm caused by the failure to advertise is that interested and affected parties do not find out about the proposed application and therefore lose the opportunity to object to or comment on it. The fact of the matter is that interested and affected parties (including the Applicant) were not prejudiced by the failure to advertise or by what was contained or omitted from the advertisements. Interested and affected parties, including members of the Applicant, had ample opportunity to – and did in fact – consider the

development parameters (including the departures in respect of parcel 7a) contained in the application.

[37] Importantly, an extensive public participation process was followed in relation to the environmental authorisation sought under NEMA (Annexure "CJH48"). The authorisation was appealed against (including by members of the Applicant) (Annexure "CJH55"). Issues raised in the appeal included concerns about retention of the trees and the layout of the proposed service road: these appeals were dismissed, but concerns raised by objectors were taken into account in the revised ROD that was issued. Therefore, the Minister of Environmental Affairs and Development Planning was satisfied that the granting of the approval had been preceded by an extensive public participation process, albeit not labelled as a LUPO process and that in substance all persons, including the Applicant and its members were afforded an opportunity to comment on the development proposals that served before the Minster of Environmental Affairs and Development Planning. The Minister of Environmental Affairs and Development Planning was satisfied that all interested and affected parties, including the constituent members of the Applicant had been afforded a fair opportunity to make submissions in relation to the application pertaining to parcel 7 (a).

[38] The alleged "non-compliance" is that the advertisements did not state that departures under LUPO were contemplated and contained in the land use application which members of the public were invited to inspect. It is difficult to understand the ECG's claim that details of the development parameters were "*not contained in any public accessible documents*". In ***Nokeng Tsa Taemane Local Municipality v Dinokeng Property Owners Association*** (518/09) [2010] ZASCA 128 (30 September 2010) the SCA

dealt with a challenge to the validity of Notices to the public in terms of section 10G (7) (c) (i) of the Local Government Transition Act 209 of 1993, which required that such notices must reflect the "*general purport*" of a resolution which has been taken by a municipal council. Of course, in this case there is no such requirement that the "*general purport*" of the proposed administrative action must be advertised. In fact, the requirement in this case is less onerous. In the ***Nokeng*** case *supra* the SCA held as follows:

"*[21] The second attack on the notices was that they were flawed because they did not set out the 'general purport' of the resolutions as required by s 10G(7)(c)(i). It was submitted that they should have given clear, full and specific details of the resolutions and their nature and effect, and that it was not sufficient to have stated simply that the budget had been adopted and that it contained the new property rates and to invite the public to inspect the detail at the municipality's offices.*

[22] It is clear that the section does not require details of the resolution and assessment to be published. Contrary to the submission by the association that the notice must set out, amongst others, the rates, areas affected, rebates applicable and the real and true effect of the increases of the rates, I hold the view that this does not accord with the ordinary grammatical meaning of the phrase 'general purport.'

...

[24] The adjective 'general' qualifies the noun 'purport.' The conjunction was not accidental but deliberately intended to make clear that specific details are not required. In this case the requirement was satisfied because interested parties were advised that the resolutions were available for inspection. This accords

with what Alexander J stated about this phrase in ***Rampersad v Tongaat Town Board*** *1990(4) SA 32 (D) at 37G:*

'.... "general purport" then involves an intimation that what follows broadly covers a specific topic. If I may expand the notion it would be tantamount to the Board having to say this: We are not providing you with all the details in this Notice but they relate to a rezoning of the La Mercy Township....'

The learned judge proceeded (at 37I-J) to elucidate in terms pertinent to the notices with which this case is concerned:

'I think the point is made because the section specifically adopts the more practical course of directing inquiries to the Town Offices. In this sense the actual mechanics of the proposed scheme, if I may so describe it, are not to be specified in the Notice, but can be scrutinised at close range elsewhere. The section thus interpreted would support the meaning advanced by the applicants: Let the Notice give us some indication that we are the ones affected by the proposals and then it is up to us to take a closer look at them.'

[25] This interpretation is sound, practical and accords with common sense and logic..."

[39] To insist that the development parameters and "departures" were not advertised whilst the members of the ECG were aware of them as shown above and even commented on them amounts to an endeavor to elevate form over substance. The need for flexibility is well illustrated in the famous dictum of US Supreme Court Justice Oliver Wendell Holmes, in a passage often cited by courts in the USA, India and elsewhere - not least by two justices of the Constitutional Court - that the machinery of

government cannot work if it is not allowed *"a little play in its joints"*. Some flexibility as to form is necessary in order to enable the government to give effect to the substance, and to do what the Constitution requires of it. See ***Bain Peanut Co of Texas et al v Pinson et al*** 282 US 499 (1931) at 501, quoted by Mokgoro and Sachs JJ in ***Bel Porto School Governing Body and others v Premier, Western Cape and Another*** 2002 (3) SA 265 (CC) para [154]. See also ***State of Haryana and others v Kashmir Singh and Another*** [2010] INSC 828. Indeed I share the view that some flexibility as to form is necessary in order to enable the government to give effect to the substance, and to do what the Constitution requires of it.

[40] In any event even if I am wrong in this regard our Courts have repeatedly held that they have a discretion whether to set aside administrative action which is found to be reviewable and that even when an administrative action is held to be reviewable, a Court may hold that it would not be just and equitable for the action concerned to be set aside. Even under the common law, all judicial review remedies were discretionary. See **Baxter, Administrative Law** 712-713. This is now reflected in the remedial provisions of Section 8 (1) of PAJA which says that where a Court finds that there has been a defect in the administrative action, the Court may grant *"any order that is just and equitable."* The ECG insists there was no compliance but steps proved to have been taken complied substantially with the requirements in that as shown earlier on in this judgment the object of the statutory prescriptions was achieved; interested and affected parties were informed of the decisions to be taken, had opportunity to comment and did in fact comment. It is well established that, as Baxter puts it "*the Courts will not grant relief where, although unlawfulness has been established, the complainant has suffered no*

adverse effects." See **Baxter, Administrative Law** page 718 and cases cited at footnote 323.

[41] In this regard guidance is to be found in ***Dinokeng*** case *supra* where the Supreme Court of Appeal held as follows:

"*[14] It is important to mention that the mere failure to comply with one or other administrative provision does not mean that the whole procedure is necessarily void. It depends in the first instance on whether the Act contemplated that the relevant failure should be visited with nullity and in the second instance on its materiality (see in general* ***Nkisimane v Santam Insurance Co Ltd*** *1978 (2) SA 430 (A) 433H-434E). To nullify the revenue stream of a local authority merely because of an administrative hiccup appears to me to be so drastic a result that it is unlikely that the Legislature could have intended it…"*

In ***Unlawful Occupiers, School Site v City of Johannesburg*** 2005 (4) SA 199 (SCA), the Supreme Court of Appeal held as follows:

"*[22] … it is clear from the authorities that even where the formalities required by statute are peremptory it is not every deviation from the literal prescription that is fatal. Even in that event, the question remains whether, in spite of the defects, the object of the statutory provision had been achieved…*"

In ***African Christian Democratic Party v The Electoral Commission and Others*** 2006 (3) SA 305 (CC), the Constitutional Court held as follows:

"*[24] … In construing whether there has been compliance with these provisions, I am mindful of the reasoning of Van Winsen AJA in* ***Maharaj and Others v Rampersad***1964 (4) SA 638 (A*) The enquiry, I suggest, is not so much whether there has been "exact", "adequate" or "substantial" compliance with this injunction but rather whether there has been compliance therewith. This enquiry*

postulates an application of the injunction to the facts and a resultant comparison between what the position is and what, according to the requirements of the injunction, it ought to be. It is quite conceivable that a Court might hold that, even though the position as it is not identical with what it ought to be, the injunction has nevertheless been complied with. In deciding whether there has been a compliance with the injunction the object sought to be achieved by the injunction and the question of whether this object has been achieved, are of importance.'

[25] The question thus formulated is whether what the applicant did constituted compliance with the statutory provisions viewed in the light of their purpose. A narrowly textual and legalistic approach is to be avoided…"

[42] In ***Moseme Road Construction CC v King Civil Engineering Contractors (Pty) Ltd*** 2010 (4) SA 359 (SCA), the Supreme Court of Appeal held as follows:

"[21] … The learned judge, in reaching his conclusion, failed to have any regard to the position of the innocent Moseme. He also did not consider the degree of the irregularity. He assumed incorrectly that King was entitled to the contract and he underestimated the adverse consequences of the order. I therefore conclude that he erred in the exercise of his discretion. This means that King, in spite of the imperfect administrative process, is not entitled to any relief. Not every slip in the administration of tenders is necessarily to be visited by judicial sanction." See also ***Minister of Social Development v Phoenix Cash & Carry*** 2007 (3) SA 115 (SCA)

Similarly in ***The Chief Executive of the South African Social Security Agency N.O. v Cash Paymaster Services (Pty) Ltd*** (90/10) [2011] ZASCA 13 (11 March 2011) the Supreme Court of Appeal held as follows:

*"[29] In any event this court in Moseme Road Construction [supra] ... held that '[n]ot every slip in the administration of tenders is necessarily to be visited by judicial sanction' ... Considerations of public interest, pragmatism and practicality should inform the exercise of a judicial discretion whether to set aside administrative action or not." (*footnotes omitted) Also see ***Millenium Waste Management (Pty) Ltd v Chairperson, Tender Board: Limpopo Province and Others*** 2008 (2) SA 481 (SCA) at para 23. Importantly, in the circumstances of the instant case and in the light of the urgency presented by the unfortunate and untenable situation and plight of the community in Imizamo Yethu which threatens the rights of that vulnerable community, indeed a compelling case is clearly made for such an exercise of discretion by the Court not to set aside the decision because such an order would not be just and equitable in the light of considerations of public interest, pragmatism and practicality.

PROCEDURAL FAIRNESS

[43] The complaint seems to be that there was no public participation and that the interested and affected parties were confused by the "appearing and disappearing" of development parameters. Procedural fairness is dealt with in Section 3 of PAJA which provides as follows in relevant part:

"3 Procedurally fair administrative action affecting any person

(1) Administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair.

(2)(a) A fair administrative procedure depends on the circumstances of each case.

(b) In order to give effect to the right to procedurally fair administrative action, an administrator, subject to subsection (4), must give a person referred to in subsection (1)-

(i) Adequate notice of the nature and purpose of the proposed administrative action;

(ii) a reasonable opportunity to make representations,…"

The question is thus whether interested and affected parties were given "adequate notice" of the proposed development parameters, and whether such parties were given a "reasonable opportunity to make representations", within the meaning of Section 3 of PAJA. Section 3 (2) of PAJA provides that procedural fairness depends on the circumstances of each case. Our Courts have repeatedly held that the facts and circumstances of each case must be considered in order to evaluate the fairness of a particular procedure, and that this evaluation must be done in a flexible manner. See ***Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others*** 2004 (4) SA 490 (CC) at para 45 and the case cited in the footnote thereto; ***Du Preez and Another v Truth and Reconciliation Commission*** 1997 (3) SA 204 (A) at 231 -232. In ***Premier, Mpumalanga v Executive Committee of the Association of State-Aided Schools, Eastern*** **Transvaal** 1999 (2) SA 91 (CC) the Constitutional Court held as follows:

"[41] In determining what constitutes procedural fairness in a given case, a court should be slow to impose obligations upon government which will inhibit its ability to make and implement policy effectively (a principle well recognized in our common law and that of other countries). As a young democracy facing immense challenges of transformation, we cannot deny the importance of the

need to ensure the ability of the Executive to act efficiently and promptly."

Whilst the proposed development parameters were not mentioned in the press advertisements which invited public comment on the development proposal, details of the proposed development parameters were contained in the land use application which lay for inspection and on which the public was invited to comment by means of press advertisements and notices sent to interested and affected parties. The members of the ECG did inspect them and did submit comments thereon. It remains difficult to comprehend the assertion by the ECG that details of the development parameters were "not contained in any publically accessible documents". The complaint of "confusion" about development parameters is tellingly not raised in neither the Founding papers nor the Supplementary Founding papers. I am in full agreement with Mr Budlender that it could not conceivably be just and equitable to stop this entire development on the basis of what after all may be technical defects in the process. Public interest, pragmatism and practicality dictate otherwise.

THE POWER OF THE MINISTER: "MUNICIPAL PLANNING"

[44] The Applicant's attack on the determination of development parameters of Imizamo Yethu on the basis that such constitutes *"municipal planning"* as provided for in Schedule 4 B of the Constitution is not accompanied by any constitutional challenge to the Provincial Minister's powers as set out in LEFTEA and LUPO. The importance of this is that the substance of the Applicant's argument involves a direct attack on LEFTEA and LUPO, which legislations bestow the powers on the respective Provincial Ministers. It is pursuant to these laws that the respective decision-makers granted the impugned approvals. Neither the Constitutional Court in ***Johannesburg Metropolitan Municipality v***

Gauteng Tribunal Development and Others 2010 (6) SA 182 (CC) nor the Supreme Court of Appeal in ***Johannesburg Metro Municipality v Gauteng Development Tribunal*** 2010 (2) SA 554 (SCA) cases defined or gave a detailed description of the content of "provincial planning". The Constitutional Court, however, in the ***Gauteng Development Tribunal*** case *supra* prefaced its endorsement of the Supreme Court of Appeal's statement of the meaning of *"municipal planning"* by referring to its judgment in ***Ex parte President of the Republic of South Africa: In re Constitutionality of the Liquor Bill*** 2000 (1) SA 732 (CC) as well as embarking on a general discussion of the *"regional planning and development"* constitutional functional areas saying that although they share the word *"planning"* they are distinct from *"municipal planning"* and *"[t]he distinctiveness lies in level at which a particular power is exercised"*. See ***Gauteng Development Tribunal*** case *supra* at paras [54] – [55].

[45] Importantly the ECG asserted that the Province "does not have the constitutional power to grant rezoning and departures". Simply, LUPO confers on the Province the power to grant rezoning and departures. See Sections 15, 16, 17 and 18 of LUPO. The development parameters imposed through LEFTEA are not the granting of rezoning and departures. In any event, LEFTEA confers on the Minister the power to decide that township establishment laws, town planning laws, and laws requiring authority for subdivision of land will not apply to land in a municipal area. It gives him the power to decide that notwithstanding designation, a provision of one of those laws (which govern *inter alia* rezoning and departures) will apply to such land. LEFTEA gives the Minister the power to decide matters relating to zoning and departures in an indirect sense, in that he may decide that the laws which regulate those

matters will not apply at all – in other words, that there will be no zoning and no town planning restrictions in this area. In the absence of a challenge to the validity of LUPO and LEFTEA, the complaint that the Province does not have the power to decide matters of rezoning and departures plainly could not survive any scrutiny. In argument, the ECG changed tack. It then said that its complaint is that the Minister imposes LEFTEA conditions of designation. These conditions re-impose some of the restrictions which the Ministers may remove entirely, or re-impose in *toto*. The power to remove in *toto* is not challenged, and the power to re-impose in *toto* is not challenged. Both must therefore be regarded as valid and permissible. It is then entirely illogical to say that the power to re-impose only limited restrictions is impermissible. The power to do the greater must include the power to do the lesser. But this is a complaint which was never raised in the Founding or Supplementary papers. The ECG cannot raise a new ground of review in argument.

[46] It must be borne in mind that the exercise of public power is only lawful when it is exercised in accordance with its enabling legislation. Parliament has the power to enact overlapping authority for different Ministers. The possibility of conflicting authorisations granted by different Ministers or even by the same Minister acting under a different statutory regime would not in itself negate the authority as provided for in the empowering statutory provisions. See ***South African Angling Association and Another v Minister of Environmental Affairs*** 2002 (5) SA 511 (SE) at 517. As a general rule LEFTEA and NEMA are separate statutory provisions, each with their own requirements and applications under them proceed along different statutory regimes. The NEMA conditions in this matter resulted from the fact that the proposed establishment of the less formal township in terms of LEFTEA would

entail a great variety of activities, some of which fell within the definition of certain listed activities contemplated in NEMA. Where different statutes apply to the use which could be made of land the different legislative schemes need to be complied with separately. See ***City of Cape Town v Maccsand (Pty) Ltd and Others*** 2010 (6) SA 63 (WC) at 74 G and 80 F-J. In the instant matter the fact that the ROD and the LEFTEA and LUPO approvals were granted under different statutes in respect of the same project does not mean that they conflict or are incompatible; it merely means that until all required approvals are not obtained the project cannot commence. In ***Maccsand v City of Cape Town*** [2011] ZASCA 141 at para [34] (handed down on 23 September 2011) the Supreme Court of Appeal held:

"In any event, as the cases (including the Kyalami Ridge case) demonstrate, dual authorisations by different administrators, serving different purposes, are not unknown, and not objectionable in principle – even if this results in one of the administrators having what amounts to a veto. In Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd & another, Kroon AJ made the point that there is no reason why 'two spheres of control cannot co-exist' and that where, as in that case and this case, one operates from 'a municipal perspective and the other from a national perspective' they each apply their own 'constitutional and policy considerations'."

[47] Imizamo Yethu is and remains a classic example in which LEFTEA was needed. The impugned approvals were clearly taken against the backdrop of the imperatives of providing access to adequate housing as well as a basic level of services, water and education to all the people of Western Cape and Hout Bay in particular. It was clearly intended by the legislature that the legislative framework of LEFTEA should serve to provide urgent powers, necessary to deal expeditiously with the plight of the homeless –

by the very nature of these powers implementation of decisions cannot be allowed to be delayed forever. See See ***Modderklip Boerdery (Edms) Bpk v President van die Republiek van Suid-Afrika en Ander*** [2003] 1 ALL SA 465 (T) at 507-508; ***Diepsloot Residents' and Landowners' Association v Adminstrator, Transvaal*** 1994 (3) SA 336 (A) at 348 H-349D.

[48] I am of the view, based on the above that this application has not merits and is doomed to failure.

ORDER

In the result I make the following order:

(a) The Application to review, correct and set aside the decisions by the Provincial Ministers and to declare same as unconstitutional, unlawful and invalid is hereby dismissed with costs which are to include:

(i) the costs occasioned by the employment of two (2) counsel by the Provincial Ministers; and

(ii) the costs occasioned by the employment of two (2) counsel by the City.

(b) An order is hereby granted discharging and setting aside the interdict granted by this Court on 17 May 2004 under case number 1094/2004.

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DLODLO, J