



STRENGTHENING ENVIRONMENTAL REVIEWS IN URBAN DEVELOPMENT

Urban Legal Case Studies: Volume 6

UN  **HABITAT**
FOR A BETTER URBAN FUTURE

Strengthening Environmental Reviews in Urban Development

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HS Number: HS/076/18E

ISBN Number (Series): 978-92-1-133365-7

ISBN Number (Volume): 978-92-1-132816-5

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Funded by: Norwegian Ministry of Foreign Affairs



Expert Group Meeting hosted by: Oslo
Centre for Interdisciplinary Environmental
and Social Research (CIENS)

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Foreword

Urbanisation is one of the most significant trends of the 21st Century with the global urban population growing from 732 million to 4 billion between 1950 and 2017. While urban areas have become engines of economic growth, as well as social and cultural development, these advances have threatened, and are threatened by, the environmental integrity of human settlements. Cities are increasingly facing declining environmental quality as characterized by rising air pollution, loss of biodiversity, depletion of aquifers and declining water quality. The environmental effects of poor and unplanned urban development have also been shown to contribute to a reduction in food supplies and an increase in socio-spatial segregation. The environmental footprints of cities have been demonstrated to have significant global impact while cities are also disproportionately vulnerable to environmental risks.

Environmental reviews, often in the form of environmental impact or strategic environmental assessments, play a fundamental role in the process of urban development. They ensure that decisions regarding projects or policies are informed and based on a comprehensive assessment of their environmental and social implications. They work by ensuring that these implications can not only be identified, but also prevented or mitigated. When implemented successfully, environmental reviews may substantially improve quality of life and economic efficiency. Environmental reviews should be considered as an important tool to achieve sustainable development in line with international commitments, including the 2030 Sustainable Development Agenda and the New Urban Agenda.

Environmental reviews don't always achieve their intended function. The intended function is to provide evidence for informed decisions and to influence how a project or policy is designed and implemented. The purpose of this intended function is to avoid or mitigate negative environmental impacts and, ideally, shape optimum outcomes balancing physical development needs and environmental risk.

Environmental reviews are often poorly conducted in whole or in part, making them vulnerable to being overturned on appeal or to being ignored or undermined by communities and governments. This creates considerable uncertainty for planners, investors and other stakeholders. In other cases, environmental reviews have been poorly coordinated with broader sustainable development priorities, sometimes encouraging inappropriate developments that have negative social and economic consequences. There is a clear need to strengthen the integration of environmental reviews in urban development processes and broader decision-making frameworks.

This book comparatively analyses the challenges to effective environmental reviews in varying legal and geographic contexts and offers legal insights to improve environmental management tools. Strengthening environmental reviews and their implementation can directly improve government effectiveness by reinforcing the rule of law and the link between public policy and law. A simpler and clearer environmental review system can also reduce corruption and the discretion of public officials. For city leaders, a better understanding of the constraints of their current legal and institutional framework can trigger reform and provide greater accountability of the system to citizens. Ultimately, this will contribute to happier, more liveable, cities and a healthier local and global environment.



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Executive Summary

Background to Urbanization and Environmental Reviews

Environmental reviews, often in the form of environmental impact or strategic environmental assessments, play a fundamental role in the process of urban development. They are institutionalized decision-making arrangements in domestic legislation to address the environmental impacts and risks associated with a project. The Environmental Assessment process contributes to sustainable development through the provision of information that is used to approve and implement projects that are ecologically sensitive, socially acceptable and economically cost-effective.

However, weaknesses in environmental reviews have been noted in several cases. In some of these, the environmental review has been poorly conducted, making the process vulnerable to being overturned on appeal and, consequently, creating considerable uncertainty and expense for public sector planners, investors and other stakeholders. In other cases, environmental reviews have been poorly coordinated with broader sustainable development priorities, sometimes encouraging inappropriate developments and informal approaches that have negative social and economic consequences. In other cases, these assessments, even when well prepared, have little real impact upon decision-making. There is a clear need to strengthen environmental reviews in urban development processes and to promote their integration into broader decision making frameworks.

Legal reform for strengthening environmental reviews may arise through multilateral environmental obligations, increased coordination between levels of government, more effective governance, and increased efficiency and reliability of decision-making at the local level. In all cases the need for public participation and consultation in environmental planning decisions is paramount.

The New Urban Agenda and the Sustainable Development Goals

Strengthened environmental and social reviews in urban development processes and their integration into broader decision making frameworks will support the implementation of the New Urban Agenda and several of the Sustainable Development Goals. In particular, they will support the creation of policy frameworks that are able to minimize the negative environmental impact of cities and human settlements (NUA §13h), protect and safeguard the world's natural heritage, protect vulnerable population groups such as women, children, the elderly, or other minority groups, improve air quality and municipal waste management, mitigate and adapt to climate change and improve resilience to disasters (SDG 11) and develop effective, accountable and transparent institutions at all levels (SDG 16).

Strengthening environmental reviews and their utilization has been shown to directly improve government effectiveness, particularly the quality of policy formulation and implementation, reinforcing the link between public policy and law. It can also reinforce rule of law through the increased implementation and effectiveness of environmental reviews and urban legislation in general. A simpler and clearer environmental reviews system will reduce corruption and discretion of public officials and improve the efficiency of the public administration. It will also facilitate a better understanding by city leaders of constraints in their current legal and institutional framework. Finally, strengthened environmental reviews will increase the consideration of environmental implications of planned city extensions.

The Case Studies

Six case studies present empirical evidence on the relationship between environmental and development decision-making in the urban context. The cases highlight the central role of environmental reviews in urban development decision-making, and identify key implementation issues and options to address them efficiently at country and city levels. Building upon this, the work also outlines capacity building needs and coordination approaches that are appropriate to resource poor contexts. Specific recommended actions and activities are identified, including any common needs for legislative, regulatory or administrative reform.

Country	City	Type of urban project	Author
Uganda	Kampala	Urban expansion of Greater Kampala into the Namanve forest reserve and Lubigi Wetland area.	Emmanuel Kasimbazi, Environmental Law Professor at Makerere University, Uganda.
South Africa	Durban	Several infrastructure projects including the airport, a pipeline and a waste disposal site.	Jeremy Ridl, Environmental Law Specialist
Fiji	Nadi-Suva	Major tourism and residential development projects and their impact on climate change and natural disasters.	Dr. Saiful Karim, Associate Professor at the Queensland University of Technology (QUT) in Brisbane, Australia
Sri Lanka	Colombo	Expansion of the Colombo Central Business District (CBD) by reclaiming the sea.	Asanga Gunawansa, Environmental law practitioner, an academic and researcher.
Brazil	Maringa	City urban development plans, sanitation infrastructure projects, urban expansion plans.	Bruno Grego Santos, Public Law Professor at the Pontifical Catholic University of Parana, Brazil
USA	New York	Expansion of the campus of Columbia University into parts of West Harlem.	Sheila Foster, Law and Public Policy Professor at Georgetown University, USA

Challenges to Environmental Reviews

Strengthening Environmental Reviews in Urban Development illustrates that a generalized approach cannot effectively manage the wide range of challenges faced by different countries. For example, outdated, colonial planning and environmental laws are rightly criticized for their inadequacy and inapplicability in various contexts. The implementation of environmental reviews has also been hindered by the incapacity of many municipalities and failed cooperation between varying relevant authorities.

Implementation

The “implementation gap” is not only the result of poor capacities and resources but it is also the consequence of poorly conceived laws. Because they don’t consider local needs (customary land tenure, informality, livelihoods, rapid urbanization, housing deficit, poor resources and capacities, corruption, etc.) and because they are not integrated with the regulatory and policy environment, they give excessive discretion to approving authorities, and they create conflicts of interest for the approving authority. Moreover, division of competencies among different government institutions is not clear, which regularly hampers implementation.

There is also a need to reflect on how to improve synergy between the EIA process, legislation and policy in specific environmental sectors such as urban planning, air quality, noise exposure, waste and water management, protection of the marine environment, soil protection, disaster risk prevention (including control of major-accident hazards), climate change, and biodiversity. More coherence among legislation and involvement of several institutions with responsibilities in these various connected areas is required. For example, the need for Strategic Environmental Assessments of urban plans could make the approval of Environmental Impact Assessments for urban projects more integrated and less discretionary.

High levels of discretion to implementing agencies, in some cases can provide important flexibility to apply the regulations to different circumstances, but it can

also lead to uncertainty about the process, and inconsistent application, particularly in cases where it is not required to make the reasons for EIA/SEA decisions publicly available.

Quality

Ensuring quality control in an EIA is largely left to the competent national authorities. However, the ability to make valid decisions depends on the quality of the information used in the EIA documentation and the independence of the EIA consultants, reviewers, and experts. Considering that in most cases, environmental reviews are financed by the project proponent, they are often steered in favour of the project and not the environment. There are several ways of ensuring quality control of EIA documentation, such as: requiring accreditation of consultants that undertake EIA work, preparation of reports by independent consultants, and the use of independent external review or expert assistance.

The quality of the environmental review also depends on a balance between comprehensiveness and efficiency in the process. The law should specify a reasonable and preferably fixed timeframe for granting development consent, with specification of the duration of the **validity** of the EIA. A clear process and assigned responsibilities is also beneficial to avoid uncertainty for public sector planners, investors and other stakeholders. Poor conduction of environmental reviews make it vulnerable to being overturned on appeal and, consequently creates considerable uncertainty.

From the case studies one can see that EIAs often react to development proposals rather than anticipate them, so they cannot steer development away from environmentally sensitive sites. Moreover, they often happen after a decision has already been made and thus are unlikely to change the course of the investment planned. Quality environmental reviews should legally mandate the consideration of the cumulative impacts caused by several projects or even by one project’s subcomponents or ancillary developments. Specific alternatives should be proposed and the EIA should provide the main reasons for the final choice. Finally, adequate

monitoring of the significant environmental effects of the implementation of projects is often missing from the environmental review procedure, but should be set up during the EIA. The law must state who monitors the project and what the penalties are for infringement of the law.

Content

Climate change issues are not adequately identified and assessed within the EIA process. Any review of the impacts of climate change is often limited to CO₂ and other greenhouse gas emissions from industry and from increases in transport as part of air quality studies or as indirect impacts. The environmental review will often not go beyond evaluating existing emissions and ensuring that ambient air quality standards are met. In addition, the effects on global climate, the cumulative effects of an additional project and adaptation to climate change are not sufficiently considered within the EIA. In the field of climate change, UNFCCC recognises impact assessments as one of the methods to consider climate change in social, economic and environmental policies and actions, to minimise adverse effects that projects or measures undertaken to mitigate or adapt to climate change can have on the quality of the environment (UNFCCC, article 4.1.f). Furthermore, while not explicitly referring to EIAs or SEAs, the Kyoto Protocol (1997) requests developed country

Parties to implement emission reduction commitments to minimise adverse social, environmental and economic impacts on developing country Parties. To that effect, countries discuss the necessary actions to minimize the adverse effects of climate change in the global and regional policy context or the impacts of response measures on developing countries (Kyoto Protocol, article 3.14). In this context, several developed countries conducted impact assessments and consultation processes when developing new, or modifying existing policies.

It is neither useful nor possible to address all aspects of environmental protection in an EIA, thus maintaining a good balance is key. Current issues that are required to be addressed in EIAs laws include: biodiversity and ecosystem services; climate change (mitigation and adaptation); risks of accidents and disasters; social impacts, including the livelihood, tenure and displacement of indigenous and local communities; community and traditional knowledge; population and human health; and the marine environment.

Main Findings: Comparative Analysis of the Case Studies

Fiona Darroch

This study reflects the first findings of a programme of research into the effectiveness of Environmental and Social Impact Assessment regimes ('ESIA') in urban development. ESIA is seen either as a discrete procedure or as part and parcel of the urban planning process, engaging with sustainable development policies and those institutional sectors affected by the project. The research consists of a set of case studies showing how ESIA legislation applies to urban planning processes in Brazil, New York, South Africa, Sri Lanka, Fiji and Uganda.

The authors presented and discussed their case studies at a conference in Oslo, in September 2017. Each author presented examples of development which they experienced as practitioners. The case studies were then analysed, and conclusions discussed and considered in a number of subsequent expert group meetings. This paper looks at the original case studies, sets out the conclusions that were drawn in the Oslo Conference and considers recommendations for future consideration in on-going research. Having identified the gaps in the understanding of ESIA regimes, it contemplates what next steps can be considered to improve the planning process, comparing widely contrasting existing ESIA regimes, and the wider international planning agenda.

The Case Studies

Uganda

Professor Kasimbazi's study, 'A Case Study of the Greater Kampala Metropolitan Area,' includes a survey of a range of projects in the GKMA. He observes the need for consolidation and reinforcement of institutional structure, and the improvement of inter-agency integration and coordination, across the physical development of GKMA, which is currently the second fastest growing urban area in Eastern Africa with an exceptional array of environmental challenges.

South Africa

Professor Jeremy Ridl's study, 'Environmental Review in Urban Development: South African case studies and perspectives' provides an analysis of the South African concept of integrated environmental management, together with its suite of tools, and accounts of the way in which such tools have been used in three different types of development: a government project – the New Multi-Product Pipeline; Public-Private partnership – Point Waterfront Development; Private Development – Renishaw Mixed Use Development.

Fiji

Dr. Saiful Karim's study, entitled 'Environmental Review of Tourism and Residential Development in Suva and Nadi: the Legal and Institutional Framework' examines the legal framework surrounding residential developments in the main urban area of Fiji, where large numbers of people live in substandard informal settlements, with no security of tenure. He also reviews the consequences of mangrove clearance, in Nadi, and other major environmental issues for coastal cities in Fiji, which relate directly to climate change catastrophe.

Sri Lanka

Dr. Asanga Gunawansa's study, entitled 'The Creation of New Urban Land by reclaiming the sea: the legal and policy aspects relating to Colombo Port City', sets out the stages of the journey which has resulted in the expansion of the Colombo Central Business District by reclaiming the sea, and developing a port city, as part of the Western Region Development Plan. His study shows the national sovereignty issues arising from the Chinese initiative to develop the port city, the political opposition to the project, and the sequential ESIA's which have been conducted.

Brazil

Professor Bruno Grego-Santos' study, 'Municipal Autonomy, Environmental Reviews and Urban development steering in Brazil', sets out the review process in two contrasting instances, 'New Downtown Maringa' and 'Green Diamond Residence', which combine to demonstrate the conflict of competencies and administrative spheres in Brazilian urban development reviews. He analyses and comments on the effectiveness of the procedures which apply to each of these two developments.

USA

Professor Sheila Foster's study, 'Columbia University Expansion into West Harlem, New York City', considers the legal regimes applied when Columbia University resolved to expand into West Harlem, by building an 18-acre science and arts complex, north of its campus, changing the physical and socio-economic layout of the area. The legal and political processes were complex, multi-level and the construction of the new campus continues to provoke tensions.

The authors of the case studies were invited to analyse the functionality of environmental impact or strategic environmental assessments, in urban development. The identifiable outcomes of the work were set out to be as follows:

- (i) to assist countries in the implementation of multilateral environmental obligations;
- (ii) to promote coordination between levels of government and effective governance; and
- (iii) to increase the efficiency and reliability of decision-making at the local level.

There are stark contrasts between the six case studies; the legislative context from which each was drawn has been chosen as the starting point in assessing the effectiveness of each of the systems under examination.

Legal Context and Structure of ESIA in the Case Studies

The New York and Durban studies contained accounts of full suites of environmental impact assessment legislation, and carefully designed processes which must be followed by developers, government at local and state level and by project affected stakeholders:

South African law originates from its 1997 Constitution and its National Environmental Management Act of 1998, which puts into effect everyone's Constitutional right 'to an environment that is not harmful to their health or wellbeing, compelling the state to enact legislation (and use other measures) to give effect to this right' [Ridl 1.1]. Ridl goes on to say, although this has resulted in the creation of first class, modern, relevant environmental legislation, the reality is that development is unfortunately tempered by measurably falling environmental standards.

By contrast, the New York planning process is governed by the city government's environmental and land use review processes. 'The land review process [City Charter's Urban Land Use Review 'ULURP'] ensures that the developer's application for approval of the project is complete and technically accurate. The environmental review's [City Environmental Quality Review 'CEQR'] purpose is to disclose and analyse potential impacts that the development proposal may trigger. Combined, both processes ensure a thorough review of the impacts of project approval on the neighbourhood, on various stakeholders, and the overall urban environment' [Foster II].

The CEQR process is the local implementation of the State EIA process. The State of New York passed the State Environmental Quality Review Act (SEQR or SEQRA) in 1975, in order to "establish a process to systematically consider environmental factors early in the planning stages of actions that are directly undertaken, funded or approved by local, regional and state agencies."

In comparing these two sophisticated ESIA systems, one might consider the political context of the legislation, and its primary purposes. Foster describes the process

by which, using a well-established legal process, Columbia University successfully expanded into West Harlem, which she notes is – or was - a low-income ethnic minority neighbourhood, in the second richest city in the world. In her analysis of the process of Columbia's expansion, she does not suggest that the process was flawed at any stage. In her view, the project was inevitable.

Ridl describes projects in and near Durban, the third largest urban population in South Africa, where sustainable development lies at the heart of a relatively new raft of environmental legislation, where biodiversity, culture, and linguistic diversity is profound. South Africa is the third most biodiverse country in the world. In Kwa Zulu Natal, Zulu is the most widely spoken language, with Tradition Council Areas in greater Durban. Ridl notes that the law is in place, but that it is ineffectively implemented.

These two planning systems are both highly sophisticated but they differ as apples do from oranges. The key note of the New York presentation was the inevitability of the process. The community was defined as immigrant (inherently), gathered from low-income ethnic minorities. The socio-economic challenges of the project faced by community members could be addressed by an appropriately structured set of community benefit agreements brokered by a coordinated group of community representatives. At each turn in the lifetime of this development it was clear who was making the decision and the basis upon which it was taken. The applicable legislation which enabled the university to expand its base in the city allowed gaps through which doubt about the inevitability of the project could be tested: first, whether or not the doctrine of eminent domain applied and second, whether the political will for the project was so powerful that the project was inevitable. One might conclude that, seen as a whole, the process is the consequence of a frequently tested, mature Constitution and a set of coordinated planning laws which have lent a predictability to the business of development in New York. This maturity has evolved into reduced options for objectors and increased certainty for developers. It has created a well-worn, if controversial path towards public participation and transparency in the planning process, through the use of community benefit agreements.

By contrast, the South African case study reflected a far wider range of challenges which are currently inherent in the planning process, particularly in ESIA: vast, disjunctive ethnic diversities; extraordinarily complex and profound levels of biodiversity; and a comparatively young constitution, with legislation which is not yet fully supported or coordinated within the planning and environmental sectors. The combination of these circumstances has produced a declining environment, lack of accountability and a public consultation/comment process which is half-hearted or lacklustre at best. It would be facile to suggest that problems described by Ridl could be addressed by the kind of legislative overhaul which would be a solution in other countries. Ridl suggests that increased coordination and accountability at institutional levels, combined with appropriate levels of training and capacity building would improve the ESIA process. At the Oslo conference, participants extended their consideration of 'coordination and accountability' to include corporate liability for environmental damage. Such liability also relates to the wider considerations of lender liability, corporate insurance and foreign direct investment.

Kasimbazi's Ugandan case study sets out the planning and ESIA process, with

relevant policies and legislation applicable to the Greater Kampala Metropolitan Area ('GKMA'). The regulatory framework is found in the National Environment Act 1995, under which the National Environment Management Authority ('NEMA') was formed. The Environmental Impact Assessment Regulations of 1998, coupled with Guidelines, are supposed to govern the process by which a developer identifies the requisite elements for ESIA in certain types of projects, and then complies with requirements largely determined in the Guidelines. He observed [Kasimbazi, 6.8], that urban development projects in the GKMA create substantial social issues, which can be addressed in the current legislation, but in Chapter 7, he points out that ESIA currently ineffectively regulate the environment. He goes on to list a range of ESIA challenges which face the GKMA, and Uganda generally. There is a weak post-colonial legal framework, weak development guidance, failed compliance with the legal approval process, and perhaps most telling, limited environmental awareness, with limited environmental data. When the political will appears to be absent, the challenges of implementing ESIA in GKMA far outstrip those described in some other case studies.

It is clear that the 1995 Ugandan Constitution explicitly envisaged sustainable development and the creation of a robust planning system as reflected in NEMA 1995. In attempting to identify the nature of ESIA in Uganda, it seems that until ESIA is fully supported politically, the process is doomed to be almost irrelevant to planning and development.

Grego-Santos identifies a different set of legal challenges in the Brazilian context. He contextualises Brazilian planning and environmental legislation, noting its contemporaneity with increasing environmental awareness in international urban planning norms, such as the UN Conferences on Human Settlements, and Housing and Sustainable Urban Developments. The significant expansion of urban populations of Brazil and a series of urban planning framework laws culminated in the Statute of the Metropolis 2015, which created a new legal structure for addressing urban development projects. He notes that Brazilian urban law continues to keep up to date with the contemporary international debates [Grego-Santos para 51]. The particular challenge is in the distribution of competencies between government tiers, and what he describes as the 'inter-federative governance' which sits between the State and Municipal tiers of government, through the urban master plan, and democratic city management, both a product of Law 10,257. A new tier of review by government appeared in the Statute of the Metropolis 2015, putting a bill into law which had been under review for 10 years to create the parameters for planning law in metropolitan areas. The environmental review and licensing procedures set out in the National Environmental Council Resolution 237, 1997, define a distribution of governance with a range of shortcomings. Grego-Santos notes, 'As a consequence of the distribution of competencies in Brazilian urban law...it is noteworthy that the procedures described are not necessarily homogeneous in the several Government entities involved in these processes' [Grego-Santos para 95]. He references two projects to show that both the lack of autonomy and autonomy itself can produce unwanted results, which in his study are shown to have arisen from the failure of the tiered approach. His view is that matters cannot improve until the autonomy of municipal government is strengthened, in the implementation of the law, 'accompanied by the broadening of the inter-federative governance concept' [Grego-Santos para 205].

In fact, Grego-Santos' comment about the absence of coordination between competencies in Brazilian urban law chimes with many similar comments from other authors who, in their respective jurisdictions, note that the absence of coordination is generally inimical to an effective ESIA regime. Such absence of coordination creates an uncertain environment for the developer who then responds accordingly. It creates the spaces in which corruption can flourish. It reduces transparency and accountability in the planning process. It erodes public trust or interest in ESIA, hampering the effectiveness of the whole process.

The legal context of the Fijian Case Study by Karim predictably prioritises Climate Change, as it is the primary concern for urban communities in the South Pacific. The Environmental Management Act 2005 is the main environmental law of Fiji which institutionalises its complex environmental impact assessment. The Administering Authority takes responsibility for forwarding any proposal to the EIA Administrator, for processing. EIA Regulations were adopted in 2007, with Guidelines following in 2008, providing a structure for the screening process. The process has yet to be fully integrated into the Town Planning Act 1946, (itself a colonial legacy). Karim notes that the absence of an integrated approach is a reason for Fijian environmental vulnerability. He questions whether western legal approaches are the most appropriate for small island developing countries, where most of the land is owned under complex customary legal land tenure structures [Karim 8.3]. During the Oslo Conference, there were a number of occasions when out-dated colonial planning and environmental laws were rightly criticised for their inadequacy, with the most egregious instance of these emerging from Fiji.

The subject of Gunawansa's Sri Lankan case study is a huge infrastructure development project called the Port City Project, the purpose of which is to reclaim part of the sea, and then construct an International Finance Centre. Civil war in Sri Lanka had clearly had a negative impact upon the economy, and this project represents, according to Gunawansa, a political initiative to bring prosperity to Sri Lanka by establishing a major international finance centre, to fill a perceived vacuum between Singapore and Dubai. The project acquired the status of a Strategic Development Project, under the Statute of that name, 2008, using a Project Company as a single purpose vehicle, which has signed a Tripartite agreement with the Government of Sri Lanka (GOSL) and the Urban Development Authority (UDA). The progress of the project has been heavily political in nature, with its status tied to the government or opposition of the day. Government Public Procurement Guidelines provide the procedure to be followed by the Project Company. There has been much debate over the lawfulness of the project's inception, which falls outside the scope of this note. However, the applicable legislation was the National Environment Act 1980, and the Coast Conservation Act 1981, which required an Initial Environmental Examination, followed by an Environmental Impact Assessment. A supplementary EIA was produced, doubling the number of recommendations, and providing a mandatory period of one month for consultation after its publication. Gunawansa sets out the remedies which are available to those adversely affected by the Project [Gunawansa G

Over the course of the Oslo Conference, a number of common themes emerged from the presentations and discussions. This note now looks at those common emerging themes.

ESIA and the Planning Process

In this analysis, in assessing the place ESIA occupies in the planning process in urban development, it may be useful to reconsider the value of the proposition that 'one size fits all', albeit that there are obvious common factors to consider. It emerged from the Oslo Conference that there are huge disparities between the legislative approaches adopted in the ESIA process. Environmental and Social Impact law is a set of ubiquitous norms, but within the paradigms, (e.g. water quality, air quality, waste), participants asked if a generalised approach was, or could be the most effective, when such a wide range of challenges exist?

It emerged during the Oslo discussions that whilst there is an obvious relationship between ESIA and the planning process, which theoretically determines the developer's compliance with legal environmental requirements, the trend appears to be that ESIA in its current, most advanced forms, ceases to become a legislative mechanism which can or may be used to halt the project altogether. Participants considered at what point the real decision is made for the project to proceed?

It is clear that in countries where the rule of environmental law is enacted, politically acknowledged, and implemented, there is an applicable ESIA process, which can in its complexity, in its application, and in its impact upon a proposed development, result in the substantial modification of a project. The process can also be used as leverage for such legal structures as Community Benefit Agreements, as the case of New York shows. Yet in the more complex planning regimes, as well as the simpler ones, it is possible that the moment when the development turns from being a proposal into a presumed certainty is not connected to the ESIA process itself.

The ESIA process is, by definition, an assessment procedure: its ultimate legal purpose, is not to determine the outcome of a planning application, although it may have that effect, where a development has substantial environmental defects. The Oslo Conference participants explored what the perceived expectations of ESIA actually are. A wide range of expectations were recorded as to the public perceptions and requirements of an ESIA. Such expectations perceive the ESIA as highly significant and so fundamental to the evaluation of a project that it could be used to halt development altogether, even if rarely. In contrast, at the other end of the spectrum, ESIA was perceived as being an inadequate and procedural nod along the road to project inevitability.

In the absence of an appropriate legislative structure, with applicable environmental obligations for a developer to comply with, environmental degradation becomes not only a risk, but in fact a likely consequence. The Fijian case provides a particularly powerful example, in Karim's example of the Denarau Golf Course, where huge mangrove destruction made way for the golf course which led to environmental degradation on an industrial scale. Intra-generational losses have created devastation in food supplies, coastal erosion and other adverse consequences, in particular those relating to climate change.

The Brazil case shows the absence of coordinating functions on the Agora Project in downtown Maringa, in which a similar absence of spatial planning has resulted in 'deliberate degradation processes, followed by the private appropriation of originally public and collective buildings and spaces, parallel to the deepening of socio-spatial

segregation' [Cordovil and Rodrigues, PR (Brasil). Scripta Nova Barcelona, v16, n418, p41, Nov 2012].

Kasimbazi of Uganda gives an example of a golf course and hotel which was proposed by a developer, to be constructed on a wetland. An injunction was not granted to an applicant NGO, although the NGO's standing was recognised, and it was given the right to sue. [Kasimbazi 6.7].

Gunawansa of Sri Lanka, by contrast, shows that the Port City Project emerged from a political initiative, in which the most significant challenge to the project arose from its genesis in Foreign Direct Investment. The project arose from an unsolicited Chinese initiative, raising a range of questions about its intrinsic legality, and the implications which could be drawn from its legal structure. Its inadequate EIA in the first instance was supplemented by a subsequent EIA, which authorised the project, ostensibly, but the political will for the project probably ensured its implementation, whereby the EIAs were simply used as mitigation measures for the environmental consequences of reclaiming land from beneath the sea.

Implementation of ESIA

The full implementation of existing ESIA regimes clearly remains a challenge in many countries. The continuum of ESIA as a means of measuring and assessing the full potential impact of a development, stretches from instances in which the ESIA process is frankly ignored, to instances where it is used for practical purposes as a vehicle to ensure that the development is a success for both the developer and those affected by the development. The Case Studies reveal the intrinsic ineffectiveness of the relevant applicable EIA legal frameworks as a means of ensuring sustainable development in the planning process. Reasons for this vary, but lack of capacity in the planning system, lack of legal cohesion, overlapping mandates within a planning system, the strength of vested interests, and corruption all contribute to the inadequacy or dysfunctionality of many current ESIA regimes. The roles of the state and municipalities themselves are often shown in these studies to be lacking in cohesion, or co-ordination.

There can be a real void in the ESIA process, caused by conflicting objectives, such as a state driven initiative imposed for wider developmental purposes, or for political expediency. Municipalities are required simply to accommodate and permit the project without full consideration of its impacts.

Looking ahead, the Oslo conference participants agreed that a more specific analysis of the various functions of ESIA would be a valuable tool in determining whether its reviewing and assessment structure can effectively ensure that urban planning is successfully implemented. From most of the case studies, it emerged that, for different reasons, the implementation of an optimal ESIA regime generally falls short as a tool for raising standards in urban planning.

Whilst reporting some ESIA successes in their case studies, Ridl and Grego Santo both reported lack of capacity in financially undernourished municipalities, and more specifically, lack of coordination between the relevant authorities, where different aspects of a development fall under the management of different parts of government. In Fiji, Karim recorded an uncoordinated, colonial planning system,

lacking any effective ESIA mechanisms, which lies uneasily beside traditional and customary tribal land ownership and leasing agreements. Kasimbazi cites numerous instances, whereby the ESIA legal mechanism is not yet regarded as a mainstream requirement for urban planning in the GKMA, although Uganda's adherence to international environmental legal norms does provide guidelines for the use of ESIA. Gunawansa's case study of Sri Lanka showed that the ESIA for an enormous development could be and in fact was used successfully to improve and reduce the ESIA of the Port Project.

The Oslo conference participants concluded that ESIA cannot be viewed as an isolated legal mechanism; it certainly is not a single process, but rather a part of the continuum of the whole planning and developmental regime. But critically, for ESIA to be effective, it must be part of a full range of related and coordinated planning and environmental provisions which are supported by legislative networks, including effective monitoring and enforcement. The research point is to determine what sector-specific matters need to be prioritised in ESIA. In developing countries, such issues as customary land tenure, informal housing, loss of livelihoods, rapid urbanisation, climate change and degradation of biodiversity require prioritisation in an ESIA. In older, more established economies, housing deficit, industrialisation and competing political agenda often have more significance in the business of ESIA.

Future research might usefully include detailed consideration of the extent to which the discretion of a planning authority can or is used to determine the ESIA and its place in the permitting process. Uncertain concepts such as proportionality, indeterminate policy and unpredictable reasoning add to the already challenging nature of discretion, and how it is exercised by the decision maker. What appears to be discretion can arise from the combined incompetence of various government institutions, leading to a gap in implementation. One might add that, at the heart of decision-making, lies the idea of presumption, whether lawful, political, financial or other. For instance, the presumption that the project would go ahead in New York was for an entirely different set of reasons from the presumptions in Uganda and Fiji. Suffice it to say, discretion is a mysterious function, which is hard to challenge, given its inchoate and subjective nature.

Public Participation and Consultation

At the Oslo Conference, there was a broad consensus on the merits of public participation by communities, in environmental and planning decisions: whilst public participation, notably including the need for full information, was considered an essential feature of ESIA, its effectiveness as a democratic tool was questioned for a range of different reasons. Methodologies for consultation were considered, as were their ultimate impact and effectiveness.

Consultation processes differ in importance under different ESIA regimes. Their functionality varies, from ensuring that a project has reached fruition whilst meeting and incorporating the needs of the local population in the final implementation of the project, to constituting a mere and dispensable formality.

In some ESIA regimes, effective consultation is entirely absent from the planning process. In others, it has been undertaken where the ultimate decision to implement a project has already been taken, with consultation being rather obviously an

afterthought, rather than prior to project planning.

The consultation processes may not hinder development, and can be seen to be beneficial all round, allowing the development to proceed, without compromising the needs of the groups of stakeholders who would otherwise have suffered severely adverse effects. Nevertheless, the inadequacy of the consultation process can sometimes stall the development.

Can the consultation processes in large projects prevent their construction altogether, where the developer and the authorities combine to permit the project for investment or political reasons? Ultimately, the answer appears to be no.

In countries where the planning process is underpinned by comprehensive legislation, to which the developer accepts itself to be bound, it seems that the consultation process loses its legitimacy and/or its effectiveness as a democratic tool which a community can use to determine whether or not the development will occur. The public participation process in such instances is simply confined to addressing the material impacts it might achieve in modifying the project, during the planning process of a major project. The more complex an environmental analysis, the less susceptible it may be to public scrutiny.

In countries where public participation is not perceived politically to be a fundamental part of the process, consultation is not a priority, and is certainly less likely to achieve environmental mitigation measures in the wake of a developer's determination to proceed with the project.

If a project is inevitable, for whatever reason, then the process of public participation can do little more than mitigate its impact. This was Professor Foster's clear message from New York, where she described the planning process for a major project as an advanced, multi-layered business, in which a range of investors, statutory bodies and elected officers have fundamental, closely defined and inter-linked roles to play in the planning process in urban development in the city. In her case study, which described the processes which led to the expansion of Columbia University, it was apparent from the start that the project could not be halted by the consultation process. Wider, co-ordinated political considerations had potential impact to block a major development, but if the developer (in this instance, Columbia University), intended to expand, and was in a position to play a long game in the planning process, its success was inevitable, provided that it was compliant with the planning regime [Foster II.C.2].

The examples in the South African case study record effective public participation as having a material impact on the planning process. EIA Regulations in South Africa are now prescriptive, giving registered interested parties the opportunity to comment on all reports, once they have been submitted to the appropriate authority [Ridl 9.4.6]. At the Oslo Conference, his more general recorded experience was that public participation in and around the city of Durban is diminishing. He noted that the consultation process seems to be hampered by inertia. It may be that the planning process is now so sophisticated and technical that public participation has become otiose. For example: 'Traditional Councils considered public participation processes to be inadequate, in that they were not consulted but merely requested to comment on development processes, that members of their communities were not

made aware of environmental processes, and that they lacked sufficient knowledge or expertise to review EIA documents competently' [Ridl 3.3.3].

In New York, language and literacy are not issues which impact upon the consultation process in the same terms. Foster records extensive consultation in the Columbia project, which culminated in a Community Benefit Agreement, which she describes as a private, legally binding contract between community groups and the developer, providing concessions and commitments on the part of the developer, which might be viewed as compensation [Foster III].

Technical issues in the consultation process: What does the consultation process actually involve? Consultation is a broad term, which translates into a range of other concepts in practice, such as 'comment' or 'review'. In more advanced ESIA processes, the concept of 'consent' is explicitly excluded from the ESIA processes altogether. In countries which are less advanced in their implementation of ESIA, the public participation process has very little political and legislative authority, so it is barely used, in any systematic way, as part of the ESIA process, thus depriving the planning process of corresponding authenticity. The question considered repeatedly at the Oslo Conference centred on the role which public participation plays in the ESIA process.

In Fiji, 'The scope of public participation and access to information is practically very limited' [Karim 7]. Karim goes on to say that the scope is currently confined to some environmental information being available on a register.

In Uganda, there are no regulations which require public participation. The extent of this planning tool is found in the National Guidelines for ESIA in Uganda, in which 'the public may appropriately be involved in the EIA process' [Kasimbazi 3.5] 'public involvement is guaranteed by the Constitution of Uganda 1995, the National Environment Act and the Regulations', and he then lists the methodologies which may be used to assess a proposed development. He notes that most ESIA's are written in English, which makes them entirely inaccessible to most communities [Kasimbazi 3.5.1].

In surveying the public participation regimes across the spectrum of the case studies, it seems that whilst full, informed and linguistically accessible consultation over ESIA has an essential role to play in the planning process, the developer is often only required by law to engage with public participation at a late stage in the planning process. It seems inevitable then that public participation is likely to diminish in its impact upon the process.

Land Ownership

The customary and statutory rights of land owners, the requirements of compulsory purchase, the doctrine of eminent domain, the adequacy of resettlement plans, and other related land ownership rights and responsibilities may all be ignored when a development is in planning. In one form or another, such rights inevitably feature within ESIA's. Whilst civil and political rights have enjoyed a significant and growing amount of international and subsequently regional and domestic legal support, social and economic rights have lagged, although such rights are reflected in some of the more advanced ESIA regulatory regimes. In future analyses, it will be necessary to consider how an ESIA regime could be strengthened by latching it

together with socio-economic rights norms, as a means of strengthening the ESIA process, to intensify and expand the means by which the ESIA legal structure can be more compelling, effective and relevant.

The contrast in adverse possession law across the case studies is stark.

- 'Eminent Domain' The doctrine of eminent domain, found in the Fifth Amendment to the US Constitution, is widely accepted as a legal concept which governments and developers can use, to acquire land for development purposes. The doctrine is applied to expropriate private property for 'public use', and the state must pay 'just compensation' to the property owner [Foster C]. In New York, the doctrine is permitted to be used by private developers for economic purposes, although that is not ubiquitous in the US. Compensation is paid at market value rates.
- In Uganda, adverse possession is reflected in 'Resettlement Action Plans', which relate to s42 of the Land Act, and the Land Acquisition Act, as well as Article 26 of the Constitution of Uganda. The Minister for Land declares that the land in question is suitable for acquisition, and after 15 days, his appointee, the Assessment Officer is tasked with the business of calculating and administering compensation, which is a matter of construing values to be paid from a Report which sets out compensation and valuation in an entitlement matrix. When the entire business is concluded, the Government takes possession of the land [Kasimbazi 3.9].
- Planning and environmental tensions in Fiji arise from the huge demand for tourism development, which constitutes a huge proportion of Fiji's economy, coupled with incentives for its expansion. Tourism is currently the most important contributor to the Fijian economy, contributing 30% to Fijian GDP [Karim 3]. It seems that the EIA processes in Fiji do not contemplate compensation for land taken for such purposes, although in his case study, Karim produces an example of a golf course development in which environmental degradation in Denarau had a profound impact upon those living in poorly built or poorly located houses [Karim 5], with no apparent compensatory mechanisms related to the development.

Legislative Challenges in the ESIA Process

Judicial review: in some countries, domestic judicial review of ESIA's is increasing, while waning in others. The relationship between effective ESIA's and judicial review procedures featured in some, if not all of the case studies. In Oslo, participants discussed the extent to which judicial review is an essential feature of the planning process. In those discussions, participants considered the grounds on which judicial review could be sought. This question engages a wider aspect of public/administrative law, addressing perceived flaws in the procedures to determine the environmental aspects of a planning decision. Does the wax or wane of judicial review in practice indicate the robust nature of the EIA process, or the progress

of improved administrative practices? What other factors should be taken into consideration? The case studies give little indication that litigation confined to parts of the ESIA process is perceived as a useful tool in the planning process. Ridl notes that 'Everyone is entitled to an administrative process that is fair, the right to reasons for administrative actions, and the right of judicial review of flawed decisions' [Ridl 4.5.2]. He goes on to say that 'appeals against decisions on EIAs seldom succeed, irrespective of whether the appellant is the developer or an interested and affected party' [Ridl 5.7]. Litigation is lengthy and expensive in South Africa.

Other legal remedies: Kasimbazi refers to an interesting case in which a Ugandan NGO sought injunctive relief, to restrain a developer from constructing a hotel on a wetland. Whilst the judge declined to issue the injunction, he recognised the standing of the NGO, and that they had a right to sue, under NEMA [Kasimbazi 6.4].

Foster describes the battle in New York's lower court over the status of West Harlem, where the court rejected the 'eminent domain' argument. Their decision was reversed by the NY Court of Appeals, who held that eminent domain could be used, as the area was indeed blighted, and that the issue was now beyond further judicial review [Foster D.1].

Gunawansa describes two cases brought to challenge the Port City Project [Gunawansa p 22]. One was a 'Fundamental Rights' application, brought by the fishermen whose constitutional fundamental rights to engage in fishing as a chosen livelihood would, they claimed, be adversely affected. In the second EIA for the Port City Project, provision was made for compensation to be paid to the fishermen. The second was by an application which challenged the validity of the EIA which had been compiled for the Project. A second, supplementary EIA was compiled. Gunawansa notes, however, that both cases failed. The ESIA application lacked adequate scientific evidence (although its petition is still pending consideration by the Court of Appeal). The fishermen were told that they were too late in bringing their case [Gunawansa E.3].

In Brazil, Grego-Santos notes that the use of judicial review is broadening. He points out that litigation is not permitted to 'interfere in the legal procedure'. This means that the democratic results of public hearings are well-anchored in the planning process through the operation of inter-federative layers of state and municipal officers. He notes that lawyers are ensuring that judicial review of administrative decisions is nevertheless expanding, in Brazil, causing the development licensing procedure to become deadlocked [Grego-Santos 118-119].

In Fiji, the complexity and traditional nature of land ownership structures, coupled with the lack of structured ESIA laws have combined to leave no avenue for the project-affected to litigate. Karim notes the profound need 'for robust application and enforcement of an environmental review system' [Karim 3].

The obvious challenges in litigation concerning ESIA may be

- the uncertainty of the outcome, given the discretionary nature of planning decisions
- the potential costs, and the risk of adverse costs orders

- the level of legal technical expertise required for a successful application to court
- unavoidable delay as an applicant gathers up the elements of the case
- underlying legislation may be insufficiently stalwart to support the kind of application required

Other challenges are often to be found in existing laws concerning discrimination, freedom of information, constitutionally articulated environmental rights, and rights acknowledged in the growing body of international law, gradually finding its way into domestic legislation.

Environmental Degradation

This is an obvious and direct consequence of many poorly considered planning decisions within emerging economies. There is much evidence of the disastrous impact of developments where climate change consequences have simply been ignored, in the pursuit of economic benefits, with no consideration of the wider, long-term environmental consequences of a completed project, or evaluation of the consequences of such degradation upon the previous occupants of the developed land. Looking ahead, there may be considerable merit in modifying an EIA system to contain key performance indicators which relate to the ESIA regulatory regime, which would then create a basis upon which environmental liability might accrue to the developer. Extending the liability regime into the future, in a structured and general way, might incentivise a more appropriate approach to ESIA, if it were part of an extended cycle.

Tracking or reviewing mechanisms which assess extended impact, at intervals following project implementation, may find be useful in a revised EIA regime, so that where a project has been implemented, with or without a full and effective ESIA process, and yet continues to produce negative environmental consequences, there are mechanisms, related to the ESIA itself, to ensure that the developer must take responsibility for the project's on-going environmental damage. A question to consider is the extent to which it would be useful for such measures to relate to the original assessment process?

There may be some merit in considering an ESIA system which contains sets of key performance indicators which relate to the ESIA regulatory regime, which would then create a basis upon which environmental liability might accrue to the developer. Extending the liability regime into the future, in a structured and general way, might incentivise a more appropriate approach to ESIA if it enabled the appropriate authorities to look constructively and successfully at environmental liability, clean-up costs, and provisions for the rectification of contaminated land and ensured that lender liability is appropriately codified in domestic or treaty law.

Foreign Direct Investment (FDI)

FDI has, through different corporate structures/vehicles, been the principal means by which a development has been financed in two of the case studies (Fiji, Sri Lanka). It is alluded to in the South African case study. Obviously this kind of investment,

depending on its corporate structure, implicates the roles of government, regional departments, the municipality and stakeholders, which themselves will vary according to the applicable legal regimes, and the relevant political agenda. In the globalised economy, there are many reasons why the role of FDI in planning, generally, should be carefully analysed, in all its forms, to enable sound conclusions to be drawn. More specifically, in relation to the ESIA process, the analysis might consider if any of the liabilities may arise from a developing entity's failure to implement the ESIA process, whilst nevertheless proceeding with the development. What sanctions are there for failure to use the ESIA process when FDI is involved, when complex financial and political considerations are already in play? Such analysis might also consider large FDI funded developments where the developer has failed to comply with conditions attached to an approved plan for the development.

Climate Change

This massive, inexact, yet inexorable environmental challenge is not explicitly reflected, within EIA structures, on the whole. There are many developments which have proceeded despite disastrous and inevitable consequences, which show major environmental destruction from ensuing climate change, particularly in the South. This featured prominently in the Fijian case study. It was relevant, if understandably under-emphasized in both the Sri Lankan and New York case studies. An extended analysis of existing EIA regimes must consider what place climate change considerations should occupy in the ESIA process. Climate Change might well provide one vehicle with an impact which becomes increasingly important.

Conclusions

International legal norms, such as the New Urban Agenda (which attempts to fuse urbanisation and the achievement of Sustainable Development Goals, such as poverty reduction) constitute the sort of policy which may ultimately ensure better, more responsible development in emerging economies. Soft law itself arrives into domestic legislation through a range of routes: through a government's international legal/treaty obligations, through movements within the global investment community, through environmental insurance and risk management, through international corporate standards imposed obliquely by the shareholder community, and via a range of other less distinct routes. The UN Conferences on Human Settlement over the last 40 years are likely to have particular relevance for any recommendations for the improvement of ESIA statutory frameworks.

The Oslo conference participants identified a number of generic shortcomings in the ESIA process as a means of ensuring that development meets optimal standards. Whilst the case studies themselves were derived from a wide range of legislatures and environments, any generalities are necessarily limited in their application; nevertheless some conclusions can be drawn from the body of evidence collated in Oslo.

ESIA and its Place in the Planning Process

- The ESIA process, when properly prescribed and implemented, has a potential, measurable impact, through the operation of environmental law constraints, upon planning decisions; nevertheless, even when the

ESIA process is used optimally, it appears that its impact on a planning decision will not generally extend to the point where a project can be halted altogether.

- Private, public/private and government development and the ESIA process: planning decisions which give permission for a project proposed in such initiatives appear to be made, in principle, far earlier in the timeline than the point at which the ESIA is required to assess the impact of the proposal. In many of the examples discussed by the Oslo conference participants, projects had already been approved in principle, either at a political or administrative level, long before any ESIA had been considered.

Recommendations

The inherent shortcomings of the ESIA process, which itself is essentially reactive by nature, should be internationally recognised for both their value and limitations. Following such recognition, country appropriate measures could be proactively adopted to ensure that all such developers are required to consider and comply with pre-application legal norms, before embarking on any new project. Such legal norms would then inform the developer's own business planning, as well as obliging the state to provide clarity, having taken account of its citizens needs in a coordinated way. For example, in a developing economy, where an infrastructure project is liable to result in the potential resettlement of a community, the loss of community resources, or the disruption of the social fabric of a community in other ways, must be considered. Such international legal norms as 'free prior and informed consent', and the measurement and calculation of social, environmental and economic impact, are examples of the range of adverse consequences which will impact upon the project-affected. The incorporation of such concepts as proportionality, risk assessment, and 'resettlement action plans' into early business planning by the developer would reduce the polarity which occurs in the planning process, ultimately improving effectiveness of the ESIA mechanism.

This pre-emptive, aspirational approach to development rights might reduce the politicisation of the decision-making process. It might also challenge the silent assumption that inappropriate but ESIA-compliant development will automatically be permitted. It might also eradicate many of the legion opportunities which currently exist for corruption in the decision-making process. It would place an added burden upon the relevant authorities, in the first instance, to put such norms in place, which are currently limited to a place in the ESIA process. In particular, in states where environmental husbandry remains of paramount importance, then placing commercial interests a step further away from the decision-making procedure would ultimately benefit both stakeholders and developers themselves. The challenge remains in coordinating such a process, and in persuading politicians that thinking ahead has greater merit than the short termism which tends to dominate political thought in so many areas.

A general acceptance of ESIA as the legal structure by which a proposed project can be assessed and managed in its development has created the presumption that the structure is generally fit for purpose. The case studies revealed a range of instances where lack of coordination, lack of competence and lack of accountability

had generally reduced faith in the ESIA process. Whilst there are some common patterns which give rise to generic flaws in the ESIA structure, one has to be realistic in assessing what an ESIA can achieve within a regional context. Accordingly, generalising differences in legal environments may not be helpful, yet common ESIA features should surely include:

- a certification process ensuring professional levels of competence on the part of the developer, any experts and any decision-maker for projects above a certain value. There is an inherent risk in taking a value-based approach. In the EU experience, a developer will simply divide the project into segments which do not attract the same standards.
- decision-making structures which are transparent and available for public scrutiny on a continuing basis, providing a bulwark against corruption.
- realistic timetables which enable the project-affected to be fully appraised of the impact of any proposal before the project commences.

Following the Oslo Conference, further thought is required to distil the essential features of an ESIA mechanism so that it retains its relevance and competence as a means by which sound development can be equitably achieved. The environmental and social challenges which dominate an impact assessment are often regionally determined. There are no mangrove swamps to be lost in the New York environment. Traditional land ownership structures vary greatly from country to country. Laws which are rooted in colonial history are very likely to range from being inappropriate to irrelevant in their application.

In more complex and established regional planning legislation (e.g. the EU), the ESIA can appear as a smaller part of a more sophisticated and extensive development regional plan, in which priorities and concerns which are identified by the policy makers then form the framework for decision making in which the ESIA for a particular project can then be drawn together. This macro approach is realistically the most effective means by which appropriate priorities can be given to the structure and content of an ESIA in a particular part of the world.

Implementation of ESIA

The case studies showed a huge disparity in implementation: environmental and social impact ranged from being a matter of indifference in some states, to a well policed, and comprehensively litigated process in others. The conclusion which did emerge is that where the political will for a substantial infra-structure project is in place, at best, ESIA considerations will come a distant second in the implementation of the project, serving as a compliance mechanism and little more. ESIA considerations are apparently ignored altogether in a state which has yet to implement ESIA at any meaningful level. At its most sophisticated, the ESIA process appears to be used as a bargaining tool by stakeholders, in mitigating impacts. At its least, the ESIA process is simply by-passed at a political or commercial level, with no effective consequences.

Recommendations

- The ESIA process itself, as currently conceived, might become formally connected to other sets of indicators, such as poverty, GDP, housing, democratic deficit, Climate Change (direct/indirect impact), as an essential feature of the wider assessment of the impact of projects, certainly for those above a certain size. Whilst state legislation is necessarily *sui generis*, to an extent — for example, biodiversity is a primary concern for environmental lawyers in South Africa, Uganda, Fiji, but not so much in New York — such indicators could be of general application, in the standard ESIA process, suitably modified.
- The ESIA process in a significant number of developing economies appears to be perfunctory, or dysfunctional. This shortcoming is particularly obvious in states where ordinary infrastructure is lacking, for example, where there is an urgent need to accommodate vast increases in urban waste, such as in the GMKA, or where a tourism development will supposedly generate new, badly needed income, as in Fiji. In such instances, the ESIA process is either neglected or flawed. The legislation itself either does not exist at all, or if it does, it is outdated, and accordingly dysfunctional. One solution to this gap may be to suggest and recommend mechanisms by which investment, in particular FDI, or state aid could contain a level of conditionality about the planning process, including the implementation of up to date legislation in the planning process, for major projects. Such conditionality might include a statutory screening system for projects of a particular dimension.

Public Participation

The Oslo conference participants questioned the effectiveness of public participation as a democratic tool in the planning process. Questions arose as to its role in the planning process, as part of ESIA requirements. What is the purpose of public participation? Is it simply an opportunity for those affected by a project to comment, in the hope of their concerns being considered by the developer? Or should such participation have a more significant role, in which comment gives way to the requirement for consent? What are the expectations of the public participation process in general?

Elsewhere we have addressed the reasons why public participation, as part of the democratisation of the planning process, is complicated and in many instances, ineffectual. The paper would be incomplete without a more forensic analysis of the procedures and the means by which public participation can be improved. Questions to be considered are:

- what are the most appropriate fora in which public views can be gathered? A public meeting may not be the most appropriate, but what are the alternatives? Who should be driving the process, to ensure that there are no conflicts of interest?
- is there sufficient time generally allowed for public responses and

commentary on a project, particularly where the project contains technical complexity?

- which process determines the impact of comments made by the public?
- is the public engaged in the processes by which monitoring inspection and compliance of a project is achieved?

Recommendations

Public participation is increasingly recognised as an essential part of the democratic process, with the emergence of such doctrines as ‘free, prior and informed consent’. For that reason, as well as the varying functions which public participation may perform in ESIA and related processes, the Oslo conference participants could usefully compile a set of guidelines to provide impartial guidance on the way in which such participation can and should be undertaken. Such Guidelines could then act as a lodestar for emerging/reforming ESIA regimes.

It seems that consultation processes should in general be conducted at a far earlier stage in the planning process, if they are to have the kind of impact which would allow public participation in planning decision making procedures to become a really effective democratic tool in urban planning. Whilst in domestic legislation, ‘consent’ is increasing giving way to the mere opportunity for the project-affected to comment, it is worth noting that in international law, such doctrines as ‘free prior and informed consent’ (‘FPIC’) have a more influential role to play, in particular for investors and developers who are driving substantial infrastructure projects involving development finance. Many lenders have now built FPIC into their requirements, thus creating an interesting potential dilemma.

The distances between comment, consultation and consent can be substantial: where community engagement with the development has been minimised through the consultation processes, or through community lack of expertise and understanding, or through insufficient time for the project to be considered by those who will be adversely affected by it, then a democratic deficit will surely follow.

If more frequent, staged opportunities for public consultation were to be used during the ESIA process, then this might increase public engagement. Communities might then be informed more thoroughly, through culturally appropriate means, about the ESIA process, having been invited to comment and engage with the project development from its inception. If such an approach were adopted, the ESIA might be an effective mechanism for community use before a project commences, giving the project-affected an opportunity to influence and shape the project in its early stages. Such thinking is not envisaged at present.

Further research is essential if planners and policy makers are to understand why people do or do not engage in public participation. There may be several answers to this question, which is considered by many to be integral to the functionality of ESIA: current barriers to engagement include the complexity of the ESIA procedure; insufficient knowledge or understanding of a proposed project; cultural/ language barriers; lack of awareness of the importance of public participation, regardless of the extent to which a project may affect a community directly and adversely;

insufficient time allowed for engagement; lack of culturally appropriate and competent representation or capacity within the community; a level of apathy which reflects the extent to which communities feel distanced, even disenfranchised from the process.

Such research might usefully include a cross-disciplinary approach, to enrich conclusions about public participation, and ensure that conclusions are effective and accurate. The research would include working with experts from a number of disciplines that are currently not automatically included in the planning spectrum, such as anthropologists, economists and geographers.

There can be little doubt that if a domestic ESIA process is to be effective, then it has to be embedded within the ESIA process and legislation which governs each specific environmental sector, such as air quality, noise exposure, waste and water management, protection of the marine environment, soil protection, disaster risk prevention, climate change and biodiversity. Part of the consultative process, where relevant, would be to create a core optimal set of competencies, with the engagement of each relevant authority having an interest in the project.

Land Ownership

The Oslo conference participants considered a wide range of land ownership models, from a planning perspective, in particular looking at compulsory purchase, and its consequences, as referred to in each case study. It is clear that many sets of social and economic rights surrounding landownership remain confused, and inchoate. The doctrine of eminent domain is well litigated in the USA, with a sophisticated structure by which community benefit agreements can be reached to offset the impact of a project. By contrast, the impact of adverse possession in Uganda is confined to the work of a state appointed assessment officer, who himself assesses the value of the land being lost to its owner, and hands out compensation. For those communities who have no title to land, whose livelihoods are based on their informal occupation of the land, their prospects are confined to resettlement action plans, which are inadequate in many respects, and which do not traditionally measure or take account of the income generation and resources which are being lost, which were vital to the community’s survival.

Recommendation

It may be helpful to create a set of model Resettlement Action Plans (‘RAP’), to include a range of features, for use by states resettling communities in the wake of development. RAPs, fortified by the constitutional rights of the citizen, will reflect that compensation for measurable losses no longer constitutes an adequate approach to a citizen’s involuntary resettlement. Loss of livelihood, loss of community and loss of future resources at many levels are all important constituent elements of an appropriately constituted RAP.

The Oslo conference participants considered specific cases, rather than the general nature of the causal relationship between land speculation and planning permission, and the conflicts which consequently exist between the public interest, commercial interests, and other players, in particular where land acquisition has been speculative, and used tax-effectively for the benefit of the developer, rather

than for the benefit of the wider economy/community. This underlying tension is an important consideration for any recommendations within such exemplar plans. One particular challenge remains in finding the correct and appropriate means for compensating those whose tenure of the land is customary in nature. Emerging thought, such as from within the Global Land Tenure Network is beginning to allow for the effective articulation of informal land rights by using community structures, but on the whole these have yet to find their voice within the ESIA mechanism.

Legislative challenges in the ESIA process.

Other than notably in Brazil, judicial review of the ESIA process itself appears to be decreasing. The Oslo conference participants noted a number of reasons for this decline. The most obvious of these appears to be the wholesale lack of capacity to challenge an ESIA on the part of those who will be most adversely affected by a project to which the ESIA refers. Too little, too late, and the prospect of an uncertain outcome, are the general characteristics of this decline. In particular, impecuniosity, and ignorance of the legal process leave impoverished communities poorly placed to challenge a project effectively. The process of judicial review itself is generally concerned with the form, rather than the substance of the decision complained of.

Recommendation

In contrast to this observable decline in administrative law, SDG 16 has opened the door to admit the Rule of Law into the mainstream of SDGs, connecting the notion of justice with poverty reduction. This may result in a correspondingly wider number of opportunities to challenge bad planning decisions, by reference to socio-economic rights. It may be that where, for example, a Resettlement Action Plan has failed to provide adequately for a project-affected community, then by reference to its constitutional rights, this might give rise to wider challenges to ESIA's. A commonly accessible library of domestic ESIA cases, for sharing amongst practitioners in the field, may lead to the cross pollination of ideas in what is a relatively undeveloped area of potential litigation. Also one must acknowledge the need for practitioners who are able to work competently in this field. The current trend towards the use of paralegals emphasises the professional gap which has to be filled, if those with an interest but no funds are to be able to gain access to the court system in a competent and timeous way.

Environmental Degradation

The Oslo conference participants produced a number of examples of disastrous planning decisions, which showed grave environmental consequences. The Group discussed environmental liability, and the measurement of extended ESIA, where the environmental consequences clearly require action on the part of the developer.

Recommendation

In some states, notably not those represented by practitioners at the Oslo Conference, an environmental tribunal system has been introduced, in which adjudicators with specialist knowledge of the environment, are tasked with

administering environmental laws, looking at the lawfulness of ESIA, and taking responsibility for low-level enforcement within an administrative framework. In others, an Environment Agency with independent powers is specifically tasked to enforce environmental laws. If ESIA as a process is to develop and become the tool which it is intended to be, it can only do so where there is a strong capacity to enforce breaches of ESIA, with sophisticated and fully structured means of imposing appropriate penalties upon entities responsible for environmental degradation.

Foreign Direct Investment

The Oslo conference participants considered the potential hazards, as well as the benefits of FDI in development. It concluded that there is insufficient analysis of the role played by the foreign investor, particularly in respect of any liabilities arising from a badly developed or unfinished project, where the investor simply withdraws, avoiding any liability. Lender liability, due diligence, environmental insurance, corporate liability, and many other aspects of FDI often simply fall away in the face of an investor eager to start work.

Recommendation:

Further research is certainly required before any recommendations can be made. In the Fijian case study, the examples of FDI and massive consequent ongoing environmental damage would provide an excellent starting point for such research, taking a resource economics-based approach, considering an actuarial approach to the assessment of true costs of a project, through the use of 'multi-criteria decision-making analysis'.

Climate Change

ESIA legislation simply does not reflect the current understanding on Climate Change, or the Paris Conference. This leaves a systemic gap in ESIA, which amounts to an egregious omission when seen beside the emissions caused by the construction industry globally, as one example.

Recommendation:

In the revision of ESIA legislation, in particular where the legislation is being updated from the 20th Century, there is the chance to draft contemporary and appropriate laws, it will be vital to include requirements for measurements of the emissions associated with a project, both in its construction and its ongoing viability. As part of this recommendation, it is essential to find ways in which climate change can be anticipated and measured, in a project, not simply by reference to simple emissions from a development, but by reference to its indirect impacts as well.

The Oslo conference has begun a fruitful international dialogue which we regard as vital to making progress in this critical area of law, common to all countries. The group thought gathered many different strands of ESIA thinking together. The most egregious damage to communities and their environments was to be found in parts of the world where the appropriate legislation was antiquated, colonial in its nature, and lacking any meaningful implementation. Those places would perhaps be the most rewarding starting points for the next phase of this work.

01

Urban Expansion in the Greater Kampala Metropolitan Area, Uganda

Emmanuel Kasimbazi



A landscape photo of Uganda's capital city, Kampala. @Shutterstock

The Greater Kampala Metropolitan Area (GKMA) includes the Kampala city centre and the inner suburbs, the outer dormitory towns and suburbs, peripheral towns and peri urban extension to Mukono, Wakiso and Mpigi districts. The area has experienced significant urban growth for many decades and is currently the second-fastest-growing urban area in Eastern Africa. It is an industrial, commercial and educational centre and vital to the country's economic growth. The urban growth of GKMA impacts on the environmental resources.

The main objective of this study is to analyse how environmental reviews are implemented in the GKMA. It reviews the urban environmental profile of GKMA and specifically identifies its environmental resources; it reviews the environmental and social impact assessment (ESIA) process in Uganda; the legal, regulatory and institutional framework for ESIA; provides ESIA experience in the GKMA urban development projects; and provides challenges of environmental reviews in the GKMA. Finally, it makes conclusions and recommendations for ESIA implementation in urban development in the GKMA.

The study has established the following key findings:

- Environmental resources in GKMA: GKMA is rich with environmental assets such as wetlands, birds and forests. However, these resources are being degraded due to urban developments, such as the establishment of sewage and faecal sludge treatment plants, and the construction of roads, shopping arcades, leisure centres and small-scale agriculture.

- ESIA process: There is a comprehensive ESIA process in Uganda. However, there are challenges with implementing the requirements of ESIA reports in urban development projects due to limited post-ESIA enforcement and monitoring.
- ESIA policy, legal and regulatory frameworks: There are several ESIA-related international and regional instruments and other soft law instruments and national policies, laws and guidelines that have been developed. The policy, legal and regulatory framework provides standards for environmental and social reviews in urban development. However, the biggest challenge is compliance with the standards.
- Institutional and administrative framework for ESIA implementation in the GKMA urban development: There are key institutional actors at both national and urban levels with mandates regarding urban planning and development and environmental management and social protection. The institutions play a critical role in environmental reviews. The challenge is that there is an overlap of mandates and lack of coordination between the institutions.
- ESIA experience in GKMA urban development projects: ESIA studies have been conducted for urban development projects in the GKMA. These projects affect land, water, wetlands, wildlife, forestry and air resources. There are also social issues, such as resettlement and compensation, that arise due to urban development projects. There are some challenges with implementing mitigation measures proposed in the environmental reviews and ensuring sustainability of environmental resources.
- Challenges of implementing environmental review reports in the GKMA: There are some challenges that affect the implementation of the reports of the environmental reviews and as a result environmental resources are degraded. The major issues are: a weak regulatory framework; overlapping legal mandates; overlapping institutional mandates; inadequate coordination; weak development guidance at

city and local government levels; loose adherence to development approval processes; limited financial and human resources; limited environmental awareness; limited environmental data resources; political interference; and professional ethics for EIA consultants.

The recommendations are:

- The Ministry of Water and Environment (MWE), in collaboration with NEMA and KCCA, need to survey, map environmental resources and demarcate boundaries in the GKMA.
- There is a need to consolidate and reinforce the institutional structures and mandates of the relevant institutions.
- Inter-agency integration and coordination across the full spectrum of development processes needs to be improved.
- KCCA and local government authorities need to develop a coordinated and wider physical development plan of the GKMA.
- There is need to strengthen environmental legislation by developing city, district/local-level by-laws for the proper management of the environment and guidelines for environment reviews at the city, district/local levels in the GKMA.
- There is a need to enforce accountability and track performance within each institution responsible for environmental reviews.
- There is need to promote environmental public education and develop communication initiatives.
- The Ministry of Finance, Planning and Economic Development and MWE need to assess economic value of environmental resources so that policy makers can appreciate the importance of environmental reviews and conservation of environmental resources.

Acronyms

AfDB: African Development Bank	GKMA: Greater Kampala Metropolitan Area	NFTPA: National Forest and Tree Planting Act
CFR: Central Forest Reserve	GoU: Government of Uganda	NWSC: National Water and Sewerage Corporation
CSO: Civil society organization	KCC: Kampala City Council	PPEs: Personal protection equipment
DLB: District Land Board	KCCA: Kampala Capital City Authority	PAPs: Project-affected persons
DLG: District Local Government	KIIDP: Kampala Institutional and Infrastructure Development Project	PCR: Physical cultural resource
DWD: Directorate of Water Development	MLHUD: Ministry of Lands, Housing and Urban Development	RAP: Resettlement action plan
DWRM: Directorate of Water Resources Management	MoH: Ministry of Health	SGR: Standard gauge railway
ESIA: Environmental and social impact assessment	MWE: Ministry of Water and Environment	ToR: Terms of reference
EIS: Environmental impact statement	NEMA: National Environment Management Authority	UIA: Uganda Investment Authority
EIStudy: Environmental impact study	NEA: National Environment Act	UNRA: Uganda National Road Authority
EIR: Environmental impact review	NFA: National Forestry Authority	

1. GENERAL INTRODUCTION

1.1. Introduction

The GKMA covers Kampala city and extends to Mukono, Wakiso and Mpigi districts. It plays a major role in driving Uganda's transformation to a middle-income country as envisaged in Vision 2040. GKMA is developing at higher relative rate in terms of infrastructure, urbanization, industrialization, commerce and trade than other areas within Uganda. However, in the drive for greater industrialization and urbanization alongside rapid population growth, pressure is being exerted on the existing natural resources and the general environment.

This report assesses how urban development projects affect environmental resources in the GKMA. It examines the ESIA process and how it is implemented in urban development projects in GKMA. The report is divided into the following eight chapters. Chapter one provides a background to the study and defines its methodologies. Chapter two provides an environmental profile of the GKMA and chapter three examines the ESIA process in Uganda. This is followed by a presentation of the legal and policy framework for ESIA in Uganda in chapter four, and of the institutional framework in chapter five. Chapter six analyses the ESIA experience in GKMA projects. Chapter seven discusses the general ESIA challenges and the last chapter provides the conclusion and recommendations. An annex of GKMA projects and ESIA studies is attached.

1.2. Background

The United Nations Human Settlements Programme, UN-Habitat, is the United Nations agency mandated by the United Nations General Assembly to promote socially and environmentally sustainable towns and cities with the goal of providing adequate shelter for all. The Urban Legislation Unit, within the Urban Legislation, Land and Governance Branch of UN-Habitat is mandated to promote enabling legislation adequate to meet the challenges of rapid urbanization. UN-Habitat recognizes urban law as one of the foundations of effective urban management and development. Well formulated law based on sound policy supports effective implementation. It creates a stable and predictable framework for both public and private sector action, and can guarantee the inclusion of the interests of vulnerable groups while also being a catalyst for local and national discourse.

Environmental reviews, often in the form of environmental impact or strategic environmental assessments, play a fundamental role in the process of urban development. They are institutionalized decision-making arrangements in domestic legislation to address the environmental impacts and risks associated with a project. The EIA contributes to sustainable development through the provision of information that is used to approve and implement projects and development that

is ecologically sensitive, socially acceptable and economically cost-effective. Apart from the obvious gatekeeping role, whereby an environmental review determines whether a development is environmentally harmful or whether expected negative outcomes can be mitigated, environmental reviews make many other contributions to urban development. Among these are promoting the efficiency and sustainability of cities and contributing to transparency in decision making. However, weaknesses in environmental reviews have been noted in some cases and in the GKMA in particular, and there is a clear need to strengthen environmental reviews in urban development processes and to promote their integration into broader decision-making frameworks. This study examines the concerns, with the focus on the GKMA.

1.3. Objective of the study

The main objective of the study is to highlight the central role of environmental reviews in urban development decision-making and to identify and validate key implementation issues. Building on this, the study will also outline capacity building needs and coordination approaches that are appropriate to resource-poor contexts. Specific recommended actions and activities will be identified, including any common needs for legislative, regulatory or administrative reform.

The outcomes of this will be to:

- (i) assist countries in the implementation of multilateral environmental obligations;
- (ii) promote coordination between levels of government and effective governance; and
- (iii) increase the efficiency and reliability of decision-making at the local level.

Ultimately, these activities will contribute to enhancing the quality of sustainable development decision-making in urban areas and will support the implementation of UN-Habitat's legislative reform processes at country level.

1.4. Scope of work

This focus of this report is limited to the parts of the Greater Kampala Metropolitan Area known as Kampala city, Mukono District, Wakiso District and Mpigi District. There was a special focus, however, on road works, industrial and business parks, waste management, landfills and wetland development.

The study engaged specific ministries, KCCA, district local governments, statutory authorities and NGOs that are related to implementation of ESIA in Uganda and in the GKMA in particular. Field visits were not conducted to assess the practical application of relevant policies and laws in the different in the GKMA. The report covers the following:

- Review of key international and regional ESIA related contained conventions and other soft law instruments, the status and application of such instruments within the Ugandan legal system;
- Review of ESIA reports, plans, strategies, policies and laws in Uganda and the extent of their implementation in the GKMA;
- Review of institutional mandate, practices and capacity in the implementation of ESIA requirements Uganda.

1.5. Methodology

The consultants employed two major approaches to carrying out this study. These were:

a) Literature and documentation review

A comprehensive literature review of relevant documents, policy papers, international instruments, national legislation, ESIA reports, strategies, plans academic papers, research reports, programme reports, evaluation and assessment reports was done.

b) Interviews and consultations with key informants and stakeholders

A preliminary analysis of the reports, policy, legal and institutional frameworks relevant to ESIA compliance and practice within the GKMA revealed that a number of stakeholders had to be consulted to identify their role in the implementation of EISA recommendations. These consultations were done through face-to-face interviews and email exchanges with key informants and stakeholders. Key consultations were with people in government ministries, KCCA, district LGs, statutory authorities, the private sector and NGOs.

2. URBAN ENVIRONMENTAL PROFILE OF GREATER KAMPALA METROPOLITAN AREA

2.1 Introduction

GKMA includes the Kampala city centre, the inner suburbs, the outer dormitory towns and suburbs, peripheral towns, and the peri urban extension to areas of Mukono, Wakiso and Mpigi Districts. The GKMA has experienced decades of significant urban growth and is currently the second-fastest-growing urban area in East Africa.

It is an industrial, commercial and education centre and is vital to the country's economic growth. The urban growth of GKMA impacts on the environmental and natural resources and this chapter looks at environmental resources and analyses how urban development has affected them.

2.2 Overview of the GKMA

The Greater Kampala Metropolitan Area (GKMA) covers an area of 1,000 km². It is the major business and industrial hub of Uganda and contributes over 70 per cent of the country's industrial production and over 60 per cent of the country's GDP. Greater Kampala has a day-time population of about 3.5 million. It is increasing at rate of about 5 per cent per annum and is projected to reach 15 million people by 2040.¹ About 23 per cent of the GKMA is fully urbanized, a significant portion (60 per cent) is semi-urbanized, and the remainder consists of rural settlements. Approximately 7 per cent of the GKMA area is wetlands (KCCA, 2012). The majority of Kampala's urban development has been residential, which covers approximately 23 per cent of the GKMA landmass (over 60 per cent of the total developed area in the GKMA) and approximately 64 per cent of the Kampala city land area. A recent survey estimated that 40 per cent of the city's population and many of the recent migrants live in informal settlements and/or slums that lack basic infrastructure services for the provision of water, storm drainage, sewage treatment, and solid waste collection (KCCA, 2012). The dense informal settlements predominate at the edges of the wetland corridors throughout the city. A consequence of rapid urbanization has been the overall decline in the quality of the urban natural environment. The impacts of climate change have exacerbated the rate and extent of environmental degradation and have made the city's efforts at environmental management more challenging.

2.3 Environmental resources in GKMA

GKMA has a lot of environmental resources. The key ones are:

2.3.1 Aquatic ecosystems

Kampala and the GKMA are rich with aquatic environmental assets. The urban fabric has been shaped by the wetlands and the waters that flow into Murchison Bay on Lake Victoria. These aquatic ecosystems provide floodwater attenuation, sewage treatment, water purification, food and building materials, while areas such as Lutembe Bay, designated an "important bird area" by Birdlife International, provide critical habitats for the city's biodiversity. There is a steady decrease in wetland area due to various developments in the GKMA. These include:

- A sewage and faecal sludge treatment plant (SFSTP) has been under constructed in the Lubigi Wetlands alongside the Northern Bypass in one of the sections that is already degraded (NWSC, 2014; NWSC, 2013).

¹ Standard Gauge Railway Project, the Greater Kampala Light Rail Mass Transit (LRT) project. <https://www.sgr.go.ug/> accessed 28 April 2017.

- Wetland encroachment for roadway and other infrastructure construction, particularly along the Northern Bypass, has reduced the capacity of the wetland areas to capture, store and dissipate storm water (UNRA, 2011).
- The Southern Expressway, proposed to be built through the Nakivubo wetland, is anticipated to cause further disturbance to the wetland's function and hasten its decline. Expansion of the Northern Bypass road is expected to further contribute to loss of habitat and loss of overall wetland function. In particular, road construction at Lubigi is anticipated to reduce the diversity of plant species due to construction materials such as limestone, which alter wetland water chemistry.
- Small-scale agriculture is a threat to the green system's overall health and function and is seen as a threat to most of Kampala's wetlands. Uprooting wetland vegetation and converting the land to agriculture can compromise a wetland's nutrient cycle functions by reducing its ability to treat wastewater. For example, cocoyam is cultivated in the GKMA wetlands by removing native-grown papyrus, but papyrus has a higher wastewater treatment potential and removes 95 per cent of nutrients from wastewater compared with cocoyam's 65 per cent rate of nutrient removal (Kansiime et al., 2007).

2.3.2 Terrestrial ecosystems

GKMA's terrestrial ecosystems include hills, a patchwork of forests, urban tree canopy, and lowland forests/floodplain forests alongside wetlands that collectively provide habitat for a considerable diversity of birdlife. Available information is limited about the state of the city's terrestrial environmental resources; however, spatial analysis shows that the amount of undeveloped land in Kampala decreased more than 50 per cent between 1989 and 2010, indicating a significant overall degradation of the city's terrestrial assets. Combined with the conversion of protected open spaces and gardens into development, this loss of soil, vegetation, habitat and biodiversity constitutes a significant threat to the city's overall ecological health.

Decades of expanding urban development has led to the clearance of much of the natural vegetation on the hill tops and slopes. This has destabilized the soil and caused increased runoff, erosion, siltation and flooding in the low-lying areas between. Residential and industrial development has reduced the land area of lowland forests in Kampala from 7.6 per cent in 1983 to 0.4 per cent in 2004 (Nyakaana, et al. 2004). Forest lands have been virtually eradicated from the city with only 58 ha remaining (KCCA, 2012). Public park spaces have been converted to urban development. For example, most of the Centenary Park was remodelled to develop a leisure and recreation centre, Lugogo green park is now a shopping plaza, and approximately 1,000 ha of Namanve Forest Reserve were de-gazetted in 1997 and allocated to the Uganda Investment Authority for development. This significant decline in overall forest coverage and associated topsoil erosion has left the GKMA with only a few areas of extensive, contiguous forest habitats and upstream catchments.

2.3.3 Air quality

Though there is limited information about local air quality conditions and risks for Kampala, some studies indicate that there is unhealthy air and suggest that exposure to ambient air in Kampala may increase the burden of environmentally induced cardiovascular, metabolic and respiratory diseases, including infections (Schwander et al. 2014; World Bank Sub-Saharan Study, 2009). Some studies show that Kampala's local air appears to show signs of poor quality with regard to particulate matter from vehicles, road dust and biomass burning (Schwander et al., 2014). Deteriorating air quality also has implications for public health through outdoor air pollution, particularly vehicle exhaust, particulate matter from burning, road dust and factory emissions (US EPA, 2014).

3. THE ENVIRONMENTAL AND SOCIAL IMPACT ASSESSMENT (ESIA) IN UGANDA

3.1 Introduction

An ESIA is a process of analysing the positive and negative effects of a proposed project, plan or activity on the environment. This may include studies on the weather, flora and fauna, soil, human health including physical, social, biological, economic and cultural impacts. It is one of those measures taken to ensure that development is sustainable by studying the possible project impact on the environment and determining the possible mechanisms to eliminate or avoid them. All EIAs are expected to assess the ecological, social and socio-economic aspects of the environment. It is for this reason that the practice in Uganda so far has been 'not to' separate EIA from social or health impact assessment as is the case in other jurisdictions, and hence the term ESIA (Justin Ecaat, NEMA 2004). For instance, road projects generate impacts that cut across the ecological, social and economic dimensions. In the conduct of EIAs for roads, therefore, the Uganda EIA system emphasizes coverage of all these aspects, including compensation for lost property and/or land, the selection of least cost road alignments, and the spread of HIV/AIDS among others.

An ESIA should be conducted before the commencement of projects and before a project is licensed or approved for implementation by the responsible licencing and/or approving agencies.

In practice so far, three approaches are used for the application of ESIA by developers:

- a) an ESIA as part of the project planning and design process;
- b) an ESIA after finalization of the project design but before implementation; and

- c) an ESIA after project development has commenced through site preparation or construction and, in most cases, as a consequence of the project having been halted by regulatory authorities on the basis of an EIA not having been done.

The level of EIA required for a particular project varies and is determined on a project-by-project basis but, in general, there are three major levels:

- a) Small-scale projects whose potential adverse environmental impacts can easily be identified and for which mitigation measures can readily be prescribed and included in the design and /or implementation. The environmental aspects of such small-scale projects would normally be approved on the basis of the mitigation measures identified, without the need for a detailed environmental impact study requiring field investigations.

- b) Projects for which there is some level of uncertainty about the nature and level of impacts. They require a more in-depth environmental impact review (EIR) to determine if mitigation measures can be identified, or a more detailed environmental impact study (EIS) would be required. If, during the review, adequate mitigation measures can be identified and incorporated into the project design, the necessity for a detailed EIS may be eliminated and the environmental aspects of the project may be approved.

- c) Projects which clearly will have significant impacts and whose mitigation measures cannot readily be prescribed unless a detailed EIS of the project and its possible alternatives is conducted. Conducting an EIS requires greater public participation.

Box 1: Issues considered in an environmental impact assessment

1. Ecological considerations;

- (a) Biological diversity including:
- (i) effects of the proposal on the number, diversity, breeding habits, etc. of wild animals and vegetation.
 - (ii) the gene pool of domesticated plants and animals, e.g. monoculture as opposed to wild types.
- (b) Sustainable use, including:
- (i) the effect of the proposal on soil fertility;
 - (ii) the breeding populations of fish and game or wild animals;
 - (iii) the natural regeneration of woodland and sustainable yields;
 - (iv) the wetland resource degradation or wise use of wetlands.
- (c) Ecosystem maintenance including:
- (i) the effect of the proposal on food chains;
 - (ii) nutrient cycles.
 - (iii) aquifer recharge, water run-off rates, etc.
 - (iv) the real extent of habitats;
 - (v) fragile ecosystems.

2. Social considerations, including:

- (a) the effects of the proposal on the generation or reduction of employment in the area;

- (b) social cohesion or disruption;
- (c) effect on human health;
- (d) immigration or emigration;
- (e) communication - roads opened, closed, re-routed;
- (f) local economy;
- (g) the effects on culture and objects of cultural value.

3. Landscape:

- (a) views opened up or closed;
- (b) the visual impacts (features, removal of vegetation, etc.);
- (c) compatibility with surrounding area;
- (d) amenity opened or closed, e.g. recreation possibilities.

4. Land uses:

- (a) the effects of the proposal on current land uses and future land use;
- (b) the possibility of multiple use;
- (c) the effects of the proposal on surrounding land uses and land-use potential.

The NEA provides for ESIA as a project implementation requirement for all projects listed in Table 1.

Table 1: Projects considered for environmental impact assessment

No.	Sector	Activity
1	General	(a) an activity out of character with its surroundings; (b) any structure of a scale not in keeping with its surroundings; (c) major changes in land use.
2	Urban development, including	(a) designation of new townships; (b) establishment of industrial estates; (c) establishment or expansion of recreational areas; (d) establishment or expansion of recreational townships in mountain areas, national parks and game reserves; (e) Shopping centres and complexes.
3	Transport, including—	(a) all major roads; (b) all roads in scenic, wooded or mountainous areas; (c) railway lines; (d) airports and airfields; (e) pipelines; (f) water transport.
4	Dams, rivers and water resources, including	(a) storage dams, barrages and weirs; (b) river diversions and water transfers between catchments; (c) flood-control schemes; (d) drilling for the purpose of using ground water resources, including geothermal energy.
5	Aerial spraying	Aerial spraying
6	Mining, including quarrying and open-cast extraction of	(a) precious metals; (b) diamonds; (c) metalliferous ores; (d) coal; (e) phosphates; (f) limestone and dolomite; (g) stone and slate; (h) aggregates, sand and gravel; (i) clay; (j) exploration for the production of petroleum in any form.
7.	Forestry-related activities, including	(a) timber harvesting; (b) clearance of forest areas; (c) reforestation and afforestation.
8.	Agriculture, including	(a) large-scale agriculture; (b) use of new pesticides; (c) introduction of new crops and animals; (d) use of fertilisers.

9	Processing and manufacturing industries, including	<ul style="list-style-type: none"> (a) mineral processing, reduction of ores and minerals; (b) smelting and refining of ores and minerals; (c) foundries; (d) brick and earthenware manufacture; (e) cement works and lime processing; (f) glass works; (g) fertiliser manufacturing or processing; (h) explosives plants; (i) oil refineries and petrochemical works; (j) tanning and dressing of hides and skins; (k) abattoirs and meat-processing plants; (l) chemical works and process plants; (m) brewing and malting; (n) bulk grain processing plants; (o) fish processing plants; (p) pulp and paper mills; (q) food processing plants; (r) plants for the manufacture or assembly of motor vehicles; (s) plants for the construction or repair of aircraft or railway equipment; (t) plants for the manufacturing or processing of rubber; (u) plants for the manufacturing of tanks, reservoirs and sheet-metal containers; (v) plants for the manufacturing of coal briquettes.
10	Electrical infrastructure, including	<ul style="list-style-type: none"> (a) electricity generation stations; (b) electrical transmission lines; (c) electrical substations; (d) pumped-storage schemes.
11	Management of hydrocarbons, including the storage of natural gas and combustible or explosive fuels.	
12	Waste disposal, including	<ul style="list-style-type: none"> (a) sites for solid waste disposal; (b) sites for hazardous waste disposal; (c) sewage disposal works; (d) major atmospheric emissions; (e) offensive odours.
13	Natural conservation areas, including	<ul style="list-style-type: none"> (a) creation of national parks, game reserves and buffer zones; (b) establishment of wilderness areas; (c) formulation or modification of forest management policies; (d) formulation or modification of water catchment management policies; (e) policies for management of ecosystems, especially by use of fire; (f) commercial exploitation of natural fauna and flora; (g) introduction of alien species of fauna and flora into ecosystem

Source: Third Schedule and section 19 of the National Environment Act (NEA) Cap 153.

3.2 Basic ESIA steps

The EIA process conforms to most international guidelines, including those of Uganda's development partners. It comprises of the project brief, screening, an environmental impact study, decision-making, and monitoring and auditing. Below is a brief description of the general requirements of the EIA process extracted from the EIA regulations and the NEMA guidelines:

a. Project brief

A developer is required to prepare a project brief, giving relevant background information and a description of the project for the consideration of NEMA.

The EIA process normally begins once the developer has submitted the project brief to NEMA, who may forward a copy to the lead agency for comments. The lead agency is required to make comments within 14 working days of receiving the project brief. The regulations define the lead agency as any agency to whom NEMA delegates its functions.

A project brief is required, which should describe:

- a) the nature of the project;
- b) the projected area of land, air and water that may be affected;
- c) activities to be undertaken during and after project development;
- d) the design of the project;
- e) the materials that the project shall use, including both construction materials and inputs;
- f) the possible products and by-products, including waste generation by the project;
- g) the number of people that the project will employ, the economic and social benefits to the local community and the nation in general;
- h) the environmental effect of the materials, methods, products and by-products of the project and how they will be mitigated (or eliminated); and
- i) any other matter which may be required by the NEMA.

b. Screening

The purpose of screening is to determine the extent to which an environmental impact study is required, and the screening process results in an environmental categorization of the project.

The process begins with the proponent submitting a project brief to the executive director of NEMA for review. If the brief meets the prescribed requirements set in the EIA regulations, it is sent to the lead agency and any other relevant stakeholders for comments. The executive director, after review of the project brief and the comments from other stakeholders, may issue a certificate of approval for the activity if:

1. no significant impacts are expected; or
2. sufficient mitigation measures are proposed.

If the review reveals that the proposed project is likely to have significant negative impacts for which no adequate mitigation measures are prescribed, then a detailed EIA is requested.

c. Scoping

If the project brief is not adequate, a full EIS and scoping will be required to determine the likely significant environmental impact to be done. The process involves drawing up the terms of reference for the EIA, usually by the developer in consultation with NEMA and the lead agency. The ToRs have specific requirements under the EIA regulations 1998. After the acceptance of the ToRs, the proponent is required to submit the names of the consultants to conduct the EIA study to the executive director of NEMA for approval. Methods of scoping are not given but the proponent is required to ensure that the views of the public among other stakeholders are incorporated and considered.

ToRs should be submitted which should, in effect, contain a scoping document. The required contents are listed under the EIA regulations and, in summary, are:

- project description;
- site description;
- alternatives and reason for rejecting alternatives;
- material inputs & their potential effects;
- an economic analysis of the project;
- technology;
- product and by products;
- effects;
- mitigation;
- knowledge gaps;
- alternatives;
- methods of data collection;
- names and qualifications of the people who will do the study.

d. Environmental impact study

During the environmental impact study, relevant data are collected and analysed,

the major impacts investigated in depth, mitigation measures developed for adverse and beneficial impacts, and compensatory measures recommended for immitigable impacts. All project alternatives are thoroughly examined. Impacts are quantified in terms of magnitude (major, moderate, negligible), extent (regional, local, site specific) and duration (long-term, medium-term and short-term). During the study, consultation must be undertaken with the relevant authorities, stakeholders and affected and interested parties.

The findings of the environmental impact study are presented in an environmental impact review report (EIR report) in the case of a study with limited scope, or an environmental impact statement (EIS) in the case of a full study. The report or statement must contain a description of the project site, surroundings, proposed activities and the significant environmental impacts and risks. The EIR report or EIS should discuss the project alternatives and recommend mitigation measures. It should also contain a monitoring and evaluation programme.

e. Decision-making

The EIR report or EIS is submitted to NEMA for review and comments and NEMA invites stakeholders and the public to comment on the document. If the EIR report or EIS is approved, then a certificate of approval of the EIA is issued, after which a decision can be made to proceed with the project.

If, however, the EIR report or EIS is not approved, the project may be rejected, or the developer may be asked to revise the proposed actions or develop other mitigation measures in order to eliminate adverse impacts. A record of the decision is prepared whether or not the project is approved. NEMA shall make a decision within 180 days.

f. Monitoring and auditing

The NEA, EIA regulations, the audit regulations of 2006, and the environmental audit guidelines of 1999 provide for monitoring and auditing in mitigation of environmental impacts.

During and after implementation of the project, the EIA regulations require that the developer carries out environmental monitoring to ensure that recommended mitigation measures are incorporated into the project design and that these measures are effective.

The regulations further prescribe that, after the first year of operation, the developer must undertake an initial environmental audit to compare the actual and predicted impacts, and to assess the effectiveness of the EIA and its appropriateness, applicability and success. Thereafter, NEMA may require additional audits to be made as circumstances warrant.

3.3 Time frames for various stages of the Uganda EIA process

Under the National Environment Impact Assessment Guidelines, time frames for the various stages of the EIA process are defined and included in the Table 2 below:

Table 2: Time frames for various stages of the Uganda EIA process

Activity:	Duration (Working Days) (Upper limits)
Scoping process:	14
Preparation of environmental impact statement	To be determined by the proponent in consultation with the study team
Circulation and comment on EIS by lead agencies	21
Public display of EIS for public review and scrutiny (where public hearing is to be held)	28
Decision making after review	14
Entire EIA decision making process	Within >180

3.4 Judicial review and enforcement

The EIA regulations provide for any person who is aggrieved by any decision of the executive director to appeal to the High Court within 30 days of the decision.

Regarding project monitoring, the developer is required to conduct an audit between 12 and 36 months after completion of the project or commencement of operations. The regulations allow an inspector to enter the land or facility to determine if the predictions made in the project brief or EIA are being complied with and to inspect records. Also, any member of the public may petition NEMA to undertake an audit. The petitioner must show reasonable cause. Audits may be performed by certified and registered consultants.

Enforceability of EIA detail is the responsibility of the executive director who may require the developer to take specific mitigation measures to ensure compliance. Also, an environmental inspector may issue an improvement notice and begin appropriate criminal or civil proceedings.

3.5 ESIA and public consultation

Although no regulations exist for public consultation, national guidelines for ESIA in Uganda require that the public is given a full opportunity for involvement and participation throughout the ESIA process. People - individuals or groups of local communities who may be directly affected by a proposed project - should be a focus for public involvement.

Since identification of the "public" likely to be indirectly affected by the proposed activity is often difficult, it is required to exercise care in deciding who participates

to ensure that a fair and balanced representation of views is obtained, and the views of minority groups are not overshadowed by more influential members of the public. The public may be involved in the EIA process appropriately by:

- Being informed about the proposed project;
- Participating in scoping exercise;
- Attending open public meetings/hearings on the projects;
- Being invited to submit written comments on proposed project;
- Using community representatives;
- Commenting and reviewing the environmental impact statements; and,
- Making relevant documents available to any interested members of the public in specified places or at the cost of reproduction.

Three stages for public involvement in the EIA process are:

a) Public consultation before EIA is done

If, after receiving and screening/reviewing the developer's project brief, the authority (NEMA), in consultation with the Lead Agency, decides that it is necessary to consult and seek public comment, it shall, within four weeks from submission of the project brief and/or notice of intent to develop, publish the developer's notification and other supporting documents or their summary in a public media. It is required that objections and comments from the public and other stakeholders be submitted to the authority and to the lead agency within 21 days from the publication of notice.²

b) Public consultation during the ESIA

The team conducting the ESIA shall consult and seek public opinion/views on social and environmental aspects of the project. Such public involvement shall be during scoping and any other appropriate stages during the study.

c) Public consultation after ESIA (ESIA review)

The EIS shall be a public document and may be inspected at any reasonable time by any person. Considering the scale and level of influences likely to result from the operation of a project, the authority, in consultation with the lead agency, shall decide on the regions where it is necessary to display the EIA report to the general public. Several stakeholders in the GKMA urban development are crucial for consultation as indicated in table 3.

3.5.1 Methodologies for public involvement

The right to freedom of speech and public involvement is guaranteed by the Constitution of Uganda 1995, the NEA and the regulations. Depending on the magnitude and sensitivity of the impacts, the following methodologies may be used individually or in combination:

- open house;
- interview survey;
- public meetings/public hearings,
- individual/group discussions;
- on-site consultations; and
- rapid rural appraisals.

The developer is required to take all measures necessary during the process of conducting the study to seek the views of the people in the communities which may be affected by the project, including publicizing the project and its anticipated effects and benefits for a period of 14 days. After 14 days, the developer shall hold meetings with the affected communities to explain the project and its effects. (EIA regulation 12)

The project proponent must hold a public meeting prior to finalizing the EIA study. In addition, after the EIA is submitted to NEMA, the executive director must call a hearing if the project is controversial, may have transboundary impact, or if the executive director believes a hearing is necessary for the protection of the environment and the promotion of good governance (EIA regulations 21 & 22).

Regarding public input at meeting, anyone may attend either in person or through a representative and make presentations at a public hearing provided that the presiding officer shall have the right to disallow frivolous and vexatious presentations which lead to the abuse of the hearing (EIA regulations 23(1)).

The days for the public review of the final EIA are 21 days for the affected individuals and 28 days for the general public. The public is provided 28 days to comment on the EIA and NEMA executive director shall consider any comments when making a decision regarding an EIA (Regulation 19 (4) EIA regulations).

The invitation to comment on the project and EIA must be accomplished through mass media and through local governments, and "shall be in languages understood by the majority of the affected persons."

However, although the invitation to comment may be written in a local language, EIAs are written in English and may not be understood by people who could be most affected by a project.

² Regulation 22 of the EIA regulations provides that on the written request of the Executive Director, the lead agency shall hold a public hearing on the environmental impact statement if, as a result of the comments made on it, the Executive Director is of the opinion that a public hearing will enable him or her to make a fair and just decision.

Table 3: Stakeholders and the purpose of consultation

Stakeholder	Role
Kampala Capital City Authority, Wakiso, Mukono & Mpigi DLGs	<ul style="list-style-type: none"> Provide the ToRs, introductory letter and any other documentation relevant to the projects
Project Affected Persons (PAPs)	<ul style="list-style-type: none"> To solicit their views on the project impact. Provide the necessary documentation with regard to land acquisition Provide information on their socio-economic status
Local Council Leaders	<ul style="list-style-type: none"> Give guidance on who are the rightful PAPs Give information on rightful property owners Provide information to absentee landlords about the projects and its impacts Solicit for support of the project among the community members
Division/ Municipal Leaders i.e. Nakawa, Kawempe, Rubaga, Makindye, & Central Division Entebbe, Kira, Kyengerera, Nansana and municipal councils	<ul style="list-style-type: none"> Guide the project team on the general situation on the ground Provide information regarding the project area Authorize consultations in the project area
Utility Services Providers i.e. NWSC, UMEME, Telecom companies such as UTL etc	<ul style="list-style-type: none"> To provide information on the utility installations in the projects

3.6 ESIA and climate change

Uganda's economy is highly vulnerable to climate change impacts on key sectors such as agriculture, fisheries, water resources, forestry, energy, health, infrastructure and settlements. In urban areas such as the GMKA, climate change may lead to hazards such as floods that affect transport systems by damaging bridges and making roads impassable.

Uganda has developed an integrated policy response to climate change. The policy is intended to help meet Vision 2040's goals through strategies and actions that address both sustainable development and climate change. This pathway shall also help the government to achieve the Post-2015 Development Agenda and other internationally agreed development goals without compromising the environment and the natural resource base. The overarching objective of the policy is to ensure that all stakeholders address climate change impacts and their causes through appropriate measures while promoting sustainable development and a green economy.

The policy gives two options for inclusion of climate change issues in environmental management. These are amending the National Environment Act, 1995, to cater for climate change and enacting an overarching standalone climate change law to facilitate the direction, coordination and governance and high-level political prioritization of climate change policy and practice. The National Environment Act is being amended and the Climate Change Climate Bill is being drafted. It is expected that documents will include specific provisions for climate change consideration in the ESIA process. Also, the climate change law is still to be drafted, giving an opportunity to incorporate ESIA into it.

3.7 Strategic environmental assessment (SEA)

Strategic environmental assessment refers to a range of analytical and participatory approaches that aim to integrate environmental considerations into policies, plans and programmes and evaluate the interlinkages with economic and social considerations. The aim of SEA is to protect the environment and promote sustainability.

Benefits of SEA

- SEA ensures prudent management of natural resources and the environment, providing the foundations for sustainable economic growth.
- It strengthens project level EIA.
- It addresses cumulative and large-scale effects.
- Assists in building stakeholder engagement for improved governance, facilitate transboundary cooperation around shared environmental resources, and contribute to conflict prevention.
- Incorporating sustainability considerations into the 'inner circles' of decision making.

SEA is not a substitute for and EIA, but complements it and other assessment approaches and tools. SEAs are applied at the policy, plan and programme levels prior to more detailed EIAs at the individual project level. Actions submitted to SEA are those for which the subsequent implementation is likely to give rise to significant environmental impacts that cannot be satisfactorily assessed later in the planning process.

3.7.1 Legislative and institutional framework for SEA in Uganda

The environmental legislation in Uganda provides for integration/ mainstreaming of environmental issues into development. The NEA provides for statutory functions of NEMA, among them to:

- ensure the integration of environmental concerns in overall national planning through coordination with the relevant ministries, departments and agencies of government;
- propose environmental policies and strategies to the policy committee; and
- ensure observance of proper safeguards in planning and execution of all development projects, including those already in existence that have or are likely to have a significant impact on the environment.

In general, SEA is still a relatively new concept and its application in the country has mainly been donor driven and/or voluntary.

The revised National Environment Management Policy, 2016, and National Environment Management Bill have both incorporated the principles of SEA. Thus, once the Bill is adopted, it will become legally binding to carry out SEA for selected policies, plans and programmes. In the meantime, a detailed SEA regulation and comprehensive step by step guidelines which highlights institutional roles and responsibilities for carrying out, reviewing, implementing, monitoring and evaluation of SEA are under development to back up the policy and Bill.

SEA in the Albertine Graben

Oil and gas in Uganda are found in Albertine Graben (AG) which is Uganda's biodiversity hotspot.

The Albertine Graben (AG) hosts 51 per cent of Africa's bird species, 30 per cent of the mammal species, 19 per cent of its amphibian species and 14 per cent of its plant and reptile species. The region harbours more endemic species than any region in Africa and also contains 79 threatened terrestrial species.

A SEA was undertaken from 2009 to 2013.

A key objective of the SEA was to ensure that environmental issues associated with the oil and gas activities in the AG and beyond are considered and integrated into laws/regulations, major decisions connected to policies, plans and programmes (PPPs) and specific strategic aspects related to petroleum activities at the earliest stage.

An international consultant was procured because Uganda has not yet developed sufficient capacity to carry out a SEA in oil and gas development. However, it was with the support of a local consultant.

SEA steering committee was also put in place to oversee the SEA activities and is composed of NEMA, UWA, DWRM, PEPD, DEA, MAAIF, MLHUD, the National Planning Authority and a representative from the Uganda Association for Impact Assessment,

Source: NEMA

http://www.nemaug.org/reports/Current_reports/Strategic_environment_assessment.pdf -- accessed 16/09/2017

<http://chein.nema.go.ug/wp/sea/> - accessed 16/09/2017

3.8 Resettlement action plan and the basic steps

Resettlement action plans (RAP) are required in instances where PAPs have been identified. A number of actions are required by the implementing agency and the principles of compensation and resettlement of the affected landowners form the basis of the RAP. These principles are premised both in national legislation and international standards. They include: participation, promotion of choice of resettlement or compensation options, gender-sensitivity, restoration of livelihoods, and monitoring and evaluation to mitigate the negative effects of resettlement and compensation. The steps undertaken in preparing a RAP are discussed below.

3.8.1 Basic RAP steps

a) Consultation and participatory approaches

The programme investment activities and locations undergo preliminary evaluation on the basis of the objectives of the programme. A participatory approach is adopted to initiate the compensation process. Consultations must start during the planning stages when the technical designs are being developed and at the land selection/screening stage. The process therefore seeks the involvement of PAPs throughout the census to identify eligible PAPs and throughout the RAP preparation process.

b) Census of affected entities

In this step, every owner of an asset to be affected by the project is enumerated and their socio-economic condition documented.

c) Disclosure and notification

The developer approaches the affected communities through the local government authorities to get consensus on possible sites for the type of facility to be adopted. All eligible PAPs are informed about the project and the RAP process. A cut-off date is established as part of determining PAPs' eligibility. In special cases where there are no clearly identifiable owners or users of the land or asset, the RAP team must notify the respective local authorities and leaders.

d) Documentation and verification of land and other assets

The government authorities at both national and local levels (village councils, parish/sub-county and district development committees), community elders and leaders, and the developer arrange meetings with PAPs to discuss the compensation and valuation process. For each individual or household affected by the sub-project, the RAP preparation team completes a compensation report containing necessary personal information on the PAPs and their household members; their total land holdings; inventory of assets affected; and demographic and socio-economic information for monitoring of impacts. This information is documented in a report and ideally should be "witnessed" by an independent or locally acceptable body (e.g. Resettlement Committee). The report is regularly updated and monitored.

e) Compensation and valuation

All types of compensation are clearly explained to the individuals and households involved. These refer in particular to the basis for valuing the land and other assets. Once a valuation is established, the developer produces a contract or agreement that lists all property and assets being acquired by the project and the types of compensation selected. These options of compensation include in-kind (e.g. replacement housing) and cash compensation. All compensation should occur in the presence of the affected people and the community leaders.

f) Grievance mechanism

The project RAP team establishes an independent grievance mechanism. This may be set up through local authorities, including a resettlement or land committee, and through community leaders. All PAPs are told how to register grievances or complaints, including specific concerns about compensation and relocation. The PAPs should also be informed about the dispute-resolution process, specifically about how the disputes will be resolved in an impartial and timely manner. The RAP team then produces a summary of all grievances. If needed, the dispute-resolution process should be referred to the Ugandan courts, but traditional institutions are recommended as an effective first step for receiving and resolving grievances.

g) Defining entitlements and preparing an entitlement matrix

The basis of what is to be paid as compensation is determined by identifying the most appropriate entitlement for each loss. Based on the entitlements, options for resettlement can be selected and the merits of the option.

The RAP planner prepares an entitlement matrix with respect to both temporary and permanent displacement. This matrix provides payment for all losses or impacts and lists the type of loss, criteria for eligibility and definitions of entitlements.

3.8.2 RAP timeframes

The following key timeframes apply in cases of any RAP implementation related to projects:

- asset inventory is completed most four months prior to the commencement of work;
- Resettlement plan shall be submitted to the chief government valuer and the funder/developing partner for approval immediately after completion of asset inventory;
- Development works commence after compensation or resettlement activities have been effected.

Adequate time and attention is required for consultation of affected parties. The amount of time depends on the extent of the resettlement and compensation and has to be agreed upon by all parties.

3.9 Compulsory land acquisition

Land in Uganda belongs to the people and is owned through four tenure types: customary, mailo, freehold and leasehold. The GKMA is mainly mailo land. The ESIA process takes into account all landowners and their land rights irrespective of the tenure. The land law requires that the use of land complies with all environmental laws.

The laws that govern compulsory acquisition of land for public purposes and compensation are the Constitution, the Land Act and the Land Acquisition Act. Under these laws, private land can be acquired for the following purposes:

- For public use
- In the interest of defence
- Public safety
- Public order
- Public morality and
- Public health

Before the government can acquire land, it must compensate the owner without delay, fairly and adequately (Article 26 of the Constitution and Section 42 of the Land Act).

The procedure for acquisition is as below:

1. The minister responsible for land determines the suitability of land for the purpose it is being acquired. This includes surveying the land, digging or boring for samples, etc. If damage occurs on the land, the government compensates the landowner for the damage (Section 2 of the Land Acquisition Act).
2. The minister then makes a declaration by statutory instrument (by law) that the land is suitable and a copy of the declaration is given to the landowner (Section 3 of the Land Acquisition Act).
3. The assessment officer (a public officer appointed by the minister) orders the marking, measuring and a plan of the land to be made (Section 4 of the Land Acquisition Act).
4. Notice of not less than 15 days is given to all people with an interest to meet the assessment officer on a specific day, time and place to determine the nature of their claims, the amount of compensation to be paid and any objections they may have to the plan for the land use (Section 5 of the Land Acquisition Act).
5. On that day, the assessment officer hears the claims and makes an award specifying the true area of the land and the compensation which should be paid to each person having an interest in the land (Section 6(1) of the Land Acquisition Act).

6. Compensation is paid based on the current market price of the land in the area that is prepared annually by the District Land Board. (Section 59(1) (e) & (f) of the Uganda Land Act).
7. Any person aggrieved by the award of the Assessment officer may appeal to the District Land Tribunal or the High Court if the value of the land exceeds UGX 50 million (Section 76 1(b) &(c) of the Land Act)
8. The Uganda Land Commission then compensates for the value of the land if no appeal is made to the courts (Section 6(4)(b) of the Land Acquisition Act).
9. It is only after all those with an interest in the land have been fully and adequately compensated that the government takes possession of the land and the land is managed by the Uganda Land Commission (Section 7 of the Land Acquisition Act, Article 26(2)(b)(i) of the Constitution).

- EIA/SIA process shall be fully transparent so that all stakeholders will have access to it and the process will serve to provide a balance between environmental, economic, social and cultural values for sustainable development in the country.

A draft National Environment Management Policy for Uganda was prepared in 2016 to replace the above policy. It promotes strategic environmental assessments (SEA) for initiated government policies, plans, programmes and private sector investments and requires the integration of SEA into private sector investments. For ESIA, it requires that public and private sector development options should be environmentally sound and sustainable. ESIA should consider not only the biophysical/environmental impact but should also address the impact of existing social, economic, political and cultural conditions.

ESIA must be conducted for development activities in the GKMA that are likely to have significant adverse ecological or social impacts.

4. ESIA POLICY, LEGAL AND REGULATORY FRAMEWORKS

4.1 Introduction

There are several ESIA-related international and regional instruments and other soft law instruments, national policies and laws that have been developed. The implementation of environmental and social reviews is critical for promoting urban development. In most cases, the requirements for ESIA are met in the reports, but implementation of the environmental impact mitigation measures lacks compliance. The section below reviews the relevant international and national laws and policies related to ESIA implementation in Uganda.

4.2 National policy frameworks

a) National Environment Management Policy, 1994

The aim of the policy is to promote sustainable economic development and social development that enhances environmental quality. It seeks to raise public awareness about linkages between the environment and development, and to ensure individual and community participation in environmental. The Government of Uganda's (GoU) policy is outlined in the National Environment Management Policy as follows:

- An environmental and social impact assessment (ESIA) shall be conducted for planned projects that are likely to or will have significant impacts on the environment so that adverse impacts can be foreseen, eliminated and or minimized;
- EIA/SIA process shall be interdisciplinary;

b) National Water Policy, 1999

The National Water Policy seeks to manage and develop the water resources of Uganda in an integrated and sustainable manner, so as to secure and provide water of adequate quantity and quality for all the social and economic needs of present and future generations, with the full participation of the stakeholders.

Developers in the GKMA must take measures not pollute the receiving surface water or ground water.

c) Policy on Conservation and Management of Wetland Resources, 1995

Wetlands are ecologically sensitive areas harbouring a lot of aquatic macro and micro biota, and they fulfil critical ecosystem functions such as flood control and ground water recharge. The GoU adopted a National Policy for the Conservation and Management of Wetland Resources to sustain wetlands' value for present and future wellbeing of the people. One of the elements of the policy is to carry out EIA on planned developments that are likely to impact on wetlands. There are several wetlands in the GKMA and ESIA have to be conducted to protect these systems.

d) National Land-Use Policy, 2013

The policy goal is to ensure an efficient, equitable and optimal use and management of Uganda's land resources for poverty reduction, wealth creation and overall socio-economic development. The relevant objectives of this policy include;

- Ensure sustainable utilization, protection and management of environmental, natural and cultural resources on land for national socio-economic development;

- Ensure planned, environmentally friendly, affordable and orderly development of human settlements for both rural and urban areas, including infrastructure development.

The policy is vital given the land requirement for development and its scarcity, especially in the GKMA. Affected local communities have to be consulted.

e) Uganda Forestry Policy 2001

The policy goal is an integrated forest sector that achieves sustainable increases in the economic, social and environmental benefits from forests and trees for all the people of Uganda, especially the poor and vulnerable.

The policy provides for the promotion of urban forestry. One of the strategies is to promote among urban authorities the establishment and maintenance of green belts in urban areas as part of urban land-use planning. Urban development should be in line this strategy.

f) National Health Policy 2005

The Environmental Health Policy concentrates on the importance of environmental sanitation which includes: safe management of human waste and associated personal hygiene; the safe collection, storage and use of drinking water; solid waste management; drainage; and protection against disease vectors (MoH, 2005). Environmental health practices include: safe disposal of human waste, hand washing, adequate water quantity for personal hygiene, and protecting water quality, all of which influence the morbidity and mortality of diseases. The policy provides guidance for the implementation of public health and hygiene intervention measures on the GKMA. Public health aspects should be given adequate attention in preparation of this ESIA. Impacts on water and its possible contamination, traffic impacts and accidents, occupational health and safety, noise and dust issues in areas of concentrated business as well as key administrative units have to be given consideration.

g) Uganda Gender Policy, 2007

The policy provides a legitimate point of reference for addressing gender inequalities at all levels of government and by all stakeholders. The major aspects of this policy include:

- Increased awareness of gender as a development concern among policy makers and implementers at all levels;
- Strengthened partnerships for the advancement of gender equality and women's empowerment, and increased impetus in gender activism.

The development of projects in GKMA affect both men and women. This requires a comprehensive gender responsive analysis while conducting the ESIA. All planning

requirements during construction, traffic management and compensation should consider gender aspects.

h) National Child Labour Policy, 2006

The main objective of the policy is to guide and promote sustainable action aimed at the progressive elimination of child labour, especially its worst forms. Attention should be given to this policy by the developers and their contractors.

i) HIV/AIDS Policy, 1992

The policy recognizes the considerable risk of HIV/AIDS in construction of infrastructure projects. Together with the ministry responsible for labour, the policy encourages employers to develop in-house HIV/AIDS policies, provide awareness and prevention measures to workers and avoid discriminating against workers living with or affected by HIV/AIDS. Most civil works in the GKMA are associated with migrant workers who may not have families or spouses living with them at the time of civil works. Given that the projects are within the central business district, it becomes pertinent that workers are trained on gender awareness and HIV/AIDS so that the money they earn should be used effectively at household level through joint planning and decision making with their spouses.

j) UNRA's Resettlement/Land Acquisition Policy Framework, 2002

This policy aims to minimize social disruption and to assist those who have lost assets as a result of a road project to maintain their livelihoods. In accordance with Ugandan laws and standards, a disturbance allowance of 15 per cent (or 30 per cent in lieu of six months' notice) is to be paid to the project-affected individual or family to cover costs of moving and re-locating. Community infrastructure must be replaced and ideally be improved in situations where it was deficient. This includes the installation of sanitary facilities, electricity generation systems, road links and the provision of water. In the GKMA, development projects should ensure the impact on social disruption and assets is addressed.

4.3 Legal frameworks

a) Constitution of the Republic of Uganda, 1995

The importance of the environment in Uganda is recognized by the Constitution of the Republic of Uganda.

National objective XXVII concerns the environment. It requires the utilization of the country's natural resources to be managed in a way that meets the development and environmental needs of present and future generations. The state has to take all possible measures to prevent or minimize damage and destruction to land, air

and water resources resulting from pollution or other causes. The objective further makes provision for the state and local governments to create and develop parks, reserves and recreation areas.

Article 39 provides for the right to a clean and healthy environment. Any aggrieved person can take legal action in response to any pollution or poor disposal of waste. Article 245 points out parliament's legal duty to protect and preserve the environment from abuse, pollution and degradation, and to ensure measures for sustainable development.

In respect to land, article 26 and 237 (2) provides for the right to ownership of property, and land belongs to the citizens of Uganda. The government holds in trust for the people all natural resources for their common good.

Government or local government may acquire compulsory land in public interest with prompt payment of fair and adequate compensation, prior to the taking of possession or acquisition. Article 242 empowers Government to regulate land use.

The constitution therefore, requires the developers in the GKMA to implement the projects without endangering human health and the environment and in accordance with the land acquisition principles where applicable.

b) National Environment Act, Cap 153

The act establishes principles for sound environmental management and provides an institutional framework for environmental management. It establishes the National Environment Management Authority (NEMA) and mandates lead agencies (LA) in sound management of the environment. It also specifies management measures, addresses pollution control and stipulates mechanisms for enforcement of the law. Under Part V on Environmental Regulations, the act elaborates on the environmental impact assessment process for projects listed in the Third Schedule to the act. The process is further elaborated upon in the environmental impact assessment regulations and the environmental impact assessment guidelines in Uganda. The projects listed therein include general projects that feature an activity out of character with its surroundings; any structure of a scale not in keeping with its surroundings; major changes in land use; urban development that includes designation of new townships; establishment of industrial estates; establishment or expansion of recreational areas; and establishment of shopping centres and complexes.

c) Water Act Cap 152

The act provides for the management of water resources in Uganda. Section 5 invests all rights to investigate, control, protect and manage water in Uganda in the government and in section 31 it makes it an offence to pollute or cause the risk of water pollution. Section 6 (1) prohibits any unauthorized construction or the operation of any works in any water and in section 18 such persons should apply to the Directorate of Water Development for a permit to do so. All development activities in the GKMA that may influence water quality and quantity should comply

with the provisions of this act. This act is mainly applicable to projects that require water abstraction, such as road construction, and abstraction permits should be obtained.

d) National Forestry and Tree Planting Act 2003

The National Forest and Tree Planting Act (NFTPA) seeks to provide for the conservation and sustainable management and development of forests for the benefit of the people of Uganda. Section 5 entrusts the government or a local government with the protection of forest reserves. In furtherance of the right to a clean and healthy environment, the NFTPA provides for any person or responsible body to undertake legal action against those whose actions or omissions have had or are likely to have a significant impact on a forest. Section 54 requires NFA in conjunction with other regulatory authorities (e.g. NEMA, UIA, KCCA, DLGs) to control and monitor industrial and mining developments in central forest reserves. Section 38 requires a person intending to undertake a project or activity which may, or is likely to have, a significant impact on a forest to undertake an EIA.

Section 38 requires a person intending to undertake a project or activity which may, or is likely to have a significant impact on a forest to undertake an Environmental Impact Assessment. The Act is relevant since forest produce such as timber are used as construction material in the different development projects in the GKMA

e) Uganda Wildlife Act Cap 200

The act provides for sustainable management of wildlife, to consolidate the law relating to wildlife management and establishes the Uganda Wildlife Authority (UWA) as a coordinating, monitoring and supervisory body for the management of wildlife resources in Uganda.

Section 15 requires any developer desiring to undertake any project which may have a significant effect on any wildlife species or community to undertake EIA in accordance with the NEA. Section 16 allows the Uganda Wildlife Authority to carry out audits and monitoring of projects in accordance with the NEA.

f) Land Act, Cap 227

The Land Act provides for tenure, ownership and management of land. Land is to be used in compliance with relevant national laws, such as those listed in section 43, including the Water Act, Forestry Act and NEA. Environmental legislation should be taken into account in urban developments. Section 44 reiterates the constitutional provision creating a trust over environmentally sensitive areas as stipulated in Article

237 (2) of the Constitution, and prohibits the government or local government from leasing or otherwise alienating any natural resource referred to in this section. In addition, section 70 provides that all rights over the water of natural resources are reserved for the government, and no such water shall be obstructed, dammed, diverted, polluted or otherwise interfered without authorization by the responsible minister. The developers therefore, have to take all the necessary measures not to interfere with water rights under this provision.

Under section 45, use of land must conform to the provisions of the Town and Country Planning Act (now the Physical Planning Act 2010). The act, under section 71, subjects all land to all existing public rights of way reserved and vested in the government on behalf of the public.

Section 42 provides for compulsory land acquisition by the government or local government under the conditions set in the Constitution.

Section 77 stipulates how payment of compensation is assessed. Briefly, the section provides as follows:

- The value of customary land is the open market value of the unimproved land;
- The value of the buildings on the land is taken at open market value for urban areas, and depreciated replacement cost for rural areas;
- The value of standing crops on the land is determined in accordance with the district land board. In addition, a disturbance allowance of either 15 per cent or 30 per cent of the assessed amount, depending on the period given in the notice to vacate, should be paid.

Urban authorities or authorized developers should comply with the above provisions in securing land for development.

g) Land Acquisition Act, Cap 226

The act provides for acquisition and legal proceedings, the former including: power to enter on and examine land, declaration that land is needed for public purpose, land to be marked out, notice to persons having an interest, inquiry and award, taking possession, withdrawal from acquisition. Therefore, KCCA and other development authorities are required to comply with the provisions of this act in the process of land acquisition.

h) Local Governments Act, Cap 243

This act provides for decentralized governance and devolution of central government functions, powers and services to local governments that have own political and administrative set-ups.

Districts have powers to oversee the implementation of development activities

through respective technical and political offices, such as those responsible for water, production, engineering, natural resources and environment, health and community development.

Part 2 of the second schedule of the act states that district councils are responsible for natural resource management, land surveying, land administration, physical planning, forests and wetlands, environment and sanitation, and road services. Thus, the district councils play an important role during the process of acquisition of land for development purposes, and in the sensitization and mobilization of the local communities.

GKMA has five divisions making up Kampala city and extends to Wakiso, Mukono and Mpigi, which should be actively engaged in monitoring, supervising and resolving potential disputes in the development process.

i) Kampala Capital City Authority Act 2011

The act establishes Kampala Capital City Authority, whose functions are, amongst others, to promote economic development in the capital city and to carry out physical planning and development control. Under section 21, the act established a Metropolitan Physical Planning Authority that is responsible for:

- developing a physical development plan for the capital city and the metropolitan areas covering Mukono, Mpigi and Wakiso;
- planning major transport, infrastructure and other utilities in conjunction with relevant bodies;
- planning recreation parks, tree planting, green corridors and other environmental areas.

Under part B of the third schedule of the act, urban councils are responsible for environmental care and protection.

On the social impact aspect, section 22 (6), provides for compensation to be made by the central government where land is required by the authority for public use or public health, including the expansion of roads, constructing new roads, water and sewerage systems, and demolishing buildings to construct new structures, in accordance with article 26 of the Constitution and the Land Acquisition Act.

j) Physical Planning Act 2010

The act regulates the approval of physical development plans and applications for development permission. It requires physical planning committees to ensure integration of social, economic and environmental plans into the physical development plans.

Section 37 requires an applicant for a development permit to acquire an environmental impact assessment certificate in accordance with the National

Environment Act before he or she can be granted full approval to develop. Physical planning committees in the GKMA should comply with the environmental requirements of this act.

k) Investment Code Act, 1991 (Cap 92)

The act sets out the procedure for acquisition of an investment licence and the kind of information to be included therein in Part II of the act. It establishes the Uganda Investment Authority with the mandate to promote, facilitate and supervise investments in Uganda. Section 18 (2) (d) requires the investor to take necessary steps to ensure that the operations of the business enterprise do not cause injury to the ecology or environment.

l) Public Health Act, Cap 281

This act aims at to avoid pollution of environmental resources that support the health and livelihoods of communities.

Section 5 confers every local authority the duty to take prevent the occurrence of, or to deal with, any outbreak or prevalence of any infectious, communicable or preventable disease to safeguard and promote public health. Part IX of the act prohibits the causation of nuisance by any person and empowers local authorities to use lawful and administrative actions against non-compliant persons. Under section 103, local authorities protect water sources to which the public has a right of use and does use for drinking or domestic purposes.

The act is thus relevant to control development activities involving waste disposal, water abstraction, digging of pits, channels that may pollute the environment or which become a nuisance. The GKMA projects should be implemented with the corporation of the local authorities (urban and local councils) which are mandated to safeguard and promote the public health.

m) Historical and Monuments Act, Cap 46

This act provides for the preservation and protection of historical monuments and objects of archaeological, paleo-ontological, ethnographical and traditional interests. Under this act, the minister has wide-ranging powers to protect any of the above objects and, under section 8, no person, whether owner or not, shall cultivate or plough the soil so as to effect to its detriment any object declared to be protected or preserved, and no alteration is permitted on any object declared to be protected or preserved. Under section 11, any person who discovers any object which may reasonably be considered to be a historical monument, or is an object of archaeological, paleo-ontological, ethnographical or traditional interest, is required to report it to the Conservator of Antiquities within 14 days of the discovery.

Environmental Management and Monitoring Plans for development projects should put in place measures for the protection of Physical Cultural Resources (PCRs). The act, however, has limited scope and is outdated (it is under review).

n) Employment Act, 2006

This act is the principal legislation that seeks to harmonize relationships between employees and employers, protect workers' interests and welfare, and safeguard their occupational health and safety through: prohibiting forced labour, discrimination and sexual harassment at workplaces (Part II); providing for labour inspection by the relevant ministry (Part III); stipulating rights and duties in employment (weekly rest, working hours, annual leave, maternity and paternity leaves, sick pay, etc. (Part VI); and continuity of employment, such as continuous service, seasonal employment, etc (Part VIII).

The Employment Act is required to be made known to the developers and contactors or their representatives and adhered to in order to promote a healthy working environment for employees. KCCA and the other urban councils are required to regularly monitor the developers' or contractors' performance and compliance with the requirements.

o) Occupational Safety and Health Act, 2006

The purpose of the act is to improve the working conditions of working people and, in particular, their safety, health and the hygiene of their working environment - to ensure that they work in an environment which is reasonably free from all hazards that can lead to injury and poor health.

In section 13, the act gives the responsibility of protection of the worker and the general environment to the employer and he or she must take all measures to protect workers and the general public from the dangerous aspects of his or her undertaking. In section 18, the employer also has the responsibility of monitoring the environment under the influence of his or her undertaking, while under section 95, the employer is to take all preventive measures, including administrative and technical measures, to prevent or reduce contamination of the working environment to the level of exposure limits specified by the commissioner. Many workers are, however, ignorant of their rights and obligations under the act.

Urban developers or contractors have an obligation to ensure that the right personal protective equipment is provided and effective measures are taken to protect the general working environment.

p) Workers Compensation Act, 2000

This act is closely related to the Occupational Safety and Health Act, and provides for compensation to workers for injuries and diseases suffered in the course of their employment.

Section 28 states that where a medical practitioner grants a certificate that a worker is suffering from a scheduled disease causing disablement, or that the death of a workman was caused by any scheduled disease that was due to the nature of the worker's employment, and was contracted within the 24 months immediately prior to the date of such disablement or death, the worker, or his or her dependants, shall

be entitled to claim and receive compensation under this act.

There are already many complaints of occupational injuries and disease related to people and workers in the different employment sectors in the country and attention has to be drawn to the Workers Compensation Act in implementing the GKMA development projects.

q) Children's Act Cap 59

Section 8 of the act prohibits the employment of children in work that may be harmful to their health, education, mental or moral development. Section 2 defines a child as a person below the age of 18 years. Developers should ensure contractors do not employ children in the project implementation processes.

r) Traffic Act Cap 361

This act seeks to enforce safe use of public roads. For this reason, the act requires that developers of public roads take measures that guarantee the safety of road users during project implementation. These include alternate routing of traffic, diversions, safety signalling and the use of traffic wardens/signallers among other things.

s) Road Act, Cap 358

This act provides for the declaration of road reserves and prohibits any persons from erecting buildings or planting trees or permanent crops within the road reserve, except with the written permission of the road authority. There are a number of development activities in the GKMA that may lie within the standard reserve requirements for roads. Standard road reserve requirements should have preference in any development project as under the law.

t) Access to Roads Act, Cap 350

The Access Roads Act regulates the rights of private landowners who have no reasonable means of access to public highways through adjoining land. The act further provides for payment of compensation to landowners of adjoining land in respect of the use of the land, the destruction of crops, trees and such other property. In essence, road projects in the GKMA should be compliant with law and in consideration of the rights of private landowners.

4.4 Enabling Regulatory Frameworks

a) Environment Impact Assessment Regulations, 1998

The Environmental Impact Assessment Regulations 1998 reinforce the EIA

requirement. Parts I-V describe the procedures to be followed in conducting EIA of projects and the issues to be considered. The regulations also charge the developer with the responsibility of ensuring that the recommendations and mitigation measures outlined in the environmental impact statement are complied with. In this regard, developers in the GKMA have to conduct the EIA in line with national requirements and are supposed to ensure that the recommendations therein are implemented. The guidelines for Environmental Impact Assessment in Uganda, 1997, give detailed processes and procedures for the conduct of ESIAAs.

b) National Environment (Waste Management) Regulations, 1999

These regulations require waste disposal to be done in a way that would not contaminate water, soil and air or impact on public health. This is in relation to onsite storage, haulage and final disposal of waste in the GKMA developments. According to regulation 14, waste haulage and disposal should be done by licenced entities. Regulation 15 requires that a waste treatment plant or disposal site carries out an EIA before a licence is issued. It further requires that an operator of a waste treatment plant or disposal site carry out an annual audit of the environmental performance of the site/plant and submit a report to NEMA. Regulation 17 makes it mandatory for every person who operates a waste treatment plant disposal site to take all necessary steps to prevent pollution from the site or plant, which includes, among other things, instituting mitigation measures.

The relevance of these regulations is to ensure that the waste generated at development sites are managed by a NEMA licensed waste handler and are in compliance with the EIA requirement.

c) National Environment (Standards for Discharge of Effluent into Water or on Land) Regulations, 1999

The standards prescribe the parameters for effluents or waste waters before discharge into water or on land.

Regulation 4 (1) provides the general obligation for every industry or establishment to install, at its premises, anti-pollution equipment for the treatment of effluent chemical discharges emanating from the industry or establishment. All discharges from development activities in the GKMA are required to comply with the standards set out in the schedule of these regulations.

d) National Environment (Wetlands, River Banks, and Lakeshores Management) Regulations, 2000

Regulation 34 provides that a developer of a project which may have a significant impact on a wetland, river bank or lake shore will be required to carry out an EIA in accordance with sections 20, 21 and 22 of the National Environment Act.

The regulations are relevant in as far as the management and protection of the

fragile ecosystems in the GKMA is concerned. Developers or contractors are expected to strictly observe that material stockpiles or the disposal of cut-to-spoil materials are not carried out at stream banks or ancillary facilities constructed in wetlands without the necessary statutory approvals and/or environmental studies.

e) National Environment (Noise Standards and Control) Regulations, 2003

These regulations provide for, among other things, the control of noise and for mitigating measures for the reduction of noise. It provides for the maximum permissible noise levels from a facility or activity to which a person may be exposed. Regulation 6 establishes permissible noise levels and in regulation 8, a facility, premises or machinery owner is obliged to ensure that noise generated does not exceed regulatory limits unless permitted by a licence issued under these regulations.

Most developments such as road works, construction and industrial development, can generate noise beyond permissible levels and need to be controlled. The regulations are critical in establishing the maximum permissible noise levels.

f) National Environment (Audit) Regulations, 2006

The regulations reinforce the requirement to undertake self-environmental audits as contained in the EIA regulations. Normally, under the conditions of approval of NEMA, it is a requirement to undertake audits for projects which comply with the EIA requirement as part of the conditions of EIA approval. Regulation 8 provides that the owner or operator of a facility whose activities are likely to have a significant impact on the environment shall establish an environment management system (EMS). Project implementation should comply with audit and EMS requirements. The Environmental Audit Guidelines for Uganda, 1999, spell out the processes and procedures for the conduct of an environmental audit.

g) National Environment (conduct and certification of environmental practitioners) Regulations (2003)

The regulations set minimum standards and criteria for qualification of EIA practitioners.

The regulations also establish an independent committee of environmental practitioners whose roles includes, among other things, to regulate the certification, registration, practice and conduct of all environmental impact assessors and environmental auditors. The committee also has powers to take disciplinary action as it finds necessary for ensuring the maintenance of high professional standards, ethics and integrity of environmental practitioners in the conduct of EIA and environmental audits

h) National Environment (Management of Ozone

Depleting Substances and Products) Regulations 63/2001.

One of the objectives of these regulations is to promote the use of ozone friendly substances, products, equipment and technology.

i) Water Resources Regulations, 1998

The regulations define procedures of application and regulation of water abstraction permits, which include surface water permits; groundwater permits; drilling permits; construction permits. Under regulation 6, application for a permit may be granted on conditions of projected availability of water in the area, existing and projected quality of water in the area, and any adverse effect which the facility may cause, among other considerations. Most urban development projects require use of water and the developers have to ensure that their activities do not violate this law.

j) Water (waste discharge) Regulations, 1998

These regulations provide for the establishment of standards for effluent or waste before it is discharged into water or on land, prohibitions on the discharge of effluent or waste, and the requirement for waste discharge permits. The permit systems implement the polluter pays principle. Regulation 10 (2) provides for an EIA or restrictions on the use of wetlands prior to the grant of a discharge permit.

k) Water Sewerage Regulations, 1998

The regulations empower the National Water and Sewerage Corporation (NWSC) to issue notices to a landowner requiring him/her to connect land to the sewerage authority's works or to carry out repairs or such other work on any sewer connection, building sewer, or connected fittings that the authority considers necessary. They also require a person erecting any building in a sewerage area to install a building sewer and other connected fittings with the prior consent of the NWSC.

l) Land Regulations, 2004

Regulation 24(1) of the Land Regulations, 2004, states that the District Land Board shall, when compiling and maintaining a list of rates of compensation, take into consideration the following:

- a) Compensation shall not be payable in respect of any crop which is illegally grown;
- b) As much time as possible shall be allowed for the harvest of seasonal crops;
- c) The current market value of the crop and trees in their locality will form the basis of determining compensation;

- d) For buildings of non-permanent nature, replacement cost less depreciation will form the basis of compensation.
- m) Employment of Children Regulations of 2012

The regulations emphasize that a child under the age of 14 years shall not be employed in any business undertaking or workplace, except for light work carried out under the supervision of an adult and where the work does not exceed 14 hours per week.

The regulations also prohibit the employment of a child to do work which is injurious, dangerous, and hazardous or in the worst forms of child labour. Children should not be employed in the development projects as a safeguard of the future and the different authorities in the GKMA should ensure compliance by the developers/contractors.

4.5 Ordinances

The district councils are the highest political authorities and have power under section 38 of the Local Government Act Cap 243 to enact district laws (ordinances) while urban, sub-county division or village councils may in relation to its specified powers and functions make by-laws. Section 8 of the KCCA Act 2010 empowers the KCCA to make ordinances of the authority not inconsistent with the Constitution or any other law made by parliament.

a) Local Governments (Kampala Capital City) (Solid Waste Management) Ordinance 2000

The KCC (Solid Waste Management) Ordinance provides for control, storage, collection, treatment, processing and disposal of solid waste generated within Kampala city; to regulate the development construction, maintenance and operation of such facilities and for connected matters. Paragraph 5 of the ordinance says no person shall place, deposit or allow any solid waste to be placed or deposited on his or her premises or on private property, on a public street, roadside or in gulch, ravine, excavation, or other place where it may be or become a public nuisance. The KCCA ordinance is, however, outdated and should be amended to incorporate sustainability of waste landfills. Developers within the city are required to abide by this ordinance in the deposition of waste associated with their operation.

b) Local Governments (Kampala City Council) (Urban Agriculture) Ordinance, 2006

The ordinance provide for the licensing, control and regulation of urban agriculture and other connected matters. Paragraph 4 prohibits any person from engaging in urban agriculture without an urban agricultural permit issued by the council. Under paragraph 11, the ordinance further prohibits agriculture under certain areas without prior permission obtained from the council. Among such areas are road reserves, wetlands, gazette green belts and parks, and abandoned landfills.

4.6 ESIA guidelines

Some sector specific guidelines have been made to guide the ESIA process in Uganda and relevant to the GKMA developments. These include:

- a) EIA guidelines of 1997: These establish three major phases through which the EIA should be conducted namely; the screening phase, the environmental impact study phase and thirdly, the decision-making phase.
- b) Environmental impact assessment public hearing guidelines of 1999: The guidelines provide the procedure of conducting the hearings in the environmental impact assessment process, especially in seeking questions and answers concerning a project under review; providing for public input in the environmental impact assessment review process and receive submissions and comments from any interested party; finding out the validity of the predictions made in an environmental impact study; and seeking information to assist the executive director to arrive at a fair and just decision, and promote good governance in the environmental impact assessment process.
- c) Environmental impact assessment guidelines for the energy sector 2014: These are in line with the National Environment Act and provide general guidance on how to address environmental management issues in most projects in Uganda's energy sector, including oil and gas. These guidelines emphasize that it is the duty of the developer to conduct an ESIA for a project and further state what should be contained in an ESIA report.
- d) Environmental impact assessment guidelines for water resources-related projects, 2011: These are intended to assist planners, developers, and EIA practitioners on how to play their role in safeguarding water resources through the ESIA process.
- e) Environmental impact assessment guidelines for road projects 2004: The guidelines present procedures for conducting EIAs on road projects where the purpose of each step in the EIA process is clearly described. These procedures basically follow the NEMA guidelines, but some modifications have been introduced which intend to streamline the ESIA process to accommodate the normal road project cycle.
- f) Guidelines for occupational safety and health, including HIV in the health services sector 2008: The overall goal of these guidelines is to provide a framework for the attainment of workplace safety and health for all workers within the health sector. The guidelines seek to provide and maintain a healthy working environment, institutionalize OHS in the work places and contribute towards safeguarding the physical environment.
- g) National physical planning standards and guidelines 2011: The overall aim of physical planning is to achieve orderly, coordinated,

efficient and environmentally sound social and economic development, and to secure the proper use of land and. Its objective is the optimum use of land for agriculture, forestry, industry, human settlements, infrastructure and other competing land uses. They make the following recommendations for buffer zones: buffer distances for lakeshores 200m, for major river banks 100 m, for forests 100m, or the use of physical barriers such as a road is recommended, for minor rivers 30m and for swamps minimum 50m depending on the function. Further regulates in gazetted wetlands and provide projects that require the preparation of EIA to be conducted before implementation as required under NEA.

- h) Environmental audit guidelines for Uganda, 1999
The guidelines reiterate the National Environment Act's requirement for all on-going activities that have or are likely to have a significant impact on the environment to be subjected to an environmental audit. A developer is expected to submit the first environmental audit report to the executive director, NEMA within a period of not less than 12 months and not more than 36 months after the completion of the project or commencement of its operations, whichever is earlier, provided that an

audit may be required sooner if the life of the project is shorter than the aforementioned period. Based on the provisions of the guidelines, KCCA or urban authorities are required to undertake environmental audits for the focus developments for which an environmental study may be undertaken.

- i) EIA guidelines for road sub-sector, 2008
These EIA guidelines outline specific EIA requirements on road projects. They categorize the various road projects and the levels of EIA to be undertaken on road projects. The guidelines therefore provide ESIA requirements for development of road projects in the GKMA.

4.7 International agreements Uganda is a signatory to a number of international agreements which are relevant to supporting the national efforts in environmental management, including the social and economic welfare of communities. Table 4 below outlines some of these agreements/conventions.

Table 4: International and regional conventions that Uganda has signed and ratified and are relevant to the implementation of ESIA

Treaty, Convention, Agreement	Obligations/ key requirements	Year Signed/Ratified	Implications for Uganda as a party and GKMA developments
The RAMSAR Convention 1971	Requires contracting parties to formulate and implement their planning so as to promote the conservation of the wetlands included in the list, and as far as possible the wise use of wetlands in their territory (article 3.1). Requires parties to arrange to be informed at the earliest possible time if the ecological character of any wetland in its territory and included in the list (or wetlands of international importance) if it has changed, is changing or is likely to change as the result of technological developments, pollution or other human interference (article 3.2).	4/3/1988	Ensure the integrity of all the RAMSAR sites that will be affected whether directly or indirectly by development projects. One of the RAMSAR sites in the GKMA is the Lutembe Bay Wetland System in Wakiso District. The system plays an important hydrological role, with the swamps surrounding the Murchison Bay acting as natural filters of wastewaters from industries, and sewage from Kampala city.
The World Heritage Convention, 1972	Parties are required to ensure that effective and active measures are taken for the protection, conservation and presentation of the cultural and natural heritage situated on its territory, each state party to this convention shall endeavour, in so far as possible, and as appropriate for each country (art. 5). Effective measures to be taken include an assessment of the feasible project alternatives to prevent or minimize or compensate for adverse impacts and assess the nature and extent of potential impacts on these resources, and designing and implementing mitigation plans.	20/11/1987	Ensure comprehensive protection of heritage sites in the urban development undertakings. Some of the world heritage sites in GKMA include the Kasubi Tombs, Namugongo Martyrs' Shrine, and Bahai Temple.
The Montreal Protocol, 1987	The Montreal Protocol on Substances that Deplete the Ozone Layer requires parties to: (a) comply with the ozone-depleting substances (ODS) freeze and phase-out; (b) Ban ODS trade with non-parties to the protocol	15/9/1988	Ensure that emissions are minimized during urban development.

The Basel Convention, 1989	The objective is to protect human health and the environment against the adverse effects of hazardous wastes. Its scope of application covers a wide range of waste defined as "hazardous waste" based on their origin and/or composition and their characteristics (article 1 and annexes I, III, VIII and IX).	11/3/1999 (Date of accession)	Ensure that the waste generated during the project development is categorized into hazardous and non-hazardous waste and disposed of in the most appropriate manner.
The Convention on Biological Diversity 1992	Its objectives are to conserve biological diversity, promote the sustainable use of its components and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources, including by appropriate access to genetic resources and by appropriate transfer of relevant technologies, taking into account all rights over those resources and technologies, and by appropriate funding (Article 1). Requires state parties to introduce procedures that require impact assessments of proposed projects likely to have significant adverse impacts on biodiversity (art. 14 (1) (a)).	12/6/1992 & 8/9/1993	Parties to this convention are required to undertake an EIA for projects likely to have significant adverse effects on biodiversity and develop national plans and programmes for conservation and sustainable use of biodiversity.
The United Nations Framework Convention on Climate Change, 1992	Requires parties to avoid adverse effects on the environment and adopt measures and policies to control carbon dioxide emissions in technologies (article 4 f).	13/6/1992 & 8/9/1993	Implementation of the proposed developments should ensure reduction of greenhouse emissions via regular servicing of equipment.
The United Nations Convention to Combat Desertification, 1992	Requires parties to take climate change considerations into account, to the extent feasible, in their relevant social, economic and environmental policies and actions, and employ appropriate methods, for example impact assessments, formulated and determined nationally, with a view to minimizing adverse effects on the economy, on public health and on the quality of the environment, of projects or measures undertaken by them to mitigate or adapt to climate change (article 4).	15/6/1997	ESIA should minimize all negative impacts of climate change.
The Rotterdam Convention on Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade 1998	The convention promotes shared responsibility between exporting and importing countries in protecting human health and the environments from the harmful effects of certain chemicals and provides for the exchange of information about potentially hazardous chemicals that may be exported and imported.	18/8/2008	Promote shared responsibility and cooperative efforts among parties in the international trade of certain hazardous chemicals in order to protect human health and the environment from potential harm.
The Stockholm Convention, 2004	The Stockholm Convention is a global treaty to protect human health and the environment from persistent organic pollutants (POPs). It focuses on eliminating or reducing releases of 12 POPs including: Aldrin, Chlordane, DDT, Dieldrin, Dioxins, Endrin, Furans, Hexachlorobenzene, Heptachlor, Mirex, PCBs and Toxaphene.	18/10/2004	With respect to the GKMA, developments such as roadworks, POPs would arise from open air combustion of waste and should therefore be avoided.
The Convention for the Safeguarding of the Intangible Cultural Heritage, 2003	The objectives include: to safeguard the intangible cultural heritage; ensure respect for the intangible cultural heritage of the communities, groups and individuals concerned and raise awareness at the local, national and international levels of the importance of the intangible cultural heritage, and of ensuring mutual appreciation thereof.	13/05/2009	The proposed developments should ensure greater respect and awareness of the intangible values through consultation with community and taking into account their views.

Regional Agreements

Treaty, Convention, Agreement	Obligations/key requirements	Year Signed/Ratified	Implications for Uganda as a party and GKMA developments
The African Convention on the Conservation of Nature and Natural Resources, 1968	The contracting states to this convention are required to undertake and to adopt measures to ensure conservation, utilization and development of soil, water, flora and fauna resources in accordance with scientific principles and with due regard to the best interests of the people. The contracting states to this convention are also required to ensure that conservation and management of natural resources are treated as an integral part of national and/or regional development plans.	1968	During the formulation of all development plans, by KCCA and urban authorities, full consideration should be given to ecological, as well as economic and social factors.

The Agreement on the Conservation of African-Eurasian Migratory Water Birds (AEWA), 1995	<p>The agreement provides for coordinated and concerted actions to be taken by the range states throughout the migration systems of the water birds to which it applies.</p> <p>It also requires them to investigate problems that are posed or are likely to be posed by human activities and endeavour to implement remedial measures, including habitat rehabilitation and restoration, and compensatory measures for loss of habitat.</p>	12/2000	<p>Ensure that any impacts on migratory birds are mitigated.</p> <p>Lutembe Bay, an 8 km² site between Kampala and Entebbe alongside Murchison Bay, is an internationally recognized Birdlife International Important Bird Area and RAMSAR Convention wetland.</p>
The Bamako Convention 1990	<p>Requires party states to use legal, administrative and other measures to prevent the import of hazardous waste into Africa from non-contracting parties. Import of hazardous waste from non-contracting parties is an illegal and criminal act (art 4.1).</p> <p>Each party is required to ensure that environmentally sound treatment and disposal facilities for hazardous wastes are located, to the extent possible, within its jurisdiction.</p> <p>Each Party is required to ensure that persons managing hazardous wastes take all actions necessary to prevent pollution arising from the management of such wastes and to minimize the impacts of such waste in the event of pollution occurring (Art 4.3)</p>	1/10/1998	Ensure that all the hazardous waste generated from the project activities are managed in line with the requirements of the convention.
EAC Treaty 1999	Article 112(2a) commits partner states to develop capabilities and measures to undertake EIA of all development project activities and programmes.		Ensure that EIA is undertaken for all development projects activities and programmes in the GKMA in line with the NEA and EIA regulations.
The Protocol on Environment and Natural Resources Management, 2006	Art. 31 requires the partner states shall at an early stage plan for trans-boundary activities and projects that may have significant adverse environmental impacts, the partner states shall, at an early stage, undertake a comprehensive assessment of the impacts with regard to their own territories and the territories of other partner states.	2010	Effective communication should be made to partner states prior to commencement of development projects that may have impact on the Lake Victoria which is a transboundary resource.

Soft Law Principles

Soft Law Instrument	Obligations/Key Requirements	Implications for Uganda and GKMA developments
The Stockholm Declaration 1972	Requires that the discharge of toxic substances or of other substances and the release of heat in such quantities or concentrations as to exceed the capacity of the environment to render them harmless, must be halted in order to ensure that serious or irreversible damage is not inflicted.	The requirement is incorporated into the NEA and regulations and developers/authorities are bound to abide and enforce
The UNEP Principle on Shared Natural Resources, 1978	Principle 4 requires states to undertake EIA for projects or activities that have trans-boundary impacts.	This is not yet incorporated in the legal framework, however prior notice should be made to the riparian states
The Rio Declaration 1992	Principle 17 requires states to undertake an EIA for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent national authority.	The requirement exists in the NEA and EIA regulations and the procedures in the EIA guidelines should be followed.
Sustainable Development Goals 2015	Requires ensuring availability and sustainable management of water and sanitation for all, conserving and sustainably using the oceans, seas and marine resources for sustainable development and protecting, restoring and promoting sustainable use of terrestrial ecosystems sustainably managing forests, combating desertification, and halting and reversing land degradation and halting biodiversity loss.	This is contained in National Water Policy & Water Act, National Environment Policy & NEA. need to be observed by the developers.

5. INSTITUTIONAL AND ADMINISTRATIVE FRAMEWORK FOR ESIA IMPLEMENTATION IN THE GKMA URBAN DEVELOPMENT

5.1 Introduction

There are key institutional actors in both the national- and urban-level agencies with a mandate to implement the process of ESIA in GKMA urban development. They are assessed below:

a) Ministry of Water & Environment (MWE)

MWE is responsible for setting national policies and standards, managing and regulating water resources and determining priorities for water development and management. It also monitors and evaluates sector development programmes to keep track of their performance, efficiency and effectiveness in service delivery. The ministry has three directorates: water resources management, water development and environmental affairs.

The Directorate of Water Resources Management processes permits to regulate the abstraction of water using motorized pumps and canals; discharging wastewater in the environment; drilling for water; construction of dams and also reviews EIAs reports related to water resources. The Directorate of Environmental Affairs through the Wetland Management Department is mandated to manage wetlands and ensure wise use and handling of wetlands for the projects in GKMA.

b) Ministry of Lands, Housing & Urban Development (MLHUD)

MLHUD is responsible for providing policy direction, national standards and the coordination of all matters concerning lands, housing and urban development for the country. It guides and directs policy, legal aspects and sets the regulatory agenda on land, housing and urban development to ensure sustainable land management promotes sustainable housing for all and fosters orderly urban development in the country. Within the ministry, there are three directorates and multiple departments. The Directorate of Land Management has three departments: the Department of Land Registration, Department of Land Administration, Department of Surveys and Mapping. It also has a Land Sector Reform Coordination Unit.

The Directorate of Physical Planning and Urban Development comprises of the Department of Physical Planning, the Department of Urban Development and the Department of Land Use Regulations and Compliance.

The Directorate of Housing is responsible for ensuring that there is orderly,

progressive and sustainable urban and rural development in the country.

The Land Act, Cap 227, mandates the district land boards (DLBs) to review the lists of rates of valuation of properties and or compensation annually. The chief government valuer is responsible for approving district compensation rates.

The CGV also approves the valuation methodology and the final valuation report usually contained in resettlement action plans (RAP). The Department of Urban Planning is responsible for structure plans in cities and towns hence the mandate over the GKMA and the RAPs of projects should be approved by the CGV before implementation/ payment of project-affected persons (PAPs).

c) Ministry of Works, and Transport

This is the lead ministry under which UNRA falls and operates through its environment liaison unit which is responsible for conducting and monitoring ESIA in road-related projects in the GKMA.

d) Ministry of Gender Labour & Social Development

The ministry is enjoined to operationalize Chapter 4 of the Constitution (Articles 31-42), which focuses on affirmative action and the promotion of fundamental human rights of the people of Uganda. The Department of Occupational Safety and Health in this ministry is responsible for the inspection of the quality of the workplace environment to safeguard occupational safety, rights of workers and gender equity.

Developers/contractors should ensure safe working environment for the workers, through provision of PPE, adequately equipped first-aid kits, fire safety apparatus, training on the use of equipment as well as other emergency response mechanism and health schemes as required.

e) Ministry of Tourism, Wildlife and Antiquities

Where cultural or heritage sites are to be affected by proposed urban developments, this institution is responsible for any chance finds that could be encountered by project activities. The Department of Museums and Monuments under this ministry is directly responsible as a lead agency for artefacts, antiquities and monuments encountered within the project areas. The department should always give a technical input in ESIA studies for the management of PCRs.

f) National Environmental Management Authority (NEMA)

NEMA is the principal agency in Uganda on matters of environment management. It is empowered by the National Environment Act to manage, coordinate and supervise all activities in the field of environment. NEMA is responsible for undertaking enforcement, compliance, review, approval and monitoring of the ESIA through

its Department of Environment Monitoring and Compliance. The department is also responsible for recommending the preparation and issuance of ESIA certificates and also implements a follow up programme to ensure that mitigation measures as contained in the EIAs and approval conditions stated in the certificates of approval are implemented.

NEMA and the District Environment Offices ensure environmental compliance and regulate activities that affect the environment for the GKMA projects during and after the works.

g) National Forestry Authority (NFA)

NFA is responsible for sustainable management of central forest reserves (CFRs), supply of seed and seedlings, and provision of technical support to stakeholders in the forestry sub-sector on contract. NFA is required to co-operate and co-ordinate with NEMA and other lead agencies in the management of Uganda's forest resources. NFA, in conjunction with KCCA, UIA, UWA and other regulatory authorities, should control and monitor industrial, infrastructural, mining developments and tourist facilities in CFRs in the GKMA.

h) Uganda Wildlife Authority (UWA)

UWA is mandated under the Uganda wildlife Act Cap 200 to ensure sustainable management of wildlife resources and supervise wildlife activities in Uganda both within and outside the protected areas. UWA should ensure developers desiring to undertake any project, which may have a significant effect on any wildlife species, or community in the GKMA, to undertake an ESIA in accordance with the National Environment Act. UWA in conjunction with should also carry out audits and monitoring of the projects in accordance with the NEA.

i) Uganda National Roads Authority (UNRA)

UNRA is established by the Uganda National Roads Authority Act, 2006. Its functions include management, maintenance and development of the national roads network and maintenance. It is a key institution for conducting the ESIA for major road projects in the GKMA, ensuring the implementation of mitigation measures and undertaking monitoring of the roadworks during construction and post construction.

j) Uganda Investment Authority

The Uganda Investment Authority (UIA) has the mandate to promote, facilitate and supervise investments in Uganda. UIA issues investment licences and provides aftercare services to all domestic and foreign investors. Where an investor is in breach of any environmental terms or condition of his or her investment licence, the UIA with approval of the Minister of Trade, Industry and Cooperatives can revoke the licence.

k) Local governments

Local governments are governed by the Local Government Act Cap 243 and have powers to oversee the implementation of development activities through respective technical and political offices, such as those responsible for water, production, engineering, natural resources and physical planning, environment, health and community development. They are responsible for ensuring that an ESIA is done for development activities under their jurisdiction, as well as carrying out a review for EIAs of such projects. This responsibility also includes carrying out inspections related to the environment and implementation of the ESIA requirements.

Local governments have under them district/local environment committees, district land boards (DLBs) and physical planning committees (PPCs). The local environment committees are the implementing organs in conservation and management of wetland and environment resource. The DLBs are responsible for land allocation at local government level and they set compensation rates for crops and structures. The PPCs plan, approve and oversee orderly progressive development of land in district.

The divisions of Kampala (Nakawa, Makindye), Kawempe, Lubaga and the Central Division, Entebbe Municipal, Wakiso, Mukono, Mpigi should be in position to ensure ESIA compliance and implementation for projects within their jurisdiction.

l) Kampala Capital City Authority (KCCA)

KCCA is established under the KCCA Act, 2010 and it is specifically obliged to plan, implement and monitor the delivery of public services, and guide city development. The KCCA Directorate of Engineering and Technical Services (DE&TS) is responsible for the planning, design and construction of all physical infrastructures. The Public Health and Environment Directorate (PH&ED) guides the authority on the efficient management of public health and the environment. The PH&ED has a department of environmental management headed by a manager under whom are five environmental management supervisors and five environmental officers. KCCA plays a key role in supervision and monitoring of project implementation processes at the authority and division levels. The Director of Gender and Community Services has a RAP team comprising of a social development/RAP specialist, and two sociologists. The environmental and social specialists and the community development officers at the divisions are the main actors for ESIA implementation in the authority.

m) Developers/development partners

According to the Uganda EIA legislation and guidelines, an EIA shall be undertaken by the developer, and the costs associated with the conduct of the assessment shall be borne by the developer. Such costs shall include, among other things, costs for the conduct of environmental impact studies, preparation and production of the EIS. There are several development partners in Uganda and Kampala in particular that should be engaged in the ESIA reviews: the African Development Bank (AfDB), Agency Française de Développement (AFD), Canadian International Development Agency, GIZ, Japan International Cooperation Agency (JICA), United States Agency

for International Development (USAID), International Finance Corporation (IFC), the Norwegian Agency for Development Cooperation (Norad) among others, that fund GMKA developments.

n) Lead agencies

The role of NEMA in the implementation of an EIA as stated earlier does not relieve the relevant line ministries, sectoral departments and other public and private institutions from the primary duty of ensuring that an EIA is done for projects and development activities under their jurisdiction, in accordance with their respective sectoral policies, and within the framework of cross-sectoral participation required for environmental impact assessments.

Each lead agency is primarily responsible for ensuring that an EIA is done for development activities under their jurisdiction, as well as carrying out reviews for EIAs of such projects. This responsibility also includes carrying out inspections related to the environment and implementation of the EIA requirements. Where the review of any one EIA requires the holding of a public hearing, the responsible lead agency shall take the lead in co-coordinating and executing a hearing in accordance with the guidelines that have been prepared by NEMA.

o) Public and civil society

The role of the public and civil society is recognized in the Uganda EIA process and includes advocacy and the provision of relevant information during the various stages of the EIA process, including EIA study and review stages. The Environment Act also provides for possible public intervention in cases where development is carried out without fulfilling the EIA requirement. Organizations like USAID have been active in EIA and funded Uganda conserve biodiversity for sustainable development (COBS) Support Project (completed in 2002) that resulted in the production of an EIA manual for public officials, and an EIA guideline for the wildlife sector. The NGO Greenwatch produced a guide to EIAs in Uganda in 2001.

p) Professional bodies

- Uganda Association for Impact Assessment: professionals involved in EIA need to be a member of this association. Administration and certification of EIA consultants is provided by an independent committee on registration of environmental practitioners. This committee has its secretariat within NEMA.
- Eastern Africa Association of Impact Assessment (EAAIA) was formed to enable the region to establish a well-managed database that acts as: a source of EA information, a mechanism for exchange and sharing of

knowledge, information and experience on EA policies and practice; and support maximization on the use of available resources in the region. Uganda is a member.

- East African Network for Environmental Compliance and Enforcement (EANECE): Regional network of governmental agencies which have in their mandate environmental management, compliance and enforcement responsibilities in the East African nations of Kenya, Uganda, Tanzania, Rwanda and Burundi.

6. ESIA EXPERIENCE IN URBAN DEVELOPMENT PROJECTS IN THE GKMA

6.1 Introduction

Section 19 of the National Environment Act requires that an environmental impact assessment shall be undertaken by the developer where the lead agency, in consultation with the executive director, is of the view that the project may have an impact on the environment or is likely to have a significant impact on the environment or will have a significant impact on the environment. The third schedule of the act requires that the following projects in urban areas shall be considered for environmental impact assessment. The general projects include an activity out of character with its surroundings, any structure of a scale not in keeping with its surroundings and major changes in land use. Urban development projects include the designation of new townships; establishment of industrial estates; establishment or expansion of recreational areas; establishment or expansion of recreational townships in mountain areas, national parks and game reserves, and shopping centres and complexes. The transport projects include all major roads, all roads in scenic, wooded or mountainous areas; railway lines; airports and airfields; pipelines and water transport, waste disposal, including sites for solid waste disposal, sites for hazardous waste disposal, sewage disposal works, major atmospheric emissions and offensive odours.

There are several projects that have been developed in the GKMA that have undergone ESIA.³ Some selected ones are reviewed below:

6.2 Projects that impact on land resources

Developments on land lead to loss of plant species and communities. Direct impacts result from disturbances that cause changes in temperature, light, moisture and nutrient levels; removal activities (e.g. clear cutting, bulldozing); impacts resulting from air and water pollution (e.g. turbidity, eutrophication). Indirect impacts result from changes in natural community processes (e.g. fire) or invasion of non-native

³ The details of the projects are provided in Annex 1.

plant species. Loss of plant communities also results in decreased water quality (e.g. loss of filter function associated with plant communities), increased erosion as a result of unstable soil, nutrient imbalances in the soil, and/or compaction of soil.

Construction activities also cause soil erosion. Soil erosion is a problem both at its source and downstream of the development site. Lost soil will be deposited somewhere and the location of the deposition could alter downstream hydrology and increase flooding. It may also pose a water quality issue directly as a result of siltation and indirectly from contaminants carried with or attached to soil particles.

Loss of other natural resources affect the quality of water supply, clean air, forests, mineral resources, wetlands, farmland, game species, rare species and recreation opportunities, and can impact a community's ability to sustain itself over the long term.

Project I - Extension of Mpererwe Sanitary Landfill Project (2008)

Under this project, KCC extended the landfill located at Mpererwe, about 15 km north of central Kampala along Kampala-Gayaza Road. The sanitary landfill had been opened in 1996 and required extension for increased efficiency in waste management.

Solid waste disposal projects are third schedule projects under the NEA, paragraph 12, and an ESIA is required to be undertaken by the developer.

KCC conducted an ESIA and identified several long-term project impacts on the land resources. The impacts were on the local planning scheme, surrounding land use, on-site contamination, reduced options for future uses of the site, tenure of the selected site was affected and reduced property value in the surrounding area.

6.3 Projects that impact on water resources

Changes in surface hydrology alter the flow of water through the landscape. Construction of impervious surfaces, such as parking lots, roads and buildings, increase the volume and rate of runoff, resulting in habitat destruction, increased pollutant loads and flooding. Built or paved areas and changes in the shape of the land also influence groundwater hydrology (i.e. recharge rates, flow, conditions). Development activities, such as construction, industrial or residential development, and the spill over effects of development, such as increased demand for drinking water and increased auto use, can impact water quality by contributing sediment, nutrients and other pollutants to limited water supplies, which may increase the temperature of the water and the rate and volume of runoff.

Development projects also affect aquatic species and communities. Changes in surface hydrology and water quality can have adverse impacts on species such as fish, plants, and microbes. Increased turbidity, temperature, velocity of flow and pollutant loads can have direct impacts on the species and their habitat.

Project II - Kampala Industrial Business Park (KIBP) at Namanve (2008)

Approximately 1,006 ha of Namanve CFR were de-gazetted by government in 1996 and placed under UIA for the development of a modern industrial and business park. The industrial park is located 11 km east of Kampala, 4.5 km west of Mukono District administrative headquarters and Mukono town. It straddles both Wakiso and Mukono districts. The Namanve River crosses KIBP from north to south.

Urban development, including industrial estates are third schedule projects under the NEA, paragraph 2, and an ESIA is required to be undertaken by the developer.

UIA conducted an ESIA study through GIBB (East Africa) Ltd and identified several impacts on surface and groundwater. Among the impacts were pollution of the streams in the area and the river by industrial effluent, and contamination of the aquifer by the construction of pit latrines.

6.4 Projects that impact on wetlands

The wetlands provide a habitat for several different species of plants and animals and their depletion greatly affects populations of different species, including animals and plants. Wetlands provide a winter home and a resting-place to many millions of migratory birds. These and many other species of birds migrate to tropical African wetlands during the winter season in Europe. The crested crane, Uganda's national bird, breeds exclusively in seasonal grass wetlands.

Project III - Kampala Sanitation Project - NWSC Faecal Sludge Treatment Plant in Lubigi Wetland (2014)

The project involved the construction of a faecal sludge treatment plant in Lubigi Wetland by NWSC under AfDB funding to achieve a total of 53,000 m³/day of sewage treatment and 500 m³/day of sludge treatment.

Waste disposal plants, including sewage disposal works, are third schedule projects under the NEA, paragraph 12. For projects listed in this schedule, an ESIA is required to be undertaken by the developer.

An ESIA study was undertaken and among the negative impacts identified was the permanent loss of some part of the wetlands in Kampala totalling approximately 6.5 ha of Lubigi Wetland.

Project IV - Golf Course Project: Construction of a Hotel in a Wetland

Court case of Greenwatch & Advocates Coalition for Development and Environment (ACODE) v Golf Course Holdings Ltd (HC Misc. Application No 390/2001). In this case, the applicant NGOs concerned with environmental protection sought a temporary injunction to restrain the respondent from constructing a hotel on a

wetland. Akiiki Kiiza J, although he declined to issue the injunction, recognized that the interest of the applicants was of a public nature and that section 72 (now section 71) of the National Environment Management Act gave them a right to sue.

6.5 Projects that impact on wildlife resources

Development activities may also cause a loss of wildlife and wildlife habitat. Wildlife habitat may be impacted both from direct and indirect activities associated with development. Alteration, fragmentation or destruction of wildlife habitat can result in the direct loss or displacement of species and the ability of the ecosystem to support other biological resources such as the plant communities upon which the wildlife relied for survival.

Project V - Kampala Industrial Business Park (KIBP) at Namanve (2008)

The industrial park development in the GKMA was established at Namanve CFR that was a habitat to various plant and animal species. It was made up of a swamp and a closed forest with plant species of conservation interest. A total of 20 bird species were regionally threatened, and 14 amphibian species comprising of 3 families were recorded in the project area.

Urban development, including industrial estates, are third schedule projects under the NEA, paragraph 2, and an ESIA is required to be undertaken by the developer.

UIA conducted an ESIA study through GIBB (East Africa) Ltd and identified negative impacts on floral and faunal habitats which were destroyed, and the loss of plant species whose habitat and food chains were destroyed.

6.6 Projects that impact on forestry resources

Forestry makes a crucial contribution to the ecology and energy needs of Uganda. Uganda's forest resources are an essential foundation for the country's current and future livelihood and growth. Uganda lost 27 per cent (1,329,570 hectares in total or 88,638 hectares per year) of its original forest cover between 1990 and 2005. The forest loss in the GKMA is due to industrial development, road construction and illegal settlements.

Project VI - Standard Gauge Railway Project (2017)

The GoU through the Ministry of Works and Transport is spearheading the development of the standard gauge railway (SGR) network. The SGR Project is being implemented over five years as a regional development in partnership with Kenya, Rwanda and South Sudan. The network will provide a modern, fast, reliable, efficient and high capacity railway transport system as a seamless single railway operation.

Transport projects, including railway lines, are third schedule projects under the NEA, paragraph 3, and an ESIA is required to be undertaken by the developer.

The project will affect the Namanve Central forest reserve and the attendant wetlands. To pave way for the SGR Project, in January 2017, the MLHUD cancelled several land titles which it said had been illegally acquired in the forest reserve.⁴

6.7 Projects that impact on air resources

Air pollution has direct and potentially hazardous impacts on human health. Air pollution includes two types: gas emissions and particulate emissions, for example from activities of oil exploration and production. Non-hazardous but undesirable air pollution includes odours produced from some manufacturers and restaurants, etc.

Air is also affected by noise pollution which can have a significant impact on both human health and the quality of life of a community. Such pollution is most commonly associated with airports, highway and interstate traffic, large industrial facilities and high volumes of truck and car traffic on city streets.

Project VII- The Greater Kampala Roads Improvement Project (GKRIP) - March 2014

The GKRIP covered the congested section from off the Clock Tower Roundabout to off the Hotel Africana Roundabout along Queensway (3.2km) as well as the extended section from Kibuye Round about to Jinja Road after the cemetery. It was undertaken to decongest the centre of Kampala city as well as the congested roundabouts located along the congested section of the project road.

Transport projects, including all major roads, are third schedule projects under the NEA, paragraph 3, and an ESIA is required to be undertaken by the developer.

ESIA was undertaken by UNRA and identified a deterioration in air quality due to increased traffic volume and the movement of construction equipment, construction activities (extraction, transport and stockpiling of materials, excavation, compaction etc.), and the generation of dust and air pollution by emissions from equipment and vehicle exhausts.

Table 3: General environmental impacts

ITEM /ENVIRONMENTAL COMPONENT	ENVIRONMENTAL IMPACT
1. Land resources	<ul style="list-style-type: none"> • Soil erosion/damage due to survey activities, vehicle tracks and other excavation and drilling • Soil contamination from drilling, mud, oil and diesel spills from survey vehicles and other equipment. • Soil compaction, loss of soil productivity, dust generation as a result of vehicle movement • Aesthetic and amenity values impact, especially for such a pristine area • At some stages, and depending on the encountered underlying rock, use of explosives and detonators might be necessary; in that case impact related to noise, risk of injury (to both animals and humans). • Disturbance/loss of heritage resources (sites and artefacts). (Impact on or loss of any heritage sites) • Conflict with adopted environmental plans and goals of community where located • Disrupt or divide physical arrangement of an established community • Conflict with established recreational, educational, religious or scientific uses of the area • Conflict with existing land-use policies • Result in a substantial alteration of the present or planned land use of an area • Conflict with local general plans, community plans or zoning • Result in the conversion of open space into urban or sub-urban scale uses • Convert prime agricultural land to non-agricultural use or impair the productivity of prime agricultural land • Expose people, structures or properties to major geological hazards e.g. earthquakes, • Result in unstable conditions or changes in geological sub-structure • Result in changes in deposition or erosion or changes which modify the channel of a river stream or the bed of any bay, inlet or lake • Cause substantial flooding, erosion or siltation • Loss of soil fertility due to improperly planned re-settlement of people from the site
2. Water Resources	
Surface Water	<ul style="list-style-type: none"> • Stream/surface water flow disruption caused by access roads and drilling areas (changes in surface flow direction, erosion) • Water consumption • Local siltation of surface water due to poorly constructed access tracks • Stream flow disruption caused by access roads and tracks • Local siltation of rivers due to poorly constructed access tracks • Water pollution from fuel spillage and waste disposal • Modification in river flow, especially with water releases affecting: ecology, fishing, water supply, irrigation and livestock watering, channel scouring and erosion etc. • Growth of nuisance algal blooms (including toxic blue-green algae) due to eutrophication (nutrient enrichment)
Groundwater Resources	<ul style="list-style-type: none"> • The groundwater could become polluted as a result of pit latrines and poor waste disposal practices • Local lowering of water table levels due to abstraction of groundwater for camp use • Modification of groundwater, such as water table levels, which could impact on ground stability, agricultural practices, water logging and salination of soils, ecosystem functioning etc.

⁴ <https://ugandamediacentreblog.wordpress.com/2017/01/20/cancellation-of-land-titles-falling-within-bukasa-and-namarve-central-forest-reserve-and-the-surrounding-wetland-sgr/>

- 3. Forestry
 - Disturbance or loss of protected/endangered plant species or communities (terrestrial, wetland, aquatic) due to survey activities
 - Introduction of problematic invasive/alien plants to site due to ground disturbance
 - Deforestation and climate change
 - Loss of biomass
 - Illegal felling of trees for firewood and the illegal collection of plant specimens

4. Wildlife resources

- Local siltation of surface water due to poorly constructed access tracks, and drilling soil waste could affect key aquatic habitats

5. Air quality

- Dust from vehicle movements, drilling.
- Fumes from drilling equipment, generators, vehicles
- Smoke from burning of cleared vegetation
- General nuisance such as noise and dust
- Violate ambient air quality standards
- Result in substantial air emissions or deterioration of ambient air, e.g. suspended dust
- Create objectionable odours
- Alter air movement, moisture or temperature or result in any change in climate either locally or regional
- Provide toxic air contaminant (TAC) emissions that exceed air pollution control threshold for health risk
- Hamper visibility
- Noise generated by survey activities, especially drilling, geophysical work and vehicles

6. Wetland Resources

- Loss of vegetation and micro-habitats
- Increase in illegal harvesting of wetland resources
- Alteration of riparian lands, wetlands, marshes or other wildlife habitats
- Pollution of wetland ecosystems

6.8 Social issues and potential impacts of urban development in the GKMA

Development projects provide new opportunities for socio-economic development to people through the creation of employment opportunities and an increase in the availability of goods and services. There are however, increased levels of deprivation, especially among vulnerable social, economic and political groups. The loss of private assets resulting in loss of income and displacement makes ESIA an important input in project design while initiating and implementing developmental interventions. An understanding of the issues related to social, economic and cultural factors of the affected people is critical in the formulation of an appropriate rehabilitation plan. ESIA also helps in enhancing the project benefits for poor and vulnerable people while minimizing or mitigating concerns, risks and adverse impacts.

a) Land acquisition and resettlement

There are displacement concerns related to urbanization. Developments cause people to lose their homes and their means of making a living. Large-scale

developments, such as road works, are the main cause of the forced displacement of people in the GKMA. This has resulted in vulnerability, a change in settlement patterns and land conflicts. Developers should prepare resettlement action plans (RAP) in consultation with the affected people and project authorities. Rightful landowners should be adequately compensated. However, compensation has been delayed after land acquisition for several projects.

Project VII – New Entebbe Express Highway (2016)

The highway starts on Masaka Road at the Busega – Mityana roundabout on the northern bypass and passes through Kabojja, Kasanje, Kinaawa and Kazinga among other villages on its way to join Entebbe Highway at Mpala. Another 14 km spur will connect Munyonyo to the Kampala - Entebbe Highway at Lweza as part of the project. The government earmarked UGX 100 billion to compensate people in 15 villages who will be displaced by the new Entebbe Highway.

b) Occupational health and safety

Urbanization has created employment opportunities in which the occupational health and safety of labourers is at risk, especially in industrial and construction works. They may either contract occupational diseases or sustain injuries in some work activities. In the GKMA, workers continue to face several hazards in their workplaces, such as not wearing necessary protective equipment, working overtime, work-related pressures and working in multiple facilities. The Occupational Safety and Health Act 2006 is not effectively implemented and interventions should be instituted to mitigate the hazards in the urbanization process.

c) Gender and marginalized people

Urbanization comes with gender-based inequalities and marginalization which limit livelihood opportunities, and exacerbate poverty and other livelihood limitations disproportionately for some social groups (women) more than others (men). ESIA should consider measures to have equal opportunities for all social groups. The gender element in ESIA during project preparation, execution and operation refers to the identification and analysis of the different ways in which men and women are affected by the proposed project activities, the different ways that men and women are engaged, respond to and cope with project-induced impacts or changes, and the differences in how women and men can meaningfully contribute to the design of mitigation measures such as the RAP and their implementation.

d) Physical and cultural resources

Physical cultural resources are the items, sites, architecture, architectural complex, natural sceneries and landscapes that have archaeological, historical, religious, cultural and aesthetic values or unique natural values. In the site-selection and design of projects, significant damage to physical cultural resources should be avoided. One part of the ESIA should be to determine whether a project will affect physical cultural resources and the ESIA should comply with relevant provisions. Major stakeholders with heritage interests in the GKMA include the Uganda Museum, Uganda Wildlife Authority, Buganda Kingdom, traditional practitioners, district and local leaders.

Project IX - Upgrading for the Greater Kampala Roads Improvement Project (GKRIP) – 2014

In the ESIA study, a search for potential PCR was done along the proposed alignment based on documented sources with Department of Museums and Monuments. The clock tower and other important monuments were considered for preservation.

7. CHALLENGES OF ESIA REVIEWS IN THE GKMA

7.1 Introduction

Environmental and social impacts in the GKMA are linked to dense population patterns, rapid urbanization and infrastructural development which has led to mass solid waste, abattoir waste, sewage, sanitation, drainage, industrial pollution, traffic pollution and atmospheric pollution. As environmentally sensitive areas such as wetlands degrade due to squatter settlements, rich people reclaim them for industrial activity. Poor waste management has resulted in the pollution of water sources. ESIA are reviewed but seem to be ineffective environmental regulations. Legal, institutional and general challenges affect environmental reviews.

7.2 Legal, regulatory and institutional challenges

Weak regulatory framework

The legal and policy framework provides requirements and standards, but different government agencies may act in way that are contrary to the guidelines and principles. For example, occasionally the Land Commission has leased wetlands or the MLHUD has given land titles to wetlands. This may be, in part, due to the absence of clear demarcation of wetland boundaries (not all wetland areas are surveyed/accurately mapped) and/or a comprehensive wetlands inventory, or the insufficient integration with development-related plans and databases (e.g land-use plans and land titling databases).

Overlapping legal and institutional mandates

There is an overlapping legal mandate between institutions. The KCCA also has a function to “enact legislation for the proper management of the capital city” and its Metropolitan Physical Planning Authority has the responsibility and power to “veto physical plans or activities inconsistent with the Metropolitan Authority Development Plan or land-use policy”, and to “ensure that the land use in the city and the metropolitan areas follows designated plans, irrespective of the tenure of land”. With respect to wetlands within Kampala, KCCA thus has the authority to monitor and enforce the requirement that such lands are used in accordance with the designated land-use zone (“Natural Wetland Reserve”). This is in addition to a similar mandate given to both the Wetlands Department and NEMA to regulate the management of wetlands. As a result, there is no clarity on which institution has the legal mandate on implementation, monitoring and enforcement of the urban environment.

As noted in chapter 5, there are the key institutional actors, including both the national and city level agencies and local government institutions. There is institutional fragmentation with overlapping mandates, and weak integration and coordination. As described earlier, both national-level (MLHUD, MWE, NEMA,

Wetlands Department) and city-level agencies (KCCA) are directly involved in different aspects of land and urban environment management and their regulatory scope and responsibilities overlap.

For example, there is multiple institutional fragmentation with regards to the management of wetlands at both the national level and vertically at the local level. At the national level, within MWE, the functions of NEMA and the Wetlands Department with regard to the management of wetlands overlap and the division of work is unclear. While NEMA is clearly the key agency presiding over the EIA process, it is also specifically empowered to manage wetlands as established under the National Environment Act. At the same time, the Wetlands Department is the primary department overseeing wetland matters. In terms of service delivery and the management of urban environment especially wetlands, the regulatory scope and responsibilities of national level agencies also overlap with that of the city-level agency – KCCA.

Inadequate coordination

In some cases, there is inadequate coordination between stakeholders, especially during planning and monitoring of infrastructure development projects.

Weak development guidance at city and local government levels

There are two major weaknesses in the guidance of development in the GKMA. First, there is no detailed physical development plan for GKMA. Currently, around 40 per cent of the population lives in unplanned and densely populated informal settlements which lack basic service provision and the high level of informality contributes to the severe degradation of environmental resources. While an array of political, social and environmental factors is behind the informality, there is no uniform physical planning for the metropolitan area. Currently, Kampala, Entebbe, Mukono, Wakiso and Mpigi have physical development plans but there is no GKMA detailed physical development plan. This means it is difficult to coordinate and implement infrastructure and public amenities, and other economic-socio investments.

Further, environmentally sensitive areas are not adequately demarcated, identified or further protected through the associated regulatory planning tools such as a structured open space plan (often part of detailed physical plan) or zoning. The absence of a uniform detailed plan also means that development decisions are conflicting at times.

Loose adherence to development approval process

Current coordination and integration vertically between the national and city-level agencies are weak, especially with regards to the issuance and enforcement of permits and approvals for development (EIA certification, land title, user permit, planning permit). The instituted due processes may not always be conducted in the proper chronological order or followed in reality. For example, inter-governmental consultation does not work effectively; whenever a development application or EIA permit application involves several government agencies/departments, all of them

should be consulted, but in practice this does not always happen. Agencies do not reinforce each other's mandate throughout the development process; the current observation is that, rather, once a potential development obtains a government issued title/permit/document (be it land title, or EIA or planning permit) this is cause for demanding all the other related government licences, even those undue.

Constraints in current capacity and resources

Limited human and financial capacity poses serious constraints on effective management and especially in ESIA enforcement. Even with all the necessary structure and regulations in place, enforcement can be the greatest challenge. For environmental reviews, enforcement and monitoring is essential. For example, at the EIA permit stage, even when conditional approvals are given, there may not be cross checks between departments for consistency or to ensure that the conditions of conditional permits were eventually met. Further, there is limited training in ESIA report preparing and, as a result, substandard reports are submitted to NEMA.

Limited environmental awareness

Development has proceeded with little awareness or sensitivity of the overall impacts on ecosystems. Along the way, it has reduced the urban forest and open landscape space, degraded the land and soil, and failed to provide essential infrastructure services that are essential to managing the impacts of urban development.

Limited environmental resources data

Data to inform environmental planning and management is limited for the city. The development of baseline environmental data would be an important tool to support the strategic planning approaches being advocated in these findings. The availability of environmental data that is specific to the city is limited; the city does not have programmes or information that address issues related to urban vegetation, open space and landscape, land soil, wildlife, or air quality. Frequently, the environmental data needed to prepare ESIA is not available or is inaccessible, and this has even led to the fabrication of data.

Political interference

In some projects, political interferences determine environmental reviews' outcomes.

Professional ethics for EIA consultants

The EIA process relies heavily on the judgment of the EIA consultants for three reasons. First, the consultant works within a limited timeframe and of necessity can consider only a few impacts seriously. Second, the requisite environmental data are not available or are not readily accessible. Third, the adverse impacts of some of the environmental impacts may not be manifest immediately.

8. CONCLUSION AND RECOMMENDATIONS FOR ESIA IN THE GKMA

8.1 Conclusion

The report highlights the urban development and ESIA reviews in the GKMA. The region is rapidly growing with mass industrialization, infrastructural development, dense and unplanned informal settlements.

Large scale projects such as the northern bypass, Entebbe express highway, Nakivubo Channel project, NWSC sewage treatment project in Lubigi, Namanve Industrial and Business Park project among others have had significant negative impacts on the environment and its function, as well the social setting for people. (Details of the impacts are in Annex 1). The built environment will continue to expand and there will inevitably be some amount of natural resource and ecosystem loss, as well as social grievances.

ESIA is a process used to predict the environmental consequences of proposed projects, activities or actions of development. ESIA should be conducted before the start of a project to avoid adverse impacts and costs that would mean a project has to be redesigned or to incorporate mitigation measures. ESIA is a legal and policy requirement in Uganda for all proposed developments that are likely to have significant impacts on the environment, and the requirements are contained in various policies, laws and strategies, with the main law being the National Environment Act Cap 153.

Several institutions, including government ministries, GKMA local governments and authorities, are responsible for implementing the ESIA studies and ensuring compliance. However, with different urban contexts, addressing issues of ESIA has been a challenge due to legal and institutional loopholes. Proper consideration of development proposals in the context of the remaining assets can allow GKMA stakeholders to avoid the mistakes of the past.

8.2 Recommendations

Survey, mapping of environmental resources and demarcation of boundaries

The Ministry of Water and Environment needs to commission a study to survey, map environmental resources and the demarcation of boundaries of resources such as wetlands and forests. The data should be integrated with other information systems for development (e.g. land information database) such data bank for relevant data for ESIA studies in the GKMA.

Finalize the National Resettlement and Compensation Policy that is being developed under the Ministry of Lands and Urban Development

Consolidate and reinforce institutional structure and mandates

At the national level within the MWE, there is a need to clarify and consolidate the functions and responsibilities of NEMA and other environmental agencies in the management of the environment. Clearer delineation vertically between the national and city-level agencies in terms of the roles and functions, and in correspondence to the development chain of activities, would be beneficial. For example, one model is to have the local authority, KCCA, carry out the day-to-day functions and be the first line of initiation and response; while national-level agencies should have the overall policy and regulation-setting role, provide backstopping support and reinforcements when called upon, and coordinate functions to ensure alignment between agencies/sectors and compatibility for national-level goals. This division of work could apply to the entire chain of activities, from planning to management and enforcement. It is imperative to clarify institutional roles, functions and mandates to empower the various agencies with the necessary authority to plan, implement and enforce their regulatory functions. Enabling this may require the amendment of existing laws, or a commitment to enforce them or establish new ones.

Improve inter-agency integration and coordination across the full chain of development processes

Related to the consolidation and reinforcement of institutional structures and mandates, the processes around development control and permitted use of environmental resources should be improved. This should start with integrated planning (develop city-wide detailed plans and planning guidelines), sharing of information and aligning database compatibility and information coherence amongst agencies, realizing mandatory consultations, aligning procedures and requirements for the issuance of relevant permits and licences, closing the loop on conditional permits, effective enforcement by conducting joint inspections where necessary, and building in joint reporting at the right forums.

In addition, coordination between all relevant agencies at various steps of the process should be strengthened, potentially by reinforcing standard operating procedures, or setting up regular forums or specific task forces. One possibility is to establish an environmental review control task force that comprises of MLHUD, MWE, NEMA, KCCA, local governments, Wetlands Department and NFA. This will enhance institutional actions to regulate, enforce and protect environmental resources and be consistent with what is already in current policy and law. The development of more sophisticated measures to address ecosystem loss is needed.

Development of a coordinated physical development plans

It is necessary that KCCA and the local governments of the metropolitan areas develop a detailed, uniform, coordinated physical development plan for the area, starting with priority areas, especially the most environmentally sensitive.

Strengthening Environmental Legislation

There is need to develop city, district/local level by-laws for the proper management of the environment. This should be in addition to development of guidelines for environment reviews at the city, district/local levels in the GKMA.

Enforcement of accountability and track performance

Within each institution, it would be useful to devise monitoring and evaluation indicators and a system to track development cases, permits/licences issuing and conditions attached to them, in addition to an associated follow-up plan. This would allow better monitoring and enforcement of the necessary requirements and procedures. Audit mechanisms could also be considered to assess the performance of both national level and local governments on aspects such as environmental regulation enforcement, together with built-in incentives or disincentives related to performance as determined by the audits.

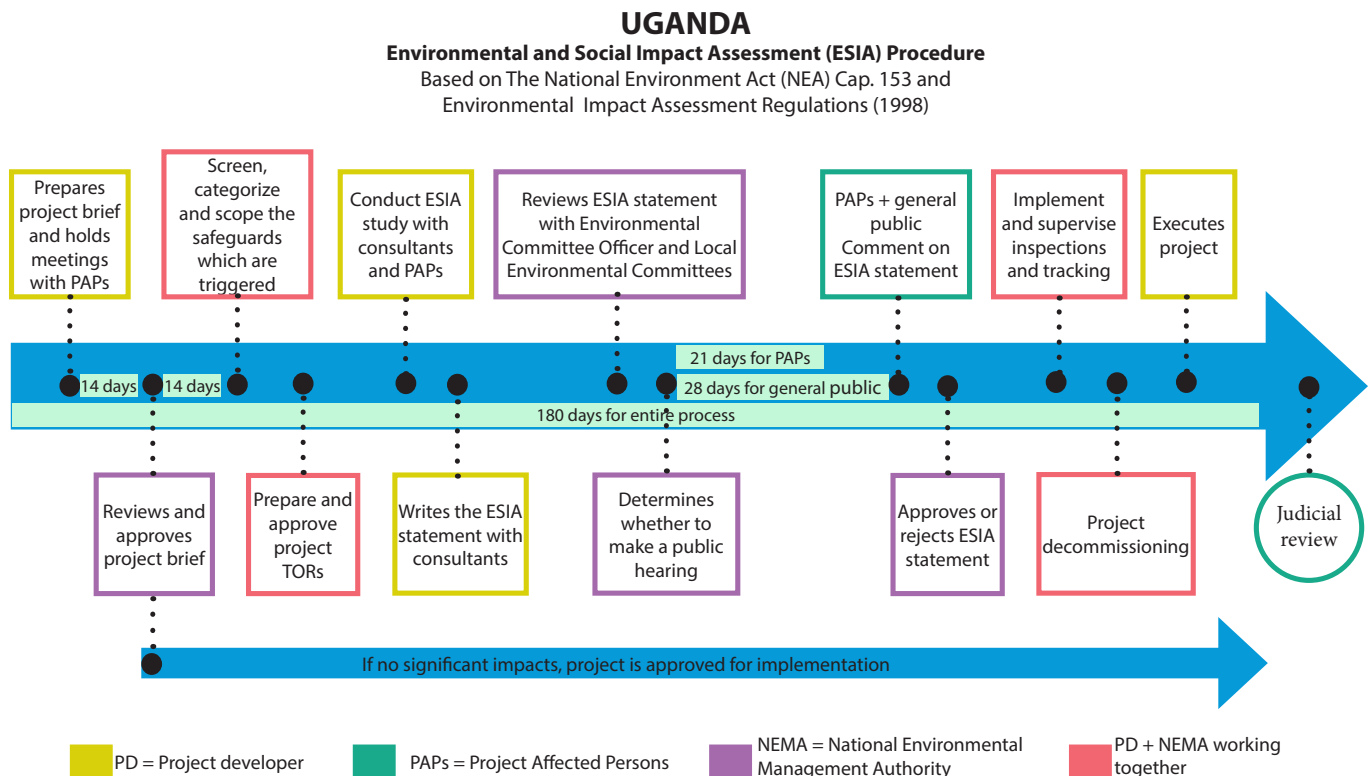
Environmental public education and communication initiatives

It is necessary to create public awareness on relevant environmental regulations; community/self-policing would be another good way to strengthen them. There are several objectives in conducting public education and communication initiatives: to demonstrate and publicize the benefits of a green urban environment and the direct positive impacts for communities (e.g. improvements to public health, increase in property values etc.); the responsibilities of various government agencies could be clarified to create transparency and build public trust.

The public should be able to direct queries and report any misconduct to the relevant authority, hold it accountable, and see that appropriate actions are taken. Conversely, the relevant authority would have the power to enforce its mandate without unnecessary interference. Each agency could embark on a communication campaign to outline its mandate, responsibilities, assessment methods (e.g. for licensing or permits) and publish public guideline documents through easily accessible channels (illustrations, pamphlets, websites etc.) and with understandable messages (in plain language, free of jargon) for the general public. In addition to the public, the management team in each agency and local leaders should be the first target group to align thinking. Once the leaders are on board, it would be easier to rely on them to disseminate the correct messages and communicate directly with their own constituents to strengthen the cause.

Assessment of economic value of environmental resources

It is necessary to commission relevant analytical work through the Ministry of Finance, Planning and Economic Development and the MWE to assess the existing environmental resources and their economic value to justify government allocation of resources and funding. In addition, consolidating institutional functions and structures, better planning to align staff numbers and skills with development priorities, or smart use of technology could help to increase efficiency in carrying out the necessary ESIA-related tasks.



Annex 1: Record of ESIA applications in urban projects in the GKMA

This chapter of the report uses a case study approach to assess and illustrate the outputs and outcomes resulting from the implementation of the ESIA. Recent projects covered include road construction projects, industrial development and waste management in and around Kampala. ESIA reports are prepared in accordance with the guidelines for EIA in Uganda. The guidelines require that any developer seeking to carry out a development of the nature and category described under Schedule 3 of the National Environment Act, Cap 153 carries out an ESIA. The projects under study are of the nature and category described under schedule of the NEA, and therefore undertook ESIA.

1.1. ESIA for road projects

a) Kampala Infrastructure and Institutional Development Project Phase 2 (KIIDP II) - Roads and Junctions

Project description

The Kampala Institutional and Infrastructure Development Project (KIIDP) Phase 2 was sanctioned to improve key road links and junctions for better traffic flow within the city, to improve the overall city appearance and quality of life, and to drive economic development by upgrading the road infrastructure, dilapidated paved roads, pavements, road shoulders and unpaved roads.

The project focused on upgrading of roads and junctions in Kampala city. The junctions include Bwaise, Fairway and Kabira. The proposed roads are Kiira Road (0.8km), Bakuli-Nakulabye-Kasubi-Northern Bypass Road (4.87 km), Makerere Hill Road (1.7km) and Mambule Road (1km). Except for Mambule Road, which will be upgraded to single-paved carriage way, the rest of the roads will become dual-carriageways.

Purpose of the project

The project aimed to meet the needs of high levels of traffic by improving the road capacity to cope with potential future increases in traffic. It was to directly improve smooth traffic flow and reduce environmental and economic costs associated with exhaust emissions from increased fuel combustion due to repeated acceleration at low speed and the loss of productivity (from the reduced speed of commercial transport and workers arriving late for work).

Project impacts as identified by the ESIA review

Positive impacts

- (a) Potential creation of job opportunities during the planning, design and construction phases;
- (b) Creation of business opportunities for small-scale businesses targeting the influx of workers to the project sites;
- (c) Improved traffic flow and mobility;
- (d) Improved drainage systems and hence reduction of flooding events.

Negative impacts

- (a) Occupational health and safety; in terms of accidents from careless driving, snake bites, to slips and falls;
- (b) Loss of land/property and resettlement;
- (c) Assault/attack/intimidation/detention of project staff by local people, especially where insecurity of land tenure exists and damage to properties that are yet to be compensated for;
- (d) Damage of property and utilities from construction activities, for example bulldozing may damage underground cable networks and water pipes, leading to supply cut-offs for some areas;
- (e) Destruction of physical cultural resources;
- (f) Ground vibrations and noise emissions from excavation works, road compaction and haulage of construction materials;
- (g) Potential soil erosion as a result of excavation works, such as excavations and increased runoff from paved roadsides;
- (h) Impact on air quality from dust emissions, exhaust fumes and material/chemical odours, for example bitumen;
- (i) Impact on water quality from siltation of streams and swamps, and flooding;
- (j) Impact on vegetation due to clearance of vegetation;
- (k) Waste generation and transport. This will include empty bags, containers, used oil, rubble from demolition, and cut to spoil materials.

Stakeholder consultation and public participation

As required by the guidelines for ESIA in Uganda, consultation meetings were held with various stakeholders from different parts of Kampala city, which were: KCCA representatives, project affected persons, Lubaga Division, Nakawa Division, Kampala Central Division, Kawempe Division and NWSC.

b) The Greater Kampala Roads Improvement Project (GKRIP) - March 2014

Project description

The GKRIP covered the congested section from off the Clock Tower Roundabout to off the Hotel Africana Roundabout along Queensway (3.2 km) as well as the extended section from Kibuye Round about to Jinja Road after the cemetery. The road project was within the central business district (CBD) of Kampala city comprising parts of Queensway, Nsambya Road, Mukwano Road, all the way to Jinja Road off Hotel Africana Roundabout.

This road project was consistent with the description of the projects under section 3 of the Third Schedule of the NEA that requires a full ESIA. JICA (the funders) classified this project as a category B project in line with their own environmental

safeguards.

Purpose of the project

The main purpose of the project was to decongest the centre of Kampala city as well as the congested roundabouts located along the section of the project road. The construction of the flyovers along the Mukwano-Nsambya roads would significantly decongest the traffic to and from the city centre.

Project impacts and mitigation measure as identified by the ESIA review

The project was considered to have the minimum of social/ environmental impacts since there would be no properties taken due to the development.

No	Impact	Mitigation Measures
During Construction		
1	Soil Erosion	<ul style="list-style-type: none"> Degraded sites, including construction material storage points, will be restored to as close to their previous condition as possible after road construction. All embankments, especially where the underpass will be created, trenches and outfalls after construction will be strengthened to limit erosion. Sediment basins/traps will also be used to trap sediments before they enter the Nakivubo Channel and other storm water drains / watercourses
2	Soil Degradation and Pollution	<ul style="list-style-type: none"> Construction materials to be stored in approved containers and washing areas for site equipment servicing and repair will be carried out in a defined area with a concrete pad draining to oil traps. Provide secure stores for hazardous materials and refuse pits that will be demolished on completion. Abandoned equipment such as tyres, batteries, filters, sparkplugs etc to be removed and carefully disposed of as required by law. Routine, systematic sprinkling of the road, work area and crushing site to reduce dust emissions.
3	Increased Storm Water	<ul style="list-style-type: none"> Road drainage to discharge into existing natural water courses. Collector systems for cut slopes to be provided to drain to the road drainage system. Culvert outlets to be protected with reno-mattresses or similar. Embankment slopes to be planted with Bahia grass or similar approved to control erosion. Burrow pits and quarries to be free draining.
4	Nakivubo Channel Water quality	<ul style="list-style-type: none"> Block the soil from entering the channel. Sedimentation basins should be created between the channel banks and areas where excavation and pitting are taking place; these to be regularly checked. Continue to monitor the channel from both up and downstream points during construction. One sample per month during times when there is no rainfall.
5	Reduction in Air quality	<ul style="list-style-type: none"> Exposed parts of the service roads should be paved. Regular monitoring of air quality in the construction area. Parameters to be monitored: Dust (PM), CO, NO2, SO2, Oxygen. Use low sulphur fuels including diesel fuel with a sulphur content, 15ppm and propane with negligible sulphur content. Meet applicable criteria with respect to emission quality on all combustion-related equipment and provide maintenance according to manufactures specifications.

6	Increased Noise levels	<ul style="list-style-type: none"> The construction fleet to be kept in good condition and fitted with efficient silencers. Speed controls (speed humps) at specified intervals (specific to each haul road) will be installed and maintained. House the generators, if required, on sites in a soundproof structure to reduce noise levels. Workers to use ear muffs to reduce exposure to noise, particularly those working at the quarry and crusher areas to reduce injury to the ears due to prolonged noise pollution. Self-audits to check on noise level. Apply dust suppressant such as water-spray trucks for dust suppression on unconsolidated working surfaces will mitigate dust generation from construction traffic.
7	Loss of vegetation and other trees	<ul style="list-style-type: none"> Clearance of vegetation will be confined to those areas where it is inevitable (within the road corridor). Landscape and replant disturbed areas using Bahia grass or approved similar and plant trees where suitable. All removed tree species have been marked and will be replanted alongside the new road or in other equivalent places as will be advised by the KCCA landscape expert.
8	Disturbance to fauna and avi-fauna	<ul style="list-style-type: none"> Clearance of vegetation will be confined to those areas where it is inevitable (within the road corridor). The flyovers should be painted with easily visible colours so that they can be more visible to flying birds. Employ a delayed approach to removing of trees to enable birds which might be laying eggs in those trees to hatch them.
9	Loss of flower gardens and agricultural crops	<ul style="list-style-type: none"> All flowers to be valued and compensated for. Ornamental trees will be valued and compensated for, while their number will be included in the trees to be replanted along the road to intensify the planted area and enhance the scenery. Where there is some additional space, flower gardens will be encouraged to shift a step backwards to allow for road construction.
10	Land take	<ul style="list-style-type: none"> Land acquired will be fully compensated for in accordance with the law. In cases of land away from the FO project (say for Burrow pits etc), agreements for land compensation or land take between the land lord and the contractor will be made and “copies of all land agreements are to be submitted to UNRA”. For land take for the purposes of BPs, all removed topsoil will be used to restore the BPs after construction. The BPs will be reshaped and re-vegetated by the contractor. The contractor will negotiate with the landlord at BP or quarry areas, and will pay him directly for the materials acquired. Vegetation will be done using indigenous existing grasses whose seed are naturally occurring in the stockpiled top soil. Otherwise other suitable species, including Cynodon dactylon, Panicum fulgens, Panicum repens etc.).
11	Disruption of services and Utilities	<ul style="list-style-type: none"> When working with utilities (communications, power lines, water mains, sewerage lines), it will be done in collaboration with the service provider and due notice of at least one month is to be given. The same will be done for the relocation of major sign posts and road furniture where they exist. The contractor will design ways of working around the utilities so that relocation is minimized. Light equipment will be used (as well as manual methods) in the initial stages of excavations, taking care to see that utilities underground are not disrupted without warning as is always the practice within cities and urban centres. Due notice to the community will be given (by the service provider) to the public in case short disruptions are envisaged.
12	W a s t e management	<ul style="list-style-type: none"> Demolished road structures to be carefully removed and recycled where possible. Contractor to balance cut and fill if possible. Workshop storage facilities to be licensed by NEMA. Bitumen tanks to be placed away from any drainage, placed on an impermeable surface and surrounded with a bund made from impermeable materials. Hazardous waste to be disposed of in accordance with the manufactures’ specifications and stored in sealed drums before transporting to designated disposal points. Separate bins to be provided for recyclable materials and arrangements for recycling made. Mobile toilets will be provided at site and garbage bins to be provided at strategic locations. Separate male and female toilets and washrooms facilities to be provided.
13	Relocation of people	<ul style="list-style-type: none"> The design has tried to avoid structures and buildings so as to minimize relocation of PAPs. A resettlement action plan has been commissioned to provide resettlement assistance to any others who might be impacted. Should the RAP identify any vulnerable people, then they will be treated separately (in line with their vulnerability) from those who are not vulnerable.

14	Relocation of Clock Tower	<ul style="list-style-type: none"> • The first priority is that the clock tower should not be relocated but can be lifted so as not to be dwarfed by the FO. • Alternatively, it may be located at a site where it will be seen from afar such as at the Shoprite pedestrian bridge, and such relocation must be done with the cooperation with officials from the Department of Museums and Monuments.
15	Other PCRs	<ul style="list-style-type: none"> • No ancillary works, burrow areas within 2 km of an identified cultural site of importance. • The Cemetery off Jinja Road and other worship places will not be touched by the road project. • Awareness of contractors and workers/staff on identification of archaeological/paleontological resource materials must be promoted. • In line with the General Specification for Road and Bridge and WB Physical Cultural Resource Safeguard Policy Guidebook, the contractor must stop work immediately on discovery of evidence of possible scientific, historical, prehistoric, or archaeological data and notify the resident engineer, giving the location and nature of the finds. • The resident engineer must notify DMM of such finds for verification and salvage. In line with the Historical Monument Act 1967, Section 11(1 &4) and section 12b).
16	Occupational Safety and health	<ul style="list-style-type: none"> • The contractor must prepare and make available at site on request, a Safety and Health Policy Document. • The contractor must have in place a risk assessment and safety & health management plan. • Prior to commencement of work, the contractor must register with the Department of Occupational Health and Safety. • The contractor must make an inspection requisition of the commissioner for site plant and equipment to be certified. • There should be a PPE programme in place such that the following should be recorded: <ul style="list-style-type: none"> – Type of equipment – The date and time supplied – The person to whom it is given (he/she will sign for it) – Date of next PPE inspection – Replacement schedule for plant and components. – First-aid kits to be provided at every active working site, in offices in site camps and any other location determined by the project manager. A clinic supplied and staffed by the contractor in accordance with UNRA guidelines, to be provided at the contractor's camp. A list of supplies must be kept and displayed at all times in the clinic. • Working areas should be contained to limit access by unauthorized persons and children. • Explosives will be handled by a qualified person, transported under police escort in accordance with the Explosives Act, and stored at a designated place. • Contractor not to use community water sources for road use. • Trucks transporting any granular material to be covered. • To protect the contractor and local communities in case of disease outbreaks among the workforce, a premedical examination for workers should be conducted, followed by routine medical examination during the works and a final post medical examination. • Put a project-specific HIV/AIDS awareness/prevention programme in place as specified in the contract documents. • Adequate sanitation facilities to be provided at site.
17	Public health	<ul style="list-style-type: none"> • To protect the contractor and local communities in case of disease outbreaks among the workforce, a premedical examination for workers should be conducted, followed by routine medical examination during the works and a final post medical examination. • Put a project-specific HIV/AIDS awareness/prevention programme in place as specified in the contract documents. • Adequate sanitation facilities to be provided at site.
18	Land scape	<ul style="list-style-type: none"> • To improve aesthetics and reduce noise pollution, it is recommended that trees are planted along the road project at places along the FO and, visibility permitting, on road islands. • The colour of the bridges and flyovers will be chosen in such a way as to blend in with the environment or the sky to enhance aesthetics. • In this case, the colours of light blue have been recommended as it is easy to harmonize with the landscape and trees. Sky blue is also recommended as it gives a more urban image. A combination of these two colours is therefore recommended. • The steel and concrete joints of the FO, especially at Kitgum House, will be blended in such a way as to provide a continuous joint from the outside. • Walkovers or pedestrian bridges to be constructed following an appealing shape which will first attract pedestrians and at the same time be pleasing to the eye. • Quarries and burrow areas must be restored in accordance with an approved restoration plan as provided for in the appropriate management plan/project brief approved by NEMA. • The contractor will work closely with the KCCA landscape expert so as to embrace the overall design concept for the KCCA.

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| 19 | Sanitation | <ul style="list-style-type: none"> • Gender considerations in allocation of sanitation facilities (toilets and bathrooms) will be observed providing adequate privacy for each gender. • Bins for solid waste collection to be placed at the contractor's camp and worksites to ensure that any hazardous waste (torch and radio batteries, oils and polythene papers and plastic bottles etc.) are separately collected and disposed of in accordance with the law; take note that there are recycling plants for plastics and polyethene. • Separate bins to be provided for recyclable materials and arrangements for recycling done with a suitable recycling facility to be identified. • Mobile / portable plastic toilets will be provided for workers along the project road (FO) and other working areas that are not permanent. |
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Operational Phase

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| 20 | Soil Erosion | <ul style="list-style-type: none"> • Regular and frequent inspection and maintenance is required to ensure roadsides soils are not exposed or removed and that any repairs required are carried out promptly. The following are essential. • Cleaning of drainage channels. • Replanting exposed soils (in case of roadside works) with approved grass seed must be carried out as soon as possible. |
| 21 | Storm Water | <ul style="list-style-type: none"> • Exposed areas to be replanted with appropriate grass. • Drain storm water to natural drainage channels to reduce erosion during road side maintenance or related works. • Ensure self-drainage of burrow areas and quarries used for road maintenance. |
| 22 | Climatic change Impacts | <ul style="list-style-type: none"> • Ensure that roadside drains continue to discharge into existing natural water courses or existing culverts. • Make use of the seasonal forecast that is produced by the Department of Meteorology to know when to clear the drains and prepare for severe weather events. • Drains to be cleaned regularly, especially before the onset of the rains. |
| 23 | Air pollution and Noise | <ul style="list-style-type: none"> • Provide noise barriers along flyovers. • Regular inspection of noise barriers to ensure functionality. • Ensuring use of approved fuels in motor vehicles. • Plant road side trees to reduce both pollution and noise due to motor vehicles. |
| 24 | Flora and fauna | <ul style="list-style-type: none"> • Care to be taken during maintenance to ensure that asphalt/bitumen is not spilled into Nakivubo Channel and other sensitive areas. • The flyovers should be painted with attractive colours so that they can be more visible to flying birds. • All burrow areas and quarries used for road maintenance to be self-draining. |
| 25 | Urban waste | <ul style="list-style-type: none"> • Provide awareness rising to inform the community about keeping drainage channels clear and protecting road infrastructure. • Use radio broadcasts and public meetings to conduct sensitization. • KCCA should reduce waste at source and encourage reuse and recycling of waste. • Drains should be regularly cleaned and inspected before rain seasons. |
| 26 | Safety | <ul style="list-style-type: none"> • Road furniture must be cleaned and inspected regularly to check its condition. • The traffic code must be enforced by the police. • It is recommended that the FO and the entire road is well lit throughout including in the bypass. • There should be measures to enforce the use of NMT and pedestrian lanes by those supposed to use them. |
| 27 | A e s t h e t i c beauty | <ul style="list-style-type: none"> • Noise barriers should be maintained along the flyover to reduce noise to the surrounding community. This will be in addition to the existing trees on the roadsides. • Paint the FO as well as the underpass as often as it fades to maintain the beauty of the structures. • The tunnel and the entire road structure will be well lit to enhance the aesthetic values. • Measures to discourage people from writing graffiti on the pillars or in the underpass will be put in place. |

Cumulative Impacts

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| 28 | <ul style="list-style-type: none"> • Most of the planned projects will commence after the FO project, apart from the BRT which is expected to commence before. The BRT will coincide with the FO project along Queensway and at the Hotel Africana Junction along Jinja Road where the impacts could be increased. Fortunately, the BRT is much smaller in width and passes through the middle of the road project, hence minimizing the cumulative impacts. Mitigation measures taken in this FO project will also address the resultant cumulative impacts due to the BRT. • Meanwhile future proposed projects will be required to take into account existing activities while conducting their specific project environmental assessment. |
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Resettlement Action Plan (RAP)

The number of impacted people in this project was less than 200. A RAP was conducted which shows that a few properties would be expropriated and some land would be acquired. The people most affected are the Uganda Railways, Kampala Capital City Authority and Uganda Police.

c) Kampala Northern Bypass, Uganda (KNB) Project (2011)

Project description

The GoU, through UNRA, embarked on widening the existing Northern Bypass to dual carriage for 17.5 km length that was still single carriage from the Kireka Jinja Road intersection up to Busega Roundabout. The bypass crosses Kampala and Wakiso, where ESIA was conducted along the adjacent areas of the Northern Bypass conforming with NEMA requirements and regulations, and EU EIA directives.

Purpose of the project

The purpose of upgrading the Kampala Northern Bypass to a dual carriageway was to ensure that it has adequate capacity to quickly evacuate present and future traffic volumes away from the city. The bypass provides an alternative route for the heavy traffic heading to the western parts of the country. It is anticipated it will stimulate and uplift economic conditions and increase demand for infrastructure services along areas it traverses.

Project impacts as identified by the ESIA review

Positive impacts

- (a) Employment opportunity for skilled and unskilled labour;
- (b) Improved traffic capacity of the bypass, which will have the capacity to divert large volumes from the city and reduce traffic congestion in Kampala city;
- (c) Sourcing of road construction materials will provide income for quarry land owners and construction materials;
- (d) Increased road safety with design of the bypass having vandal-proof road safety signage, safe motorcyclist and pedestrian walkways and crossings, gender sensitive foot bridges and provision of lighting; the pass will attract more commercial and residential developments along the route;
- (e) Climate change impact as a result of reduction in vehicle emissions from the existing situation;

Negative impacts

- (a) Loss of wetland will reduce eco-system services from the destroyed wetland, for example temporal storage of storm water, small-scale

harvesting of papyrus, growing of tree and flower nurseries, siltation of wetlands and associated health risks;

- (b) Improper management of cut to spoil during construction, large volumes will bring about disposal challenge, for example illegal dumping within the wetland and undesignated dump sites;
- (c) Improper construction waste management, where waste bitumen and overburden may be dumped in undesignated places, which would cause aesthetic and or environmental contamination;
- (d) Contamination of roadside spring wells, by dumping waste and overburdening in and around roadside springs poses great health risks to the communities, and has potential for causing water scarcity in communities without other water sources;
- (e) Dust plumes from construction operations like excavations, grading, shaping, hauling of materials and equipment, and dumping of soil generate dust plumes and lead to air pollution;
- (f) Contamination at the equipment yard, where daily activities will generate domestic and hazardous waste, for example fuel and oil spillages, derelict equipment, exhaust fumes;
- (g) Occupational health and safety impacts, with risk of burns, electrocution, noise and body vibration from equipment to the workers;
- (h) Impacts related to material sourcing, associated risks and impacts of opening and use of quarries and borrow sites, haulage of road construction materials, improper storage of construction materials;
- (i) Influx of people seeking jobs may generate the risk of personal injury;
- (j) Traffic flow impacts during construction as a result of diversions or detours;
- (k) Social ills of construction labour & HIV/AIDS with increase in social pathologies such as alcoholism, drug abuse and prostitution as a result of influx of youth with ready cash compared to the locals;
- (l) Soil erosion and drainage impacts are most likely to occur due to excavation, dredging, cutting and filling works, removal of vegetation and storage of gravel and overburden on the road sides. Placing of culverts and diversion of surface water may lead to localized floods and ponding;
- (m) Excessive water demand, large volumes of water will be used during road construction which may lead to water stress supplies in Kampala;
- (n) Damage to roadside water sources as a result of construction activities poses social impact on communities that use these water sources;
- (o) Construction and operation noise impact beyond ambient construction

noise, as a result of widening the Northern Bypass;

- (p) Impact on local air quality during bypass operation as a result of higher traffic volumes might lead to a deterioration of the local airshed with high levels of exhaust emissions
- (q) Climate change impact due to increased traffic volumes on the Northern Bypass.

1.2. ESIA for industrial park projects

a) Kampala Industrial Business Park (KIBP) at Namanve (2008)

Project description

The Uganda Investment Authority (UIA) proposed to construct an industrial and business park at Namanve which was to be financed by government and the United Nations International Development Organization (UNIDO). Approximately 1,006 ha of Namanve CFR were degazetted for the development under the management of UIA. The industrial park is located 11 km east of Kampala and lies north and south of Jinja Highway and the Kampala-Mombasa railway. The site is 4.5 km west of Mukono District administrative headquarters and Mukono Town. It straddles both Wakiso and Mukono districts. The Namanve River crosses KIBP from north to south.

Purpose of the project

The project was intended to diversify exports and enhance economic competitiveness, and to develop an infrastructure network for manufacturing industries to lower production and operational costs. The project was also intended to increase the growth of the private sector, the level of exports of the country, and the performance of micro, small and medium enterprises (MSMEs). Project objectives were to improve: (i) the efficiency of trade-related services; (ii) the investment climate; (iii) output and employment in firms, in particular MSMEs; (iv) financial markets for MSMEs; and (v) project implementation and coordination.

Project impacts as identified by the ESIA review

Positive impacts

- (a) Enhancement of Kayobe swamp drainage when lined drainage system is passed through the swamp;
- (b) Employment opportunities during construction work for unskilled workers in the communities living around the project area;
- (c) Increased investment conducive to the environment, and the associated

benefits of increasing production and the economy.

Negative impacts

- (a) Increased development costs for low-gradient sites for drainage and sewage treatment works;
- (b) Exposure and erosion of topsoil due to vegetation removal;
- (c) Increased sand and murram exploitation for construction;
- (d) Loss of flora and fauna as vegetation removal will encroach on wetland areas;
- (e) Wetland degradation as a result of pollution by the discharge of unprocessed effluent/ runoff from the industries;
- (f) Increased air pollution emissions, with increased motorized traffic, industrial processes, and dust pollution from trucks' daily use of unpaved roads;
- (g) Noise pollution with increased noise from machinery, traffic from noise construction and transport vehicles;
- (h) Water pollution, where industrial effluent may pollute springs, streams and rivers, increased pollution in the Inner Murchision Bay and Lake Victoria;
- (i) Social impact of unplanned influx of population and settlement, increased health problems, and an increase in HIV/AIDS and STDs in the project area.

1.3 ESIA waste management projects

Solid waste disposal are third schedule projects under the NEA, paragraph 12. For projects listed this under this schedule, an ESIA is required to be undertaken by the developer.

a) Kampala Sanitation Project - NWSC Faecal Sludge Treatment Plant in Lubigi Wetland

Project description (2014)

NWSC on behalf of the GoU mobilized the necessary funds to address water and sanitation problems arising from increasing development in Kampala and higher demands for water supply and sanitation problems. Funding of approximately UGX 64 million was to achieve 53,000 m³/day of sewage treatment and 500 m³/day of sludge treatment. The project involved the construction of a Faecal Sludge

Treatment Plant in Lubigi Wetland. Since the project involved major construction work, development in the wetland and the displacement of informal settlements, an ESIA was carried out as required by NEMA and AfDB.

Purpose of the project

The project objective is the sustainable management and protection of Lake Victoria from pollution to preserve its water quality for the production of drinking water. The focus was on the protection of the Inner Murchison Bay of Lake Victoria through improved sanitation and sewerage in the city of Kampala.

Project impacts as identified by the ESIA review

Positive impacts

- (a) The wastewater collection system will provide an immediate benefit to the human health by improving sanitation in the Kampala area and consequently reducing the risk of disease caused by micro-organisms in the wastewater;
- (b) The proposed Kampala sanitation programme will improve water quality in Lake Victoria which would, in turn, have a positive impact on fishing;
- (c) The enlargement of the sewer catchment area using adequate sewerage materials will have a positive impact on groundwater quality. Benefits are accrued particularly where wastewater collection takes waste to suitable wastewater treatment systems prior to disposal;
- (d) A decrease in the total pollutant load due to sewerage network improvements which decrease the potential for untreated effluent to spill onto surface water courses from overflows in the sewerage system or from emergency overflows at pumping stations;
- (e) There will be improved health due to better sanitation and industrial connection that is likely to be enforced because of better accessibility to the sewerage system;
- (f) Creation of new employment opportunities (200-300 workers) during construction and operation of the system.

Negative impacts

- (a) The permanent loss of an area of the wetlands in the Lubigi area of Kampala of approximately 6.5 ha as a result of the land requirements of the proposed sewerage treatment works;
- (b) Modification of the ecological wetland due to land clearing for the treatment works and associated infrastructure e.g. access, sewer line roads, excavating of peat etc;

- (c) Construction of ponds, sewers, buildings or infrastructures will create noise, dust and the removal of existing sewerage will need to be carried out carefully;
- (d) Contamination of soil, surface water and groundwater with oil, grease and solid waste by construction activities. For instance, water contamination comes from the dumping of soil from land levelling into watercourses and runoff from on-site machine maintenance (oil change, refuelling, washing) affecting surface and groundwater supplies;
- (e) Lack of adequate sanitary facilities for construction workers;
- (f) Erosion from construction of buildings for offices and access roads, resulting in destruction of wetland sedimentation of watercourses, etc.
- (g) Creation of an environment favouring disease vectors. For example, construction debris may serve as a breeding ground for rats; standing water may serve as a breeding ground for insect vectors and harbour water-borne diseases;
- (h) Marring of aesthetic qualities by the failure to properly dispose of construction waste (including rubbish produced by workers)

b) Extension of Mpererwe Sanitary Landfill Project (2008)

Project description

KCC intended to extend the existing landfill located at Mpererwe, about 15 km north of central Kampala along Kampala-Gayaza Road. The sanitary landfill was opened in 1996 and required an extension for increased efficiency in waste management. It was the only disposal site for managing Kampala's waste disposal.

Purpose of the project

The project was meant to increase the capacity of the existing Mpererwe sanitary landfill that had become inadequate due to increase in times of waste generated by Kampala. It would thus improve the waste management service offered to citizens.

Project impacts as identified by the ESIA review

Construction phase

- i. During the excavation of the landfill extension, all the vegetation in the project area will be destroyed together with fauna habitats. This activity is likely to have a temporal negative impact on the fauna of the area.

- ii. For vegetation, the medium negative impact resulting from the excavation activities would be mitigated by the availability of similar vegetation composition in the vicinity of the site

Operation phase

- i. Scavenging birds such as the marabou stork and hooded vulture will have a wider forage site. This is a medium positive impact.
- ii. The rubbish heaps may provide temporal breeding, feeding and hiding sites for some mammals, such as rodents. This is a medium positive impact.

Negative impacts

Total displacement of fauna which are slow to run away from danger and have small ranges, and total destruction of flora.

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02

Pipelines, Airports, and Waterfront Development in Ethekewini (Durban), South Africa

Jeremy Ridl



Above view of crowded low cost residential housing settlement landscape in Durban, South Africa @Shutterstock

The concept of integrated environmental management, with its environmental management tools of environmental impact assessment and strategic environmental assessment, entered South African law and policy in the early 1990s. The Environment Conservation Act 73 of 1989 made provision for the declaration of an environmental policy for the country and for environmental impact assessments for specified “listed activities”. This statute survived the transition from apartheid to South Africa’s democratic governance in 1994.

1. INTRODUCTION

The regulations that provided the procedure for environmental impact assessments and the notice determining the list of activities requiring environmental authorization, were promulgated some years later, in 1997. In the next year, landmark environmental legislation followed in the form of the National Environmental Management Act 107 of 1998 (“NEMA”), described as “framework” legislation under which key statutes termed “specific environmental management Acts” could

be introduced.¹ In addition to providing the foundation for the legislation that was to follow, NEMA carried into effect the constitutional imperatives imposed on the state by section 24 of the South African Constitution that affords everyone the right to an environment that is not harmful to their health or wellbeing, and compels the state to enact legislation (and use other measures) to give effect to this right. Importantly, NEMA binds all organs of state to principles of sustainable development and all

¹ NEMA lists these as: the Environment Conservation Act 73 of 1989; the National Water Act 36 of 1998; the National Environmental Management: Protected Areas Act 57 of 2003; the National Environmental Management: Biodiversity Act 10 of 2004; the National Environmental Management: Air Quality Act 39 of 2004; the National Environmental Management: Integrated Coastal Management Act 24 of 2008; the National Environmental Management: Waste Act 59 of 2008; the World Heritage Convention Act, 1999 49 of 1999, and any regulation or other subordinate legislation made in terms of any of those Acts.

people to a duty of care to the environment. As a result, South Africa has a suite of excellent environmental legislation, underpinned by a progressive constitution.

Despite the quality of its legislation, environmental standards continue to drop (measured by declining water quality, rising air pollution and loss of biodiversity), particularly in urban areas.

This study examines the reasons for this apparent contradiction and how the better use of available environmental management tools in planning may improve urban environmental health and quality of life.

The study concludes with suggestions as to how urban planners may better use the environmental tools at their disposal.

2. SELECTED CITY: ETHEKWINI METROPOLITAN MUNICIPALITY (DURBAN)

Durban is chosen for the case studies because of its size, demography, varied geographic properties and rich biodiversity.

It is the largest city in the province of KwaZulu-Natal and the third most populous urban area in South Africa after Johannesburg and Cape Town. It is the second most important manufacturing hub in South Africa after Johannesburg. Durban is the busiest port in Africa and serves as a trade gateway into the continent. It is a major centre of tourism because of the city's warm subtropical climate and extensive beaches.

The greater Durban area includes Traditional Council Areas (formerly known as Tribal Authority Areas), increasing its diversity for study purposes.

The city is approximately 2,297 square kilometres in extent and has a population of approximately 3.5 million people making it one of the biggest cities on the Indian Ocean coast of the African continent.

Cultural influences that must be accommodated in planning have their origins in the Zulu people, indentured Indian labourers and colonial Britain. Zulu is the most widely spoken language.

South Africa is the third most biodiverse country in the world² and Durban contains:

- Three of the country's nine terrestrial biomes;
- Eight broad vegetation types, some of which are rare, threatened or irreplaceable;

- Over 2,000 plant species;
- 97 kilometres of coastline with a diversity of beach types and productive rocky shores;
- 17 river catchments and 16 estuaries;
- 4,000 kilometres of rivers; and
- An open space system of approximately 75,000 ha (2010/2011), representing almost one third of Durban's total municipal area.

The biological richness of Durban's environment provides valuable "ecosystem goods and services". The challenge that faces environmental managers is how to control the exploitation of this natural capital so that its benefits can be unlocked, without compromising its sustainability.

3. IDENTIFICATION OF KEY ISSUES AND STAKEHOLDER INPUT

The questionnaire in Appendix 1 was used to solicit stakeholder opinion on the key issues examined in the study from:

- Officials in the three spheres of government (national, provincial and municipal);
- Representatives of state-owned enterprises involved in infrastructure development (Eskom, Telkom, Transnet);
- Traditional Councils (Qadi, Ximba, KwaCele);
- Environmental and environmental justice, non-government organizations (NGOs) (Wildlife and Environment Society of Southern Africa, South Durban Community Environmental Alliance);
- Practitioners in the urban development field (environmental assessment practitioners; environmental specialists, town, and regional planners);
- Private developers.

² Endangered Wildlife Trust (2002). The Biodiversity of South Africa 2002: Indicators, trends and human impacts.

3.2. Key issues are set out in Table 1.

TABLE 1

EXAMPLES OF DEVELOPMENT PROCESSES AND ISSUES	SPECIFIC QUESTIONS
1. DEVELOPMENT WITHOUT EIA ³	<ul style="list-style-type: none"> (i) Are you aware of any major urban developments that proceeded without an EIA? If so, please identify the most significant. (ii) Why was there no EIA? (iii) Was any environmental process followed (e.g. section 31A of the ECA⁴ or section 28 of NEMA⁵)? (iv) What planning process was followed, if any? (v) Were social, economic, and environmental issues nevertheless addressed sufficiently?⁶ (vi) Was D'MOSS⁷ involved?
2. DEVELOPMENT WITH EIA	<ul style="list-style-type: none"> (i) Have you been satisfied that environmental and social issues have been addressed adequately in the EIA processes in which you have participated in your official capacity? (ii) Do public participation processes ensure that interested and affected parties are sufficiently informed about proposed developments? (iii) Are interested and affected parties given any/enough assistance to participate in the EIA process where these skills are lacking? (iv) Are environmental assessment practitioners sufficiently competent to prepare assessment and specialist reports? (v) Do assessment authorities have sufficient competence and capacity? (vi) Do the outcomes of EIAs generally serve the best interests of the community in which the proposed development is planned? (vii) Are all stakeholders in EIA processes treated equitably? (viii) Is the legislation (and regulations) governing EIA processes easy to understand? (ix) Did input from interested and affected parties influence the assessment of impacts in the EIA? (x) Did input from interested and affected parties affect the decision of the authority?

³ EIA in this context refers to any formal environmental assessment process, including Basic Assessment, Scoping and Environmental Impact Reporting, Strategic Environmental Assessment, Reports/assessments in terms of section 28 of NEMA, and compliance with section 31A of the Environment Conservation Act 73 of 1989.

⁴ Environment Conservation Act 73 of 1989.

⁵ National Environmental Management Act 107 of 1998.

⁶ Section 2(3) of NEMA, which is binding on all organs of state, requires that "development must be socially, environmentally and economically sustainable".

⁷ The Durban Metropolitan Open Space System, or D'MOSS, is a system of open spaces, some 74,000 ha of land and water, that incorporates areas of high biodiversity value linked together in a viable network of open spaces (eThekweni Municipality official website).

3. NEGATIVE IMPACT ON COMMUNITIES DESPITE EIA
- (i) Are you aware of projects that have harmed communities (socially, economically, or environmentally), despite the undertaking of an EIA?
 - (ii) If the answer to (i) was affirmative, was the fault with:
 - (a) the process;
 - (b) the quality of the EIA;
 - (c) the decision of the authority?
 - (iii) What was the level of public participation in the process:
 - (a) high;
 - (b) acceptable;
 - (c) poor?
 - (iv) Were interested and affected parties from “poor communities” (informal and low-income housing areas) represented in the public participation process?
 - (v) Were poor communities assisted by any organ of state to gain a better understanding of the process and the development proposal?
 - (vi) Did poor communities comment on any of the documents made available during the process?
 - (vii) Were the EIA documents made available in Zulu where the development affected predominantly Zulu-speaking people?
 - (viii) Where scoping preceded EIA, were all relevant issues accurately and completely captured?
 - (ix) Were the concerns of interested and affected parties dealt with in the EIA? If yes:
 - (d) were recorded but not addressed;
 - (e) were dealt with and dismissed;
 - (f) were reflected in the assessment of impacts and the authorization;
 - (g) made a significant impact on the decision of the authority?
 - (x) Were the negative impacts mostly:
 - (h) social;
 - (i) economic;
 - (j) environmental?
 - (xi) Was community “sense of place”⁸ considered in the process?
4. EXAMPLES OF DEVELOPMENT BEING BLOCKED BY EIA
- (i) Are you aware of any developments being “blocked” by the findings of the EIA? If yes, was it because:
 - (a) the process was flawed;
 - (b) social and/or impacts on the affected community were excessive;
 - (c) environmental impacts were excessive or could not be mitigated adequately or at all;
 - (d) the proposed development was considered undesirable and/or not in the public interest;
 - (e) the project was not financially viable?
5. CHANGE OF PROJECT OR LOCATION BECAUSE OF EIA
- Do you know of instances where either a project or its location was changed because of the findings of the EIA?
6. INFLUENCE OF CLIMATE CHANGE IMPACT ON SELECTION, SITING, PLANNING, AND IMPLEMENTATION OF PROJECT
- (i) Is climate change a significant factor in decisions of:
 - (a) private sector developers?
 - (b) government (all three spheres)?
 - (ii) Is climate change adequately identified and dealt with competently in EIAs?
 - (iii) Are you aware of any projects that were materially affected because of climate change findings in the EIA?
 - (iv) Does the impact of climate change feature in:
 - (a) the guidance provided to developers/EAPS by departmental assessment officials;
 - (b) the decisions of the authority?

⁸ The combination of factors that give a community an identity, shared culture and values, social cohesion, quality of life and wellbeing.

7. CONFLICT BETWEEN EIA AND OTHER POLICIES AND/OR LEGISLATION ⁹	<ul style="list-style-type: none"> (i) Are you aware of instances where an EIA has contradicted any non-environmental legislation or policy? (ii) Has any legislation or policy interfered with any EIA in which you have been involved? (iii) In your experience, has an EIA ever stood in the way of urban development, social development programmes or economic development where poor or vulnerable communities were the beneficiaries?
8. INFLUENCE OF EIA ON CITY WIDE URBAN DEVELOPMENT PLAN	<ul style="list-style-type: none"> (i) Does EIA (including its counterparts – SEA and EMF) influence city wide urban planning? (ii) Are environmental considerations taken into account sufficiently in the compiling of the City's IDP,¹⁰ SDF,¹¹ SDP,¹² LAP¹³ or Precinct Plans?
9. EIAs THAT DID NOT ADEQUATELY ADDRESS ISSUES OF VULNERABLE POPULATION GROUPS (E.G. WOMEN, CHILDREN AND MINORITY GROUPS)	<ul style="list-style-type: none"> (i) In EIA, are vulnerable population groups treated: <ul style="list-style-type: none"> (a) fairly (no differently to others); (b) specially; (c) poorly? (ii) Is there discrimination against vulnerable groups in EIA?
10. FOLLOW UP AND MONITORING AFTER APPROVAL OF DEVELOPMENT	<ul style="list-style-type: none"> (i) Are the conditions of approval of environmental authorizations sufficiently monitored and enforced? (ii) If not, what are the reasons? (iii) Has the non-enforcement of conditions of approval/authorization led to: <ul style="list-style-type: none"> (a) serious environmental degradation; (b) harm to vulnerable communities?
11. DOES EIA FULFIL THE OBJECTIVES GOOD GOVERNANCE CONTEMPLATED IN NEMA?	<ul style="list-style-type: none"> (i) That the law develops a framework for integrating good environmental management into all development activities; (ii) that the law should promote certainty regarding decision-making by organs of state on matters affecting the environment; (iii) that the law should establish principles guiding the exercise of functions affecting the environment; (iv) that the law should ensure that organs of state maintain the principles guiding the exercise of functions affecting the environment; (v) that the law should establish procedures and institutions to facilitate and promote cooperative government and intergovernmental relations; (vi) that the law should establish procedures and institutions to facilitate and promote public participation in environmental governance; (vii) that the law should be enforced by the state and that the law should facilitate the enforcement of environmental laws by civil society.
12. GENERAL ISSUES OR NON-SPECIFIC QUESTIONS OR COMMENTS	<p>Questions: Comments:</p>

3.3. The responses to the questions indicated the following broad trends:

Officials in all spheres of government had confidence in EIA as an effective tool in environmental decision making with the following reservations:

- environmental consultants were not truly independent, despite the requirement of the legislation that they be so, because the developer paid them;
- the environment is low on the political agenda, resulting in environmental compromises;
- they (the officials) are perceived as being an obstruction to development;
- developers cannot be trusted.

⁹ Note D'MOSS is treated as a "planning layer" in the eThekweni Land Use Management Scheme and therefore has the effect of law.

¹⁰ Integrated Development Plan.

¹¹ Spatial Development Framework.

¹² Spatial Development Plan.

¹³ Local Area Plan.

State-owned enterprises and developers consider environmental processes to be onerous, unduly complicated, the cause of serious delays in major projects, and unnecessarily costly.

Traditional Councils consider public participation processes to be inadequate, they are not consulted but merely requested to comment on development proposals, that members of their communities are not made aware of environmental processes, and that they lack sufficient knowledge or expertise to review EIA documents competently.

NGOs have little faith in the integrity of EIA processes, distrust developers and their consultants, consider public participation processes to be inadequate and generally consider the process to favour developers.

4. THE LEGAL FRAMEWORK

4.1. Constitution

South Africa's Constitution¹⁴ provides for government in three spheres: national, provincial and local. The environment is a "concurrent" legislative competence in the hands of national and provincial government. De facto environmental management is generally carried out at the municipal level, often with unfunded mandates resulting in the inadequate allocation of resources to protect the environment.

Section 24 provides as follows: Everyone has the right -

- (a) to an environment that is not harmful to their health or well-being; and
- (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that –
 - (i) prevent pollution and ecological degradation;
 - (ii) promote conservation; and
 - (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

Subsection (a) has both physical (health) and emotional or spiritual (wellbeing) dimensions. In EIA processes, the physical impacts of a development are generally dealt with comprehensively. "Wellbeing" because it is not easy to define, is often overlooked or dealt with inadequately in social impact assessments. It is common practice to conflate social impacts with economic impacts in a "socio-economic" assessment. In the process, negative social impacts are juxtaposed with economic benefits, often expressed as work opportunities. No account is taken of the potential loss of "sense of place" of a community or its individual members. There is often a misplaced belief that a poor rural community is prepared to give up their way of life to make way for commercial or industrial development on their land.

Subsection (b)(iii) introduces a theme that runs throughout the Constitution and the environmental legislation that it enjoins the state to promulgate – the need to balance ecologically sustainable development and the use of natural resources with the imperative to promote "justifiable economic and social development". The harsh reality is that where a balance cannot be achieved, social and economic development considerations trump environmental protection. Politically, promoting what are perceived to be the more important constitutional rights of access to adequate housing (section 26), and healthcare, food, water and social security (section 27) will always take precedence over environmental rights. Similarly, with an official national unemployment rate of around 27 per cent, "environment" is readily traded for "development" that promises jobs.

Against these negative observations are the following positive features of the Constitution:

- (a) The environmental rights created by section 24 are available to all;
- (b) Section 38 extends locus standi people acting as embers of, or in the interests of, a group or class of persons and anyone acting in the public interest.
- (c) Importantly, constitutional environmental rights have been recognized by South African courts and are justiciable.¹⁵

Property rights (which are not limited to land¹⁶) are protected by section 25 which provides as follows:

- (1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.
- (2) Property may be expropriated only in terms of law of general application:
 - (a) for a public purpose or in the public interest; and
 - (b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.
- (3) The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including:
 - (a) the current use of the property;
 - (b) the history of the acquisition and use of the property;
 - (c) the market value of the property;

¹⁴ Constitution of the Republic of South Africa, 1996.

¹⁵ 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).

¹⁶ See section 25(4)(b).

- (d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and
- (e) the purpose of the expropriation.

Property rights are strongly protected, notwithstanding the obligation on the state in subsections (5) to (9) of section 25 to ensure equitable access to land by all, to provide security of tenure and redress for those who were dispossessed by apartheid, restoration of land or compensation for those who lost ownership of land, and the obligation to enact legislation to give effect to the foregoing.

The doctrine of eminent domain is recognized in South African law and plays no part in environmental and social impact assessments. Land may only be taken for a public purpose, not for private economic gain.

4.2. National legislation

Environmental management

(The state's response to the obligation imposed on it by section 24(b) of the Constitution to ensure that everyone has the right "to have the environment protected, for the benefit of present and future generations, through reasonable and other measures" was the promulgation of the National Environmental Management Act 107 of 1998 (NEMA).

Section 2 of NEMA 17 provides for national environmental management principles that apply to the actions of all organs of state that may significantly affect the environment. These principles:

- (i) apply alongside all other appropriate and relevant considerations, including the state's responsibility to respect, protect, promote, and fulfil the social and economic rights contained in the Constitution, and in particular, the basic needs of categories of persons disadvantaged by unfair discrimination;
- (ii) serve as guidelines by reference to which any organ of state must exercise any function when taking any decision in terms of the Act, or any statutory provision concerning the protection of the environment;
- (iii) guide the interpretation, administration and implementation of the Act, and any other law concerned with the protection or management of the environment.

In effect, all administrative actions by officials in all organs of state in terms of any legislation concerned with the protection or management of the environment are governed by the principles contained in section 2 of NEMA. Therefore, these principles apply to all urban planning and development decisions as such

decisions are concerned with the "management" and, at times, the protection of the environment. EIA processes are concerned with both the protection and management of the environment.

The principles are wide ranging and include the following:

- (i) environment management must put people and their needs at the forefront of its concern;
- (ii) environmental degradation (in all its forms) must be avoided, or where it cannot be avoided altogether, must be minimized and remedied;
- (iii) the "precautionary principle" (expressed as "a risk averse and cautious approach, which takes into account the limits of current knowledge") must be applied to decisions concerning the environment;
- (iv) "cradle to grave" responsibility applies to actions that may affect environmental health;
- (v) the "polluter pays" principle applies to those who cause pollution to the environment;
- (vi) public participation in environmental decisions must be ensured;
- (vii) environmental justice must be pursued to avoid the unfair distribution of adverse environmental impacts, especially to ensure that there is no discrimination against vulnerable people or people disadvantaged by unfair discrimination;
- (viii) there must be equitable access to environmental resources, especially by vulnerable or disadvantaged people;
- (ix) the vital role of women and children must be recognized and their full participation in environmental management must be promoted;
- (x) special attention must be given to sensitive, vulnerable, highly dynamic, or stressed ecosystems;
- (xi) In theory therefore, the relevant authorities involved in all aspects of spatial planning and land use management must apply these principles. Properly applied, these principles should ensure that decisions involving the use of land are wise, are taken in or after consultation with interested and affected parties, best serve the public interest, and protect the environment without impeding economic development;
- (xii) Section 24(1) of NEMA makes EIA (either in the form of a "basic assessment" or the more comprehensive "scoping and environmental impact reporting") mandatory if "listed activities" are to be undertaken. The national Minister of Environmental Affairs is empowered in terms of section 24(2)(a) of NEMA to identify activities that may not commence

¹⁷ See Appendix 2.

without environmental authorization from the competent authority.¹⁸

- (xiii) The EIA process that must be followed to obtain an environmental authorization is set out in EIA Regulations¹⁹ promulgated by the Minister of Environmental Affairs in terms of section 24(5)(a) of NEMA. The process will be dealt with below.

Town Planning

The Constitution places town planning in the exclusive executive and legislative competence of municipalities.²⁰ Urban planning and development is accordingly controlled at the lowest level of government. Communities therefore have direct access to planning processes and can shape social, economic and environmental policy. Through input into the various planning layers, from broad municipality-wide “integrated development plans”, which set out the strategic social, economic, and environmental goals of the municipality, and are embodied in “spatial development frameworks” to “local area plans”, detailed “precinct plans” and “land use management schemes” (previously called “town planning schemes”). The various planning tools and “package of plans” used in land-use planning are set out diagrammatically in Appendix 4.

The Spatial Planning and Land Use Management Act 16 of 2013 (“SPLUMA”) is the principal national legislation directly governing urban planning.²¹ Section 7 of SPLUMA sets out five development principles that apply to spatial planning, land development and land-use management. These are aimed broadly at redressing the spatial and other development inequities created by the apartheid regime, and the creation of viable communities, in compact urban settlements with adequate access to infrastructure and environmental resources.²²

SPLUMA empowers municipalities to pass planning bylaws, which must be consistent with its provisions. Bylaws provide the procedure that must be followed in land use and development applications, specify the information that an applicant must provide in its application, and guides municipal planning authorities on the matters to be considered when dealing with an application.

In terms of SPLUMA, municipal planning tribunals and planning authorities may not make decisions that are inconsistent with the municipality’s spatial development framework²³, except where site-specific circumstances justify this²⁴

Durban adopted, but not yet promulgated, its spatial planning and land use management bylaws as most other municipalities in the province. The planning procedure is governed by the KwaZulu-Natal Planning and Development Act 6 of 2008 (PDA), which will become obsolete when all municipalities in the province

have bylaws.²⁵

The relationship between environmental and planning legislation and the processes that are followed to obtain their respective approvals will be discussed below.

4.3. Provincial legislation

Provincial environmental legislation is limited and deals exclusively with nature conservation and the protection of biodiversity. The KwaZulu-Natal Nature Conservation Ordinance 15 of 1974 provides for the protection of fauna and flora in the province. Unless protected species are affected during the course of urban development, it does not feature in the process. However, the nature conservation authority established in terms of the KwaZulu-Natal Nature Conservation Management Act 9 of 1997 (in the form of the KwaZulu-Natal Nature Conservation Management Board and the KwaZulu-Natal Nature Conservation Service, also known as Ezemvelo KZN Wildlife) is one of the organs of state that has a duty to comment on all changes in land use that may affect the biodiversity of the province. Once a very active participant in planning and environmental processes, its lack of financial resources has limited the role of the conservation authority to applications that may have an impact on protected areas.

Post-apartheid provincial planning legislation exists only in the province of KwaZulu-Natal and only in the form of the PDA discussed above. As observed, is limited to providing the procedure in municipalities that do not have spatial planning and land-use management bylaws.

4.4. Municipal bylaws

Municipal bylaws provide for environmental health controls. Municipalities also implement national air quality legislation. The environmental branches of municipal management play a significant role in urban planning applications, in commenting on land use applications to the municipality. In the case of Durban, the environmental branch enforces compliance with the municipality’s open space system and demands that, where listed activities requiring environmental authorization under NEMA will be undertaken, that environmental authorization be obtained prior to the lodging of the planning application.

The approach of the municipality is that a change in land use should not be permitted if there is no guarantee that environmental authorization will be forthcoming. Legally, this is not the correct approach and adds significantly to the time taken to obtain approval for proposed developments. Inevitably, developers blame the EIA process for the ensuing delays as they see it as an intervention in the planning process.

¹⁸ The minister may also identify areas where activities may be undertaken without environmental authorisation (section 22(2)(b)) and areas in which no environmental authorizations may be issued, in order to protect the environment (section 24(2A)).

¹⁹ The current regulations are the EIA regulations, 2014 (as amended by Government Notice 326 of 7 April 2017).

²⁰ Section 156(1)(a) of the Constitution gives municipalities executive authority in respect of, and the right, to administer the local government matters listed in Part B of Schedule 4 and Part B of Schedule 5, one of which matters is “municipal planning”.

²¹ Other related legislation includes Local Government: Demarcation Act 27 of 1998; Local Government: Municipal Structures Act 117 of 1998; Local Government Transition Amendment Act 52 of 1997; Local Government: Municipal Systems Act 32 of 2000; Promotion of Administrative Justice Act 3 of 2000; Municipal Property Rates Act 6 of 2004; and Intergovernmental Relations Framework Act 13 of 2005.

²² See the SPLUMA development principles set out in **Appendix 3**.

²³ Section 22(1) of SPLUMA.

²⁴ Section 22(2) of SPLUMA.

²⁵ The appeal provisions of the PDA were found to be unconstitutional in that the appeal tribunal was appointed and administered as a provincial authority, thus falling foul of the determination by the Constitution that municipal planning was the exclusive domain of municipalities. See *Tronox KZN Sands (Pty) Ltd v KwaZulu-Natal Planning and Development Appeal Tribunal and others* 2016 (4) BCLR 469 (CC).

The Constitution requires all spheres of government (national, provincial and municipal) and all organs of state within each sphere to respect the constitutional status, institutions, powers and functions of government in the other spheres,²⁶ and not to assume any power or function except those conferred on them in terms of the Constitution.²⁷ The Constitution also requires all spheres of government and all organs of state to cooperate with each other in mutual trust and good faith, and to coordinate their actions and legislation with each other.²⁸

Consistent with this constitutional directive, the EIA Regulations require the process it prescribes to be aligned with and run concurrently with applications in terms of any other legislation, where the processes inform each other. This makes sense in the planning context as many issues overlap²⁹ and generally it is the same community or communities that are likely to be interested or affected by the decisions in each process.

In practice, while there is cooperation between organs of state, they still tend to operate within silos, each somewhat jealously protecting their turf. This does not make for efficient land development processes.

Section 2(3) of NEMA demands that “development must be socially, environmentally and economically sustainable”. The EIA process requires that social, environmental and economic issues (social and economic often being conflated) be balanced in any development. This does not mean they must be “equal” but assessed to ensure that the positive and negative impacts are distributed equitably between developers and affected communities.

The legal mechanisms are in place to ensure that environmental review influences planning processes, and should, if the benefits to society are outweighed by the disadvantages to society (usually manifested by negative social and environmental impacts), the development should not be approved.

4.5. Administrative justice and access to information

Central to environmental justice is access to information and just administrative action. The Constitution provides for this in sections 32 and 33 respectively. Flowing from the Constitution are the Promotion of Access to Information Act 2 of 2000 (PAIA) and the Promotion of Administrative Justice Act 3 of 2000 (PAJA).

Clear mechanisms exist to enable interested and affected parties to obtain information in the possession of the state and private persons if the information is required for the protection of any of their constitutional rights. Everyone is entitled to an administrative process that is fair, the right to reasons for administrative actions, and the right of judicial review of flawed decisions.

Both statutes play an important role in ensuring planning and environmental

processes are conducted in accordance with the law. In the first instance, the relevant organs of state recognize and respect the right of people to access to information and to a procedure that is fair, as determined by PAJA. In the second, South African courts have shown a willingness to enforce the provisions of PAIA and PAJA, which serves as a deterrent to organs of state to deny people their rights under sections 32 and 33 of the Constitution.

5. INSTITUTIONAL STRUCTURES

As observed above, the environment is the concurrent legislative, administrative and executive competence of national and provincial government. The national Minister of Environmental Affairs is the political head of the Department of Environmental Affairs. The minister and his or her department coordinate national legislation and policy.

In KwaZulu-Natal, the Member of Executive Council (MEC): Economic Development, Tourism and Environmental Affairs is the provincial “minister” and directs provincial legislation and policy.

Section 24C(1) of NEMA requires the Minister of Environmental Affairs, when listing the activities for which environmental authorization is required, must identify the competent authority for such authorization. Currently, the competent authority for all EIAs is the provincial MEC responsible for the environment³⁰ except EIAs:

- where the proposed development has international implications or the development footprint crosses provincial or international boundaries;
- in which any organ of state is an applicant;
- will take place in a nationally proclaimed protected area, or other conservation areas under the control of a national authority, for which the Minister of Environmental Affairs is the competent authority.

The provincial and national departments of environment affairs, administer the EIA process, and their respective Heads of Department and Director General make decisions and issue environmental authorizations. These officials act under delegated authority from their respective ministers.³¹

EIAs in respect of activities related to mining are an anomaly. The competent authority is the Minister of Mineral Resources, and the national Department of Mineral Resources administers the EIA process.

Appeals against decisions on EIAs are dealt with by:

- the Minister of Environmental Affairs, where the decision was made by the heads of the national Departments of Environmental Affairs and of Mineral Resources;

²⁶ Section 41(1)(e).

²⁷ Section 41(1)(f).

²⁸ Section 41(1)(h)(iv).

²⁹ For example, both processes must consider traffic impacts, the impacts on sense of place, need and desirability, the likelihood of noise, air and light pollution, social, economic and environmental impacts.

- provincial MECs where the decision was made by the head of the relevant provincial Department of Environmental Affairs.

Appeals against decisions on EIAs seldom succeed, irrespective of whether the appellant is the developer or an interested and affected party. The reasons are twofold:

- First, by the time the EIA is completed, all (or most) issues are identified and dealt with, usually persuasively by the developer's consultant team and specialists, and the relevant assessing officer is inclined to approve the application, sometimes making the environmental authorization subject to conditions to appease opponents of the development;
- Second, the minister or MEC is likely to be influenced by officials of the department he or she oversees, and for whom she or he is politically accountable and will be hard pressed to contradict their findings.

Appeal panels are appointed by the minister and MECs. However, panel members, too, are likely to have a stronger allegiance to the departmental officials than to developers. The panel is also likely to be influenced by the quality of the environmental reports supporting the decision, which are generally superior to the submissions of interested and affected parties, who seldom have the time or resources to provide environmental reports that compete with those of the developer.

The processes prescribed by the EIA Regulations, and the National Appeal Regulations, 2014,³² favour developers.

Public participation in the EIA process is limited to the right to comment on all reports, documents etc. contained in the basic assessment reports, scoping reports, or environmental impact assessment report. The opportunity to comment usually arises only once in respect of each of these reports. The period for comment must be at least 30 days, the latter being the usual time allowed. Where the EIA consists of voluminous and complex specialist reports compiled over many months, and even in relatively simple reports, this is wholly inadequate. Even well-resourced interested and affected parties are hard-pressed to make meaningful input into the process. The developer has the right to respond to all comments received and therefore has the final word on the issues before the competent authority considers them.

Any person aggrieved by a decision of the competent authority has the right to appeal. The appeal regulations require an appellant to lodge an appeal within 20 days of being notified of a decision. Considering that the decision is based on what are usually complex impact assessment reports and the decision, with its record of decision and reasons, may also be complex and require specialist input, 20 days within which to file a complete and comprehensive appeal, is also wholly inadequate. In short, the odds are stacked against interested and affected parties.

State-owned entities and companies³³ are responsible for most public infrastructure

and related services. They provide national roads, multi-purpose pipelines, port facilities, dams and water supply pipelines, railways, national and international airports, electricity supply and telecommunications.

These state-owned entities and companies are deemed organs of state and, while being "developers", must comment on all EIAs if their areas of operation will be affected. Getting timely comment from these entities is difficult and can delay both EIA and planning processes. This is despite regulation 2(2) of the EIA Regulations, 2014 which requires state departments to comment on EIAs within 30 days from the date upon which they were requested to comment, failing which, they will be deemed to have no comment. This is of no assistance when the state department clearly should comment on the application, and no decision should be made without such comment. The only recourse in such circumstances is to the court, which itself, is can be a lengthy and expensive process.

6. ENVIRONMENTAL MANAGEMENT TOOLS

The Minister of Environmental Affairs may identify geographical areas based on environmental attributes and specify spatial tools and environmental assessment applicable to these areas to determine if environmental authorization is required for specified activities, or where environmental authorization is not required.³⁴ These tools and instruments include:

- environmental management frameworks (EMF);
- strategic environmental assessments (SEA);
- environmental impact assessments (EIA);
- environmental management programmes (EMPr);
- environmental risk assessments;
- environment feasibility assessments;
- norms or standards;
- spatial development tools;
- minimum information requirements;
- any other relevant environmental management instrument that may be developed in time.

The most widely used of these instruments is an EIA.

SEA is used informally by developers who wish to establish the environmental constraints to the development of a property or area, and more formally by municipalities as a precursor to the adoption of an EMF.

EMF is a potentially important instrument and has started to gain traction with municipalities. An EMF identifies the biophysical attributes of the municipality on a spatial framework plan and imposes development constraints, ranging from the total prohibition of activities, limitations on development or the requirement that

³⁰ In the case of KwaZulu-Natal, the competent authority is the MEC: Economic Development, Tourism and Environmental Affairs.

³¹ Powers of delegation are derived from section 42 of NEMA in the case of the national minister, and section 42A in the case of the MECs.

³² Published in Government Notice R.993 of 8 December 2014.

environmental authorization be obtained for activities that would otherwise not require this.

While a municipality does not have the power to identify activities for which environmental authorization is required under section 24(1) of NEMA, included in the activities identified by the Minister of Environmental Affairs under this section, are activities that appear in “Listing Notice 3”,³⁵ where these activities are to be undertaken in sensitive areas as identified in an environmental management framework.

Durban’s “Metropolitan Open Space System” (D’MOSS) is an important tool developed by the eThekweni Municipality. It has a similar effect to EMF, although the environmental controls are imposed as a town planning “layer” in the municipality’s Land Use Management Scheme. D’MOSS is an important tool in the municipality’s climate protection strategies. It is described as follows:

- D’MOSS is a system of open spaces, some 74 000 ha of land and water, that incorporates areas of high biodiversity value linked together in a viable network of open spaces. It comprises both private and public land.
- D’MOSS conserves many of South Africa’s threatened ecosystems and species including: the endangered Sandstone Sourveld grasslands; the critically endangered *Brachystelma natalense* (a small herbaceous plant); and the endangered Oribi, Spotted Ground Thrush, and Pickersgill’s Reed Frog. D’MOSS assists the province and the country in meeting biodiversity conservation targets.
- D’MOSS provides a range of ecosystem goods and services to all residents of Durban, including the formation of soil, erosion control, water supply and regulation, climate regulation, cultural and recreational opportunities, raw materials for craft and building, food production, pollination, nutrient cycling, and waste treatment.
- From a climate adaptation perspective, the biodiversity that is protected within D’MOSS plays an important role. The impacts of sea-level rise, for example, can be reduced by ensuring the protection of well vegetated fore-dunes and setting coastal developments back from vulnerable areas. Increased flood events can be moderated by ensuring that wetlands and floodplains are protected and, where necessary, rehabilitated. Predicted increased temperatures can also be alleviated by D’MOSS as vegetated areas help to reduce temperatures.
- D’MOSS also plays a substantial role in climate change mitigation. Research undertaken in 2006 found that D’MOSS stores the equivalent of 24.7±0.6 million tons of carbon dioxide. In addition, it

was conservatively calculated that it sequesters between 31,000 and 36,000 tons of carbon dioxide per annum. Wetlands and forest ecosystems store the most carbon, while disturbed woodlands and alien thickets store the least. These more degraded D’MOSS areas offer restoration opportunities using poverty alleviation projects, providing benefits to biodiversity, people and the climate.

EMPrs are an integral part of EIAs and must be submitted with EIA reports for approval with the issue of an environmental authorization. EMPrs serve the useful purpose of managing impacts during the construction and operational phases, and ensuring compliance with the conditions of environmental authorization.

It is usual for an environmental authorization to stipulate as a condition of approval, that an independent environmental compliance officer (ECO) must be appointed to manage and implement the EMPr for the construction phase, and if appropriate, post construction and operational phases, for the lifespan of the development. The ECO is required to submit audit reports to the environmental authority. Where there are non-compliances, the authorities generally take action, their task being made easier by having the independent audit report on which they can act. This can create tension between the ECO and the developer, as it is the latter who appoints and pays the ECO.

7. NON-COMPLIANCE WITH ENVIRONMENTAL LAWS

The minister and MEC have the power under sections 31B and 31C of NEMA respectively, to designate environmental management inspectors (EMI) with mandates to enforce NEMA and specific environmental Acts, in part or in full.³⁶ Subject to any constraints in their designations, EMIs have wide powers of inspection and seizure of evidence. EMIs enforce environmental legislation (criminal action aside) by way of compliance notices issued under section 31L of NEMA.

Because of requirements of PAJA, that a person who faces administrative action must be given notice of any impending action, and the right to make representations as to why the action should not be taken, an EMI must give notice of the intended action in writing by way of a “pre-compliance notice”. This notice affords the recipient the opportunity to make representations within a stipulated period, usually 14 or 30 days depending on the urgency, why a “compliance notice” should not be issued. If the environmental transgression is serious or is likely to cause irreversible environmental harm, then both the pre-compliance notice and compliance notices may stipulate that the offending activity should cease immediately. The recipient has the right to object to the notices and may apply to the minister or MEC for a directive suspending the operation of the compliance notice, pending the outcome of the objection. Where ongoing harm is perceived, the minister or MEC is unlikely to suspend the compliance notice from taking immediate effect.

³³ Transnet State Owned Company Limited (road transport, rail, ports, multipurpose petroleum pipelines); South African National Roads Agency; Eskom Limited; Telkom Limited; various water utility enterprises.

³⁴ Section 24(2) read with section 24(5)(bA) of NEMA.

³⁵ Published in Government Notice 324 of 7 April 2017 (amending Listing Notice 3 published in Government Notice 985 of 4 December 2017).

Apart from prohibiting the continuation of the offending activity, the compliance notice may issue directives as to rehabilitation of the affected environment and the implementation of measures to prevent ongoing environmental harm.

Where circumstances dictate, compliance notices can be issued verbally, but must be followed up with a written notice as soon as is practicable.

Contraventions of NEMA and specific environmental Acts carry substantial criminal sanctions (fines of up to R10 million, or imprisonment of up to 10 years, or both) and may be accompanied by clean-up or rehabilitation costs, which could run into millions of rand.

8. EIA AND RELATED PROCESSES

Land development invariably involves multiple processes. As observed above, there is a close relationship between EIA and town planning processes. There are also linked processes under specific environmental Acts which also require authorization for specified activities:

- Water uses listed in section 21 of the National Water Act require a water use licence;
- Atmospheric emissions require an Atmospheric Emission Licence under the Environmental Management: Air Quality Act;
- Waste management activities require a Waste Management Licence under the National Environmental Management: Waste Act.

EIA is the environmental assessment procedure that must be followed in applications

for licences under these specific environmental Acts.

Applications for exploration, prospecting and mining rights, and mining permits require the undertaking of EIA, either in the form of a basic assessment if there is no processing of minerals on site, and if no activities in Listing Notice 2 will be undertaken, or scoping and environmental impact reporting if such activities will be undertaken.

While mining and urban development may be separate activities, large-scale urban development that requires construction materials in the form of sand and stone can provoke mining activities near or on land designated for urban development.

9. THE EIA PROCESS

The EIA Regulations determine two forms of process:

- Basic assessment, which must be followed for activities appearing in Listing Notices 1 and 3;
- Scoping and environmental impact reporting, which must be followed for activities appearing in Listing Notice 2.

An applicant for environmental authorization must appoint an independent environmental assessment practitioner (EAP) to manage the EIA process.

The EAP must determine if basic assessment or scoping and environmental impact reporting must be followed.

³⁶ The Ministers of Water Affairs and Sanitation, and Mineral Resources also have the power to appoint EMIs to enforce the legislation under their administration.

Basic assessment

TIME FRAME	PROCEDURAL STEP	COMMENTARY
	<p>PRELIMINARY STEPS</p> <p>Appointment of EAP</p> <p>Pre-application consultation with assessing officer (optional)</p>	<p>This part of the process is voluntary. The applicant and/or EAP can streamline the process, while observing the statutory timeframes.</p> <p>I&APs do not have the same right. Potential prejudice to stakeholders.</p> <p>The competent authority must inform the applicant of any factors that may prejudice the application (regulation 8).</p>
START	SUBMIT APPLICATION FORM AND PAY APPLICATION FEE	Sets out basic information about the applicant, the property involved in the application and the development. Supporting documents (title deeds, proof of company registration etc.)
90 DAYS FROM APPLICATION APPLICANT CAN REQUEST THIS TO BE EXTENDED TO 140 DAYS	<p>PREPARE BASIC ASSESSMENT INCLUSIVE OF SPECIALIST REPORTS (BAR)</p> <hr/> <p>CONDUCT PUBLIC PARTICIPATION</p> <hr/> <p>SUBMIT BAR AND INCLUDE COMMENTS FROM I&APs</p>	<p>The EAP and specialist undertake studies determined by the nature of the development and the biophysical attributes of the land and the receiving environment. Includes social and economic impacts, need and desirability.</p> <hr/> <p>Minimum of 30 days. Methods of giving notice stipulated in regulation 41, includes notice by post, placing notice board on site, advert in local newspaper.</p> <hr/> <p>BAR and specialist reports, together with comments received, and applicant's responses (if any). The report must conform to Appendix 1 of the regulations, which stipulates the content and methodology.</p>
107 DAYS FROM RECEIPT OF BAR	COMPETENT AUTHORITY DECISION	Application reviewed by assessing officer and departmental specialists.
5 DAYS FROM DECISION	COMPETENT AUTHORITY NOTIFIES APPLICANT OF DECISION	Must be in writing.
14 DAYS NOTIFICATION OF APPLICANT	APPLICANT NOTIFIES I&APs OF DECISION AND RIGHT OF APPEAL	Must be in writing and may include advertisement in the same newspaper in which notice of the application was given.
20 DAYS OF NOTIFICATION OF DECISION	LODGE APPEAL SUBMISSION WITH MINISTER/MEC	Severely limits the ability of I&APs to lodge a competent appeal unless.
20 DAYS OF RECEIPT OF APPEAL SUBMISSION	APPLICANT/DECISION-MAKER/I&AP RESPONDING STATEMENT	The appellant has no right to reply to the responding statement. This is a departure from the usual rules of debate and is prejudicial to the Appellant.
	DECISION ON APPEAL	These timeframes are seldom met, especially if an expert or appeal panel is appointed. The appeal authority is expected to make a decision within 20 days of receiving the appeal administrator's recommendation.
50 days	If no appeal panel or expert	
70 days	If appeal panel or expert	
At same time as appeal decision	NOTIFY APPELLANT AND APPLICANT/DECISION-MAKER/I&AP OF APPEAL OF DECISION	There is no further right of appeal. Recourse is to the Supreme Court by way of a judicial review application.

Scoping and Environmental Impact Reporting

Scoping and Environmental Impact Reporting (S&EIR) must be applied to all activities appearing in Listing Notice 2. This is a more comprehensive form of investigation of issues and determined either the magnitude of the development (area to be developed, storage volume, output, or throughput). Normally a wide range of specialist studies are required.

TIME FRAME	PROCEDURAL STEP	COMMENTARY
	PRELIMINARY STEPS	As for BAR. This part of the process is voluntary. The applicant and/or EAP can streamline the process, while observing the statutory timeframes.
	Appointment of EAP	I&APs do not have the same right. Potential prejudice to stakeholders.
	Pre-application consultation with assessing officer (optional)	The competent authority must inform the applicant of any factors that may prejudice the application (regulation 8).
START	SUBMIT APPLICATION FORM AND PAY APPLICATION FEE	Sets out basic information about the applicant, the property involved, and the development. Supporting documents (title deeds, proof of company registration etc.)
44 DAYS FROM APPLICATION	PREPARE SCOPING REPORT	The EAP and specialists investigate issues determined by the nature of the development and the biophysical attributes of the land/receiving environment. Includes social and economic impacts, need and desirability. Receive public input solicited by written invitations, newspaper advertisements and public meetings.
	SUBJECT SCOPING REPORT TO PUBLIC PARTICIPATION PROCESS OF NOT LESS THAN 30 DAYS	Minimum of 30 days. Methods of giving notice stipulated in regulation 41, includes notice by post, placing notice board on site, advert in local newspaper.
	SUBMIT SCOPING REPORT AND INCLUDE COMMENTS FROM I&APs AND COMPETENT AUTHORITY	This part of the process is intended to solicit comments and receive information from I&APs. Invariably, scoping consists of presentations by the applicant and consultants at public meetings. These are often perceived as the applicant's marketing of the project and not the opportunity to engage with the consultants meaningfully.
	SCOPING REPORT MUST COMPLY SUBSTANTIALLY WITH APPENDIX 2 OF THE EIA REGULATIONS	
43 DAYS FROM RECEIPT OF SCOPING REPORT	COMPETENT AUTHORITY DECISION ON SCOPING REPORT	Competent authority must accept scoping report, or refuse environmental authorization if the proposed activity conflicts with legislation, or if the report does not comply with Appendix 2.
106 DAYS INCLUDING PUBLIC PARTICIPATION OF NOT LESS THAN 30 DAYS	COMPLETE STUDIES, COMPILER ENVIRONMENTAL IMPACT REPORT (EIR) AND MUST COMPLY WITH APPENDIX 3	The EIR builds on the scoping report. Scoping may reveal new impacts and/or concerns raised by specialists, I&APs, or competent authority and these must be dealt with by additional or more comprehensive reports.
APPLICANT CAN EXTEND TO 156 DAYS IF CHANGES ARE NEEDED	ENVIRONMENTAL MANAGEMENT PROGRAMME (EMPr)	
	MUST COMPLY WITH APPENDIX 4 INCLUDE COMMENTS FROM I&APs AND COMPETENT AUTHORITY	
107 DAYS FROM RECEIPT OF EIR AND EMPr	COMPETENT AUTHORITY DECISION	Must grant or refuse environmental authorization. Environmental authorization must comply with and contain the information set out in regulations 25 and 26.
14 DAYS NOTIFICATION OF APPLICANT	APPLICANT NOTIFIES I&APs OF DECISION AND RIGHT OF APPEAL	Must be in writing and may include advertisement in the same newspaper in which notice of the application was given.
20 DAYS OF NOTIFICATION OF DECISION	LODGE APPEAL SUBMISSION WITH MINISTER/MEC	Severely limits the ability of I&APs to lodge a competent appeal
20 DAYS OF RECEIPT OF APPEAL SUBMISSION	APPLICANT/DECISION-MAKER/I&AP RESPONDING STATEMENT	The appellant has no right to reply to the responding statement. This is a departure from the usual rules of debate and is prejudicial to the appellant.
	DECISION ON APPEAL	These timeframes are seldom met, especially if an expert or appeal panel is appointed. The appeal authority is expected to make a decision within 20 days of receiving the appeal administrator's recommendation.
50 days	If no appeal panel or expert	
70 days	If appeal panel or expert	
At same time as appeal decision	NOTIFY APPELLANT AND APPLICANT/DECISION-MAKER/I&AP OF APPEAL OF DECISION	There is no further right of appeal. Recourse is to the Supreme Court by way of a judicial review application.

Environmental authorizations may be amended by the competent authority to cure clerical errors or by the applicant on application to the competent authority. Non-substantive amendments are dealt with administratively and without public participation. Notice of the amendment and the right of I&APs to appeal the decision is usually required to be published in a local newspaper. Substantive amendments which increase impacts or change the scope of the proposed developments must be supported by appropriate impact and assessment reports and will be subjected to the same or similar public participation process required for basic assessment and S&EIR.

An applicant cannot submit an application that is substantially similar to an application that has been refused unless an appeal has been finalized or the time for an appeal has lapsed.

Public participation

Since the promulgation of the first EIA Regulations in 1997, amendments in 2006, 2007, 2010, 2014 and 2017 have been introduced to “streamline” the process by refining the lists of activities for which environmental authorization is required, excluding certain activities in urban areas and confining public participation to the right to “comment” on the application. “Consultation” with affected parties or any direct engagement is no longer a requirement of the process. The first EIA Regulations, which took effect in 1997, were short, to the point of being cryptic. No timeframes were prescribed. These were agreed between the developer and the competent authority. On the one hand, the exclusion of interested and affected parties from the agreement between the developer and the competent authority was manifestly unfair. However, provision was seldom used, probably because the process was new. The developer and the competent authority generally did not communicate outside the process. On the other hand, the lack of prescribed timeframes allowed interested and affected parties to prolong the process, many EIAs consequently taking many years to complete. In the early days of EIA, “public participation” was taken to mean “public consultation”, which implies that a level of consensus between the parties must be reached.

In the first revision of the EIA Regulations in 2006, the then Minister of Environmental Affairs (and Tourism), claimed in a newspaper article that they were “quicker, better, greener”, responding to developer complaints that the EIA process was stifling development. Ironically, the six pages of the 1997 EIA Regulations were expanded to 53 in the Government Gazette! Public participation, as observed above, became limited to the right to comment on the process and all relevant documents. Direct engagement between the developer and interested and affected parties, although encouraged, was not mandatory. Public meetings are generally unhelpful as they tend to descend into slanging matches and do little to enhance the public perception of EIA.

In the result, the process is conducted at arms’ length, with the participants having as little direct contact with each other as possible.

The three participant groups must all share some blame for the bad reputation that EIA has gained:

1. the authorities, because they are dilatory, often uncooperative and over-bureaucratic, and sometimes incompetent;
2. developers because they resent the costs to which they are put, and because an EIA means lengthy project delays, and because the need for an EIA is ignored or avoided until late in their development planning, by which stage the development is ready to start, but the EIA process has yet to begin;
3. interested and affected parties because they can be deliberately obstructive, generally have self-interests at heart, and tend to attack the people involved, rather than the issues.

With the expanding of the EIA Regulations, the methods of ensuring public participation have become prescriptive, and public participation limited to the right to “comment”.

The EAP managing an EIA process must ensure that potential or registered interested and affected parties must be provided with an opportunity to comment on all reports once an application has been submitted to the competent authority.³⁷The methods of giving notice of an application and the invitation to comment, are prescribed. They include:

- fixing a notice board at a place conspicuous to and accessible by the public at the boundary, on the fence or along the corridor of the site where the activity to which the application or proposed application relates is or is to be undertaken, and to any alternative site;
- giving written notice to the occupiers of the land in question and the owner, if the proponent is not the owner, as is often the case with applications for minerals exploration or prospecting rights; owners, persons in control of, and occupiers of land adjacent to the site where the activity is or is to be undertaken and to any alternative site where the activity is to be undertaken; the municipal councillor of the ward in which the site and alternative site is situated and any organization of ratepayers that represents the community in the area; the municipality which has jurisdiction in the area; any organ of state having jurisdiction in respect of any aspect of the activity; and any other party as required by the competent authority;
- placing an advertisement in one local newspaper; or any official gazette that is published specifically for the purpose of providing public notice of applications or other submissions made in terms of these regulations; and in at least one provincial newspaper or national newspaper, if the activity has or may have an impact that extends beyond the boundaries of the metropolitan or district municipality in which it is or will be undertaken;
- using reasonable alternative methods, as agreed to by the competent authority, in those instances where a person is desirous of but unable to participate in the process owing to illiteracy, disability or any other disadvantage;

- the notice, notice board or advertisement referred to in above must: give details of the application or proposed application which is subjected to public participation; state whether basic assessment or S&EIR procedures are being applied to the application; state the nature and location of the activity to which the application relates; disclose where further information on the application or proposed application can be obtained; and
- stating the manner in which, and the person to whom, representations in respect of the application or proposed application may be made.

In broad terms, the Constitution, environmental, planning and local government legislation, oblige the authorities to ensure that members of the public are given the opportunity to have a say in decisions that affect them. The law is in place, but is ineffectively implemented. The authorities are not solely at fault - communities are notoriously apathetic when called upon to provide input into planning and environmental processes. It is only contentious developments, usually publicised by activists, that attract attention. Housing development, often large scale, receive very little input from affected, mostly black, communities.

Part of the problem lies in the fact that environmental and planning issues are often complex and highly technical. For communities to participate meaningfully, they need specialist assistance to interpret the various (often voluminous) reports, and because of South Africa's diversity of languages, translation of the documents. It is the duty of the organs of state involved to promote participation of interested and affected parties in environmental governance, to ensure that all people have the opportunity to develop the understanding, skills and capacity necessary for achieving equitable and effective participation, and to ensure participation by vulnerable and disadvantaged persons in environmental decision making.

Regulation 46 requires the competent authority processing an application to give reasonable assistance to people who are illiterate, suffer disabilities or any other disadvantage, who cannot, but desire to comply with the regulations. This includes applicants and I&APs. The competent authority occasionally assists applicants. The author has no experience of I&APs being assisted by the competent authority to participate in any EIA process.

Again, the law is in place, but is not implemented effectively.

10. CASE STUDIES

The case studies are chosen for their contribution to urban expansion and regeneration. The developers are grouped under:

- Government projects;
- Private – public partnerships;
- Private developers.

Where development has taken place without an EIA and without environmental authorization where this required, such developments are illegal. Generally, these developments have been stopped by the authorities following legal action, and in most instances (except for illegal sand mining), rehabilitation has been compelled.

Government

New Multi-Product Pipeline (NMPP)

(The developer is a state-owned company, Transnet State Owned Company Limited (Transnet). The project is managed by its Capital Projects and Pipelines divisions.

NMPP is one of the biggest multi-product pipelines in the world providing approximately 715km of underground piping. It is designed to transport liquid petroleum fuel from Durban to Johannesburg (Gauteng province and neighbouring regions).

S&EIR was applied to the project and was conducted in segments by different teams of consultants. On completion, rehabilitation and monitoring was put under the control of one environmental consultant with a specialization in grassland ecology.

The proclaimed benefits of the pipeline are socio-economic and environmental.

The economic benefits are reflected primarily in the supply of necessary fuel to the economic hub of South Africa. The construction phase of the project generated approximately 12,000 new jobs. These are for the duration of construction only. The number of permanent jobs is insignificant. There were no obvious negative economic impacts.

Environmental benefits include reducing road congestion and road maintenance costs, and lower carbon emissions associated with road transport.

Environment impacts are associated with the crossing of 49 main rivers, 95 wetlands and various sensitive environments, including the KwaZulu-Natal Mistbelt Grassland region and the Drakensberg mountain range. Of special concern is the loss of Mistbelt Grassland, a rare and endemic vegetation type that is difficult to replace. The dominant grass species, *Themeda triandra* (Red Grass) does not repopulate itself once removed and must be manually re-planted with seedlings if the grassland type is to be rehabilitated. This is an expensive process. Transnet was not willing to rehabilitate land using this method, despite having agreed to do so with landowners on the route. Otherwise, rehabilitation in the form of revegetation and the reinstatement of wetlands (no longer pristine) is reasonable. The pipeline route followed in 1965 is still clearly visible except where cultivated, indicating that even in the long term, full rehabilitation without intervention, does not occur.

The South Durban Community Environmental Alliance (SDCEA) raised social and political concerns about the selection of the route of new pipeline. It was alleged

³⁷ Regulation 41(3) of the EIA Regulations 2014.

that “affluent white areas” were avoided because the latter could voice their concerns, but poor communities were not able to, or their concerns were ignored. the choice of route, to the detriment of poor communities in the densely populated south Durban and rural Umbumbulu areas.³⁸

There is a legitimate perception that the new pipeline followed a new route that avoided the “affluent white areas” areas of Hillcrest, Assagay and Alverstone, all of which have experienced several large leaks and spills since the construction of the “old” pipeline in 1965. With greater resources and influence, these communities were able influence.

A complaint common to most stakeholders is that Transnet representatives and some of their consultants were arrogant during the EIA process and showed little respect for I&APs. A similar complaint was prevalent during the rehabilitation period. Transnet ran roughshod over agreements with landowners, were dilatory in paying compensation for loss of land use and in paying rent for land used for temporary purposes during construction.

Monitoring by the Department of Environmental Affairs during construction was limited and ineffective. Similarly, the independent environmental control appointed as a condition of the environmental authorization was seldom seen on site during

construction or during the rehabilitation period.

King Shaka International Airport

Stakeholders had similar complaints with the other major infrastructure projects undertaken by Transnet in the region.

(King Shaka International Airport was planned and commenced in the early 1970s when the bulk earthworks were largely completed. The project was abandoned by the apartheid government for economic and political reasons. Interest in the site was revived in the mid-1990s and was again a “stop-start” project for the same reasons. South Africa’s hosting of the 2006 Soccer World Cup and possibly a change in political control of the province to the ruling party were probably the main catalysts for the resumption of the project.

An EIA was conducted after the decision was taken to proceed with the project. Objections to the project and appeals against the EIA failed, and the project proceeded, albeit with delays. At best, the EIA assisted with the identification of off-site impacts that had to be taken into account, noise being the most significant. As part of the rezoning of the airport site, surrounding land that would be subjected

New Transnet pipeline route (green) versus old (dotted line)



Source: Transnet NMPP Environmental Impact Assessment Draft Scoping Report, 2008

³⁸ See Patrick Bond (2015). “South African oil spill pollutes rich whites’ playground. But suburban Durban disaster reveals wider planetary abuse and eco-tourism”. In The Con 19 February . Available at: www.theconmag.co.za/2015/02/19/pipeline-to-hell .

to high noise levels making it unsuitable for residential use was rezoned to non-residential commercial uses.

Going through the motions of compliance with the EIA Regulations added no value to the impact report. I&APs added nothing to the identification of the potential impacts of the project that the consultants would have identified anyway, and their concerns had no effect on the outcome.

In this case, as with the NMPP project, the EIA delayed the project by many months, running into years. By provoking delays, EIA in South Africa has gained a bad reputation among developers, who are often to blame for the delays by not including their environmental due diligence at the same time as they investigate the financial and technical feasibility of their projects.

Public-Private Partnership

Point Waterfront Development

This project is a joint venture between the eThekweni (Durban) Municipality and a consortium of South African and Malaysian investors.

The project involves foreign direct investment (FDI). Generally, in South Africa FDI does not affect the environmental and social impact assessment processes as they are mandatory. However, there is the potential for political interference in the decision or outcome because the head of the environmental authority is a minister or MEC. The minister (or MEC), is also the appeal authority and has the power to overturn the decisions of the competent authority, which is generally a department under their control.

The Point Waterfront area once housed a prison, residences for prison employees and other government employees in various occupations related to the Durban Port. Much of the area was taken up with railway and harbour infrastructure, warehousing and customs clearing houses. As the port developed, harbour facilities were moved elsewhere, the prison was closed, hotels became run down and the social structure of the area crumbled. Much of the area became derelict and many buildings were demolished.

The development opportunities of the area are obvious. Because of location at the mouth off the harbour and a sheltered beach on its eastern side, it lends itself to residential, commercial and tourism development. On its northern boundary is an aquarium, shops and restaurants, making it a popular tourism destination.

The area is also home to four water sports clubs: Durban Underwater Club; Durban Point Yacht Club; Durban Paddle Ski Club; Durban Ski Boat Club, all occupying prime locations on the beachfront. In their midst is Durban Seine Netters, a business operating net-fishing using rowing boats launched from the beach, just as the founders of the business (indentured Indian workers released from service) did about 150 years ago. Their descents still run the business from the same location. The operation has considerable “living heritage” value.

Development has commenced in accordance with plans approved following an EIA process.

The water sports clubs and Durban Seine Netters, all of whom operated under leases from the state, were required to relocate to make way for the proposed development.

The EIA process took more than five years to finalise, with the environmental authorization being issued in February 2007. The decision of the competent authority was taken on appeal by 14 I&APs on both procedural and substantive



Durban Point area prior to development (2001)

grounds. All the appeals were dismissed in August 2009.

During the EIA, Durban Paddle Ski Club and an activist group (Save Vetch's Pier) took legal action to prevent harm to Vetch's Pier, an artificial reef formed by the unsuccessful construction of a pier in early 1860 and abandoned in 1864. The pier is now a naturalized reef with abundant marine life. It is an excellent place for novice divers and the protection it offers the beach makes it a popular family recreation area.

In the litigation, the "privatization" of the beach was also challenged. The litigation was unsuccessful.

At the same time, the water sports clubs were at loggerheads with each other, making any agreement between them and the developer on sites for their relocation difficult. The clubs settled their differences, and an agreement was reached for their relocation to the north-eastern part of the development area.

The environmental authorization was amended in October 2014 to accommodate the proposed relocation and to make various layout changes. Part of Vetch's Pier was excluded from the development and part of the development removed from the beach to allow greater public access to the area.

Abandoned layout

These changes did not deal with all the issues raised in the EIA process, particularly those related to the construction of a small craft harbour in the sea and the limitation of public access to part of the beach.

In early 2015, Malaysian project managers were appointed and major changes to the development were made. These must obtain planning and environmental

approval but, by and large, they address most of the concerns raised during the EIA process. The small craft harbour in the sea has been scrapped, and all development is pulled back and will not extend beyond the "erosion" zone, which defines the public area of the seashore. A promenade (boardwalk), to which the public will have access, will run along the entire beachfront. The water sports clubs and Durban Seine Netters will be accommodated approximately in their current locations, under the boardwalk, and will have direct access to the beach.

Current (2016) development proposal

The EIA did not resolve the thorny issues of public access to the beach, the rights of the water sports clubs and the seine netters and their heritage, the preservation of Vetch's Pier, and the impacts on the marine environment from the small craft harbour. In that sense, the EIA failed the affected community, as EIA processes so often do. However, the public participation process raised significant issues that a more receptive developer might have considered. The compromises made in the 2014 amendment forced I&APs to make the best of a bad thing.

The influence of the Malaysian investors and the new Malaysian project managers was a significant factor in the development. They clearly recognized the merits of the complaints of I&APs even if the developer and the authority did not and that, for the development to succeed, it needed the goodwill and support of the affected communities.

The development has the potential to kick-start development in a part of the city much in need of urban renewal and social transformation. On the one hand, EIA will be blamed for the delays in the development (although there were many other financial and political reasons for the delays), but on the other, this project demonstrates that the EIA process can improve the quality of developments.



Current state of development (21 April 2017)

Foreign direct investment (FDI) can potentially have negative impacts for local communities. Foreigners come in and make a profit, which “leaks” from the local area and/or the country, leaving behind a bad social, economic and environmental legacy.

FDI is an important aspect of the Point Waterfront Development. It has presented problems, but these are not caused by the current Malaysian investors in the developer company. The first investor, also a Malaysian company, ran into financial difficulties, leading to the project stalling. The eThekweni Municipality, as the other shareholder, had neither the financial resources nor the ability to take the project on alone. In any event, part of the motivation for the project was to solicit foreign investment in Durban.

The current developer, UEM Sunrise Berhad, is a public-listed company and one of Malaysia’s top property developers. It is the flagship company for township and property development businesses of UEM Group Berhad and Khazanah Nasional Berhad. UEM Group is wholly-owned by Khazanah, an investment holding arm of the Government of Malaysia. The political commitment of the Malaysian Government compels the developer to persist with the project. Ordinary private developers would have long since cut their losses and walked away from the project, as did the South African company which was previously driving the development.

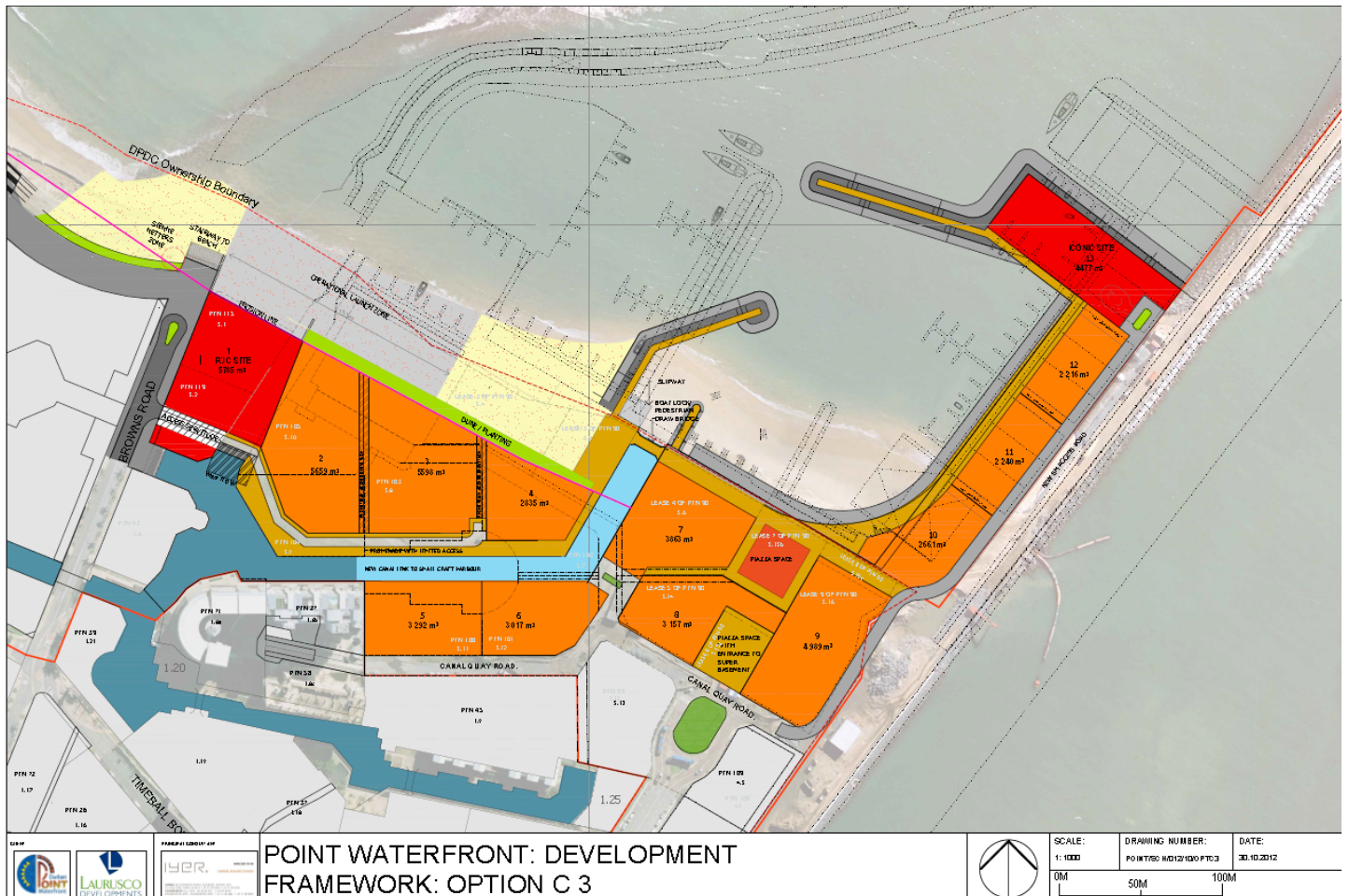
In this project, FDI is not a negative factor. Because it may be difficult to hold the foreign component of the developer accountable for contractual breaches or environmental non-compliances, political accountability is an important safeguard. The criminal provisions of NEMA - the ability of the state to hold directors of the company personally accountable and the power to arrest them to secure their appearance in court - are both a deterrent and a safeguard against reckless disregard for the environment.

Private development

Renishaw Mixed-Use Development

This is a large urban expansion project to be developed over approximately 30 years. The land to be developed is the coastal belt to the south of Durban and falls within the eThekweni and Umdoni Municipalities.

The EIA process assisted in the identification of environmentally sensitive areas and the social impact on the adjacent areas that fall within Traditional Council Areas (formerly known as Tribal Areas).³⁹ The predicted social and economic impacts of



³⁹ The Ingonyama Trust own all Traditional Council land. This land, which formed the KwaZulu “homeland”, was transferred from the South African Government to the Trust to secure the participation of the Inkatha Freedom Party (predominantly Zulu) in the 1994 democratic election. This land cannot be sold or leased except by the Trust, who must have the consent of the Traditional Council (represented by the chief). The chief has the limited right to issue “permissions to occupy” to members of his community.

the development are largely positive.

The layouts in Appendices 5 and 6 show the extent to which the environmental issues identified in the EIA were dealt with in the development proposal. The layouts were approved and form part of the environmental authorization.

An EIA process assisted the developer to form a relationship with the affected communities. This assisted the developer (a public company traded on both the South African and London Stock Exchanges) to revise its business model by including affected communities in its long-term development strategies.

The developer's primary business since the 1870s has been sugar farming, although it has diversified its activities in recent years. As sugar farmers, they own large tracts of land, often adjoining Traditional Council Areas. Some of this land is subject to "land claim" under the Restitution of Land Rights Act.⁴⁰ Although the window for land claims has closed, it is likely to be reopened during the current parliamentary session.

The land comprising the Renishaw Development comprises both land subject to a land claim and land not under claim. Some of the development includes land that may be claimed in the future. Most of the land comprising the development will not be subject to land claim.

Approximate areas of "tribal" land and development land

Partly to pre-empt land claims over a small portion of the land, but more to do what it considers to be socially and economically prudent, the developer has entered into a development protocol with the adjacent "tribal" community. In the protocol, the developer recognizes not only valid land claims but also the need to redress some of the skewed equity in land provoked by apartheid. The community, through its business trust and development company, will acquire a shareholding in the subsidiary of the developer that will own and undertake the development. This is not regarded as a gratuitous gesture. The value of the community's land rights, because they are recognized by law and because recognizing the intangible, emotional connection of the community to the land is "the right thing to do", is given monetary value. These rights are contributed to the development in return for shares.

Having equity in the project will provide the community with long-term income for community upliftment projects.

As with most construction projects of this magnitude, many jobs during the construction period will be created and, because of the duration of the projects, many of these may be regarded as permanent. Post development jobs will also be created. All of this is a positive economic impact. In addition to these benefits to the community, the EIA identified the need to develop skills in the community so that they will be suitably qualified to secure the jobs that become available

during the project. In collaboration with the community and government training entities, formal training programmes, related to construction at this stage, have been implemented. In addition, all major contractors employed on the project are obliged to use local labour where possible and must appoint local subcontractors who are suitably qualified.

While the EIA was not the direct cause of the innovative approach adopted by the developer in its broader business strategy, confronting these issues during the EIA enabled the developer to understand the needs of the ambient community.

11. EFFECTIVENESS OF THE ENVIRONMENTAL TOOLS

The following emerges from the case studies:

- Very few development proposals fail in the environmental assessment phase.
- The EIA process can provoke changes in a development for the better, even if this is not by rulings or decisions of the competent authority.
- Minor modifications may be made because of the undertaking of an SEA. The full potential of this instrument is not exploited.
- Stakeholder comments during the course of an EIA may influence the conditions imposed as part of an environmental authorization or approval, but seldom result in the cancellation of the project.
- Very few appeals succeed, be they by the appellant the developer or an interested and affected party.
- Environmental management frameworks are useful but under-used.

EIA has not reached its full potential because of a combination of factors, these being primarily:

- Over-elaboration over time of the legislation, regulations and lists of activities requiring environmental authorization;
- Lack of capacity and, at times, competence within the regulating authorities;
- Lack of goodwill towards the process by developers;
- Lack of a regulatory body for EAPs and consequently inconsistency in the competence of practitioners.

³⁹ The Ingonyama Trust own all Traditional Council land. This land, which formed the KwaZulu "homeland", was transferred from the South African Government to the Trust to secure the participation of the Inkatha Freedom Party (predominantly Zulu) in the 1994 democratic election. This land cannot be sold or leased except by the Trust, who must have the consent of the Traditional Council (represented by the chief). The chief has the limited right to issue "permissions to occupy" to members of his community.

⁴⁰ Act 22 of 1994. The Act provides for the restitution of land, or compensation for land to people removed by apartheid legislation between 1913 and 1998.

12. ENFORCEMENT

Enforcement of the law is selective enforcement and generally poor. Environmental legislation is seldom applied in Traditional Council Areas.

13. ENVIRONMENTAL CONSIDERATIONS IN PLANNING

The environment plays a small role in planning decisions despite the comprehensive legislation that exists, and compels environmental concerns to be considered in spatial and land use planning. Development ambition generally overrides environmental priorities.

14. CONCLUSIONS

One of the reasons for conducting an EIA, is to determine whether a project should proceed. In the case of all major infrastructure projects, strategic political decisions are made long before the project is planned and an EIA undertaken. The EIA serves to determine how the project is to be undertaken, which of the design, route or location options are preferred, but not whether the project should go ahead at all. I&APs are sucked into the process believing that their input and the collective opposition to the project by the community, might stop the project altogether. This is clearly not the case.

An EIA process with a predetermined outcome fails stakeholders in the following ways:

- the process is dishonest – if the “no development” option that the developer must consider when looking at “alternatives” in the EIA process is not a possibility, this should be disclosed at the outset. Communities would be spared the time, effort, and emotion they put into opposing a development through the EIA process.
- The EIA process could then serve the purpose of a “mitigation report”, to which I&APs could contribute to ensure that impacts are avoided where possible, minimised if they cannot be avoided at all, and rectified by way of rehabilitation or management controls.⁴²

By paying lip service to public participation, I&APs are being denied their constitutional right to have a say in decisions that affect them.

Private developers of major contracts can be persuaded by the findings of the EIA to modify their development plans to accommodate the concerns of I&APs, and in some instances, may influence the developer’s approach to social and economic impacts arising from development.

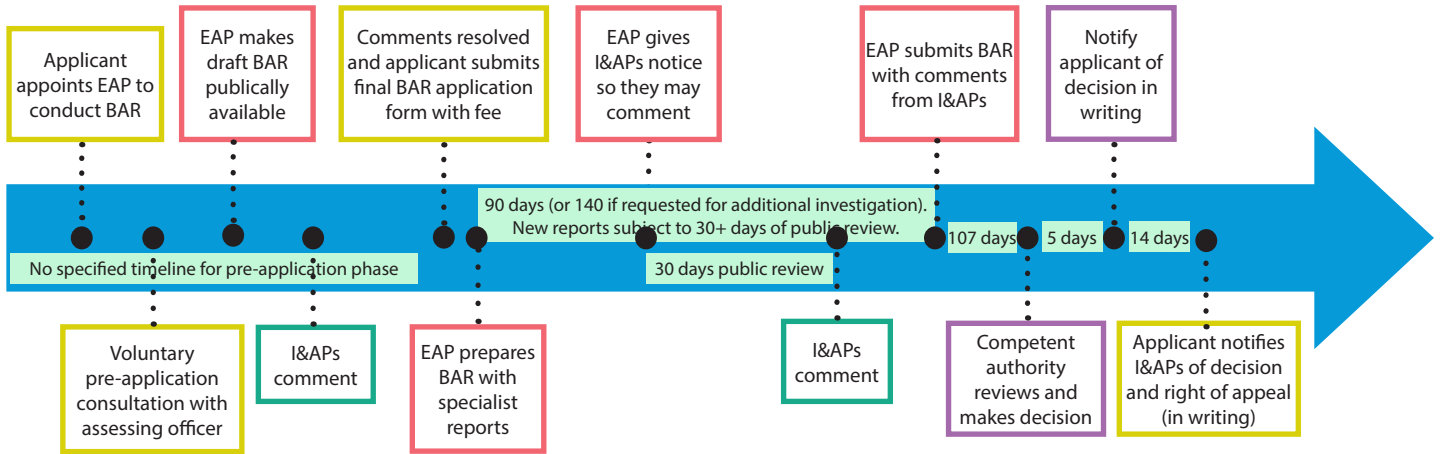
A persuasive approach is to be preferred over a combative strategy, if legal coercion is available, to ensure environmental compliance.

15. RECOMMENDATIONS

- Greater use should be made of EMF and SEAs to provide an information base that indicates areas that are suitable for development, in which case, development should be permissible, subject to planning permission and an EMPr to ensure that impacts are properly managed. Sensitive areas requiring EIA could be identified and, in these areas, the EIA should be rigorous and its main purpose should be to determine if the development should take place, not how. If development is permitted, impacts can be managed through an EMPr. Development in highly sensitive, vulnerable or stressed environments should be prohibited except in exceptional circumstances.
- The lists of activities for which environmental authorization (and therefore EIA) is required, need revision. Thresholds are arbitrary and often serve a bureaucratic rather than an environmental purpose.
- Public participation would be improved if it took place in EMF and SEA processes, conducted by consultants employed by the government and funded from the public purse. The public should have a say in the appointment of consultants and the framing of their terms of reference. Interested and affected parties should have the ability to engage with the consultants, not merely comment on their work. “Open days” could be held at milestone stages of the project and the public should have the opportunity to raise issues in person with the consultants.
- Affected disadvantaged groups must be identified (by the authorities, with the consultants and interested and affected parties) and provided with the necessary assistance and resources to participate meaningfully. Funding for this should be shared between the developer and the state.
- In EIA processes, the EAP should be appointed by the authority on a public tender basis (as is the case with most government projects) but be paid for by the developer. Public notice of the proposed application should be given as a first step of the process, in which notice the invitation to EAPs to tender for the project should be disclosed. This will give the public the opportunity to monitor the appointment of EAPs and to ensure that the tender process and appointment are legitimate.
- Provision should be made for officials who do not comply with prescribed EIA timeframes to be held personally accountable.
- A regulatory body to ensure that only qualified, competent practitioners are allowed to practise as EAPs must be established urgently.

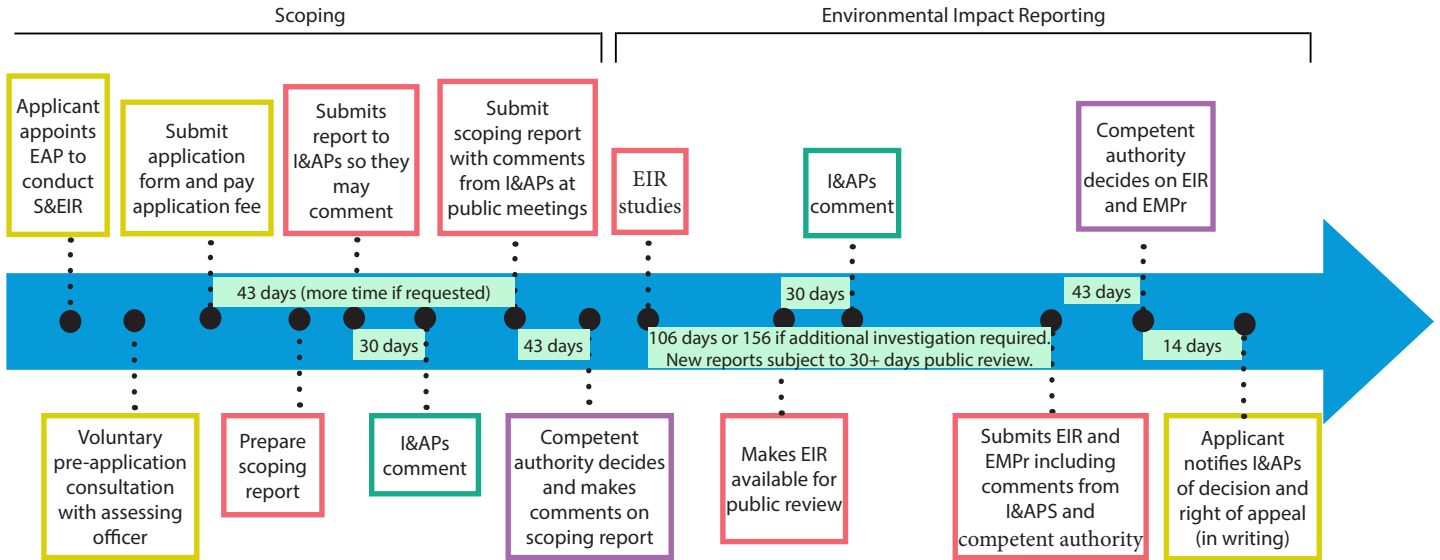
Basic Assessment Report* (BAR) for activities in listing notices 1 & 3

*The appointed EAP determines whether BAR or S&EIR must be conducted

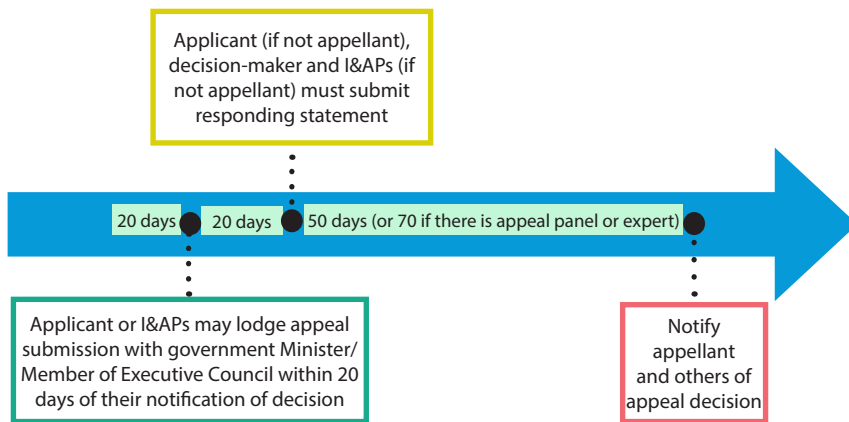


Scoping and Environmental Impact Report* (S&EIR) for activities in listing notice 2

*The appointed EAP determines whether BAR or S&EIR must be conducted
EMPR = environmental management program report



Appeal Process for BAR and EIR



Applicant
 I&APs = Interested and Affected Parties
 Government Authority
 EAP = Independent Environmental Assessment Practitioner

03

Tourism and Residential Development in Suva and Nadi, Fiji

Saiful Karim



View of the city centre of Suva, the capital city of Fiji @Shutterstock

The South Pacific Islands Country of Fiji is facing rapid urbanisation. The urban areas of Fiji currently host 50.7% of the 865,611 people of the country (2014 estimate).¹ More than 60% of Fiji's population will live in urban areas by 2030.² The growth rate of the urban population is significantly greater than the rural population growth rate in Fiji.³

INTRODUCTION

Fiji is an archipelago consisting of 330 small islands, of which 110 are permanently inhabited, with a total land area of about 18,300 square kilometres. Naturally, all of the major cities and towns in Fiji are located in coastal areas, rendering them vulnerable to cyclones, storm surges and probable sea level rise due to climate change.⁴ According to a study, nearly one fifth of the people in the urban areas of Fiji live in settlements facing a “diverse range of physical, legal and social conditions that often do not meet basic human rights and are highly vulnerable to climate change impacts.”⁵

87% of the Fiji's population live in two major islands Viti Levu and Vanua Levu. However, most of the towns and cities are in Viti Levu, which is hilly in the interior. Two major cities in Fiji named Suva and Nadi are among the most populated cities of the South Pacific Island countries. While Suva is the capital of Fiji, Nadi is the major communication hub for Fiji and some other small island countries of the South Pacific. Therefore, these two cities are not only important for Fiji but also for the region. Both greater Suva (GSUA) and Nadi area are experiencing rapid population growth creating the need for new housing projects. Moreover, because

¹ Fiji Bureau of Statistics, Population and Labour Force Estimates of 2014 (FBoS Release No. 99, 2015, 31 December, 2015). UN Habitat, Fiji Urban Profile (UN Habitat, 2012).

² UN Habitat, Greater Suva Urban Profile (UN Habitat, 2012).

³ UN Habitat, above n 1.

⁴ UN Habitat, above n 1.

⁵ People's Community Network, Fiji Informal Settlement Situation Analysis (2 August 2016) <https://pcnfiji.files.wordpress.com/2017/06/pcn_unhpsup_ssa_final_report.pdf>

of the natural beauty of Fiji, there is a demand for holiday homes, hotels and other tourism related development. Therefore, the main forms of urban development in both cities are tourism and residential expansion.

Taking these main forms of urban development into account, environmental reviews in Fiji must be considered from a complex environmental, economic, social and cultural perspective. For example, residential and tourism development is indivisibly interlinked with the land ownership. Most of the land in Fiji is held customarily by the iTaukei (indigenous) people and managed by the iTaukei Land Trust Board. The customary nature of iTaukei land means that the land is owned by groups called mataqali; rather than the names of the individuals in the group, the name of the mataqali appears in the title document as the landowner. iTaukei land is generally not be sold, transferred, mortgaged or otherwise encumbered, except to the state.⁶ However, leasing is possible through the iTaukei Land Trust Board.

While 91.68% of Fiji land is customary iTaukei land, there are three other categories of land in Fiji: individually held (freehold) private land (7.94%), state land managed by the Department of Lands (0.13%),⁷ and Rotuman Land that is governed through a different land management system (0.25%).⁸ That being said, most of the tourism and residential development activities there are on land leased from iTaukei people. For example, 72% of the land in the Great Suva Urban Area (GSUA) is iTaukei land.⁹ On many occasions, local people have challenged proposed development projects in court because of landownership disputes.

This paper critically analyses the relevant laws for environmental review of tourism and residential development in Fiji, particularly in two major urban centres, Suva and Nadi. This paper examines whether the current legal framework for environmental review is adequate to address the emerging environmental issues and moreover, whether the principles of sustainable development can be integrated into the process, through a Strategic Environmental Assessment (SEA).

RESIDENTIAL DEVELOPMENTS

The GSUA is the main urban area of Fiji. The GSUA consists of Suva City and three nearby municipal towns including Lami, Nasinu and Nausori. The estimated population of the GSUA accounts for more than 57% of Fiji's total urban population (and nearly 29% of the total population of the country).¹⁰ As the major economic centre, contributing 40% of the national gross domestic product, this area is experiencing a 1.7% growth rate of population, with even higher growth in some

specific parts of the area.¹¹ Moreover, a large number of people commute to GSUA every day for work and other purposes

Many residents of Suva do not have proper housing. There are approximately 230 squatter settlements in Suva that host almost 16% of the city's population.¹² This creates some complex problems as identified in a project information document of a World Bank funded project:

“The lack of accessible, affordable and safe housing has contributed to a situation whereby a large number of people are compelled to live in substandard conditions in squatter/informal settlements without any security of tenure. It has led to increased demands on infrastructure services, e.g., roads, utilities such as water, sewerage, electricity, telephone and fire hydrants, as well as an increase in health and social problems. The settlements are generally characterized by overcrowding with high concentrations of people occupying relatively small areas, and large extended families with more than one family/household in a single shelter. The majority of inhabitants are unable to sustain what may be considered a basic standard of living, including housing. This has led to insecurity and undue stress among the settlers, as well as exploitation. The generally poor hygiene and sanitation also continue to lead to ill health for these vulnerable populations.”¹³

The Fiji Government's Urban Policy Action Plan (2004), Urban Growth Management Plan (2006), and National Housing Policy (2011) show the government's willingness to take increased initiative in providing affordable housing to the people. Relevant authorities are taking new projects and inviting the private sector into development leases for housing and land development projects.¹⁴ In general, the serious demand for housing is leading to more housing projects: a number of major housing projects are either completed, underway or proposed, including Waila City, Tacirua East, and Wainibuku and Nepani subdivisions.¹⁵

However, some projects do not make it to completion, for example, Waila City. When it began in 2011, Waila City was supposed to be the biggest housing project of Fiji, spread over 700 acres of freehold land with the target to develop approximately 5,000 housing units that cater for all categories of home buyers including low, middle and high income earners.¹⁶ This project was initiated by the Fiji Housing Authority but was given to Top Symphony (Fiji) Limited of Malaysia under a Private Participation Partnership arrangement.¹⁷ Unfortunately after several years of inaction and uncertainty, the contract with this company was terminated in 2016.¹⁸

⁶ On iTaukei land, see, Constitution of the Republic of Fiji 2013, s 28.

⁷ Kelera Gadolo, 'Securing Land Rights for Equity, Sustainability & Resilience: The Successful Management of Customary Land', paper presented at the 2017 World Bank Conference on Land and Poverty, the World Bank, Washington DC, March 20-24, 2017.

⁸ Ibid. On Routama land management, see Don Paterson and Makereta Hiagi Mua, 'Rotuma', in Don Paterson and Sue Farran (eds.) South Pacific Land Systems (USP Press, 2013) 227 – 234.

⁹ TLTB, Revised TLTB Land Use Plan for The Greater Suva Region, (2016) <http://gisconference.gsd.spc.int/images/2016-conf-presentation/DAY2/Session2/GIS_RS_Conference_2016_TLTB_Land_use_plan.pdf>.

¹⁰ UN Habitat, above n 2.

¹¹ Ibid.

¹² Jennifer Joy Bryant-Tokalau, 'Urban squatters and the poor in Fiji: Issues of land and investment in coastal areas' (2014) 55 Asia Pacific Viewpoint 54–66. Another estimate shows that "In 2011 the GSUA had over 100 informal settlements, increased from 50 identified in the 2006 UGMAP. Most of these new settlements are located along the GSUA's main link roads. Informal settlements in the GSUA contain more than 90,000 residents, some 30 per cent of the total GSUA population, and are of varying size and density with limited access to basic urban infrastructure." UN Habitat, above n 2. It is also "estimated that 15,445 households (77,794 people) currently live in over 240 squatter settlements around the country. This is equivalent to about 7 percent of Fiji's total population and 15 percent of the total urban population." World Bank, Project Information Document (PID)- Utility Services for the Development of Housing in Squatter/ Informal Settlements (30 September 2016) <<http://documents.worldbank.org/curated/en/636021468273901429/pdf/PIDC56649.pdf>>.

¹³ World Bank, Ibid.

¹⁴ UN Habitat, above n 1, World Bank, Ibid.

¹⁵ UN Habitat, above n 2

¹⁶ Housing Authority of Fiji, Waila City Project, (2014) <<http://www.housing.com.fj/waila-city-project/>>

¹⁷ Ibid.

¹⁸ Arieta Vakasukawaqa, Terminated, Fiji Sun (online) 2 September 2016 <<http://fijisun.com.fj/2016/09/02/terminated-2/>>.

Without major housing improvements, the growing demand and high price of housing in Suva city is leading to often unregulated residential development projects and subdivisions in peri-urban areas as well as in nearby towns, Nasinu and Nausori.¹⁹ Unregulated residential, industrial and tourism development have been identified as major threats to the mangrove forests around urban and peri-urban areas, with detrimental environmental effects in the GSUA.²⁰ Developments in coastal areas and wetland reclamation, especially around densely industrialised and urban areas of Fiji, are responsible for the destruction of mangrove and Littoral forests.²¹ Littoral forests, like mangrove forests, are a wetland forest area with a sensitive ecosystem and home to many endangered species. Moreover, land reclamation, coral extraction, and river dredging encompass some of the other major environmental issues for the coastal cities in Fiji.²²

The destruction of the mangrove and littoral forests for housing and tourism projects and its consequential environmental and social impact on the people is not a new phenomenon in Fiji, particularly in greater Suva areas. Here is an example from the 1980s:

“In 1985, Fiji’s Housing Authority decided to establish a low income housing area in Davuilevu, near Suva. Because statutory bodies in Fiji are not subject to an EIA, no attempt was made to determine the likely environmental effects of this proposal. An area of 20 hectares of rainforest was bulldozed and divided into suburban lots. Seven years later, most of the Plots are unoccupied and the area is a wasteland of bare red soil. The soil was so seriously disturbed that nothing has grown since. An EIA would have pointed out the folly of removing all the forest cover over such a wide area.”²³

The example above indicates the longstanding problem regarding EIA processes for residential or housing development projects in Fiji, particularly in and around the GSUA area. Amidst these concerns, Fiji significantly developed an environmental legal and institutional framework in the last few decades, including a legal framework for EIA. However, despite the significant development of a legal framework supporting EIA, the situation has not been changed, due to a lack in enforcement and institutional deficiency.²⁴

ENVIRONMENTAL IMPACT OF TOURISM DEVELOPMENTS

Fiji has achieved record earnings from the tourism sector in the last few years. In 2016, Fiji earned FJD 1,602.9 million from tourism, 2.7 percent higher than the FJD 1,560.2 million figure from 2015.²⁵ A record 792,320 visitors arrived in Fiji in 2016 which was 5% higher than the 2015’s arrival of 754,835.²⁶ It is remarkable that 792,320 people visited the country in 2016 whereas the total population of the country is only 865,611 (2014 estimate). A record 68,495 visitors arrived in Fiji in April 2017, which is 17.8% higher than April 2016.²⁷ This increased interest in tourism encourages more and more tourism related development.

In a recent statement, Fiji’s Permanent Secretary for Industry, Trade and Tourism stated that ‘the tourism sector is the most important contributor to the Fijian economy, contributing 30 per cent to our GDP and providing direct and indirect employment to one in three Fijians in the workforce.’²⁸ In his speech, the Permanent Secretary identified a number of priority strategies including inter alia attracting quality investment to grow the industry in a sustainable manner and ensuring the industry’s preparedness for climate change and global economic shocks.²⁹

The Fiji government is currently drafting a new Tourism Development Plan, known as Fijian Tourism 2021.³⁰ It is encouraging to see the issue of climate change has been given attention in the proposed tourism plan but tourism related impact on the environment and the consequential sufferings of local people is yet to be mainstreamed in the national tourism development policy agenda.

However, the Permanent Secretary stated the following in his statement about environmental sustainability of the industry:

“Whilst ensuring that there are economic benefits for all Fijians, we have to ensure that industry grows in a sustainable manner... Sustainable development is not only considering the needs of future generations, it is also about protecting existing tourism infrastructure and services from environmental impacts. It is about keeping this sector – vital to our economy – resilient to climate-related catastrophe.”³¹

This aspiration makes the importance of robust application and enforcement of an environmental review system under the environmental and planning legal regime even more crucial.

Nadi is the tourist capital of Fiji and hosts the Nadi International Airport and the Denarau Port. 85% of the total number of visitors in Fiji are concentrated in Nadi.³² Nadi is the gateway of Fiji as well as for some other South Pacific countries. With a present population of around 42,000 people (including Nadi Town and the

¹⁹ UN Habitat, above n 2.

²⁰ ADB, Country Partnership Strategy: Fiji, 2014–2018, Environment Assessment (Summary) <<https://www.adb.org/sites/default/files/linked-documents/cps-fij-2014-2018-ena.pdf>>

²¹ ADB, *ibid*: Bryant-Tokalau, above n 12; Wadan Narsey, Development at What Environmental Cost? Fiji Times (online) 21 June 2014 <http://www.fijitimes.com/story.aspx?id=272094>; MESCAL, Review of Policy and Legislation Relating to the Use and Management of Mangroves in Fiji <https://www.iucn.org/sites/dev/files/content/documents/fiji_policy_and_legislative_review_report.pdf>.

²² ADB, above n 20.

²³ Richard K. Morgan, A Guide to Environmental Impact Assessment in the South Pacific (SPREP, 1993) 3.

²⁴ Bryant-Tokalau, above n 12.

²⁵ Fiji Bureau of Statistics, Fiji’s Earnings from Tourism - December & Annual 2016 (28th March 2017) <<http://www.statsfiji.gov.fj/latest-releases/tourism-and-migration/earnings-from-tourism>>

²⁶ Fiji Bureau of Statistics, Provisional Visitor Arrivals - December 2016 (17th January, 2017) <<http://www.statsfiji.gov.fj/latest-releases/tourism-and-migration/visitor-arrivals/697-provisional-visitor-arrivals-december-2016>>

²⁷ Fiji Bureau of Statistics, Provisional Visitor Arrivals - April 2017 (17 May 2017) <<http://www.statsfiji.gov.fj/latest-releases/tourism-and-migration/visitor-arrivals>>

²⁸ Shaheen Ali, Tourism is the Future Driver of Economic Activity in Fiji, Fiji Sun (online), 24 February 2017, <<http://fijisun.com.fj/2017/02/24/tourism-is-the-future-driver-of-economic-activity-in-fiji/>>

²⁹ *Ibid*.

³⁰ *Ibid*.

³¹ *Ibid*.

³² Fiji Government, Tourism Development Plan in Final Stages (18 January 2016) <<http://www.fiji.gov.fj/Media-Center/Press-Releases/tourism-development-plan-in-final-stages.aspx>>



A Squatter Settlement in Nadi



A Squatter Settlement in Nadi



A Squatter Settlement in Nadi

surrounding peri-urban areas) the town is experiencing a population growth of 2.5% per year.³³ Economic activities of Nadi rely mainly on three interconnected sectors: tourism, transport and real estate.³⁴ Growth in the tourism sector has changed the land use pattern of Nadi and surrounding area from predominately residential to tourism related development. However, the effectiveness of environmental review of tourism related development projects is questionable. This will be elaborated here with an example from the Denarau island development.

Before the development of Denarau as a tourist area, it was an area of mangroves, swamps, small, low-laying islands, and mud flats.³⁵ Denarau Island's development is approximately 850 acres of landscaped area situated within the close proximity of Nadi town and Nadi International Airport. It features an 18-hole international standard golf course, port, marina and more importantly eight world-class, high-end resorts.³⁶ It is the biggest tourism development endeavour in Fiji.

The preliminary development of Denarau started in 1969 by an American developer and the construction of the resort started in 1972.³⁷ In 1988, a Japanese property developer became involved with the project and between 1988 and 1993, extensive development work in the island was undertaken including "clearing of the balance of

the 600 acres of the island, the reclamation of a vast area of swamp, the construction of an 18 hole championship golf course, a clubhouse, extensive dredging in the marina, the construction of marina facilities, and foreshore protection."³⁸ In 1996, ownership was transferred again to another consortium.³⁹ The adjacent areas are still undergoing further development. An extensive further development master plan for Port Denarau Marina is underway to construct a new sailing club, marina village, maritime school, boat yard, stadium and residential apartments.⁴⁰

The project has involved significant construction on reclaimed land using soil and concrete.⁴¹ An entire hill was demolished to bring 2.5 million cubic meters of soil from an adjacent village.⁴² The coastline of the area was full of old mangroves, many of which were more than 100 years old, but vast areas of mangroves were removed for the construction of resorts and other facilities and the course of the nearby Nadi river was also changed.⁴³ As observed by an affected local resident:

"I am from a community that approved one of Fiji's biggest mangrove destructions 23 years ago for the development of Denarau Golf Course. I was just in class 7 and was not involved in the consultation process nor the approval process, however we were part of a small group that

³³ UN Habitat, Fiji: Nadi Town Urban Profile (UN Habitat, 2012).

³⁴ Ibid.

³⁵ Karen Bernard and Samantha Cook, 'Luxury Tourism Investment and Flood Risk: Case Study on Unsustainable Development in Denarau Island Resort in Fiji' (2015) 14 (3) International Journal of Disaster Risk Reduction 302–311.

³⁶ Denarau Corporation Ltd, Destination Denarau (2017) < <https://www.denarau.com/destination-denarau/> >

³⁷ Denarau Corporation Ltd, History of Denarau Island (October 2010) < <https://www.denarau.com/history/> >

³⁸ Ibid.

³⁹ Ibid.

⁴⁰ John Ross, Exciting New Development by Port Denarau Marina, Fiji Sun (online) 17 January 2015, <<http://fijisun.com.fj/2015/01/17/exciting-new-development-by-port-denarau-marina/>>

⁴¹ Bernard and Cook, above n 35.

⁴² Ibid.

⁴³ Ibid.



Mangrove Destruction in Nadi

protested the mangrove destruction. Today the Vanua [land] of Nadi is facing numerous floods that are partly linked to the clearing of mangroves in Denarau Island and Denarau Island's beach front sand erosion... In terms of livelihood, we have lost forever our mangrove food source, while we gained some source of employment for our villagers. At that time no proper economic analysis on the opportunity cost foregone for clearing the mangroves for the golf course was undertaken...⁴⁴

This indicates the need for an appropriate legal framework to require proper spatial planning suitable for tourism developments, ensure sustainability through conservation efforts, and resource management to prevent the destruction of coastal resources.⁴⁵

The Denarau island development shows the inadequacy of a project-based EIA and the need for a SEA, in order to consider impact on the entire area. The assessment should also consider the position of the development project within the overall planning and sustainable urban development scheme while taking into account emerging and likely environmental, demographic, economic changes.

ENVIRONMENTAL REVIEW AND

CLIMATE CHANGE

The Republic of Fiji National Climate Change Policy, 2012 identified a number of challenges Fiji is facing in respect of urban development and housing because of climate change.⁴⁶ Extreme events like flooding and cyclones may incur additional pressure on the urban areas particularly in the "lives of people in poorly built or poorly located houses."⁴⁷ This marginal segment of the society will bear a disproportionate burden, which will be further exacerbated by the migration to urban areas due to land loss and reduction of arable land.⁴⁸ Damage to houses and residential buildings due to floods, storm surges, cyclones and other extreme weather events may make the urban poor more vulnerable.⁴⁹

The National Climate Change Policy identified a number policy objectives for climate change mitigation and adaptation in the context of urban development including inter alia increasing energy efficiency and the use of renewable energy; reducing waste burning; the introduction of cyclone and flood resilient construction methods as well as encouraging the use of resilient construction materials; discouraging construction in foreshore areas, riverbanks and floodplains; increasing measures for flood control; and elaborated measures for "reforestation, land-use controls, protection of wetlands and soil conservation."⁵⁰

The National Climate Change Policy also identified climate change related issues for the tourism sector. Some of the policy objectives in the context of adverse

⁴⁴ Cited in Bernard and Cook, above n 35.

⁴⁵ Philip Feifan Xie, Vishal Chandra, Kai Gu, 'Morphological Changes of Coastal Tourism: A Case Study of Denarau Island, Fiji' (2013) 5 *Tourism Management Perspectives* 75–83.

⁴⁶ Republic of Fiji National Climate Change Policy, 2012 (Secretariat of the Pacific Community, 2012)

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*



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impact of climate change on tourism may be highly relevant for environmental review of tourism related developments in urban and peri-urban areas. The Climate Change Policy further states that the tourism sector may face some challenges due to climate change including buildings and infrastructural damage; disruption in transport network; a decrease in the number of tourist arrivals; adverse changes in natural attractions; increase of costs for adaptations; and a decrease of touristic capital investments due to climate impact.⁵¹

Although the Climate Change Policy of Fiji identified probable threats from climate change in urban development, climate change impact is yet to be fully integrated into the environmental review system of development projects in Fiji. The Policy (2012) offers some policy objectives for mitigation and adaptation of climate change in the context of the tourism sector, but it does not provide any direction for how the impact of climate change will be incorporated in the environmental review process of future development projects. There is a lack of mechanism for SEA that makes the issue even more problematic. It is pertinent to make specific reference to climate change in the environmental review related legislation, particularly to the Environmental Management Act, Town Planning Act and Subdivision Act. Establishment of a process for interagency cooperation to fully integrate climate change aspects in the environmental review is needed. More importantly, a consideration of the future climate change projections is a necessary component of the environmental review of development plan and urban and regional planning schemes.

ENVIRONMENTAL REVIEW AND SUSTAINABLE DEVELOPMENT GOALS (SDGS), 2030

It is also relevant to highlight whether the current legal and institutional framework is adequate in considering the broader issues of poverty reduction and livelihood, such as whether the current environmental and social review legal framework of Fiji adheres to the global Sustainable Development Goals (SDGs), 2030. This section examines whether the existing review process incorporates the issue of social review as well as whether the review of development projects in the peri-urban areas adequately addresses the issues of agriculture and food security.⁵²

The Prime Minister of Fiji said in a speech at the United Nations that “Fiji’s commitment to the 2030 global sustainable development agenda is absolute and is a cornerstone of our national policies.”⁵³ Goal 11 of the Sustainable Development Goals (SDGs), 2030 is dedicated to make “cities and human settlements inclusive, safe, resilient and sustainable”.⁵⁴ An effective environmental review system is essential for ensuring resilient and sustainable urban development. SDG Goal 11 set a number of targets for achieving the goal by 2030 including inter alia integrated and sustainable human settlement planning and management; reduction of per capita adverse environmental impact of cities and adoption and implementation of

⁵¹ Ibid.

⁵² On agriculture, see generally, Md Saiful Karim et al., “Policy and Legal Framework for Promoting Sustainable Agroforestry in Fiji” in Steve Harrison and Md Saiful Karim (eds.) Promoting Sustainable Agriculture and Agroforestry to Replace Unproductive Land use in Fiji and Vanuatu. Australian Centre for International Agricultural Research (ACIAR, 2016) 171-181.

⁵³ Ministry of Foreign Affairs, Prime Minister Voreqe Bainimarama’s Statement at the UN High Level Debate on the Achievement of Sustainable Development Goals (21 April 2017) <<http://www.foreignaffairs.gov.fj/media-publications/media-release/869-pm-s-statement-on-achievement-of-sdgs>>.

⁵⁴ United Nations, Transforming Our World: The 2030 Agenda for Sustainable Development, UN Doc. A/RES/70/1 (21 October 2015).

integrated policies and plans for inclusiveness, resource efficiency, climate change mitigation and adaptation and disasters management and resilience.⁵⁵ Fiji needs to mainstream these targets in the environmental review process of future urban development project approvals, as well through planning schemes by using the method of SEA.

LEGAL AND INSTITUTIONAL FRAMEWORK FOR ENVIRONMENTAL REVIEW IN FIJI

Many laws of Fiji are relevant for environmental conservation. Fiji is a member of most of the major international environmental legal instruments and has enacted domestic laws to give effect to some of these international legal instruments. Administrative mechanisms for environmental impact assessments (EIA) were first introduced in Fiji in the early 1980s, mainly through the discretionary power of the Director of Town and Country Planning under the Town Planning Act 1946.⁵⁶ However, government-led development projects were excluded from the process.⁵⁷ In general this early introduction of EIA in Fiji does not represent a significant success for the environmental protection regime.⁵⁸

EIA is now institutionalised under the Environment Management Act 2005 (EMA) which is the main environmental Law of Fiji. The main purpose of the Act is to “apply the principles of sustainable use and development of natural resources.”⁵⁹ The Act obliges any person utilising natural and physical resources to regard the following

matters of National importance:

- a) “the preservation of the coastal environment, margins of wetlands, lakes and rivers;
- b) the protection of outstanding natural landscapes and natural features;
- c) the protection of areas of significant indigenous vegetation and significant habitat of indigenous fauna;
- d) the relationship of indigenous Fijians with their ancestral lands, waters, sites, sacred areas and other treasures;
- e) the protection of human life and health.”⁶⁰

The EMA introduced a complex system for EIA. Two government institutions play a major role, namely the relevant authority of development projection within the government departments and the EIA administrator under the Department of Environment. The EMA defines the authority with the decision-making power on development proposals as a minister, department, statutory authority, local authority or person authorised under a law to approve the proposal.⁶¹

Section 12 of the Act provides for the establishment of an Environmental Impact Assessment unit within the Department of Environment, comprised of an Environmental Impact Assessment Administrator and other public officers. This unit has the duty to examine and process every development proposal which:

- a) ‘is referred to the EIA Administrator by an approving authority;



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⁵⁵ United Nations, Goal 11: Make Cities Inclusive, Safe, Resilient and Sustainable (2015) <<http://www.un.org/sustainabledevelopment/cities/>>.

⁵⁶ Jane Turnbull, “Environmental Impact Assessment in the Fijian State Sector” (2003) 23 *Environmental Impact Assessment Review* 73–89.

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*

⁵⁹ EMA, s 3(2).

⁶⁰ EMA, s 3(3).

⁶¹ EMA, s 2.

- b) may come to the attention of the unit because it may have a significant environmental or resource management impact; or
- c) causes, or in the opinion of the Minister, is likely to cause, public concern'.⁶²

The Act provides the Approving Authority the decision making power in the screening stage of EIA. Section 27 of the Act obliges the Approving Authority to examine every development proposal submitted to it and to determine the likely significant environmental and resource management impact of the development proposal, considering the following:

- a) "the nature and scope of the activity or undertaking in the proposed development;
- b) the significance of any environmental or resource management impact;
- c) whether any technically or economically feasible measures exist that would prevent or mitigate any adverse environmental or resource management impact; or
- d) any public concern relating to the activity or undertaking."⁶³

After considering the above, if the Administering Authority determines that there is a likely cause of significant impact, it will forward it to the EIA Administrator either for processing or for determination of the need for EIA, depending on types of development. If a government 'ministry, department, statutory authority or local

authority makes its own proposal for development activity or undertaking must refer the proposal to the EIA Administrator for processing..."⁶⁴

The Environmental Management Act defines a 'development activity or undertaking' as 'any activity or undertaking likely to alter the physical nature of the land in any way, and includes the construction of buildings or works, the deposit of wastes or other material from outfalls, vessels or by other means, the removal of sand, coral, shells, natural vegetation, sea grass or other substances, dredging, filling, land reclamation, mining or drilling for minerals, but does not include fishing'.⁶⁵ It defines a 'development proposal' as 'a proposal for a development activity or undertaking submitted to an approving authority for approval under any written law'.⁶⁶ The Act elaborates provisions for screening, scoping, preparation of an EIA report, content, reviewing, decision, approval, environmental management and monitoring, and other prescribed procedures.⁶⁷

For further elaboration of these provisions, the Fiji government adopted the Environment Management (EIA Process) Regulations, 2007. The Regulations elaborated provisions for screening, EIA processing, and the EIA Study and Report. A very important provision of the guidelines is the clarification regarding development projects by government ministries and entities. According to these regulations, if a government ministry or other government entity proposes a development activity or undertaking for which it would otherwise be the approving authority, it must apply to the EIA Administrator wherein the EIA Administrator performs the role of the approving authority. However, the power of screening is conferred upon the environmental management unit of the proposing government entity,⁶⁸ which may create some problems. The Department of Environment also published the



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⁶² EMA, s 12.

⁶³ EMA s 27.

⁶⁴ EMA s 27(6).

⁶⁵ EMA s 2.

⁶⁶ EMA s 2.

⁶⁷ EMA s 28, 29, 30, 31, 32.

Environment Impact Assessment (EIA) Guidelines in 2008.⁶⁹

The extent to which public participation and the right to information in the review process is ensured is another important issue. The scope for public participation and access to information is practically very limited. The EMA provides for the establishment of an Environmental Register wherein the prescribed matters must be recorded; any person is entitled to have access to any record or document within the Environmental Register.⁷¹ Regulations 41 and 42 of Environment Management (EIA Process) Regulations, 2007 further elaborated these provisions to include all EIA documents in the Register.⁷² Despite these advances on paper, they have not been upheld in practice. In a recent decision, the High Court of Fiji ordered the Department of the Environment to provide EIA reports of a planned development project to some people who may be affected by the project.⁷³ The Department of the Environment initially refused to provide the documents.⁷⁴

The support for the legal framework of environmental reviews by necessary institutional, technical and other organizations is also a questionable issue in Fiji. The inter-agency cooperation as well as that between different levels of government is another area that warrants improvement.

LAND USE PLANNING AND DEVELOPMENT APPROVAL SYSTEM

The Environmental Review process for urban residential and tourism developments is interlinked with the legal framework for urban and regional planning and development. Apart from the EIA system under EMA, discussed above, environmental reviews of residential and tourism development projects may directly or indirectly involve a number of Fijian laws including inter alia: The iTaukei Lands Act, The iTaukei Land Trust Act, The Town Planning Act, The State Lands Act, The Land Transfer Act, The Forestry Act, The Subdivision Act, The Public Health Act, The Roads Act, The State Acquisition Act, The Water Supply Act, and The Local Government Act.

It is important to develop regulatory system for strategic physical planning because land use planning law has a very significant role in the environmental assessment of residential and tourism development projects. The main aim of land use planning law is to satisfy the competing demands for land in a sustainable way. However, the full consideration of environmental issues in planning is a relatively modern concept. As observed by Leslie A. Stein:

“It is hard to decide whether planning or environmental issues need more attention. Urban decay, inadequate infrastructure, endless traffic congestion, and resultant harm to the environment point to the need for planning solutions. However, the nightmares of climate change, overexploitation of natural resources and loss of habitat make environmental issue a primary focus for the world... It is the case that all decisions made in the implementation of the planning process have an effect on the physical environment. For example, the clustering of housing density around transport corridors may reduce car trips and thus lessen pollution in the central city, or the encroachment of housing into suburbs may have an effect on habitat corridors. Historically, however, environmental matters were not part of the planning regulatory system.”⁷⁵

The connection between environmental and planning law developed slowly after 1970s in some countries.⁷⁶ Modern land use planning should consider all aspects of sustainable urban development including environmental and ecological aspects. In order to achieve these results, land use planning law and environmental law should optimally complement each other. Strategic land use planning in Fiji is yet to be fully developed, as opposed to development and regulatory controls.

The Town Planning Act governs the land use planning and development approval system in Fiji. The Subdivision of Land Act is important for areas where the Town Planning Act is not applicable. The Director of Town and Country Planning is responsible for the implementation and enforcement of both The Town Planning Act and The Subdivision of Land Act.

The main mechanism for regulation used in The Town Planning Act is known as the town planning scheme. The Act provides that local authority shall prepare and submit a scheme in respect to all land within the town planning area. There are two declared cities and ten declared towns in Fiji.⁷⁷ The Fiji government also declared several rural town planning areas. These are the surrounding areas of some of the declared cities and towns or else they are areas where the government envisages significant development and/or subdivision.⁷⁸ According to the Act, permission must be obtained from the Local Authority for land developments carried out within a town planning area.⁷⁹ After a 2008 reform, local councils are now governed by a Special Administrator appointed by the government.

The Department of Town and Country Planning (DTCP) recently prepared drafts for a revised Town Planning Act and a Subdivision of Land Act.⁸⁰ DTCP also prepared a draft procedure for lodgement, assessment and the approval of development and subdivision applications.⁸¹ The main features of these revised Acts will be the concentration of all planning related power to the Director and the creation

⁶⁹ Environment Management (EIA Process) Regulations 2007, Regulation 5.

⁷⁰ Department of Environment, Environment Impact Assessment (EIA) Guidelines (Government of Fiji, 2008).

⁷¹ Ibid.

⁷² EMA, s 17.

⁷³ Environment Management (EIA Process) Regulations 2007, s 41 and 42.

⁷⁴ Losalini Bolatagici, Court Rules on EIA Regulations, The Fiji Times (Online) 25 May 2016 <<http://www.fijitimes.com/story.aspx?id=355152>>

⁷⁵ Ibid.

⁷⁶ Leslie A. Stein, Principles of Planning Law (Oxford University Press, 2008) 23.

⁷⁷ Ibid.

⁷⁸ 'Lautoka City, Suva City, Ba Town, Labasa Town, Lami Town, Levuka Town, Nadi Town, Nasinu Town, Nausori Town, Savusavu Town, Sigatoka Town, Tavua Town.' Department of Country and Town Planning, Town Planning Areas, <<http://www.townplanning.gov.fj/index.php/planning/planning-context/town-planning-areas>>

of a planning Tribunal. The existing Act does not include any consideration of environmental review within the process for development and subdivision application,⁸² and the revised Act will not change the scenario. Despite the importance of emerging environmental issues like climate change in Fiji, both the existing and proposed revised law fail to adequately integrate environmental reviews within the land development and subdivision framework.⁸³

As mentioned earlier, the environmental review and consideration of emerging environmental issues is yet to be fully integrated within the town and country planning system. According to the Town Planning Act, a planning scheme may be made “with the general objective of controlling the development of the land to which such a scheme applies, and of securing suitable provisions for traffic, transportation, disposition of commercial, residential, and industrial areas, proper sanitary conditions, amenities and conveniences, parks, gardens and reserves, and of making suitable provisions for the use of land for building or other purposes...”⁸⁴ This provision was made in 1946 in the colonial era. However, despite Fiji’s vulnerability to many emerging environmental issues including the need for climate change adaptation and mitigation, the overall objective of the planning schemes under this Act is still the same. Even the most recent proposed amendment of the Act does not deal with the emerging environmental issues. This is inconsistent with the broader environmental, climate change and sustainable development policy objectives of the country. It is important to have mechanisms for environmental review of the planning scheme itself not just a development application under the scheme. If the environmental issues are not well integrated into the planning scheme, subsequent review of development applications using this plan or planning scheme will not be very effective.

There are many states in the world where there has been legislative reform to integrate environmental conservation into the planning scheme. An example of integration of environmental conservation in town planning schemes is the planning law of the Australian State of Western Australia. The Planning and Development Act, 2005 of Western Australia provides that in making state planning policy, “conservation of natural or cultural resources for social, economic, environmental, ecological and scientific purposes” need to be considered.⁸⁵ The Act also provides that regional and local planning schemes have to be referred to the Environment Protection Agency.⁸⁶ The Environment Protection Agency has the power to “require the responsible authority, if it wishes that scheme to proceed, to undertake an environmental review of that scheme and report on it to the Authority, and issue to the responsible authority instructions concerning the scope and content of that environmental review.”⁸⁷ There is scope for Fiji to learn from the experience of

other jurisdictions and integrate environmental review within the broader urban and country planning and development approval legal regime.

TOWARDS A COMPREHENSIVE ENVIRONMENTAL REVIEW SYSTEM

Although Fiji has developed a legal framework for environmental reviews or environmental impact assessments, the framework for development projects in the urban areas of Fiji is not effective. The integration of environmental review within the framework of urban and country planning is yet to be achieved. Moreover, the principle of sustainable urban development and integration of sustainable development goals within the environmental review process yet to get proper attention. The planning and review regime of Fiji is yet to fully address and integrate the emerging environmental issue of climate change.

Considering the multidimensional problems faced by Fiji’s urban areas and the country as a whole, it is pertinent to introduce a system of SEA for urban and regional planning schemes in order to extend the application of EIA from projects to policies, programs and plans.⁸⁸ Sadler and Verheem define SEA as “a systematic process for evaluating the environmental consequences of proposed policy, plan or programme initiatives in order to ensure that they are fully included and appropriately addressed at the earliest appropriate stage of decision making, on par with economic and social considerations.”⁸⁹ Some case studies show that the integration of sustainability principles into urban planning can be achieved by introducing SEA.⁹⁰

The inadequate integration of environmental considerations in regional and urban development has been identified as one of the main reasons for high vulnerability to natural disasters in developing countries.⁹¹ Mainstreaming environmental review in the broader urban and country planning context is essential to considering the interconnection of many competing issues. Fiji’s current legal framework is mainly based on EIA of particular development projects. Considering the changing context and emerging environmental challenges, Fiji needs to comprehensively review the existing legal framework for environmental review.

Coordination between Environmental

⁷⁸ The declared Rural Town Planning Areas are: ‘Ba Rural, Dreketi Rural, Labasa Rural, Lautoka Rural, Nabouwalu Rural, Nadi Rural, Nadroga Rural, Nausori Rural, Navua Rural, Ra Rural, Savusavu Rural, Seqaqa Rural, Suva Rural, Tavua Rural, Wainikoro Rural.’ Ibid.

⁷⁹ Town Planning Act, s 7(1).

⁸⁰ Department of Town and Country Planning (DTCP), Proposed Revised Town Planning Act [Cap-139] <http://www.townplanning.gov.fj/images/4-11-15__PROPOSED_REVISSED_TPA1a.pdf>; Department of Town and Country Planning (DTCP), Proposed Revised Subdivision of Land Act [Cap-140] <http://www.townplanning.gov.fj/images/Subdivision_of_Lands_Act_Booklet_17_11_15.pdf>.

⁸¹ The Department of Town & Country Planning (DTCP), Proposed Procedure for Lodgement & Assessment of Development Applications, (2017) <http://www.townplanning.gov.fj/images/Proposed_Procedure_for_Lodgement_of_Development_Applications_02-11-15.pdf>

⁸² Amadou S. Dia, ‘How to Adapt the Planning Legislation to the Ground Reality in the Pacific Small Islands Nations: The Fiji Town and Country Planning Act Case Study’, paper presented at the 46th ISOCARP Congress, 2010 <http://www.isocarp.net/Data/case_studies/1786.pdf>

⁸³ Nevertheless, subdivision approval process made a provision for referral to stakeholder agencies. According to the proposed amendment to the Act, one of the stakeholder agencies will be the Department of Environment. The Department of Town & Country Planning (DTCP), Proposed Procedure for Lodgement & Approval of Subdivision Applications, (2017) <http://www.townplanning.gov.fj/images/Proposed_Procedure_for_Lodgement_of_Subdivision_Applications_02-11-15.pdf>

⁸⁴ Town Planning Act, s 16.

⁸⁵ Planning and Development Act 2005 (WA) s 27.

⁸⁶ Planning and Development Act 2005 (WA) s 81 and s 38.

⁸⁷ Environmental Protection Act 1986 (WA), s 48C.

⁸⁸ Kulsum Ahmed and Ernesto Sánchez-Triana ‘SEA and Policy Formulation’ in Kulsum Ahmed and Ernesto Sánchez-Triana (eds.) Strategic Environmental Assessment for Policies: An Instrument for Good Governance (World Bank, 2008) 1- 10.

⁸⁹ Cited in Ibid.

⁹⁰ Anne Shepherd and Leonard Ortolano, ‘Strategic Environmental Assessment for Sustainable Urban Development’ (1996) 16 Environmental Impact Assessment Review 321-335

Impact Assessment and Town and Country Planning and Development Approval System

As identified in this paper, there is a lack of coordination between environmental impact assessment and town and country planning. Town and country planning and development approval is a relatively old system first introduced by the former colonial ruler. The new system of EIA, rather, is yet to be fully developed in Fiji. Environmental impact assessment and town and country planning are administered by different government authorities having different responsibilities within the broader governance system. The lack of coordination between the existing system of urban planning and newly emerged concept of environmental impact assessment is not a problem unique to Fiji. Many countries, particularly developing countries, are suffering from the same problem.

One of the methods for coordination would be interagency collaboration. The Department of Environment, for example, must have a role in the town and country planning and development approval processes. The main problem in many developing countries, including Fiji, is the reluctance of planning and development approval authorities or ministries to recognise the role of the Department of Environment in the development approval and planning process. Rather than becoming part of a coordinated overall development and planning regime, the environmental impact assessment process has been developed as a weak, separate system. The lack of capacity and expertise of the Department of Environment, as a relatively new institution, is also partly responsible for this unsatisfactory scenario.

A harmonised effort from the highest level of government for better coordination and the recognition of the role of the environment related government agencies is needed to solve this critical problem. A well-funded program for capacity building of the Department of Environment is also essential. However, without mainstreaming environmental conservation in the national development agenda, none of this will be achieved.

Climate Smart Urban Planning, Governance and SEA

Urban areas may face many distinct challenges for climate change adaptation.⁹² Prioritising adaptation options is critical, when considering the various challenges and resource limitations for adaptation that cities are facing.⁹³ Climate smart spatial planning, mainstreaming urban adaptations into the overall urbanisation agenda, and collaborative approaches may be critical for overcoming the urban challenges.⁹⁴ An interdisciplinary, systematic modelling approach may be needed due to some unexpected long term implications of climate change related urban planning strategies.⁹⁵ A comprehensive SEA can play a vital role in this regard.

Integrated assessments are critical for avoiding maladaptation.⁹⁶

It is pertinent to examine whether the current legal and institutional framework for environmental reviews is capable of considering emerging and pressing issues the country is facing, such as the issue of climate change and increasing natural disasters. As discussed in this paper, the major coastal cities of Fiji are facing an increasing impact of changing climate. The current Environmental Impact Assessment system is inadequate for future climate change related challenges. In order to reach the necessary level of competence, Fiji needs to establish a system for SEA. In the urban context, the system for SEA should be strongly linked with the existing system of town and country planning and the development approval process. The comprehensive system should be developed to ensure the assessment of both development policies and plans, as well as development projects from the perspective of climate change mitigation, adaptation and loss and damage. The core of this should be considering the probable future impact of development plans or projects, not just short term impacts. This, again, will require a very high level of scientific and institutional capacity building.

Customary Land Ownership and Public Participation in Environmental Impact Assessment and Urban Planning and Development Approval Process

As discussed earlier, in Fiji most of the lands are under customary landownership. Customary land tenure and sustainable development is a challenging issue in the South Pacific countries.⁹⁷ This makes public participation even more important in environmental impact assessments and urban planning and development approval processes. Despite some provisions for public participation in relevant laws, public participation has not been ensured in practice. This has aggrieved the traditional customary owners of the land. As mentioned earlier, in a recent case, the relevant authorities refused to provide local people EIA related information of a project that may have impact on the environment surrounding them. This prompted them to take the matter to the High Court. A representative of the applicant said the following to a local newspaper: “they were not opposed to the development but they wanted to know what was happening on their borders, adding that they lived in flood prone areas, so any development taking place in the area should be known, particularly if there were provisions for drainage and other sort of services.” He said further that “the community committee had called and emailed the Department of Environment but was told that no copies would be released.”⁹⁹ Even the department refused to give the document to their lawyers who claimed that these are public documents.¹⁰⁰

The court held that section 17 of the Environment Management Act, 2005 obliges

⁹¹ Ahmed and Sánchez-Triana, above n 88.

⁹² Meghan Doherty, Kelly Klima, and Jessica J. Hellmann, ‘Climate Change in the Urban Environment: Advancing, Measuring and Achieving Resiliency’ (2016) 66 *Environmental Science and Policy* 310

⁹³ Chen Chen et al. ‘Measuring the Adaptation Gap: A Framework for Evaluating Climate Hazards and Opportunities in Urban Areas’ (2016) 66 *Environmental Science and Policy* 403.

⁹⁴ Jeremy G. Carter et al., ‘Climate Change and the City: Building Capacity for Urban Adaptation’ (2015) 95 *Progress in Planning* 1.

⁹⁵ V. Massona et al., ‘Adapting Cities to Climate Change: A Systemic Modelling Approach’ (2014) 10 *Urban Climate* 407.

⁹⁶ Yvonne Andersson-Sköld et al., ‘An Integrated Method for Assessing Climate-related Risks and Adaptation Alternatives in Urban Areas’ (2015) 7 *Climate Risk Management* 31

the Department of Environment to maintain an environmental register that should contain all the documents prescribed in the regulations 41(1) and 41(2) of the EIA Regulations, 2007. The Court also held that the public must have access to this register and is entitled to obtain copies of the documents needed without any restriction.¹⁰¹ However, access to EIA documents is not enough. There should be a practically operational system for public participation, particularly the participation of customary landowners in decision making for environmental assessment, development planning and approval processes. Although existing laws have some avenues for public participation, these provisions have not been operationalised. Nevertheless, a comprehensive legal and institutional reform is needed in this regard.

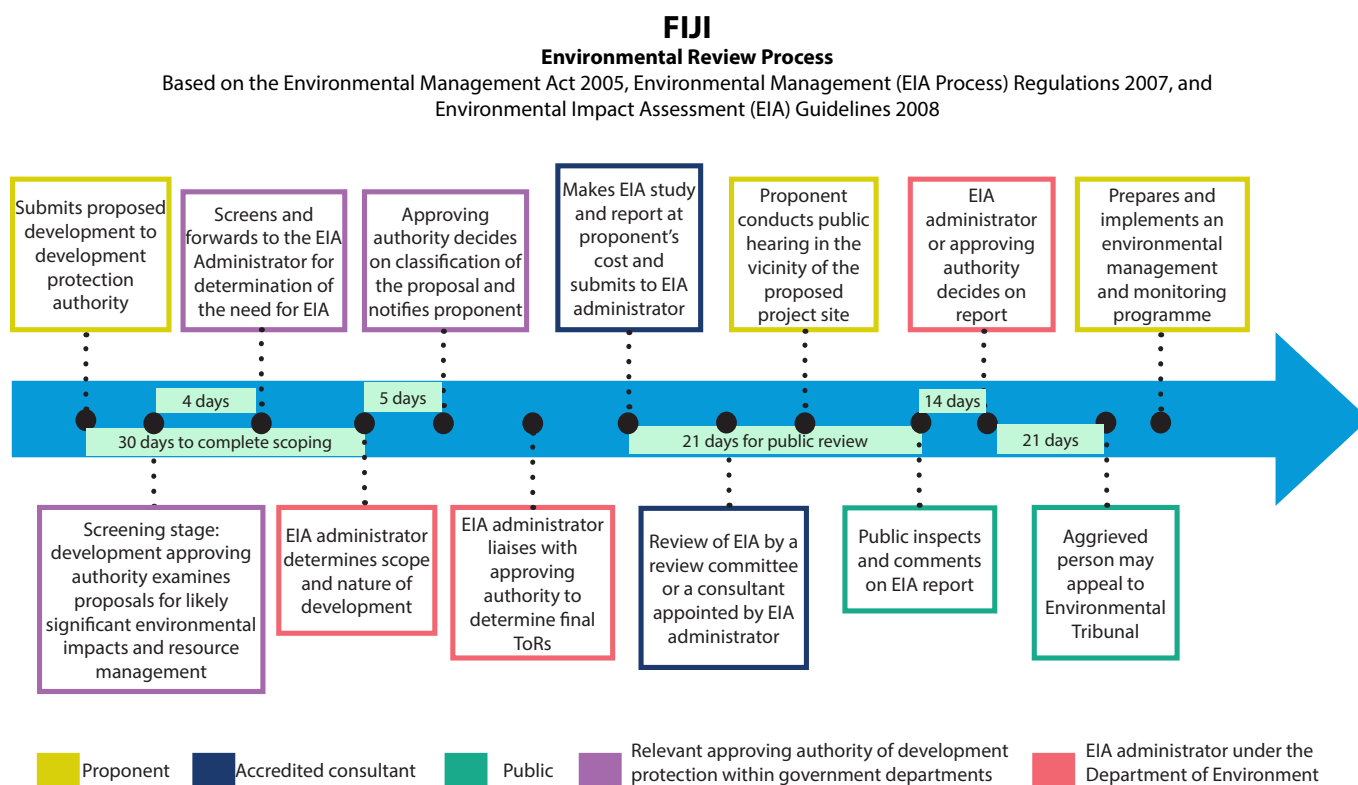
Like many other newly emerging independent developing countries, Fiji introduced an environmental legal framework mainly copied from developed countries. No comprehensive study was undertaken to examine how far these modern legalisation and associated mechanisms such as EIA can be harmonised with customary law and practices. In Fiji, and in some other South Pacific countries, customary laws of land ownership and modern legislative development for environmental protection coexist as two separate systems in apparent disharmony.

It is also pertinent to examine whether wholesale replication of western approaches for environmental protection is effective in the small island developing countries, having long standing tradition of customary practices with a very complex land tenure system. Moreover, the introduction of the modern techniques like EIA has

not been supported by a simultaneous development of institutional and technical capacity in the relevant government departments.

CONCLUSION

Fiji is facing rapid urbanisation and a number of ongoing and future environmental challenges, but legal and institutional development for environmental review of tourism and residential development in the country have not been established in a coordinated way. Despite the ongoing and future environmental threats, an effective system of EIA and SEA is yet to be achieved. Public participation in the development and environmental decision making is yet to be fully operationalised. This paper suggests a comprehensive legal and institutional reform for environmental review in the urban context. A joint strategy for this should be prepared with the participation of all relevant government agencies, civil society, non government organisations, researchers and the community. Considering the complex customary landownership system, the participation, involvement and prior informed consent of people will be sine qua non for successful environmental review of plans and projects.



⁹⁷ Ron Crocombe, Customary Land Tenure and Sustainable Development: Complementarity or Conflict? (South Pacific Commission and University of the South Pacific, 1995).

⁹⁸ Bolatagici, above n 73.

⁹⁹ Ibid.

¹⁰⁰ Ibid.

¹⁰¹ Ibid.

04

Creation of New Urban Land by Reclaiming the Sea in Colombo Port City, Sri Lanka

Asanga Gunawansa



View to the seaside road in downtown Colombo, Sri Lanka @Shutterstock

Sri Lanka is a medium sized island state with approximately 22 million people. The island has a total area of 65,610 km², with 64,740 km² of land and 870 km² of water. The coastline is 1,340 km long. After nearly 500 years of colonial rule, Sri Lanka gained independence in 1948. Though the country is rich with natural resources, development initiatives by various successive governments in the post-independence era have not borne much fruit, mainly due to the civil and communal strife that has lasted more than 25 years.

The commercial capital, Colombo, is an overpopulated, unplanned old coastal city which badly needs expansion. If the declared ambitions of every elected government since 1977 are to be realized - i.e. to develop Colombo as a regional commercial hub - the expansion of the central business district is a must. It is against this backdrop that the idea of reclaiming land was first mooted and considered by the government almost 25 years ago.

The expansion of the Colombo central business district (CBD) by reclaiming land from the sea was originally proposed in 1991 by the then Sri Lankan Industries, Science and Technology Minister, Ranil Wickremesinghe (the current Prime Minister

of Sri Lanka). At that time, he presented a conceptual plan to develop the Western Province of Sri Lanka as a megapolis to the visiting Japanese Prime Minister, Toshiki Kaifu, with the aim of getting Japanese assistance. However, development of the concept came to a halt with the change of government in 1994. Subsequently, when the United National Party, then headed by Ranil Wickremesinghe, came back in to power and formed a government in 2001, the Singaporean Housing Development Board's (HDB) design subsidiary, CESMA, was invited to develop the Western Region Megapolis plan. A proposal based on the said plan was submitted to the Board of Investment of Sri Lanka (BOI) to call for expressions of interest by investors. Under the CESMA Plan, Colombo's CBD was to be expanded for real

estate development by reclaiming approximately 145 ha of land from the sea to the south of the proposed Colombo South Port breakwater by 2010. However, the fall of the government in April 2004 following a snap election called for by the then president, Chandrika Kumaranatunga, led to the project being shelved.

The new initiative to develop a port city in Colombo was declared in or about 2013 by the government led by President Mahinda Rajapaksa. It is important to note that this was a surprise move given that there had been no indication of any intent by the government to reclaim land to expand Colombo. In fact, the government policy statement entitled Mahinda Chinthanaya: A Vision for New Sri Lanka, which dealt with the government's intended development plans for the period 2006 – 2016, made no mention of such a development goal.

Following the government's declaration of its desire to reclaim land from the sea and expand Colombo's CBD, in 2014 an unsolicited proposal was submitted by the Chinese state-owned China Communication and Construction Company (CCCC). This was evaluated by a cabinet-appointed negotiation committee and, after negotiations which lasted approximately a year, a concession agreement was signed in September 2015 between the Sri Lanka Ports Authority, a statutory corporation, and the Chinese investor, CHEC Colombo Port City Private Ltd., a fully owned subsidiary of the CCCC, to develop the Colombo Port City. It was envisaged that a land area of 233 ha would be created by the reclamation, of which approximately 8 per cent was to be given to the investor on free-hold basis and about 40 per cent on a 99-year lease as consideration for the investment made.

At the time, the project was severely criticized. Some opposition parliamentarians said the project had been implemented without proper legal due diligence. The key criticisms were a) the signing authority for the government had no legal capacity to enter into the agreement; b) no adequate environmental impact assessment had been conducted before approving the project and c) that from an environmental perspective, the project could lead to disastrous consequences including inter alia, sea erosion, the destruction of marine life, harm to fishing communities and climate change.

In March 2015, a new government unilaterally suspended the project. However, after several months of negotiations and the completion of what was called a "supplementary" environmental impact assessment, or "SEIA", the new government signed a fresh agreement under which the area to be reclaimed was substantially increased.

Against this backdrop, the key aim of this case study is to answer the following questions:

1. Is there a genuine need for expanding the CBD area of Colombo?
2. Is the reclamation of land from the sea a viable and a sustainable solution?
3. What are the environmental risks associated with such land reclamation projects?
4. Were such risks adequately assessed?

5. Were the legal requirements fulfilled when procuring such a project and when assessing the environmental risks?
6. Are there any merits in the objections raised concerning the project?

1. INTRODUCTION

1.1 The country

Sri Lanka is a lower-middle-income country with around 22 million inhabitants. The island state's main economic sectors include: agricultural commodities (such as tea, rubber and coconut), gems, tourism, shipping and apparel manufacturing.

The country's abundance of natural resources and strategic location made it a target for colonization by European powers looking to take advantage of the Silk Road's wealth. From the sixteenth century, Ceylon, as it was formerly referred to, was ruled by the Portuguese, Dutch and British respectively for over four centuries. The country only officially regained its independence from the British in February 1948 and since then has enjoyed nation status with democratically elected governments.

Post-independence, the country was expected to flourish into a symbol of success in the region but, in large part due to civil and communal unrest that stunted economic growth and hindered development, it has fallen short of expectations. To be more specific, there were two major youth uprisings, the first in the early 1970s and the latter in the late 1980s by a left-wing political group known as the Janatha Vimukthi Peramuna (JVP). The official death toll in the first uprising was 1,200 but unofficial figures reliably estimated it to be between 4,000 and 5,000 (Fernando, 2013). The second insurrection lasted from 1987 to 1989 with the JVP resorting to subversion, assassinations, raids and attacks on military, civil administration and civilian targets. The official death toll is said to be around 25,000 (Gunaratna, 1998). The worst was the ethnic conflict between the majority Sinhalese community and the minority Tamil community which started in or about 1983 and lasted for approximately 30 years, causing the deaths of over 60,000 on both sides (LLRC, 2011; Gordon, 2011).

Since the elimination of the leadership of the Liberation Tigers of Tamil Eelam (LTTE), the separatist group largely responsible for the armed struggle which led to the civil war in 2011, Sri Lanka is currently in a period of peace and prosperity and is rebuilding its image and social and economic infrastructures. Despite the absence of war, some critics argue that the country is far from experiencing stable peace, especially given that there are over 350,000 internally displaced people in Sri Lanka (Muggah, 2013) and the Tamil diaspora and several Western nations still question the initiatives and motives of the Sri Lankan Government for establishing and maintaining lasting peace.

1.2 The capital and the CBD

Colombo is the largest city in Sri Lanka and is located on the western coast of the island in the District of Colombo. Formerly the country's official capital, it is now

referred to as the country's commercial and financial capital. Sri Lanka's legislative capital since 1977, Sri Jayewardenepura Kotte, is located approximately 11 km away from the city centre in one of Colombo's suburbs.

The District of Colombo is one of the 25 administrative districts of Sri Lanka. It is approximately 699 km² and has over 5.6 million inhabitants in the metropolitan area (World Bank, 2015), thus making it the most densely populated district in the country. The city of Colombo is approximately 37 km² in size and is home to over 750,000 people according to the 2011 census. The country's largest and busiest port (the Port of Colombo) is in Colombo Fort, the area that has been considered to be the CBD of Colombo since independence in 1948.

Colombo's CBD is a relatively small stretch of land that contains many important landmarks including the former parliament building, the World Trade Centre (WTC) and banking headquarters.

The strategic positioning of Colombo, which borders the Indian Ocean and is at the heart of East-West trade routes, made it an optimal location for the country's colonial rulers to establish a trading hub. To bolster trading activities, a port was built in the city's natural harbour, towards the south-western shores of the Kelani River. Prior to the Portuguese invasion in 1505, Colombo's harbour was already well established and had been used by silk-road merchants from China, Persia and India from as early as the fourteenth century. The city's name is derived from the Sinhala words *Kolon Thota*, which means "port on the Kelani River", and evidences the inextricable link between the city and its port.

Colombo's infrastructure has, by and large, been focused around the main port to facilitate the transportation of commodities to and from the hinterland through the development of railroad and canal networks. As trading increased, the city began to grow in size, population and density, with most of the colonial era development occurring in the area surrounding the port.

1.3 The need for expanding the CBD of Colombo

In 2011, Colombo was ranked among the world's 10 worst cities to live in by the Economist Intelligence Unit's (EIU) Liveability Survey. According to the survey, Colombo is ranked 131 out of 140 cities.

The current population of Colombo is estimated to be over 750,000. The number would increase to over 5 million if it included the surrounding metropolitan district. The rapid population increase, mainly the result of economic migration from less developed areas into Colombo, has contributed to the unplanned proliferation of slums, a lack of appropriate infrastructure and inadequate public utilities. As a coastal city lying only 1.5 metres above sea level, Colombo is at high risk of flooding and is prone to cyclones and the risk is intensifying as climate change increases the volatility and frequency of severe weather conditions.

There is limited land in Colombo, especially in the core CBD area. There are a few reasons for this. Firstly, the CBD is based in the former fort that was built by the Dutch in the sixteenth century and was limited in its expansion by the physical boundaries of the fort. Much of the commercial and business-related activities were concentrated around the narrow streets of the fort which, with modern traffic levels, are now un navigable. Secondly, due to Sri Lanka's archaic land acquisition laws that have largely remained unchallenged - such as the ordinances that were introduced during British rule - the majority of land within the CBD is held privately. Any moves to acquire land from private people has been unpopular with politicians who are hesitant to support decisions that could be unwelcomed by the electorate. It has been extremely cumbersome for the government to acquire prime real estate for commercial developments as, quite apart from lacking political support, any successful applications are vehemently opposed by litigants, leading to significant delays and making any efforts in this regard redundant.

To stimulate economic growth there is a need for quality real estate in the heart of the CBD and the most viable option to create this land and space for investors and businesses is through the expansion of the city. According to Sri Lanka's Ministry of Megapolis and Western Development, two decisive inter-dependent transformations are required in Sri Lanka's forward march to achieve the status of a high-income country. The first involves the spatial transformation of urban agglomerations in the western region of the country, where Colombo is situated and, secondly, the structural transformation of the national economy as a whole (Ministry of Megapolis and Western Development, 2015). The Expansion of the Colombo CBD is seen as an essential requirement under the ministry's Western Region Development Plan.

As discussed, the option of acquiring land from private citizens is burdensome, time consuming and is not feasible in Colombo. The most viable option to create this land and space, and one that has been contemplated since the 1990s, is through the reclamation of land from the sea, thereby extending the land area for development whilst also maintaining a close proximity to the current CBD.

1.4 The Colombo Port City Project: historical aspects

The first attempt to develop the CBD of Colombo by expanding the city limits through a port city built on reclaimed land, was made in the late 1990s when the government invited a Singaporean company, CESMA (now known as now Suburna), to study the Colombo Metropolitan Regional Structure Plan. The final plan, published in 2004 and developed by a cross-functional Sri Lankan and Singaporean team, proposed a western region "megapolis" by 2030. However, the concept plans could not be implemented due to the high cost of building the breakwater in deep water to protect the reclaimed land. The study concluded that a port city would become financially feasible if and when a breakwater was integrated with the Colombo Port Expansion Project.

2. THE DEVELOPMENT OF THE PORT CITY

2.1 The unsolicited proposal and the first project agreement

In April 2011, China Communications Construction Company Ltd. (CCCC), a Chinese state-owned public corporation, submitted an unsolicited proposal to the Sri Lanka Ports Authority (SLPA), a statutory corporation created by the Sri Lanka Ports Authority Act¹ to inter alia administer ports and declared port areas in Sri Lanka. The CCCC's vision was to make Colombo one of the region's leading maritime and logistics hubs, and to dynamically change the geography of Sri Lanka's primary trade gateways. This aligned the CCCC with one of the Sri Lankan Government's strategic aims: to develop the city as a regional and global hub. The proposal for the "Colombo Port City Project" also estimated a primary investment of USD 1 billion, making it the single largest direct foreign investment project in Sri Lanka, and suggested that the port would be built by reclaiming approximately 233 hectares of land from the sea.

This proposal was reviewed in September 2011 by the Standing Cabinet Appointed Review Committee (SCARC) appointed by the Executive arm of the government (the Cabinet of Ministers) to consider public procurement proposals. Following a recommendation made by the SCARC, a cabinet decision was taken that a Memorandum of Understanding should be signed with CCCC by the SLPA to commence discussions concerning the feasibility of the proposed project.

The SLPA and the CCCC entered into a Memorandum of Understanding in September 2012. In October 2012, the CCCC submitted a detailed proposal pertaining to the Port City Development Project to the SLPA. After several rounds of clarification with CCCC, a government-appointed Technical Evaluation Committee (TEC) submitted an evaluation report to SCARC in January 2013. Thereafter, following nearly eight months of negotiation, the SLPA and the CCCC reached consensus on the key terms to be contained in a Concession Agreement under which the government, through the SLPA, would enter into a project development agreement with the CCCC.

In the meantime, SCARC submitted a report to the cabinet, recommending that the SLPA and the CCCC enter into the Concession Agreement after obtaining clearance from the Attorney General. The report also recommended that, subject to such approval, the project proceed as a Strategic Development Project under the Strategic Development Projects Act of Sri Lanka,² a statute passed by parliament to provide special investment promotion concessions to investors in projects considered by the government to be strategically important.

In January 2014, the cabinet approved the key terms of the Concession Agreement and further granted its approval for the project to proceed as a Strategic Development Project. However, the decision taken previously, to proceed with the

project through the SLPA as the public partner, was revoked following legal advice received from the Attorney General (AG) as well as the legal representatives of the CCCC (also referred to as the investor). The argument put forward by the AG and the other legal experts was that the SLPA, being a statutory corporation, was legally bound to act within the powers conferred on it by the Sri Lanka Ports Authority Act. Under this statute, a land reclamation project of the type contemplated, although concerning an area adjacent to the Colombo Port, would be ultra vires the powers and functions of the SLPA. Specifically, it was pointed out that Section 6 of the Act sets out the 'objects' and 'duties' of the SLPA, while Section 7 stipulates the powers of the SLPA. Both these sections do not empower the SLPA to engage in seabed reclamation for implementing commercial projects such as the Colombo Port City. Also, they do not empower the SLPA to engage in commercial city development and management projects.

Accordingly, in September 2014, the cabinet gave the approval to the Secretary to the Ministry of Highways, Ports and Shipping, acting for and on behalf of the government to enter into an agreement with the investor (or a subsidiary to be incorporated in Sri Lanka) on terms that are the same, in all material aspects, to a fully negotiated Concession Agreement. The cabinet decided that such an agreement between the government and the investor would remain effective until the date on which appropriate amendments to the SLPA Act had been enacted to ensure that the SLPA was given adequate powers and capacity to perform its obligations under the Concession Agreement. In other words, the decision taken by the government was that, since the SLPA did not have the legal capacity to participate in the development of the Colombo Port City Project given the scope of its powers and functions under the SLPA Act, until such time the Act was amended to enable SLPA to participate in the Project, the government would enter into a direct agreement with the investor through the Secretary, Ministry of Highways, Ports and Shipping, the chief administrative officer in charge of the ministry under which the SLPA operates.

Following the cabinet decision, an agreement was signed between the Secretary, Ministry of Highways, Ports and Shipping and a fully owned subsidiary of CCCC, which was by then incorporated into Sri Lanka under the name CHEC Port City Colombo (Pvt) Ltd. (known as the Project Company) on 16 September 2014 (which was named the Government of Sri Lanka Agreement). A fully negotiated Concession Agreement was annexed to the said GOSL Agreement as a binding annexure, making the government the direct obligor to the project company for inter alia granting permission to carry out the reclamation works, obtaining the necessary approvals and permits for the reclamation works, and for payment of the agreed consideration to the project company for investing in the project and for carrying out the reclamation works.

The GOSL Agreement also provided that the SLPA Act would be appropriately amended during the term of the GOSL Agreement (one year) and upon such amendment, the SLPA would have the right to step into the concession grantor's position in place of the GOSL.³

¹ Fij Act No.15 of 1979.

² Act No. 14 of 2008.

³ Clause 2 of the GOSL Agreement.

2.2 Key features of the agreement signed in September 2014

In the GOSL Agreement and the Concession Agreement annexed to it, it was agreed that the Project Company would be allocated 20 hectares of land reclaimed under the project on freehold basis, as constituting part-payment for implementing the project at a cost exceeding USD 1.4 billion. In addition, it was further agreed that 88 hectares of reclaimed land would be allocated to the Project Company for a lease period of 99 years.

In order to ensure that the Project Company would have an unrestricted opportunity to recover its investment, it was agreed that GOSL would not undertake any competing infrastructure development projects within a 20 km radius of the Colombo Port City Project until such time the Project Company has settled all its senior debt (borrowing from lenders for developing the project). It was also agreed that when developing marketable land, preference would be given to the Project Company, until the repayment of the senior debt, subject to the exception that GOSL would be entitled to develop public infrastructure projects.

The agreement also provided that the land would be reclaimed and the Port City would be developed based on a pre-approved master plan by the Urban Development Authority of Sri Lanka (UDA), the statutory entity created by the Act of Parliament No 41 of 1978. This was done with a view to promoting the integrated planning and implementation of economic social and physical development of the areas declared by the minister in charge of urban development, thus, being the entity empowered to function as the key urban planning and implementing agency of the country.

The agreement further made provision for the joint appointment of a quality controller, named the Jointly Appointed Quality Representative, to play the role typically played by a supervising engineer/architect in a construction project, subject to the limitation that instead of using his or her authority to give instructions to the contractor, she or he would only make recommendations for consideration by the GOSL and the project company.

The Project Company was also given the right to have the project be designed and built by an engineering procurement construction (EPC) contractor chosen by them, without having to call for competitive bids and following the typical guidelines and procedures applicable for public procurement projects. The Project Company accordingly appointed as the EPC contractor, M/s China Harbour Corporation, a fully owned subsidiary of the parent company of the Project Company, namely the CCCC.

3. PROJECT SUSPENSION

The Colombo Port City Project, although not legally challenged prior to March 2016, attracted severe criticism from opposition parliamentarians during the run up to the Presidential Election of January 2015 and during the run up to the General Election in August 2015. Several politicians, including the then opposition leader and the current Prime Minister of Sri Lanka, Ranil Wickramasinghe, were very critical and threatened to suspend the project soon after the formation of a new government. Some politicians even threatened to terminate the contract.

Following the Presidential Election in January 2015, and the formation of the new coalition government in March 2015, the GOSL unilaterally suspended the project alleging it had been implemented without the necessary regulatory permits and/or clearances. The key allegations that eventually led to its suspension in March 2016 are discussed below.

3.1 Public and political opposition based on legal and policy grounds

3.1.1 Unsolicited bid

The contract for the development of the Colombo Port City was awarded to the Project Company based on an unsolicited bid submitted by its parent company, the CCCC, in 2013. Those opposed to the Colombo Port City Project argued that the GOSL had accepted a one-sided proposal without understanding and/or evaluating the need for the project or the project's technical, environmental and financial feasibility.

Several members of the new government formed in March 2015, including the current prime minister Ranil Wickremasinghe, argued that even when an unsolicited bid was received, the GOSL should have followed the Government Public Procurement Guidelines (Procurement Guidelines). These are that when awarding the contract, the government should have called for other interested parties to bid for the project whilst offering a first right of refusal to the original proposer.

It is important to note that even though there is no specific public procurement law in Sri Lanka, the National Procurement Agency has issued guidelines which deal in general with the procurement of public projects. The Procurement Guidelines (2006) identify and recommend several methods of procurement, including International Competitive Bidding (ICB), Limited International Bidding and National Competitive

Bidding (NCB). According to the guidelines, unsolicited bids were not expressly ruled out and recommended procedures are to be followed in such cases. When an unsolicited proposal is received, the relevant government entity is expected to ascertain the technical and financial viability of the project, including information on the capacity of the party proposing the project to finance and develop it. Once such a preliminary review process is concluded, the government is required to publish an advertisement calling for proposals in connection with the proposal. The party who submitted the unsolicited bid is given a chance to match or improve on any competing bid received in response to the bid invitation.

The Procurement Guidelines provide for an exception to the general rule on unsolicited bids and a deviation from the prescribed procedure is permitted in urgent and exceptional circumstances, on the condition that specific cabinet approval is obtained for such a deviation. As far as the Port City Project is concerned, the unsolicited bid received from the investor had been accepted without following the recommended procedure.

3.1.2 Capacity of the actors

There was also some criticism of the legal capacity of an actor chosen by the government, namely, SLPA. The new government, especially Prime Minister Wickremasinghe, who is himself a qualified lawyer, argued that the specific power to reclaim any part of the foreshore or bed of the sea is vested with the president only in terms of the State Lands Ordinance No. 8 of 1947,⁴ and thus, the SLPA had no legal capacity to engage in the Colombo Port City Project.

There was some merit to this argument as in terms of Section 60 (3) of the State Lands Ordinance, which deals with administration of foreshore vested in the state, it is the president who has the power to reclaim any part of the foreshore or bed of the sea and to lease or otherwise dispose of any such reclaimed area. Section 61 of the State Lands Ordinance also states that the president may lease any part of the foreshore or bed of the sea provided that such a lease would not prejudice public rights. In terms of this statute, when land is reclaimed, the surveyor general will survey the land and draw survey plans to demarcate boundaries. Upon authorization by the president in terms of section 110 of the State Land Ordinance, the reclaimed land then becomes state land. However, the State Lands Ordinance did not prevent the president from engaging the services of any party to carry out the reclamation works. Thus, the counter argument was put forward that there was no legal impediment to awarding a contract to the project company for the reclamation works.

As far as the SLPA is concerned, it was argued that the SLPA lacked the legal capacity to proceed with the project as the SLPA Act does not empower the SLPA to undertake a commercial development as envisaged under the Port City Project. There was merit in this argument too, as according to Beasto et al, (2010):

“Any act done by a corporation incorporated by statute and outside its statutory powers is ultra vires and void. Since the corporation has no existence independent of the statute which creates the corporation or authorizes its creation, it follows that its capacity is limited to the exercise of such powers as are actually conferred or may be reasonably deduced from the language of the statute.”

Corporations incorporated by statute in Sri Lanka are subject to the common law doctrine of ultra vires, that is, what is not expressly or by implication authorized in the statute must be taken to have been forbidden. In the commercial context, this rule has been construed liberally, so that a company may participate in acts which it is not expressly authorized to, provided that they are reasonably incidental to its main objects and provided those main objects are still being pursued (Halsbury's Laws of England).

As far as the capacity of the Project Company was concerned, although there was criticism that the company was a single purpose company established merely to develop the Colombo Port City and thus lacked the necessary expertise, there was not much merit in that criticism. The CCCC is recognized as being one of the largest multinational companies with extensive experience in infrastructure development projects. In 2014, the CCCC was ranked 187 among the Fortune 500 companies in the world and is currently 135th in Forbes Global 2000 list of the world's largest public companies (Forbes.com, 2017).

As would befit a company of this size, the CCCC had sought the expertise of internationally reputed development consultancy firms such as AECOM (American's premier fully integrated infrastructure and support services firm), ATKINS (globally recognized United Kingdom-based design engineering and project management consultancy), SWECO (Nordic region's leading consulting engineering company in sustainable engineering and design), JLL (United States & India's Professional Services and Investment Management Company specializing in real estate services), legal experts attached to Pinsent Masons (United Kingdom) and the Colombo Law Alliance (Sri Lanka), to name a few, to assist its subsidiary, the Project Company, in connection with the project. Further, it is well-established practice by investors to set up single purpose vehicles for undertaking large-scale infrastructure development projects. Thus, the Project Company was well-suited to take on the project and had globally renowned experts supporting it.

⁴ The specific power to reclaim any part of the foreshore or bed of the sea is vested with the President of Sri Lanka in terms of Section 60 (3), Part VIII, of the State Lands Ordinance, which deals with administration of foreshore vested in the state. The said section authorizes the president to reclaim any part of the foreshore or bed of the sea and also to lease or otherwise dispose of any such reclaimed area. Section 61 of the State Lands Ordinance provides inter alia that the president may lease any part of the foreshore or bed of the sea provided that such lease would not prejudice public rights.

3.1.3 Fears relating to national sovereignty

Several ministers in the new government that was formed in 2015 were concerned that the reclamation of land under the Port City Project would extend the territorial boundary of Sri Lanka and it was argued that this extension would affect the sovereignty and territorial waters of the country. Some claimed that by agreeing to give 20 hectares of land on a freehold basis and approximately 80 hectares of land on a 99-year lease to the “Chinese investor”, the former government had enabled the creation of a sovereign Chinese territory in Sri Lanka, thus undermining the territorial sovereignty and independence of Sri Lanka.

On 17th March 2015, the Daily News, one of the most widely read daily newspapers in Sri Lanka, published an article entitled “Colombo Port City Project runs into fresh snag: Flying over Port City a taboo!”. This article said that the Civil Aviation Authority of Sri Lanka had pointed out that “the air space over the Chinese-held area will be exclusively held by China” according to Article 1 and Article 2 of the International Convention on Civil Aviation (1944) (Chicago Convention) thus, threatening the national sovereignty of Sri Lanka and creating security concerns for the South Asian region.

3.2 Resistance based on environmental and social concerns

3.2.1 Applicable law

Before the GOSL Agreement was signed in September 2016, the SLPA had commissioned an environmental study for the Port City Project as required by the National Environmental Act No. 47 of 1980 (NEA) and the Coast Conservation Act No. 57 of 1981⁵ (CCA). Accordingly, an initial environmental examination (IEE) and an environmental impact assessment (EIA) had been conducted.⁶

Under the provisions of section 23 Z of the NEA, the EIA process applies only to “prescribed projects”, which have been specified by the minister in charge of the environment in Gazette Extra-Ordinary No. 772/22 of 24th June 1993 amended by Gazette Extra Ordinary No. 1104/22 of 05th November 1999. The EIA process is implemented through designated project approving agencies (PAA) as prescribed by the minister under Section 23 Y of the NEA. Under Section 23 CC of the NEA, regulations have been made by the minister stating the procedures that should be followed in order to achieve the EIA requirements of the NEA.

The list of “prescribed projects” published under the NEA states that the CCA applies to those prescribed projects which are located wholly within the Coastal Zone. The CCA as amended by the Coast Conservation (Amendment) Act, No. 64 of 1988 and Coast Conservation (Amendment) Act, No. 49 of 2011 governs the Coastal Zone.

Coastal Zone is defined in the CCA as “the area lying within a limit of 300 metres landward of the mean high water line and a limit of two kilometres seaward of the mean low water line. In the case of rivers, streams lagoons or any other body of water connected to the sea, either permanently or periodically, the landward boundary shall extend to a limit of 2 kilometres measured perpendicular to the straight base line drawn between the natural entrance points identified by the mean low water line thereof”. In terms of Section 14 of the CCA, any person desiring to engage in a development activity within the Coastal Zone will be required to obtain a permit issued by the department prior to commencing the activity.

Accordingly, the EIA process for the Colombo Port City is part of the permit procedure mandated in Part II of the CCA. Section 16 of the CCA confers on the Director General of Coast Conservation and Coastal Recourse Management Department (CC&CRMD) the discretion to request a developer applying for a permit (to engage in a development activity within the Coastal Zone) to furnish an IEE or EIA relating to the proposed development activity. The CCA does not, however, specify how and when this discretion should be exercised. The CC&CRMD interprets this provision as requiring an EIA when the impacts of the project are likely to be significant.

The said IEE and the EIA for the Port City Project had been initially conducted for reclamation of approximately 200 ha of land in April 2011. However, when a decision was taken by the government and the Project Company to increase the reclaimed land area in order to increase the area for public use (public parks etc.), an addendum to the initial EIA was conducted in September 2013.

The EIA was opened for public consideration on 11 June 2011 and comments and responses were taken into consideration when granting the development permit to the Project Company, subject to several conditions (CECB, 2015). It should be noted that the addendum of 2013 was not opened for public consideration and this was referred to in the SEIA of 2015.⁷

⁵ The EIA process was first introduced to Sri Lanka through the Coast Conservation Act No. 57 of 1981. The provisions in this Act apply to projects which are implemented within the Coastal Zone. The EIA requirement for projects outside the coastal zone was brought in through an amendment to the National Environmental Act No. 47 of 1980 (Amendment Act No. 56 of 1988).

⁶ The National Environmental Act has identified two levels in the EIA process. The first level is the Initial Environmental Examination (IEE) and possible impacts of a prescribed project are assessed with a view to determining whether the impacts are significant or not. The second level is the EIA, which is more comprehensive. Alternatives to the proposed project are considered and the option with the least impact on the environment is identified as the viable option and assessed. Mitigation measures for the identified impacts is a significant part of an EIA report.

⁷ CECB (2015). SEIA Report, p. 4.

3.2.2 Objections concerning the EIA process

Although no legal steps were taken to challenge the Port City Project based on environmental concerns prior to the formation of the new government in March 2015, with the formation of the new government both ruling party politicians and several NGOs started to publicly criticize the Port City citing environmental concerns. Key among them were that:

- The EIA process that had been followed was not comprehensive;
- The addendum to the EIA was not made available for public review and comment;
- The project would result in sea erosion and would affect marine life; and
- The project would have an impact on climate change.

Those opposed to the project also argued that no social impact assessment had been conducted before approving the project and that, in particular, the adverse impact on the fishing communities whose livelihoods would be affected during the reclamation period had not been taken into consideration.

Two NGOs began legal proceedings in 2015 soon after the formation of the new government. The first was a Fundamental Rights Application (SCFR 151/2015) filed by the All Ceylon Fisher Folk Trade Union of Sri Lanka. They alleged that their fundamental right of engaging in their chosen livelihood (fishing) would be affected as a result of sea erosion and loss of marine life due to the dredging and land reclamation works carried out under the Port City Project. The second was a Writ Application (CA Writ 112/2015) filed by the Centre for Environmental Justice, challenging the validity of the EIA done for the Colombo Port City Project.

4. ANALYSIS OF THE GROUNDS FOR SUSPENSION OF THE PORT CITY PROJECT IN MARCH 2015

4.1 Legality of the suspension

Generally, construction and infrastructure development contracts require that the contractor progresses with the work regularly and diligently. However, in certain circumstances, there may be a need to suspend the work. The need to suspend a project can arise for various reasons; for example, the work under a contract may need to be suspended due to financial issues encountered by the parties, a breach

of the agreement, or as a result of an unexpected environmental issue emerging during the course of the construction project. This right, to temporarily halt the progress of the works, can be either:

- (a) granted through contractual provisions (specific clause in the contract which grants the parties or a defined party a right to suspend the works for various specified reasons); or
- (b) granted through a specific provision in a statute.

The GOSL Agreement makes no provision for either party to suspend the works to be carried out under the Port City Project. Further, in Sri Lanka there is no specific statute that regulates construction projects. As the contract is silent on the right to suspend the works and there are no statutory provisions which enable a party to suspend the works carried out under the contract, it is important to consider whether the works could have been suspended by the GOSL based on common law grounds.

The common law position is that unless there is an express term permitting suspension enshrined in the contract, parties do not have a right to suspend work under the contract.⁸ Thus, it can be concluded that there is no contractual or any other legal basis on which the Port City Project could have been unilaterally suspended by the government.

4.2 Could the Port City Project have been suspended on public policy grounds?

Given that there is no contractual, statutory or common law basis for suspending the Colombo Port City Project, the remaining issue to be considered is whether it could have been suspended by the government on public policy grounds, i.e. whether by operation of law, a clause could be read into the contract (implied) which would give the government the inherent authority to suspend a project based on public policy/public trust considerations. In other words, the issue is whether, irrespective of the legal validity of the contract, the new government could overturn a contractual commitment by its predecessor on the basis that such commitment is against public interest.

Some jurisdictions recognize an inherent right of the government to suspend or terminate a contract to which the government is party by the operation of law based on the existence of a significant public procurement policy of incorporating such mandatory clauses into government contracts. In the United States, for example, this is known as the "*Christian Doctrine*."⁹

The Christian Doctrine is not part of Sri Lankan Law. However, the Doctrine of State Necessity which was recognized by the International Court of Justice (ICJ) in the

⁸ Channel Tunnel v Balfour Beatty [1992] 2 Lloyd's Rep. 7

⁹ The scope of this doctrine is discussed in G.L. Christian & Assoc. v. United States, 312 F.2d 418 (Ct. Cl. 1963).

¹⁰ S.C. Application No. 884/99, (2000) 3 Sri L. R. 243.

Dispute over the Gabčíkovo-Nagymaros Project (Hungary/Slovakia) (1997) seems to have been recognized in Sri Lanka. In the Gabčíkovo-Nagymaros dispute, the ICJ clearly established the rule that a state has the right to suspend contracts entered into by public authorities on the basis of “state necessities” (in the larger interest of nations).

The ICJ's view in this case was that, with regard to unilateral suspension of work, it is the existence of state necessity which, in the correct circumstances, would preclude the responsibility of wrongful acts. In support of this view, the ICJ cited the work of the International Law Commission which, in its Draft Articles on the Responsibility of States, upheld the notion of state necessity as grounds for precluding responsibility. The ICJ went on to say that safeguarding environmental concerns and ecological balances could be considered as an essential interest of all states.

In several judgments, the Supreme Court of Sri Lanka has concluded that the constitutional duty of the state is to “...protect, preserve and improve the environment for the benefit of the community”, Article 27(14) of the Sri Lankan Constitution, and could supersede contractual obligations of the state in the larger interest of the nation. In *Bulankulama v. Minister on Industrial Development (“Eppawala Case”)*,¹⁰ the Supreme Court held that the constitution recognizes duties on the part of parliament, the president and the cabinet of ministers, as well as duties on the part of “persons”, including juristic.

Article 28(f) of the constitution states that “the exercise and enjoyment of rights and freedoms... is inseparable from the performance of duties and obligations, and accordingly it is the duty of every person in Sri Lanka to protect nature and conserve its riches”. Recognizing the said duty, the Eppawala Case held further that although the signing of an agreement may please, or even delight an investor, there is justification for examining the project as a whole when certain dangers in proceeding with the project are brought to the attention of the state by those adversely affected. It was held that fairness to all, including the people of Sri Lanka, rather than the company's “comfort”, should be the lodestar in doing justice.

In *Environmental Foundation v. Urban Development Authority (Galle Face Case)*,¹¹ it was held that the Directive Principles of State Policy and the Fundamental Duties contained in chapter VI of the constitution suggest that, not only the state but also every person in Sri Lanka, including all bodies, institutions and organizations that have been invested with legal personality, are responsible for the protection and conservation of the environment. It is the state, in terms of international law as well as in national law, as the guardian or trustee of the country's natural resources that is primarily responsible for environmental protection and conservation, through its various agencies and actors. The Supreme Court has also stated that the organs of government are expected to act in accordance with the best interests of the people and that an individual can seek to hold public institutions accountable for the violation of the collective rights of the citizenry of Sri Lanka.

In *Sugathapala Mendis and Others v. C B Kumaratunga and Others, SC (FR) 352/2007*,¹² the Supreme Court recognized that large development projects do not manifest all their multifarious facets until long after the expiration of the window of opportunity for the public to object. It further noted that “the mere fact that the various environmental authorities said the project could be done, does not in itself suggest that it should have been done”. On the contrary, such external approvals are to be seen merely as conditions precedent to the commencement of analysis of the viability of any given project and not as the basis for any decision.

In these circumstances, even if the Project Company takes the position that the suspension of the project pursuant to a cabinet decision is a breach of the Concession Agreement and/or the GOSL Agreement, the government could argue that Article 27(14) of the constitution as well as the Doctrine of State Necessity entitles the government to suspend a project and review the procurement process, especially if doubts exist concerning the environmental viability of the project.

It is important to note, however, that when projects are developed on a public private partnership (PPP) basis, project-related risks are typically allocated between the project partners. If one peruses the project agreements signed between the GOSL and the Project Company for the Colombo Port City Project, it is clear that whilst the financial risk has been undertaken by the Project Company by agreeing to finance the entire reclamation project without any financial equity or debt obligation on the part of the GOSL, the regulatory risk of obtaining the necessary approvals and clearances for the project vests with the GOSL. Thus, one could argue that even if the GOSL (pursuant to a change of government) were to draw the conclusion that the Colombo Port City Project is against public interest as the necessary processes concerning public procurement and environmental viability have not been followed, they would still be required to compensate the Project Company for project suspension as the contractual obligation was with the GOSL to ensure that all necessary approvals and clearances for the project are obtained.¹³

4.3 Analysis of the other objections

4.3.1 Is the project company an entity blacklisted by the World Bank?

One of the allegations levelled against the Project Company by those who were opposed to the Colombo Port City Project was that the company was a subsidiary or an affiliate of a multinational company blacklisted by the World Bank for corruption.

Research done for this report shows that the China Road and Bridge Company (CRBC) was established in 1979 and was acquired by CCCC in 2005. Prior to becoming a subsidiary of CCCC, CRBC had been invited in 2002 to bid for a national

¹¹ SC(FR) No. 47/2004, (2009) 1 Sri. L.R. 123.

¹² SC(FR) No. 352/2007, (2008) 2 Sri. L.R. 339.

¹³ Clause 12 of the Concession Agreement annexed to the GOSL Agreement signed in September 2014 provides that SLPA shall obtain all applicable permits stated in Schedule 2 to be the ports authority's responsibility together with all other applicable permits necessary for the design, construction and completion of the reclamation works. Schedule 2 to the Concession Agreement amongst other things lists the completion of the EIA process as an obligation of the SLPA. Clause 3.1.2 of the GOSL agreement provides that all the rights, obligations and liabilities of the SLPA under the Concession Agreement shall have full force and effect as rights, obligations and liabilities of GOSL under the GOSL Agreement.

¹⁴ The Amendment (VIII) to the Criminal Law of the People's Republic of China was adopted at the nineteenth meeting of the Standing Committee of the Eleventh National People's Congress of the People's Republic of China on 25 February 2011. It came into force on 1 May 2011.

road improvement and management project in the Philippines. During the bidding process, the World Bank announced sanctions on CRBC (World Bank, 2011).

Under these sanctions, even successor organizations (through purchase or reorganization) are subject to the same sanctions applied to the original firm. Thus, by purchasing the controlling shares of CRBC, CCCC attracted the same World Bank suspension in 2009.

Given that CCCC has never been directly sanctioned by any international and/or national entity for corrupt practices, there does not seem to be any justification for suspending the Port City Project based on the blacklisting of CRBC by the World Bank because the incident which led to the blacklisting occurred prior to the takeover of CRBC by CCCC. In any event, the Colombo Port City Project is being developed by CHEC Port City Colombo (Pvt.) Ltd, a company incorporated in terms of the Companies Act No. 7 of 2007 of Sri Lanka. Thus, although the Project Company is a fully owned subsidiary of CCCC, it is a company operating within the jurisdiction of Sri Lanka and is a single purpose vehicle engaged only in the Colombo Port City Project.

Another support for the argument that suspension of the project based purely on the aforesaid blacklisting is unjust is that, besides the Port City Project, there are several other infrastructure development projects which the Sri Lankan Government has awarded to CCCC or its subsidiaries, for example, the Airport Highway, the Hambantota Port and the Southern Highway Projects. If blacklisting of CRBC were to be a solid reason for suspending and/or terminating the Port City Project, then there is no justification for awarding CCCC or its subsidiaries contracts for other projects.

It is also important to note that the Eighth Amendment to the Criminal Law of the People's Republic of China¹⁴ specifically tackles the issue of corrupt practices by Chinese companies. This law makes it a crime to make payments to foreign government officials and to officials of international public organizations for any illegitimate commercial benefits. Thus, being a state-owned company, it is unlikely that the CCCC, or any of its subsidiaries, would act in violation of their own country's legislation.

4.3.2 Will the Port City Project undermine the sovereignty of Sri Lanka?

The fears around the sovereignty of Sri Lanka being undermined by the Port City Project seem to be largely unfounded. Reclaimed land does not detrimentally affect a neighbouring foreign coast, as it is accepted as a part of the state's coastline. In the case of the Port City Project, no foreign coastlines would be affected by the reclamation of land and, in particular, it would not affect the boundary between Sri Lanka and its neighbour, India.

In terms of the agreement between Sri Lanka and India on the Boundary in Historic Waters between the two Countries and Related Matters¹⁵:

"The boundary between Sri Lanka and India in the waters from Palk Strait to Adam's Bridge shall be arcs of Great Circles between the following positions, in the sequence given below, defined by latitude and longitude:

Position 1: 10° 05' North, 80° 03' East

Position 2: 09° 57' North, 79° 35' East

Position 3: 09° 40.15' North, 79° 22.60' East

Position 4: 09° 21.80' North, 79° 30.70' East

Position 5: 09° 13' North, 79° 32' East

Position 6: 09° 06' North, 79° 32' East."

Section 8 of the Maritime Zones Law (No. 22 of 1976) of Sri Lanka further defines the boundary between Sri Lanka and India from Palk Strait to Adam's Bridge; the boundary between Sri Lanka and India in the Gulf of Mannar; and the boundary between Sri Lanka and India in the Bay of Bengal. All such boundaries are in reference to an objective boundary, defined by latitude and longitude and not by reference to the geographical boundary of Sri Lanka. In the circumstances, the reclamation of coastal land would not have an adverse effect on the sovereignty of Sri Lanka, with specific reference to its territorial waters.

4.3.3 Will the Port City provide exclusive rights over the airspace of Sri Lanka?

Again, a sense of alarm and media fear-mongering seems to have disproportionately weighed on the side of regional security concerns. On close analysis of the relevant conventions, there seems to be no merit to the argument that the Port City Project would in any way bestow exclusive rights, indirect or otherwise, to the Chinese investors.

The article in the Daily News referred to earlier said that China will have exclusive rights over the airspace above the plot of land given on freehold basis (20 hectares) under the Port City Project. This is a baseless and a misinformed statement that demonstrates an absence of understanding of how the Chicago Convention operates. Firstly, under the Port City Project, no land had been allocated on freehold basis to China. The Project Company, to which the 20 hectares of land was to be allocated on freehold basis, and 88 hectares on leasehold basis, is a private limited liability company incorporated in Sri Lanka. Thus, despite its foreign shareholding, the project company is subject to the applicable laws of Sri Lanka.

¹⁵ The maritime boundary agreements between India and Sri Lanka were negotiated and agreed between 1974 and 1976. The first agreement was concluded in 1974 and it dealt with the maritime boundary in historic waters of Palk Strait and came in to effect on 8 July 1974. The second agreement dealt with the boundaries in the Gulf of Mannar and Bay of Bengal; it was signed on 22 March 1976 and came into effect on 10 May 1976. A third agreement for the extension of the maritime boundary in the Gulf of Mannar was signed on 22 November 1976 and came in to effect on 5 February 1977.

Secondly, the Chicago Convention provides no rights to state-owned or military aircraft over the air space of any other sovereign nation. Article 3 clearly recognizes that it does not apply to state aircrafts and military/police aircrafts; Article 3 (f) provides in particular that:

“No state aircraft of a contracting state shall fly over the territory of another state or land thereon without authorization by special agreement or otherwise, and in accordance with the terms thereto.”

Further, Article 9 of the convention says:

“Each contracting state may, for reasons of military necessity or public safety, restrict or prohibit uniformly the aircraft of other states from flying over certain areas of its territory.”

It is clear that under the Chicago Convention, the sovereign rights of nation states to declare no fly zones over their territories is not removed or diminished.

Territorial waters, or a territorial sea, as defined by the 1982 United Nations Convention on the Law of the Sea, is a belt of coastal waters extending, at most, 12 nautical miles (22.2 km; 13.8 miles) from the baseline (usually the mean low-water mark) of a coastal state. Airspace is the portion of the atmosphere controlled by a country above its territory, including its territorial waters or, more generally, any specific three-dimensional portion of the atmosphere. Thus, even after the desired land area is reclaimed under the Port City Project, the GOSL will have full authority over its territorial waters. Any aircraft coming to the 20-hectare land given on freehold basis to the Project Company will have to cross Sri Lankan Airspace and Territorial Waters over which the Government of Sri Lanka has sole and absolute authority.

4.3.4 Is the waiver of sovereign immunity in the Port City Agreement bad for Sri Lanka?

Sovereign Immunity typically excuses states from liability based on the legal doctrine that a sovereign or state cannot commit a legal wrong and is immune from civil suit or criminal prosecution. However, in the Port City Agreement, the GOSL has waived such immunity.

Under international law and national law, it is universally recognized that the state (government) has no sovereign immunity when it concerns commercial contracts if the state (government) is acting more as a contracting body (example: making an agreement with a local party or an international investor for developing infrastructure). If this were not the case, then no person or entity (especially a foreign trader or investor) would want to enter into a commercial agreement with a state or a state entity. This is because, a state or a state entity could intentionally breach a commercial contract and then seek refuge under the doctrine of state immunity and claim that it is not under any obligation to compensate the other party

to the contract. No country, especially a developing country like Sri Lanka, would be able to survive, let alone chase billion-dollar infrastructure development projects, by taking such a stand given the reliance on foreign investment and foreign trade (exports and imports) which require the state and the state entities to enter into commercial contracts.

In connection with foreign investment, the concept of sovereign immunity is often misunderstood. Those who are not aware of sovereign rights of a state and contractual liability of a state, often think that it is important to state in commercial contracts that the sovereign immunity of the state is retained. They equally do not appreciate the unattractive nature of a commercial contract that leaves the investor without a remedy in the event of a breach of contract occurring. In other words, no foreign investor or a foreign lender would enter into a development agreement with a country, if they do not have the ability to sue for compensation in the event of a contractual breach by the state party to the contract.

It is also important to understand that by entering into a commercial contract, what is being surrendered by a state is not its sovereignty, but its right to do a wrong (i.e. breach a contract) and then avoid liability. This can be best explained by taking as an example a decision by a government to nationalize assets of a foreign investor (such decisions have been often taken by states, for example nationalization in Libya, nationalization of oil facilities in Iran, expropriation in Sri Lanka). Courts and tribunals have held that states in fact have the right to nationalize/expropriate, if they think fit, provided that timely and adequate compensation is paid to the victims of such nationalization/expropriation. The United Nations General Assembly (UNGA) Resolution on Permanent Sovereignty¹⁶ declares that investors *“shall be paid appropriate compensation ... in accordance with international law”* where their property, including by inference their contract rights, have been violated.

Another important point is that, since independence, Sri Lanka has entered into several bilateral treaties, including with China. Article 157 of the Sri Lankan Constitution provides:

“Where parliament ... approves as being essential for the development of the national economy, any treaty or agreement between the Government of Sri Lanka and the government of any foreign state for the promotion and protection of the investments in Sri Lanka of such foreign state, its nationals, or of corporations, companies and other associations incorporated or constituted under its laws, such treaty or agreement shall have the force of law in Sri Lanka and otherwise than in the interests of national security no written law shall be enacted or made, and no executive or administrative action shall be taken, in contravention of the provisions of such treaty or agreement.”

Given the aforesaid explanations, it is a misnomer that by entering into a commercial agreement such as the Colombo Port City Agreement, Sri Lanka is compromising its national sovereignty.

¹⁶ UNGA Resolution 1803 of 1962.

5. LIFTING THE SUSPENSION IN 2016 AND RECOMMENCING THE PORT CITY PROJECT

5.1 The supplementary environmental impact assessment

Following the suspension of the Colombo Port City Project in March 2015 by the GOSL, the Project Company commenced extensive discussions with the new GOSL to establish:

- Whether the EIA and the addendum to the EIA were sufficiently comprehensive and conducted by neutral experts at the invitation of GOSL and not on the invitation of the Project Company;
- Why most of the allegations made against the project's environmental sustainability were not raised during the EIA review process and prior to awarding the contract;
- That the reclamation works under the project commenced only after SLPA on behalf of GOSL confirmed that all relevant statutory clearances and permits were in place;
- The contractual obligation to obtain the relevant environmental approvals for the project (and therefore the associated risk) was with GOSL and SLPA and not the Project Company, and, hence, the legal liability for suspension of the project on the basis that the required statutory permits and/or clearances were not in place lies with the GOSL;
- Reclamation projects similar to the Port City Project have been successfully completed in other parts of the world, for example, in Singapore and in the Middle East, and there is no evidence of any permanent environmental harm such as sea erosion, increased risk of tsunamis, loss of marine life and climate change resulting as a direct consequence of reclamation of the sea, as alleged by those opposed to the Port City Project;
- The Project Company is a private limited liability company incorporated in Sri Lanka and thus subject to Sri Lankan laws. Further, the project agreements are governed by Sri Lankan laws. Thus, any fears concerning compromising national sovereignty are unfounded;
- If GOSL has any remaining environmental/social impact concerns, a supplementary environmental impact assessment (SEIA) could be conducted covering all such concerns;

- If the GOSL fails to lift the suspension and restart the project, the Project Company might not have any other choice but to refer the dispute to international commercial arbitration in Singapore under the Arbitration Rules of the United Nations Commission on International Trade Law as agreed in the Concession Agreement and claim damages including for loss of profit from the GOSL.

The Project Company drew attention to the legal obligations that the GOSL had breached as a result of the unilateral suspension of the project and the legal rights of the Project Company to seek compensation. Following this, in or about May 2015, the GOSL appointed a high-level committee comprising of secretaries to several ministries of the GOSL to explore the possibility of authorizing the continuation of the project. After rectifying identified shortcomings and procedures, the project was approved by the cabinet following the approval of a Cabinet Memorandum tabled to that effect by the prime minister in his capacity as Minister of Policy Planning, Economic Affairs, Child, Youth and Cultural Affairs.¹⁷

Lengthy negotiations followed during the period June 2015 – February 2016 between the Project Company and the high-level committee (the Committee of Secretaries) and the Cabinet of Ministers¹⁸ gave the greenlight for the recommencement of the Colombo Port City Project. Permission was given subject to the completion of a supplementary environmental impact assessment to address the various environmental concerns the GOSL had following the formation of the new government in March 2016, and the issuance of a development permit following substantial amendments to the Concession Agreement which was annexed to the GOSL Agreement signed in September 2014.

The supplementary EIA (SEIA) was completed in or about November 2015 and was made available for public comments for the mandatory period of one month, as specified in the relevant legislation. In particular, public comments were invited on 1 December 2015 under Section 16(2) (d) of the CCA by newspaper publication. In addition, a Gazette Notification was published on 30th November 2015.¹⁹

It is important to note here that the involvement of the public is one of the most crucial aspects of the EIA process. The provision for public participation is contained in the NEA. The notice of availability of the EIA report for public review must be published in all three official languages in Sri Lanka. Therefore, it was required that the notice be inserted into a minimum of one newspaper in Sinhala, Tamil and English. Further, the notice has to be published in the Government Gazette. Once the public comment period is over the project approving agency must decide whether the case warrants a public hearing.

The public comments received during the 30-day period must be sent back to the project proponent within six days for review and response in terms of Section 23BB(3) of the NEA. The project proponent must respond to such comments in writing to the project approving agency and make every effort to modify alternatives, including the proposed action, to develop and evaluate alternatives not provided, to give serious consideration to providing supplementary information in the document and to make factual corrections. All substantive comments received on the draft

¹⁷ Office of the Cabinet of Ministers of Sri Lanka (2015), Press briefing of Cabinet Decision taken on 27 May 2015.

¹⁸ Decision of the Cabinet of Ministers at the Cabinet Meeting held on 9 March 2016.

¹⁹ Gazette Notice No. 1943/8, 30 November 2015.

²⁰ Section 16 (2)(b) of the Coast Conservation Act No 57 of 1981.

²¹ Mundy vs. Central Environmental Authority and others, SC Appeal 58/03, SC Minutes of 20 January 2004.

should be attached to the final statement.

As stated above, the SEIA which was completed by November 2015 and went through the public consultation process in December 2015, notes that the CC&CRMD as the project approving agency (PAA) made the initial EIA report of April 2011 for reclamation of approximately 200ha of land by filling the seabed, and that the said EIA report was made available for public comments as required under CCA.²⁰ It further notes that although there is an addendum to the said EIA, proposing a reclamation area of 233 ha instead of 200 ha, the addendum report to the EIA was not opened for public comment as it was seen as an initiative taken to inform the PAA of a “*deviation which has taken place to expand the project from 200 ha to 233 ha...*”.

The SEIA further notes that a “Permit for a Development Activity under Part III – Section 14 of the Coast Conservation & Coastal Resource Management Act No 57 of 1981, for reclamation, dredging and construction of breakwaters, revetments” has been issued for carrying out the reclamation works under the project following the said EIA and the addendum to the EIA and the signing of the GOSL Agreement. This permit contains 42 conditions of which number 40 states “a separate approval should be obtained from the CEA for extracting sand from the offshore to be reclaimed the proposed near shore area and submitted to this department prior to the commencement of the construction” (CECB, 2015).

A careful review of the SEIA shows that although the word “supplementary” is used in its title, it is a comprehensive EIA that has been done taking into account the following:

- The shortcomings of the initial EIA done in 2014 so that the environment related concerns raised by the GOSL following the formation of the new government in March 2015 are addressed;
- Addressing the issues covered in the addendum to the EIA done in 2014 which was not opened for public comments;
- Addressing the environment related issues arising out of the conditions subject to which the Development Permit for the Colombo Port City Project had been granted under Section 14 of the CCA, in particular, the issues relating to sand extraction for the reclamation works.

It is important to note here that neither the NEA nor the CCA makes any provision for supplementary environmental impact assessment reports. However, given that no statutory bar exists for such SEIAs, the author is of the view that if the government forms the view that it needs an additional and/or a more comprehensive EIA before proceeding with a development project, there is nothing illegal and/or irregular in such a move. In fact, the Supreme Court of Sri Lanka considered an SEIA when the Southern Expressway Project was challenged in a public interest litigation case.²¹

5.2 Amending the Concession Agreement

Whilst the SEIA was being developed, negotiations commenced between the GOSL and the Project Company on the amendments proposed by the GOSL to the Concession Agreement of September 2014. Accordingly, a decision was taken to amend the Concession Agreement.

Because the SLPA lacked the legal capacity to enter into the Concession Agreement given its limited scope under the enabling statute, the SLPA Act, it was mutually agreed that the Concession Agreement should be converted into a Tripartite Agreement between the GOSL, the UDA, a statutory corporation created under Act No. 41 of 1978, and the Project Company. The GOSL, mindful that once land is reclaimed the development of the reclaimed area would necessarily be an urban development project, decided that instead of the secretary to the ministry in charge of the subject of ports who signed the GOSL Agreement of September 2014, the new Concession Agreement (Tripartite Agreement) should be signed on behalf of the GOSL by the secretary to the ministry in charge of the subject of urban development, namely, the Secretary, Ministry of Megapolis and Western Development.

The decision to add the UDA as a party was on the basis that, if the development activities undertaken under the Colombo Port City Project are to be considered urban development activities, then the most appropriate GOSL agency to take charge of the project would be the UDA. However, the GOSL and the Project Company agreed that as only the President of Sri Lanka has the power to authorize the reclamation of the seabed and/or foreshore of Sri Lanka under the State Lands Ordinance and further, as such reclaimed land becomes state land in terms of the State Lands Ordinance,²² until such time the reclaimed land is vested in the UDA, the GOSL should be a party to the Tripartite Agreement.

The understanding and the agreement reached between the parties was that the GOSL would be a party to the project agreement acting through the Secretary, Ministry of Megapolis and Western Development, the minister under whose purview the subject of urban development comes. Once the land is reclaimed, the same will be vested in the UDA and thereafter UDA would step into perform the obligations of the GOSL under the said tripartite agreement.

The UDA has been established to plan and implement development in areas designated as urban development areas under the UDA Act. In Terms of Clause 3 of the UDA Act, the UDA can exercise powers and discharge its functions only in areas declared by the minister as urban development areas/ development areas. Part II of the Act sets out the powers and functions of the UDA, and Section 8 of the Act specifies the following:

“8 the powers and functions of authority within any development area shall be –

²⁰ Section 110 of Ordinance No. 8 of 1947.

²¹ Recitals A – K and Clauses 2 and 24 of the Tripartite Agreement signed by the Secretary, Ministry of Megapolis and Western Development, the Urban Development Authority of Sri Lanka and CHEC Colombo Port City (Pvt.) Ltd.) on 11 August 2016.

²⁴ Chapters III and IV of the Constitution of Sri Lanka guarantees fundamental rights to the people of Sri Lanka. Under Article 126 of the constitution, the Supreme Court of Sri Lanka has the sole and exclusive jurisdiction to hear and determine cases relating to the infringement or imminent infringement of these fundamental rights. Such application could be proceeded with only with leave to proceed first had and obtained from the Supreme Court. An application should be filed in the Supreme Court within one month from the date of infringement or the alleged infringement. This time limit of one month will be ignored by the Supreme Court in the case of continuing violation of fundamental rights where the applicant may not have had access to the court within one month from the first date of infringement (for example, a person illegally detained may not have such access during the time of detention).

- (c) *to enter into, perform and carry out, whether directly or by way of a joint venture with any person in or outside Sri Lanka, all such contracts or agreements as maybe necessary for the purpose of carrying out any development project or scheme, as maybe approved by the government;*
- (d) *to undertake the execution of development projects and schemes as maybe approved by the government;*
- (e) *to enter into any contract with any person for the execution of development projects and schemes as maybe approved by the government;*

.....” [emphasis added]

Unlike the case of the SLPA, there was no doubt concerning the capacity of the UDA to engage in the Colombo Port City Project, once the land is reclaimed and declared an urban development area.

During the negotiations to recommence the project subject to amending the Concession Agreement, it was also agreed between the parties that the Project Company would withdraw its claim for compensation arising out of the unilateral suspension of the project by the GOSL. It was further agreed that the Project Company would surrender its contractual right under the GOSL Agreement of 2014 to receive 20 ha of freehold land. In consideration of the Project Company agreeing to the above, the GOSL agreed that the land area leased to the Project Company for a period of 99 years was increased from 88 hectares to approximately 113 hectares.²³

5.3 Analysis of the reasons compelling the GOSL to recommence the project

The two public interest litigation cases instituted against the relevant government agencies (SLPA, the Board of Investment of Sri Lanka, the Central Environmental Authority (CEA), the CC&CRMD, Secretary, Ministry of Highways and Ports) challenging the decision to develop the Colombo Port City Project were unsuccessful.

When the Fundamental Rights Application No. SCFR 151/2015 filed before the Supreme Court²⁴ was made for granting leave to proceed, the lawyers representing the GOSL (the Attorney General’s Department) and the lawyers for the Project Company successfully argued that there was no merit in the various allegations concerning the alleged environmental harm that the project is likely to cause. It was submitted that, whilst the GOSL had carried out a detailed EIA, an addendum to the

EIA and subsequently also a SEIA, all three reports having been compiled by high-level experts, the allegations that the project would result in erosion of the beach, loss of sea life, adversely affect the livelihood of the fishing community, the project would contribute to adverse climate conditions in Sri Lanka etc., were not supported by adequate scientific evidence.

It was also argued that the petitioner (an association representing a fishing community) had filed the fundamental rights application nearly two years after the initial EIA was conducted and was opened for public comment, and thus the petitioners were guilty of laches by not coming before the Supreme Court of Sri Lanka within the specified time limit of one month²⁵ from the alleged infringement of fundamental rights. It was submitted that the petitioners had not made use of the opportunity given to all those who were interested in and/or were opposed to the project to submit their observations on the EIA and the SEIA when they were opened for public comment as required under the NEA.²⁶

It was argued by the respondents that the petitioner had not named the correct parties in its application and had not challenged the correct contract. This argument was made on the basis that SLPA would no longer be a party to the operative agreement dealing with the project, namely the Tripartite Agreement that was by then finalized and approved by the Cabinet of Ministers to be signed by the GOSL, the UDA and the Project Company. Further, it was submitted that the GOSL Agreement challenged by the petitioner would no longer be operative when the parties to the project sign the Tripartite Agreement.²⁷

Eventually, the proceedings (SCFR 151/2015) were terminated by the Supreme Court on 7 July 2016 without granting leave to the petitioners²⁸ as the court concluded that it could not be found that the rights of the community had been violated as a result of the project.

The Writ Application²⁹ No. 112 of 2015 filed before the Court of Appeal by a non-governmental organization (NGO), the Centre for Environmental Justice, has had no success to date. Although this case too was filed in or about March 2015 (soon after the formation of the new government), the Court of Appeal noted that the petitioner has not taken into consideration the SEIA which was conducted by the GOSL to address its concerns prior to recommencement of the project.³⁰ Further, the Court of Appeal considered the preliminary objections raised on behalf of the Attorney General who appeared for the Secretary, Ministry of Ports and Highways, the SLPA, the Board of Investment of Sri Lanka and the CC&CRMD. It was held that the petitioner was guilty of laches, they had not named the correct parties as respondents as SLPA was no longer a party to the agreement, that the only operative agreement concerning the project at the time was the GOSL Agreement signed between the Secretary, Ministry of Highways and Ports and the Project Company, and that the petitioner had failed to raise its concerns during the public consultation process when the EIA and subsequently the SEIA was opened for public comment.

²³ Article 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

²⁴ Act No. 47 of 1980.

²⁵ The Tripartite Agreement was signed on 11 August 2016.

²⁶ The Sunday Times (2016). “Supreme Court terminates proceedings in the case against Colombo Port City Project”. 17 July.

²⁷ Writ Actions in Sri Lanka are regulated by Articles 140 and 141 of the constitution. Writs may be sought to obtain relief against a public body where it is acting ultra vires.

²⁸ SLPA News Letter, “Port City: several steps taken by govt. on good intentions – CA”, 30 July 2016.

On 28 July 2016, the Court of Appeal advised the petitioner to reconsider its application and to consider the preliminary objections raised by the Attorney General and the new information available by then concerning the approval by the Cabinet of Ministers to sign a new Tripartite Agreement pursuant to the completion of the SEIA, which had addressed the GOSL's concerns.

Accordingly, the petitioner said it would make an application to support the matter after filing an amended application, which was eventually done on or about 31 October 2016. The matter is still pending before the Court of Appeal.

It could be said that the concern, if any, that the GOSL might have had about the project being annulled by the Supreme Court or the Court of Appeal on the basis that the project was against public policy and/or public interest, was reduced to a large extent by the courts refusing to entertain the reliefs claimed for by the petitioners.

At the time the Tripartite Agreement was signed by the GOSL, the UDA and the Project Company on 11 August 2016, there was no adverse finding against the Port City Project, nor a pending application before any court in Sri Lanka.

It could also be said that the substantial financial risk of compensation being owed to the Project Company for the unilateral suspension of the project would have convinced the GOSL to lift the suspension and recommence the project. The Project Company had informed GOSL that as a result of the suspension it was incurring losses of approximately USD 380,000 per day. The Project Company argued that the suspension was unilateral and was based on the lack of environmental-related permits to commence the project, which was an obligation GOSL had to perform.

Another factor that may have convinced the GOSL to recommence the project is the lack of foreign direct investment inflows into the country, even after ending the three-decade long civil strife discussed earlier. According to the Central Bank of Sri Lanka, China is the biggest contributor to Sri Lanka's FDI with over USD 400 million in investment in 2014 (Central Bank, 2015). The Port City Project alone is expected to bring in USD 1.4 billion worth of investments during the reclamation period.

Given the global financial crisis during the current decade and the diminishing capacity of the Western nations such as the United States, United Kingdom and European Union countries to fund large-scale infrastructure development projects overseas and the lack of funds and/or capacity amongst the multilateral banks such as the World Bank and the Asian Development Bank to cater to the development needs of all the developing nations, it is likely that even the new Government of Sri Lanka realized that antagonizing perhaps one of the very few countries in the world willing to invest in Sri Lanka would not be a prudent move.

5.4 The Tripartite Agreement

Approximately 16 months after the Colombo Port City project was suspended, the new Tripartite Agreement was signed by the GOSL, the UDA and the Project Company on 11 August 2016. This followed the conclusion of the second EIA, referred to as the Supplementary Environmental Impact Assessment (SEIA), commissioned by the Ministry of Megapolis and Western Development and conducted by the Central Engineering Consultancy Bureau.

The 400+ page SEIA Report gives details of the agreements that were signed by the previous GOSL and the extent of the environmental assessment. It concludes that the project was feasible at an even larger scale than before, and recommended that the government reclaim 269 hectares of land (previous agreement being for the reclamation of 233 hectares) and that the associated risks would not cause significant damage to the environment or climate.

With the Tripartite Agreement in place, the GOSL has given the greenlight for the reclamation works. It appears that the new government formed in March 2015 is satisfied that the Colombo Port City Project is an environmentally, financially and socially feasible project that should be carried out and that the SEIA has addressed the doubts concerning the environmental viability of the Port City Project.

6. SUSTAINABILITY OF THE COLOMBO PORT CITY PROJECT

6.1 Have the project proponents identified the potential environmental risks?

6.1.1 Initial EIA Process

As noted above, many groups have questioned the sustainability of the Colombo Port City and the damage it may cause to the environment. Despite having carried out an IEE and EIA prior to the project's inauguration in September 2014, there were "grey areas" relating to the environmental, economic and social impacts that the project could have, that needed to be resolved. In particular, the sheer scale of the project (to claim over 200 ha of land from the sea) meant that an unprecedented level of depth and detail was required to satisfy opponents that the country would be better off after the project was completed.

The first EIA was commissioned by the SLPA and led by the University of Moratuwa, one of the top-ranking universities in Sri Lanka. Although the EIA detailed the scope of the Port City Project and some of the associated environmental risks, it was heavily criticised for failing to address a number of important issues, inter alia:

1. The exact dimensions and parameters of the project;
2. The specific activities that would be carried out to complete the project (at the reclamation stage);
3. The methodology and models that were used to derive the conclusions reached;
4. Graphical representations (including detailed maps) of the project and its parameters;
5. Data on marine biodiversity and the availability of sensitive areas;
6. Details on the supply and transport of raw materials, particularly quarry rock and granite;
7. Waste management and the disposal of wastewater;
8. The environmental impact of sand extraction; and
9. The environmental impact on Colombo and its surrounding suburbs.

It was also argued that, due to enormity of the project and the fact that no land reclamation had ever been undertaken in Sri Lanka on such a scale, the team, which was led by local university professors, would not have the necessary expertise or experience to conduct the EIA to the requisite standard. In addition, it was alleged by the Environmental Foundation Limited (Environmental Foundation, 2015) that the relevant local authorities had not been consulted during the EIA process:

“The existing document for the EIA carried out seemed to have no consultation from the Central Environmental Authority (CEA), Marine Environment Protection Authority (MEPA), Geological Survey & Mines Bureau (GSMB), Sri Lanka Land Reclamation and Development Corporation (SLLRDC) and the Hydrographic Division of National Aquatic Resources Research and Development Agency (NARA), who are the mandated government authorities for working on environmental issues, marine environment protection, offshore sand exploration and mining, land reclamation and the study of ocean currents.”

It is important to note that while it is reasonable to conclude that the IEE and the EIA done prior to the GOSL Agreement being signed in September 2014 was inadequate in some respects, not all of the criticism levelled against the EIA process has merit. For example, whilst it is true that no major sea reclamation project had been carried out in Sri Lanka prior to the commencement of the Port City Project, the consultants involved in the first EIA did have adequate qualifications and exposure. For instance, Professor Samantha Hettiarachchi, the Team Leader for consultants from the University of Moratuwa who completed the EIA, is a Professor of Civil Engineering of the University of Moratuwa and a former Chair of the UNESCO Indian Ocean Consortium on Risk Assessment.

He is an internationally renowned expert on the assessment of environmental harm due to reclamation works. It is pertinent to note that those who criticised the EIA process, including the two petitioners in the Writ Application filed in the Court of Appeal³¹ and the fundamental rights application filed in the Supreme Court,³² had no reliable scientific backing to substantiate their claims that the EIA was inadequate.

Another important point is that the Environmental Foundation Ltd.'s allegation that relevant stakeholders such as the CEA had not been consulted when completing the EIA process lacked merit. The CEA is the project approving agency (PAA) under the NEA.³³ In the case of the Port City, since the project involves coastal management, the PAA was the CC&CRMD and had been involved as required in terms of the CCA³⁴ in approving the EIA. Further, there is clear evidence in the EIA to show that all relevant stakeholders were involved in the EIA process; this is that the Terms of Reference for the EIA had been prepared by a Scoping Committee appointed by the CC&CRMD, comprising of the 16 regulatory agencies, which included: the Colombo Municipal Council, Colombo District Secretariat, Sri Lanka Navy, Colombo Divisional Secretariat, Ministry of Defence, Ministry of Economic Development, Department of Fisheries, UDA, Sri Lanka Tourism Development Authority, CEA, Road Development Authority, Marine Environment Protection Authority, Department of Archaeology, Geological Survey and Mines Bureau, and Sri Lanka Land Reclamation and Development Corporation.

Moreover, clause 12.1 of the Concession Agreement, which was annexed to the GOSL Agreement of September 2014, specifically provided that the GOSL shall obtain the applicable permits and consents necessary for the design, construction and completion of the Port City Project. This establishes the fact that the relevant agencies, in any event, would have had to carry out an independent evaluation of the EIA process before issuing permits such as:

- The environmental clearances pursuant to an EIA;
- Sand Mining Licenses for sand borrow zone from the Department of Coastal Conservation and Coastal Resources Management;

³¹ CA 112/2015.

³² SCFR 151/2015.

³³ Act No. 47 of 1980.

³⁴ Act No. 57 of 1981.

³⁵ The Central Engineering Consultancy Bureau (CECB) was established as a fully owned State Enterprise by the Government of Sri Lanka in 1973. It is currently attached to the Ministry of Mahaweli Development and Environment. It has been operating as a self-financed government corporation since inception and is primarily involved in providing engineering consultancy, construction and related services.

³⁶ The associated consultants were: GSMB Technical Services (Pvt) Ltd.; National Aquatic Resources and Research Agency; Lanka Hydraulic Institute Ltd.; Uni Consultants, University of Moratuwa; CDR International B.V, the Netherlands.

³⁷ Central Engineering Consultancy Bureau. Available at: http://cecb.lk/project/Completed%20Projects/completed_Ports%20and%20Coastal.html (Accessed 24 June 2017).

³⁸ SEIA, 2015, Executive Summary, p. 1.

- Permits for quarry operations;
- Approvals from the Department of Archaeology;
- Marine Environment Protection Authority (MEPA); etc.

6.1.2 The SEIA

As mentioned above, it was decided by the incoming administration after the March 2015 elections that a fresh EIA should be conducted to address the inadequacies of the first assessment and to account for an increase in the proposed area for reclamation. Accordingly, a 'supplementary' EIA (SEIA) was commissioned by the Ministry of Megapolis and Western Development and conducted by the Central Engineering Consultancy Bureau (CECB)³⁵ as the Lead Consultant.³⁶

The SEIA sets out a two-phased approach to the analysis in which it would cover the first phase of development, relating to the reclamation of the land for the Port City, including the "... reclamation, sand extraction and construction of coastal structures to protect the landfill and landscaping aesthetics for the proposed Colombo Port City" (CECB, 2015). The second phase of the EIA, which has yet to be commissioned, is a requirement in order for building to commence once the land has successfully been reclaimed and would cover the construction of buildings and infrastructure for the Port City (CECB, 2015).

According to the lead consultant, CECB, the SEIA aimed to fill the lacuna created by the EIA and IEE and was conducted by a team of experts with experience in consulting for large-scale ports and coastal projects both within and outside of Sri Lanka.³⁷ In the detailed 400+ page study, numerous potential environmental issues are identified and their respective risk levels are determined. Where relevant, measures and alternatives that would help mitigate the effects and alleviate any negative impacts caused by the construction of the Port City are suggested.

The SEIA explains its scope in the following words:

"This Supplementary Environmental Impact Assessment (SEIA) study is carried out for the expansion of the reclamation area of the Colombo Port City Project from an area of 200 ha, which was approved by the project approving agency, the Department of Coast Conservation and Coastal Resources Management, subsequent to an environmental impact assessment (EIA) study that was subject to public comments via a notice placed in newspapers on 11 June 2011, to an altered design comprising an area of 269 ha, together with the impacts of extraction of sand from the identified borrow areas and quarry material required for the entire landfill and protective works. The above-mentioned EIA for 200 ha did not cover environmental impacts of sand extraction as a separate and inconclusive initial environmental impact assessment (IEE) process was adopted by the Sri Lanka Ports Authority in this respect, and this lacuna is being addressed

*via this SEIA study. Notwithstanding the EIA of 2011 for 200 ha being approved after the public review process, this SEIA study covers the entire reclamation footprint and the extraction of quarry material and sand required for the entire project."*³⁸

Thus, it would appear that, irrespective of the use of "supplementary" in its title, the SEIA is a comprehensive environmental assessment of the Port City Project.

The SEIA notes that the CCCC was regarded as a competent land reclamation specialist as it had undertaken several large land reclamation projects around the world.³⁹ Because of this, the initial EIA process for the Port City Project assumed that many of the environmental risks associated with dredging had been considered during the planning stages and, accordingly, these were not dealt with in adequate detail in the EIA. This approach, referred to as "mitigation by design", has drastically reduced the need for considering specific mitigation measures during the EIA process.⁴⁰

According to the SEIA the objectives of Colombo Port City as formulated by the Project Company are:

- To foster integrated oceanfront living within the CBD to provide a high quality of life through world class office, residential and recreational spaces that will attract tourists, professionals, entrepreneurs, managers and retirees;
- Position Colombo as the most liveable city in South Asia;
- To create a regional business hub, a city with a distinct brand with high-quality public spaces and infrastructure facilities, attractive to local and international developers and investors;
- To create a tourism hub with a unique character that reflects the distinctive local culture and the existing urban fabric;
- To design and build a sustainable urban city space that is adapted to the local climate, creates a comfortable micro climate and makes efficient use of energy resources.

The SEIA notes that Colombo cannot become a destination that appeals to the international business travellers or tourists with ad hoc and fragmented developments and without distinct positioning. Therefore, Colombo Port City provides an opportunity for the old and historic part of Colombo's central business district to seamlessly interface with a modern planned metropolis like no other in South Asia.

With this background, the SEIA shows that it is the end product of a comprehensive review of the modelling work and preliminary designs carried out for the Feasibility Study of Port City. The studies, which have been reviewed, contain comprehensive

³⁹ According to the information available on the CCCC website, the company has undertaken several land reclamation and related infrastructure development projects in Mexico, Mauritania, Pakistan, Hong Kong, Malaysia, Ethiopia, Indonesia, Macao, Sudan and Uzbekistan. See <http://en.cccctd.cn/business/overseas/index.html>. (Accessed 20 August 2017).

⁴⁰ SEIA, 2015, pp. 29-30.

2D and 3D physical model test studies and numerical modelling studies, which include: an interpretation of coastal evolution and siltation due to the proposed development; sediment transport modelling considering dredging and reclaiming; and an interpretation of contaminant concentration at the Beira Lake outfall with the proposed mitigation measures. Further, ground investigations have been carried out to better understand the technical requirements to be considered in the implementation of the project.

The SEIA lists the following engineering studies that were carried out during the feasibility and environmental study phase of the Port City Project and which have been reviewed in developing the SEIA report:

- Wave climate modelling
- Hydrodynamic modelling
- Wave disturbance modelling
- Sediment transport modelling
- Sediment dispersal modelling
- Shore profile survey
- 2D stability physical model test on offshore breakwater and revetment for a marina;
- 3D physical model study test;
- Analysis (numerical modelling) of coastal evolution and siltation;
- Numerical modelling of water exchange;
- Ground investigations;
- Water quality sampling and analysis;
- Assessment of inland quarry material availability, permits, transport routes, impacts etc.;
- Model and ecological studies at reclamation area;
- Impacts on Beira Lake outfall and storm water drain outlets impacts due to the proposed development, including 3D numerical model.

The table below shows the key environmental risks identified in the SEIA and the conclusions reached and/or recommendations made in connection with the same ⁴¹:

Potential Risk	Conclusions/Recommendations
Coastal erosion to the north of the Colombo Port.	The Colombo South Port breakwater which extends 2 km in length perpendicular to the coast protects the land to be reclaimed for the Port City. It has increased the wave shadow, extending it northwards. As a consequence, wave conditions in this area had become calmer and the shoreline between the Colombo South Port and the Kelani River has remained stable. Monitoring over the last four years has confirmed that erosion has not taken place due to the breakwater. The sediments from the Kelani River discharged north of the Colombo Port have also contributed to this effect. Port City is in the shadow of the Colombo South Port breakwater. Therefore, it has no impact on coastal erosion north of Colombo Port.
Erosion due to dredging.	When dredging is taking place for sand, material must be taken away from the active dynamic zone, where waves do not have an influence on the seabed. In the case of Port City, dredging areas have been identified on this basis.
A total of 2.83 million cubic metres of quarry material and 65 million cubic metres of dredged sea sand will be required for the Port City. Making these available for the project would cause environmental harm.	For the Port City, quarry material will be obtained from existing, licensed quarry suppliers. These quarries have been already screened for environmental concerns when granting licences. Sand is to be extracted from two areas designated by the Geological Surveys and Mines Bureau. Licences for these sites have been already issued. The available sand in these two sites is almost double the requirement for the Port City.
Environmental damage (danger to marine life) from dredging activities.	The approved methodologies for dredging have taken this aspect into consideration to ensure that there will be no impact on coastal erosion.
Adverse effect on the livelihood of the fishing community.	Measures have been recommended to allow fishers to engage in fishing within the allocated dredging sites by giving proper notice in advance and after dredging work is done to recommence fishing. This will be in accordance with COLREG regulations. ⁴² Recommendations have been made to implement an income support and benefits programme to fishermen. ⁴³

⁴¹ For a more detailed analysis of all the identified risks and the recommended mitigation measures, please see chapters 4, 5 and 7 of the SEIA, 2015.

⁴² The International Regulations for Preventing Collisions at Sea 1972 (COLREGs) published by the International Maritime Organization (IMO).

⁴³ SEIA, 2015, Chapter 5.

<p>Loss of marine life</p>	<p>There will be no reduction in fishing grounds in the reclamation area since this is not an ideal habitat for fish breeding due to already silted conditions.</p> <p>In any event, the dominant fish resources in the area are pelagic, transient species that are likely to avoid unsuitable environmental conditions and return once normal conditions are established in the long term.</p> <p>There will be some beneficial effects from the project. The use of granite boulders and concrete elements for protection works will serve as suitable habitats for fauna and flora. These will provide shelter for benthic animals that inhabit reefs such as lobsters and some fish. In addition, these boulders will serve as habitats for coral organisms as observed in the newly constructed breakwaters of the Hambantota port. Therefore, the populations of such animal may increase.</p> <p>Sand dredging is expected to cause some temporary impacts by removing benthic fauna and increasing turbidity as a result of an increase in suspended particles in the water column. However, the restriction of the dredge depth is expected to mitigate these impacts.</p>
<p>The influx of demand for power and sewerage could negatively impact the surrounding communities and the city as a whole.</p>	<p>Under the terms of the Agreement, the GOSL bears full responsibility for the provision of utilities (including water, power and sewerage) to the entire Port City. The project is to be developed in phases, thus giving adequate time for GOSL to implement the necessary support infrastructure projects.</p> <p>The SEIA covers in detail how sewage will be disposed of both during and after the reclamation phase is completed. It also used a specifically tailored numerical model to assess the impact on the discharge from the Beira Lake outfall and suggests a comprehensive plan for “improving dispersion and preventing any obstruction”.</p>

Chapter 7 of the SEIA outlines an environmental management plan (EMP), the terms of which form a part of the contract between the Project Company and the GOSL. The EMP is described as a “tool for the management of the environmental performance of the project and it is developed as an important component of the project activity”.

According to the SEIA, the EMP will be overseen by an environmental monitoring committee (EMC) which will ensure the project’s compliance and adherence to the EMP. The EMC will be chaired by the CC&CRMD and will include membership from a broad spectrum of stakeholders including the CEA, National Aquatic Resources Research and Development Agency, Department of Fisheries, Department of Archaeology, as well as the EIA consultants and the contractors. This diverse membership is likely to allow a balanced approach to the management of various challenges presented by the Port City and will also give the opportunity for multiple parties to weigh-in on issues that may affect particular groups, communities or environmental causes. Accordingly, it can be said that the project proponents have identified the risks that the first EIA failed to address. In addition, they have suggested practical solutions to diminish the impact that they could have had on the environment and a feasible way to monitor the results through a cross-functional EMC.

6.2 Balancing the economic interest and the environmental concerns

As with any large infrastructure project on the scale of the Colombo Port City Project, there are costs, risks and benefits to be weighed against each other. These must be viewed with regard to the current status of Sri Lanka, as a post-war country that has grand aspirations of becoming a dynamic commercial and financial hub. To achieve this end, and position Colombo as the “go-to” destination in the South Asian region, a significant financial investment is required to fund large-scale development. However, this must be carefully balanced against the social, environmental and humanitarian impact that achieving such a feat could entail.

The main environmental costs identified by the EIA and SEIA, for the entire project are: potential losses to archaeological and cultural aspects (Sri Lankan Rupees LKR 1.2 million), accidental damage or injury costs (LKR 178.5 million per year during reclamation), mitigation costs (LKR 63.5 million) and monitoring costs (LKR 261 million). This does not include the LKR 1,000 million that has been allocated as part of the benefits programme designed to compensate local fishermen for loss of revenue and earnings as a result of the Port City’s construction. Thus, the approximate environmental cost of the Port City Project in monetary terms would be LKR 1,504.2 million (approximately USD 10 million). This should be weighed against the agreed foreign direct investment of USD 1.4 billion for developing the project.

It is also important to note that the development of the Port City Project will not require any local capital, resulting in a drastic reduction in the amount of tax payers’ money being used to support the project (at the reclamation stage). Apart from the opportunities for foreign companies to take advantage of Colombo’s unique strategic location, the project will also directly lead to the creation of jobs and entrepreneurship opportunities for local Sri Lankans. The SEIA estimates that each year will bring approximately 15,000 new jobs, totalling 150,000 jobs for the first 10 years of business operations. Other benefits include land sales, valued conservatively at USD 6 billion, for the land allocation to the GOSL, over a period of 20 years. In addition to all this, there will also be a FDI inflow to develop the reclaimed land.

In the aforesaid premises, it could be said that as long as the identified environmental risks are adequately addressed, and efficient and effective mitigation measures are put in place, the Colombo Port City Project does not have to be another white elephant.

8. LEGAL MEASURES AVAILABLE TO DEAL WITH FUTURE ENVIRONMENTAL HARM FROM THE PORT CITY

Sri Lanka has developed a significant body of legislation that protects the environment and the public's freedom to enjoy nature. In fact, environmental protection is enshrined in the constitution: "the state shall protect, preserve and improve the environment for the benefit of the community" (Article 27 (14)). An important piece of legislation that could be invoked in any future legal challenges is the NEA, a violation of which may lead to a prison sentence.

For severe environmental harm that falls outside the scope of the EIAs, litigation is an option for those affected, although the process can be long and drawn out.

There are broadly speaking three main channels for a legal challenge against the Port City: criminal action, administrative action and civil action.

Section 261 of the Penal Code details "public nuisance" and the specific behaviour/conduct that would constitute an offence. There are two main requirements, namely, a common injury, danger or annoyance, either to the public or the people who dwell or occupy property in the vicinity, and an injury, danger, or annoyance to persons who may have occasion to use a public right. The principal form of relief granted to those who have been affected by a public nuisance is an abatement, or removal of the nuisance caused.

If any future environmental harm were to occur due to the Port City Project, a public nuisance claim could be brought against the Project Company and/or its EPC contractor. Whilst it could be argued that as the project has been identified as beneficial to Sri Lanka's growth and develop, it should not be classified as a "public nuisance". However, Section 261 of the Penal Code provides for such situations and clearly states that such an offence may not be excused solely on the basis that it may have a positive or advantageous impact.

In addition to criminal action, those affected by the Port City Project could also file administrative action against the relevant public-sector entities involved in regulating the project, for example, the CEA, CC&CRMD, and the UDA. Such actions may be filed in the form of a Writ Application as provided for in Article 140 of the constitution or in the form of a Fundamental Rights Application as provided for in Article 126 of the constitution. In addition to such actions against the state, those affected may also pursue civil actions for damages arising out of negligent construction and/or environmental management. Where the complained effect/impact is severe and irreparable, it may also be possible to obtain injunctive relief.

It is also important to note that, apart from the rights the third parties may have to challenge the Port City Project, the Tripartite Agreement signed between the GOSL, the UDA and the Project Company has also several inbuilt checks and balances to ensure that the development activities do not cause environmental harm. For example, clauses 8 and 9 of the agreement specify the functional and design

requirements which have to be met by the Project Company. Clause 13 of the Tripartite Agreement ensures that the project proceeds according to a Development Master Plan approved by the UDA. This clause also ensures that the reclamation works are carried out subject to the required statutory clearances being in place. Clause 16 requires the Project Company to keep the GOSL updated on the progress of the works and to comply with all the agreed construction tests. Clause 17 provides for the joint appointment of an employer's quality representative, who will report to the GOSL on the quality of construction by the Project Company. Further, Clause 6.1 of Schedule 3 (functional requirements) to the agreement provides that:

"Environmental Management Plan (EMP) - 2016 was prepared to cover all the mitigatory measures proposed in EIA (2012) and SEIA (2015) and the permit conditions imposed by CC&CRMD [...] The Port City Project developer should work proactively to avoid similar adverse environmental and social incidents. All potential environmental and social impacts will be mitigated to acceptable levels by the implementation mechanism of the EIA via the EMP under the guidance of the environmental monitoring committee (EMC), which will be established by the CC&CRMD."

Moreover, Clause 6.2 of Schedule 3 (functional requirements) to the Tripartite Agreement provides that: "The Port City Project developer should work proactively to avoid similar adverse environmental and social incidents. All potential environmental and social impacts will be mitigated to acceptable levels by the implementation mechanism of the EIA via the EMP under the guidance of the environmental monitoring committee (EMC), which will be established by the CC&CRMD."

Thus, it is clear that the Tripartite Agreement has adequate provisions to ensure that the parties comply with the agreed mechanisms to minimize environmental harm from the project.

9. CONCLUSION

The entire purpose of conducting the EIAs is to evaluate "the likely environmental impacts of a proposed project or development, taking into account inter-related socio-economic, cultural and human-health impacts, both beneficial and adverse" (CBD, 2017). Thus, it can be inferred that the present, as well as the "likely" future environmental harm, must be considered in order to complete such an assessment.

The reclamation stage of the Port City Project is covered by not one, but two EIAs, which have both been rigorously scrutinized, opened for public comment and evaluated by the relevant decision makers, prior to being approved. Any environmental harm that has been identified under the EIAs must be considered in light of the laws and regulations of Sri Lanka, and their approval is only given on the basis that any harm or damage does not outweigh the socio-economic benefits of the project.

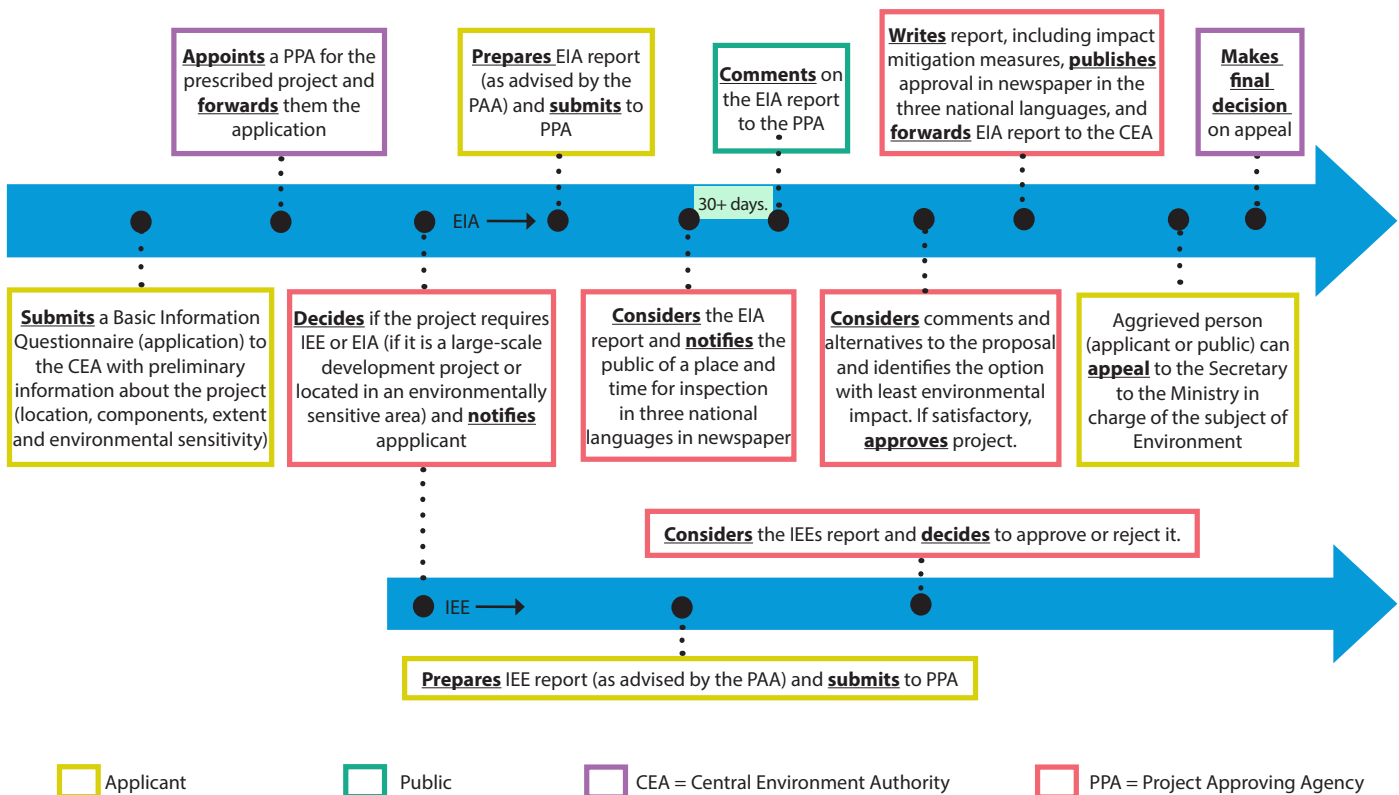
The Port City project will be overseen by a committee that will ensure that the views and rights of multiple parties are protected during the reclamation phase, as recommended by the SEIA. If any environmental harm is identified, it will be the responsibility of the EMC and contractor to seek an open and transparent dialogue

with the affected local community and public, with a view to “manage, investigate and act upon, any issues raised” after works have commenced. This will reduce the prevalence of litigation and will allow the parties themselves to come to a resolution on any issues that may arise during the course of construction.

The second phase of development on the reclaimed Port City is likely to bring new environmental concerns and to address those properly the project proponents must satisfy a new EIA to cover the environmental risks that will arise post-reclamation, during the construction phase. As with the first EIA and Supplementary EIA, the planned development will be opened for public scrutiny, at which point affected communities would be able raise their concerns and seek remedies directly with the Project Company, the GOSL or other relevant third parties.

All that said, it is reasonable to conclude that with the completion of the SEIA to address lacunas in the previous EIA for the Port City Project, the environmental management plan introduced by the SEIA to mitigate the adverse impacts of the project and the checks and balances put in place in the Tripartite Agreement, the Port City Project no longer looks the ill-defined and badly planned project it was alleged to be at the time it was unilaterally suspended by the GOSL.

SRI LANKA Initial Environmental Examination (IEE) and Environmental Impact Assessment (EIA) Process Based on National Environmental Act Amendment No. 56 of 1988, Part IV C



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05

New Downtown and Residency in Maringá, Parana State, Brazil

Bruno Grego-Santos



Maringá, Brazil @Shutterstock

The study assesses the environmental impact reviews in urban development licensing procedures in Brazil, exemplified by the urban development tendencies observed in the Maringá Metropolitan area, Paraná State. The study starts with a description of the Brazilian urban legal framework, addressing its rules and regulations, allocation of competencies between administrative spheres, procedural design, social protagonism and transparency, and judicial review. Based on this scenario, the two cases reveal the harm to social interest that comes from the contradictory issues regarding municipal autonomy, since both municipal protagonism and restraint seem to lead to unwanted results. The critical analysis and propositions reveal that formal and procedural controls lack effectiveness in transforming the public agents' conduct. A strategic change is needed in order to address the exposed issues with real positive results. In conclusion, the search for balance in municipal autonomy is key. A combination between capacity development and support and supervision from an interfederative governance structure seems to be the way towards better conduction of urban policy in Brazil, and may serve as a model for countries with similar issues.

1 INTRODUCTION

1. The northern region of the Paraná State, in Brazil, has been a fertile ground for urban development in the past 10 years. Particularly in the City of Maringá; it is widely recognized that the urban development rhythm there is second to none in the Country, reputed as the best city in Brazil for urban development, second best Brazilian city in sanitation, among other rankings.
2. Founded in 1947, Maringá spreads over an area of 487,930 square kilometers, with 403,063 inhabitants, a Human Development Index of 0,808 and Gross Domestic Income of US\$ 4,551,652.70 per year. Its peculiar urban management history¹ is a fertile ground for this inspection.
3. A recent study regarded Maringá as the best of the 100 larger cities in Brazil, when health, education and culture, public security, sanitation and sustainability indicators are analyzed.² Nonetheless, these circumstances do not guarantee the best social interests in the management of urban development projects, specially regarding environmental reviews.
4. In this scenario, according to the Brazilian Institute of Geography and Statistics, Maringá's population grew 1.4662% between 2014 and 2015. The Housing and Condominiums Syndicate in Paraná states that the medium square meter price for real state has risen 76.6% between 2009 and 2014, as the medium worker's income increased only 34.4% in the same period, according to DIEESE. All these factors lead to a natural increase in the need for urban policy surveillance from the Public Administration, especially when the number of licenses jumped 36% in only four years, according to the Construction Industry Syndicate.
5. Several issues related to urban development licensing – specifically in regard to environmental impact assessment procedures – arise: how can local governments deal with the overwhelming increase in number of procedures? Is the function allocation between federal, state and municipal governments adequate? Is the judiciary keeping up with demand for review? Are the local regulations sufficient to provide environmental protection in urban development licensing procedures? How do these issues affect the reliability of this framework? How may the Brazilian model be improved, taking in consideration the NUA and the SDGs?
6. Regarding this scenario, urban development licensing in soaring Brazilian cities such as Maringá, is heavily dominated by economic pressure. Urban development enterprises are a main economic field in these cities, and both companies and workers rely on constant and fast expansion.
7. On the other side, municipal governments struggle to keep up with demand. Although the decentralization of urban public policy brings democracy and social oversight against corruption, cities rarely or never have the capabilities of states and the Federal Governments, and thus the conduction of licensing procedures suffers.

8. Between these two poles sits the legal framework for technical, environmental and social licensing procedures of urban development. Particularly in relation to environmental impact assessments, procedures are extremely complex and expensive, making urban development procedures slow for private actors and difficult for governments.
9. These are the challenges that lay in the path of this study.

2 URBAN DEVELOPMENT REVIEWS IN BRAZIL

10. In order to provide answers to the questions and problems described, the outlined case study consists of two parts: the study of a case in which the municipal autonomy for urban planning led to unwanted social and environmental results; and the study of a case in which the lack of municipal autonomy for environmental licensing led to unwanted social and urban results.
11. However, prior to the detailed analysis of these cases, the study is steered towards an accurate description of the legal and institutional framework of environmental reviews in urban development in Brazil, including “national, subnational, or sectorial implementing institutions and applicable laws, regulations, rules and procedures, and implementation capacity, which are relevant to the environmental and social risks and impacts of urban projects,” as stated in the call for proposals.
12. The description includes flow designs, from proposal through approval and the final review or appeal. Special attention will be given to the metropolitan administration structures, still incipient in Brazil, and the following issue areas:
 - a. The criteria to determine whether an urban development project should be submitted to specific environmental impact assessment, and the consequent government tier competent to conduct the review;
 - b. Elements of social review in such processes, especially regarding stakeholder identification and engagement, and transparency and information disclosure, with special care to the nature and relevance of such interventions;
 - c. The overall technical and political assessment of urban, environmental, social and economic impacts of urban development projects, including the mitigation of negative externalities and the enhancement of positive ones.
 - d. The effectiveness of environmental reviews in urban development licensing procedures, regarding the positive or negative impacts of the environmental report's propositions on the final design of the project;

¹ CORDOVIL, Fabiolla Castelo de Souza. A aventura planejada: Engenharia e urbanismo na construção de Maringá. 2010. Thesis (Doctorate in Architecture and Urbanism) – University of São Paulo, São Paulo, 2010.

² PORTO, Claudio; et. al. Desafios da gestão municipal. Rio de Janeiro: Macroplan, 2017. E ainda: BRETAS, Valéria. As melhores e piores 100 grandes cidades do Brasil. Exame, São Paulo, 16 mar. 2017.

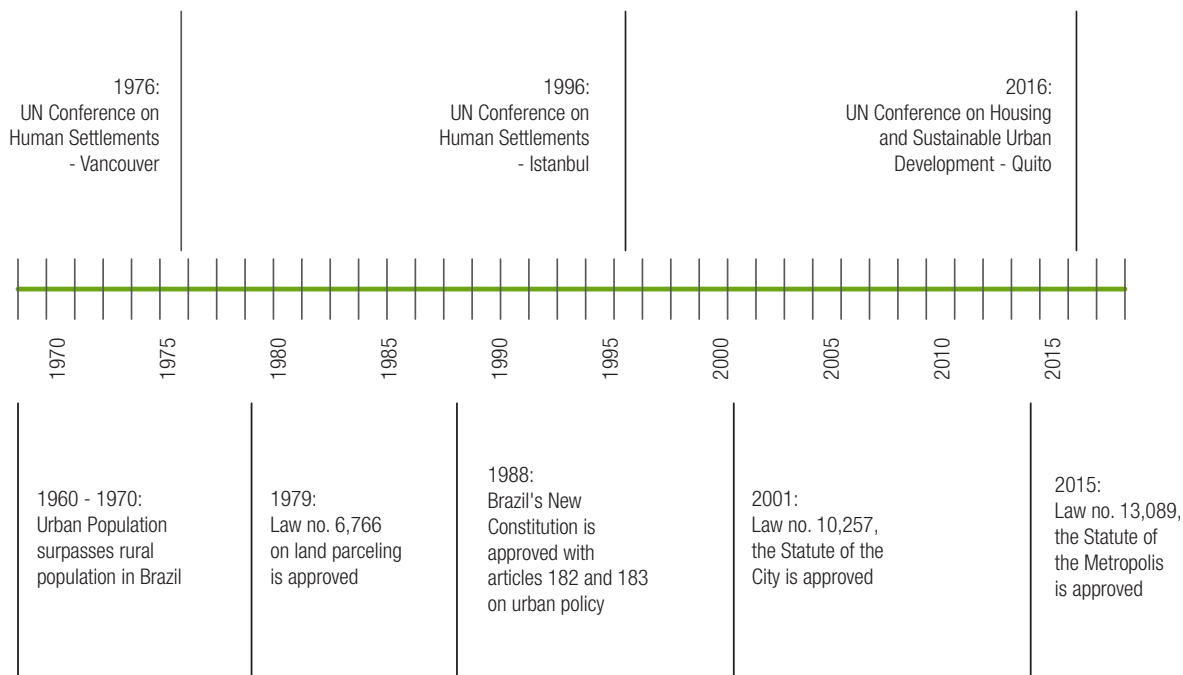
- e. The stability of policy and regulations stability, particularly regarding issues of legislative changes, bias and manipulation;
 - f. The structures and frameworks of Metropolitan administrations;
 - g. Consistency of the actual analysis conducted in environmental and social review of urban development projects, including compliance with the national, state and local policy frameworks;
 - h. Administrative review and judicial control over urban development procedures, along with social and environmental impact monitoring mechanisms.
13. Finally, the theoretical and practical background of the assessment will lead to critical conclusions for improving the design of environmental law and processes for urban development in Brazil, taking into account the capacity building needed to support this improvement.
- ## 2.1 Legal framework
14. The current framework for Brazilian urban law is a phenomenon best studied from a historical perspective. Moreover, urban law in Brazil has developed in parallel with worldwide concerns over the “urban question”, mainly since the second half of the 20th century. Thus, a combined vision of both domestic and foreign urbanism is the key to comprehending the current scenario.
15. As such, although several years of discussion over each legal Act are needed, specific domestic Acts (called “leis”, “laws”) in Brazil keep up with the international tendencies and events in urban law. This is the case, for example, regarding the United Nations Conference on Human Settlements in Vancouver in 1976, and the subsequent Law no. 6,766, on land parceling of 1979; as well as with the United Nations Conference on Human Settlements in Istanbul in 1996, and Law no. 10,257, the “Statute of the City” of 2001; and the United Nations Conference on Housing and Sustainable Urban Development in Quito in 2016, and Law no. 13,089, the “Statute of the Metropolis” of 2015.
16. Nonetheless, the contemporaneity between the development of urban legal instruments both in Brazil and internationally didn’t result in a perfectly functional system of reviews – including environmental – for urban development initiatives. This is an issue approached throughout the study, especially in the final section.
17. The second half of the 20th century marks the urban spin in Brazil. Between 1960 and 1970, Brazil’s urban population surpassed its rural population,³ almost thirty years before the same was observed in a global perspective. These tendencies started in the Southeastern Region – comprising States such as São Paulo and Rio de Janeiro – during the 1950s, and were consolidated throughout the other regions during the 1970s.⁴
18. During this period, some historically important urban laws in Brazil dedicated efforts to these issues. Law no. 4,380 of 1964 was dedicated to the financing and planning of housing programs; Law no. 5,318 of 1967 established the National Policies on Sanitation; the Complementary Law no. 14 of 1973⁵ created and briefly regulated several Metropolitan Areas.⁶
19. In 1976, contemporary international concerns with the urban issues were addressed at the United Nation’s Conference on Human Settlements in Vancouver. At this point, urban policy guidelines were focused on housing and land parceling, but relied mainly on the leadership of national governments; thus, incipient urban policy was established in an unstructured manner.
20. The Vancouver Declaration on Human Settlements demonstrated deep concerns with the problems rising from the urbanization phenomena worldwide and established eleven guidelines for urban actions that may be outlined as (i.) governmental and international organizations’ efforts, (ii.) the focus on governments for policy adoption and strategic planning; (iii.) how policies should harmonize several components such as population growth and distribution, employment, shelter, land use, infrastructure, and services, through adequate mechanisms and institutions, (iv.) and that they should work towards the improvement of rural habitats, thus containing the rural exodus.
- (v.) The pressing need for policies on growth and distribution of population, land tenure and localization of productive activities translated into (vi.) progressive minimum standards for an acceptable quality of life in human settlement policies and programmes, (vii.) with care to avoid international transposition of inadequate standards and criteria.
- Finally, the Declaration states core values of (viii.) adequate shelter and services, (ix.) health and (x.) human dignity for all, (xi.) with equal employment “of all human resources, both skilled and unskilled”.
21. In Brazil, the urban scenario was reflected in the Law no. 6,766 of 1979 on land parceling. This piece of legislation represented a rupture with past conceptions on urbanism; aligned with the Vancouver Declaration on Human Settlements’ guidelines, urbanization and land parceling directives were thus marked with a social trait.⁷ Accordingly, Law no. 6,766’s dispositions were centralized, stressing the national government’s leadership regarding urban standards.
22. Thus, Law no. 6,766 was the first contemporary legal landmark in Brazilian urbanism, aligned with pressing global debates. Still in force, its dispositions empower states and municipalities to complement federal provisions on urban law, in order to adapt them to “regional and local peculiarities” (Article 2).

Table I - Distributed Population in the Demographic Censuses 1960-2010

Census	1960	1970	1980	1991	2000	2010
Urban	32.004.817	52.904.744	82.013.375	110.875.826	137.755.550	160.925.792
Rural	38.987.526	41.603.839	39.137.198	36.041.633	31.835.143	29.830.007

Source: IBGE, Demographic Censuses 1960, 1970, 1980, 1991, 2000 and 2010.

Figure 1 - Timeline of the Brazilian Legal Framework on Urban Law



Source: Composed by the author.

23. Law no. 6,766 determines standards for land parceling – as allotments or dismemberments – establishing minimal infrastructure, prohibitions, acceptance criteria, documents, review and approval procedures, and public registry standards for urban development projects. It also regulates the relations between entrepreneurs and the general public, establishing contractual standards and sanctions.
24. The arrival of the 1980s also held important innovations in Brazilian urban law. Of special importance for this study is Law no. 6,938 of 1981 that established the National Environmental Policy. Moreover, the 1988 Brazilian Constitution stressed the importance of urban real estate's social function for the full development of the city and the welfare of its inhabitants, thus elevating urbanistic concerns to the constitutional level.
25. The several previous Brazilian Constitutions – of 1824, 1891, 1934, 1937, 1946, 1967 and 1969 – lacked specific dispositions on urban law, while consistently protecting private property. Although the Constitutions of 1824, 1891, 1934 and 1937 contemplated the possibility of public expropriation – with the 1946 Constitution steering its disposition towards a more important role for municipal governments⁸ and the use of property in accordance with social welfare – only the 1967 Constitution included dispositions of property's social function.⁹ Nonetheless, this Constitution did not address the urban nature of real estate issues, maybe due to the still incipient characteristic of urbanization in Brazil during that period of time.
26. With the 1988 Constitution, the concept of urban real estate in Brazil changed. This rupture with the previous order – by which the urban real

³ BRITO, Fausto, O deslocamento da população brasileira para as metrópoles. Estudos Avançados, São Paulo, v. 20, n. 57, may-aug, 2006.

⁴ BRAZIL. INSTITUTO Brasileiro de Geografia e Estatística. Tendências Demográficas: Uma análise dos resultados da Sinopse Preliminar do Censo Demográfico 2000. Rio de Janeiro: IBGE, 2001. P. 13.

⁵ In the Brazilian system of legal diplomas, a Complementary Law is a piece of legislation that is dedicated to specifically regulate matters addressed by the Constitution, thus complementing the latter. In such conception, it may be said that a Complementary Law is an act hierarchically superior to a Law, called ordinary.

⁶ PIRES, Maria Coeli Simões. Os Rumos do Direito Urbanístico no Brasil: Avaliação Histórica. Revista Fórum de Direito Urbano e Ambiental, Belo Horizonte, v. 3, p. 107-124, 2004.

⁷ PIRES, Maria Coeli Simões. Os Rumos do Direito Urbanístico no Brasil: Avaliação Histórica. Revista Fórum de Direito Urbano e Ambiental, Belo Horizonte, v. 3, p. 107-124, 2004.

⁸ COSTALDELLO, Angela Cassia. As transformações do regime jurídico da propriedade privada: a influência no direito urbanístico. Revista da Faculdade de Direito da UFPR, Curitiba, v. 45, p. 151-168, 2006.

⁹ PIRES, Maria Coeli Simões. Os Rumos do Direito Urbanístico no Brasil: Avaliação Histórica. Revista Fórum de Direito Urbano e Ambiental, Belo Horizonte, v. 3, p. 107-124, 2004.

estate became bound to a social function – had impacts on urban law, since real estate rights ceased to be only individual. Although private property is still a right to be protected, the exercise of such an individual right is only adequate under the circumstances of fulfilling the property's social function.¹⁰

27. Under this scope, urban real estate is conceived not as isolated properties, but as a whole and coordinated network of urban elements that fulfill their social function. They must also comply with the “city's ordination of fundamental exigencies expressed through the master plan”, as stated in Article 182, second paragraph of the 1988 Brazilian Constitution, balancing public and private natures.¹¹
28. Thus, as Costaldello (2006) stresses and Silva declares (2000), the social function of urban real estate is founded in “human activity's projection, impregnated with cultural value, in the sense of something that is built through the human spirit's projection”.¹²
29. Nonetheless, as detected by Pires (2004), while this [urban law structuration] effort was materializing in 1988, over 70% of the Brazilian population lived in cities, and Brazil's urban tragedy was already settled: irregular occupations, pollution, housing congestion, epidemics, violence. A tragedy that is not a direct product of the 20th century, but of 500 years of the Brazilian society's formation, resulted from the logic of private concentration of land [...] and of a segregated urban growth process [...].¹³
30. This is an indication that the dispositions in Law no. 6,766 and international debates on urban planning, regardless of their alignment, were not sufficient to properly address urban issues in this period. Even so, the 1988 Constitution deeply influenced urban law, by establishing essential institutions and instruments that guide urban planning and development to this day.
31. Articles 182 and 183 of the 1988 Constitution constitute the chapter dedicated to urban policy, currently in force.
32. Article 182 establishes municipal governments' leadership in the execution of urban development policy – in accordance with the general legal standards – based on the master plan, compulsory for cities with over 20,000 inhabitants. Its fourth paragraph creates three important instruments for the enforcement of urban property's social function: compulsory parceling or building; progressive real estate taxation; and expropriation paid through public debt securities.
33. Article 183 creates a scenario for adverse possession, or usucaption, in which the term of possession is reduced to five years, provided that the occupant, without being the owner of other real estate, uses the land for his housing or his family's. Evidently, this is steered towards the prevention of urban real estate speculation, favoring the social function of urban land, especially for housing of social interest.
34. Immediately, Bill no. 181 of 1989 was presented before the Brazilian Congress, in order to establish norms and regulations regarding the urban policy outlined in Articles 182 and 183 of the Constitution. However, before its approval, another important international event of urban interest took place.
35. In 1996, the United Nation's Conference on Human Settlements (Habitat II) in Istanbul steered international debates on urban issues towards sustainability, focusing on the performance of local governments, although lacking specific provisions on this matter according to some authors.
36. Twenty years had passed since Habitat I in Vancouver. The Istanbul Declaration on Human Settlements established the Habitat Agenda – followed by an extensive Global Plan of Action – revising the guidelines from Vancouver under fifteen topics: the member states (i.) endorsed the goals and values already established under the two major themes of adequate housing and sustainable development, (ii.) showing concern about “the continuing deterioration of conditions of shelter and human settlements”, although recognizing them as centers of human existence. The declaration (iii.) stressed the need for better standards of living for all, (iv.) depending on the “combat [of] the deterioration of conditions”, (v.) sometimes critically demanding specific assessments for specific countries. Its content adopted as values the harmonization (vi.) of urban and rural development and (vii.) of the living conditions of all people, reaffirming (viii.) the commitment to the right to adequate housing, (ix.) with special attention to housing markets. The (x.) sustainable development of human settlements, (xi.) respecting heritage, is paramount, made feasible through (xii.) partnership, participation and strengthening of local governments, (xiii.) and adequate funding, not only national and international, but also public and private. Finally, the declaration (xiv.) highlighted the importance of UN-Habitat for all these achievements, (xv.) foreseeing a “new era of cooperation, an era of a culture of solidarity” towards sustainable urban development.
37. These directives were reaffirmed and reinforced by the United Nations General Assembly's Declaration on Cities and Other Human Settlements in the New Millennium of 2001. Remarkably, it noted that notwithstanding the governments' commitment to work towards the Habitat Agenda, general urban conditions continued degrading in several countries.
38. At the historical moment when Bill no. 181 of 1989, after almost twelve years under the scrutiny of the Brazilian Congress, was approved, the Statute of the City – Law no. 10,257 of 2001 – was birthed. This piece of legislation established the general regulations claimed by Article 182 of the 1988

¹⁰ COSTALDELLO, Angela Cassia. As transformações do regime jurídico da propriedade privada: a influência no direito urbanístico. *Revista da Faculdade de Direito da UFPR, Curitiba*, v. 45, p. 151-168, 2006.

¹¹ DI SARNO, Daniela Campos Libório. *Elementos de direito urbanístico*. São Paulo: Manole, 2004. P. 48.

¹² SILVA, José Afonso da. *Direito urbanístico brasileiro*. São Paulo: Malheiros, 2000. P. 74. [Our translation].

¹³ PIRES, Maria Coeli Simões. Os Rumos do Direito Urbanístico no Brasil: Avaliação Histórica. *Revista Fórum de Direito Urbano e Ambiental, Belo Horizonte*, v. 3, p. 107-124, 2004. [Our translation].

- Constitution, with standards for the fulfilment of urban real estate's social function and the democratic management of cities.
39. Law no. 10,257 comprises a broad set of urbanistic instruments. As general guidelines, it affirms that its goal is to “regulate the use of urban real estate in favor of collective good, safety, and the welfare of citizens, as well as of environmental balance” (Article 1, single paragraph).
 40. Thus, the Statute of the City establishes goals and guidelines for urban policy, highlighting environmental concerns in subsections I, IV, VIII, XII and XVII of Article 2, distributing competencies between governmental tiers, and outlining several instruments of urban policy.
 41. Specifically, Law no. 10,257 outlines the three instruments created by the fourth paragraph of Article 182 from the Brazilian Constitution. It addresses compulsory use, building or parceling (Articles 5 and 6), progressive real estate taxation (Article 7) and public expropriation paid through public debt securities (Article 8). It also regulates the special adverse possession of social nature, created by Article 183 of the Brazilian Constitution, and instruments such as surface rights, governmental pre-emption rights, the onerous grant of building rights, and urban operations in consortium, among others.
 42. Finally, Law no. 10,257 erects the decision making process on urban matters through two main instruments: urban master plans (Articles 39 through 42-A) and democratic city management (Articles 43 through 45).
 43. Again, just like Law no. 6,766, Law no. 10,257 aligned its provisions with the contemporary international debates on urban law, especially those of the Habitat Agenda. After Law no. 10,257, other legal instruments also regulated particular issues in urban management, such as: Law no. 11,445 of 2007, the national guidelines on sanitation, Law no. 11,977 of 2009, on housing and urban land regularization, Law no. 12,305 of 2010, which established the national solid waste policy, and Law no. 12,587 of 2012, dedicated to the national policy on urban mobility.
 44. Progressing with the international debates on urban issues, the Sustainable Development Goals approved by the United Nation's member states in 2015 included an important goal regarding urban development, SDG11: “Make cities and human settlements inclusive, safe, resilient and sustainable.” These new provisions were followed by the UN Conference on Housing and Sustainable Urban Development (Habitat III) in 2016, with the establishment of the New Urban Agenda.
 45. In order to achieve SDG11, the New Urban Agenda outlined the ideal human settlement as being the one that (i.) fulfills its social function, including the social and ecological function of land, (ii.) is participatory, promotes civic engagement, engenders a sense of belonging and ownership among all their inhabitants, (iii.) achieves gender equality and empowers all women and girls, (iv.) meets the challenges and opportunities of present and future sustained, inclusive, and sustainable economic growth, (v.) fulfills their territorial functions across administrative boundaries, (vi.) promotes age- and gender-responsive planning and investment for sustainable, safe, and accessible urban mobility, (vii.) adopts and implements disaster risk reduction and management, and (viii.) protects, conserves, restores, and promotes its ecosystems, water, natural habitats, and biodiversity, minimizes its environmental impact, and changes to sustainable consumption and production patterns.
 46. Meanwhile, Brazil witnessed the birth of the Statute of the Metropolis, through Law no. 13,089 of 2015 – after the Bill no. 3,460 remained under the scrutiny of the National Congress for ten years – that innovated by creating a new governmental tier of review for urban development projects.
 47. As stated in Article 1, Law no. 13,089 [...] establishes: general guidelines for common interest public function planning, management, and execution, in State-created metropolitan areas and urban clusters; general rules for the integrated urban development plans and other interfederative governance instruments; and criteria for the Union's support for interfederative governance actions in the field of urban development.
 48. Notably, Law no. 13,089 defines several urban concepts, such as “metropolis”, “metropolitan area”, and “urban cluster”, with special attention to the concept of common interest public function: “public policy or action whose accomplishment by an isolated municipality would be unfeasible, or would cause impact on neighboring cities”.
 49. Thus, the Statute of the Metropolis creates parameters for the institution of metropolitan areas (Articles 3 through 5), establishes principles, guidelines and structures for the interfederative governance of metropolitan areas and urban clusters (Articles 6 through 8), provides for integrated urban development instruments (Articles 9 through 12), and establishes the Union's role in supporting integrated urban development (Articles 13 through 16). The creation of a National Integrated Urban Development Fund, in Articles 17 and 18, was vetoed.
 50. As a result, the current legal framework in Brazilian urban law may be organized, based on a timeline, as follows:

Table II - Mapping of the Brazilian Urban Law Provisions

Instrument	Theme	Article(s)	Contents
Law no. 6,766 of 1979	Urban Land Parceling	1	Preamble and allocation of competencies
		2	General concepts
		3	Constraints to urban land parceling
		4	Minimal requirements for allotments
		5	Land reserve for urban equipment
		6-8	Preliminary procedures
		9	Parameters for allotment projects
		10-11	Parameters for dismemberment projects
		12-17	Review procedures
		18-24	Project's public registry
		25-36	Contract's regulations
		37-49	Sanctions and judicial review
		Brazilian Constitution of 1988	Urban Policy
182 § 1	Master plan		
182 § 2	Social function of urban real estate		
182 § 4	Adequate urban exploitation instruments		
183	Special urban adverse possession		
Law no. 10,257 of 2001	Statute of the City	1-2	General guidelines
		3	Union's attributions
		4	Urban policy instruments
		5-6	Compulsory parceling, building or use
		7	Progressive urban real estate taxation
		8	Public expropriation paid with securities
		9-14	Special urban adverse possession
		21-24	Surface rights
		25-27	Government pre-emption rights
		28-31	Onerous grant of building rights
		32-34A	Urban operations in consortium
		35	Building rights transference
		36-38	Neighborhood impact studies
Law no. 13,089 of 2015	Statute of the Metropolis	39-42B	Master plan
		43-45	Democratic urban management
		46-58	General and final provisions
		1	Preliminary provisions
		2	Definitions
		3-5	Creation of metropolitan areas and urban clusters
		6-8	Interfederative governance
9-12	Integrated urban development instruments		
13-16	Union's support to integrated urban development		
19-25	Final provisions		

Source: Composed by the Author.

51. Of course, some of these provisions are too recent to be judged on their effectiveness. Nonetheless, it may be noted that, in a historical panorama, Brazilian urban law is subject to several efforts to keep up to date with the contemporary international debates.
52. With that being said, one may keep questioning the results of this legal framework in the improvement of urban life conditions in Brazil. Thus, the following analysis may shed some light on these issues.
- ## 2.2 Distribution of competencies and administrative spheres
53. As described in the prior topic, regarding the parallel development between the Brazilian legal framework of urban law and the international debates on this matter, one may detect the progressive decentralization of competencies.
54. Originally, diplomas prior to Law no. 6.766, of 1979, established a typically centralized system, in which federal and state governments held the power to determine regulations of still incipient urban development.
55. Internationally, the focus on local capacity building has been achieved mainly through the developments that led to the positions revealed in Habitat II and that conditioned the conduction of Habitat III.
56. In Brazil, the municipal competencies regarding urban policy gained initial expression during the decentralizing democratic period of 1946-1964, though in an incipient form. The 1946 Constitution did not address this matter adequately, but nonetheless, practice led to a scenario where a municipal government, in order to “administrate [...] its peculiar interest and [...] organize local public services” (Article 28, subsection II, item b), should manage urbanistic instruments.¹⁴
57. In the legal framework outlined by the 1988 Constitution, federal and state-level governments hold shared competencies in establishing rules in urban law (Article 24, subsection I) and in related matters, as environmental and heritage law (Article 24, subsections VI, VII, VIII). These concurrent competencies are shared by the Union, which holds the power to establish general rules (Article 24, first paragraph), and by the states and the Federal District, which hold supplementary power in detailing federal provisions of general nature (Article 24, second through fourth paragraphs).
58. Also, the federal government holds the power to articulate national policies and programs, creating and funding initiatives that, due to their cost or scale, are not within reach to the other government levels.
59. Municipal governments, in turn, hold the constitutional competencies to “legislate on local interest matters [...], supplementing federal and state legislation where applicable”, especially to “promote [...] adequate territorial organization, through land use, parceling and occupation planning and control” (Article 30, subsections I, II and VIII). Even further, Article 182 expressly determines that the urban development policy should be executed by municipal governments. This task is conducted through the urban master plan, mandatory to cities over twenty thousand inhabitants.
- [...] the current arrangement invokes cooperative efforts between federative entities and overall, the attention to the subsidiarity principle applicable in the urban policy concertation, in a way that public powers should be oriented in a successively supplementary fashion, towards the nearest entity in relation to the obligation to provide social and urbanistic needs.¹⁵
60. Within this framework, the constitutional urban law system notably lacks more detailed and specific provisions. In several cases, competency on a matter is undetermined; the clash between federal, state and municipal acts on urban law is not uncommon. More specifically, the review process of urban development projects is frequently subject to federal, state and municipal rulings, a circumstance that leads essentially to the problems addressed in this study.
61. Finally, regarding the distribution of competencies between government tiers, Brazilian urban law is currently facing a new scenario that is not fully defined yet. Law no. 13,089 of 2015 – whose instruments are still under initial implementation – establishes a new level to the decision-making process, the “interfederative governance” that sits between state and municipal tiers.
62. These new interfederative governance entities will hold the power to rule on questions of shared urbanistic interest between cities in metropolitan areas and urban clusters, composed by representatives of the municipalities and the civil society. Thus, urban matters of collective interest – mainly, “common interest public functions” – in metropolitan areas and urban clusters will be subject not to three, but to four tiers of review, through an additional “integrated urban development plan”.
63. All the current provisions on distribution of competencies in urban governance in Brazil may be summarized as follows:

¹⁴ PIRES, Maria Coeli Simões. Os Rumos do Direito Urbanístico no Brasil: Avaliação Histórica. Revista Fórum de Direito Urbano e Ambiental, Belo Horizonte, v. 3, p. 107-124, 2004.

¹⁵ PIRES, Maria Coeli Simões. Os Rumos do Direito Urbanístico no Brasil: Avaliação Histórica. Revista Fórum de Direito Urbano e Ambiental, Belo Horizonte, v. 3, p. 107-124, 2004. [Our translation].

Table III - Distribution of Competencies in Brazilian Urban Governance

Government Tier	Competencies
The Union	General rules
	National policies and programs
	Macro-regional plans
States and Federal District	Supplementary rules
	Regional plans
Interfederative Governance	Integrated urban development plans (metropolitan areas)
	Common interest public functions (metropolitan areas)
Municipalities	Master plans
	Local rules
	Execution of urban policy

Source: Composed by the Author.

64. It is also necessary to address the issue of the distribution of competencies and the regulations regarding environmental reviews – a topic of special importance to this study – established by Law no. 6,938 of 1981.
65. The CONAMA (National Environmental Council) Resolution no. 237 of 1997 defines the environmental review and licensing procedures, and Complementary Law no. 140 of 2011, in Articles 6 through 17, establishes a coordinated system of environmental competencies between governmental levels.
66. Regarding issues that pertain to environmental reviews of urban development projects, the Complementary Law no. 140 provides that all of the cooperation actions between the three government tiers should be conducted in an integrated and harmonized fashion, in order to achieve sustainable development and applicable principles (Article 6).
67. Thus, the Federal Government holds the power to establish the National Environmental Policy and promote it nationally and internationally, coordinating and integrating programs and actions in all the government levels, as well as articulating the National Environmental Policy and the urban policy (Article 7, subsections I, II, IV and VII). Also, it is the Union's responsibility to create national and regional environmental zoning, defining territorial spaces worthy of special protection (Article 7, subsections IX and X).
68. So as to concrete review and licensing attributions, the federal government holds the power to control projects of transnational or cross-border nature, located in indigenous land or conservational units, or located between two or more states (Article 7, subsection XIV).
69. Regional level governments – states and the Federal District – in turn, are entitled to execute the National Environmental Policy in their territories, establishing the state environmental policies and zoning, and coordinating state and municipal level actions (Article 8, subsections I, III, IV, IX).
70. Regarding review and licensing powers, state governments are entitled to a residual competency, reviewing projects that are not subject to special federal or municipal government licensing (Article 8, subsection XIV).
71. The municipal tier, in turn, is entitled to execute locally the national and state environmental policies and to establish the Municipal Environmental Policy and the Urban Master Plan (Article 9, subsections I and III).
72. Also, municipal governments hold the power to review and license all activities and enterprises that are subject to these procedures under local administrations by the legislation, especially regarding projects that cause or may cause local environmental impact, considering the size, nature and polluting potential, as determined by State Environmental Councils (Article 9, subsections XIII and XIV).
73. Thus, it is noteworthy that the case analysis, regarding distribution of competencies, will rely on the verification of specific applicable law. Nonetheless, Complementary Law no. 140 determines that the review process should be conducted by only one governmental entity, with the other public administration tiers eventually acting in a supplementary and subsidiary fashion in relation to the review process, as established by Articles 13 through 16.
74. Despite all these competencies attributed to the different government tiers, one has to bear in mind that, regarding urban licensing environmental reviews, these assignments are only related to the analysis of the studies and the application of its conclusions, and not to the concrete composition of Environmental Impact Assessments. CONAMA Resolution no. 1 of 1986 determines that the studies and documents that compose the Environmental Impact Assessment should be “submitted” to the competent governmental entity (Articles 3 and 10), since it will be conducted by an independent, private multidisciplinary team, funded by the entrepreneur (Articles 7 and 8).

75. These are, of course, essential factors in this study. One of the main problems in environmental reviews in urban development has its roots in the superposition of competencies and conflicting decision-making processes between government tiers. This issue is addressed in the critical analysis.

2.3 Social protagonism and transparency

76. An important element in the Brazilian system of urban policy is the participatory management of the city. The search for democracy in governmental affairs has been a main topic in Brazilian administrative law since the 1988 Constitution, and these tendencies also cast their influence on urban law.

77. Law no. 10,257 of 2001 – the Statute of the City – is the first piece of legislation to heavily rely on social protagonism in order to establish urban policy. Prior provisions, mostly concentrated in Law no. 6,766 of 1979, did not focus on these democratic components as criteria to appreciate urban management.

78. Democratizing provisions are profuse in Law no. 10,257. Article 2, subsection II, determines that democratic management is a general directive in urban policy. This democratic component in urban management would be achieved through individual and collective participation in the establishment, execution and review of urban development plans, programs and projects.

79. Thus, Article 4, subsection III, item f, and its third paragraph elect participatory budgeting and social review as special parts of municipal planning, an essential instrument in Law no. 10,257. Other instruments, such as the urban operation consortium funding mechanism¹⁶ (Article 32, first paragraph, and Article 33, subsection VII) require participatory procedures.

80. The main piece of legislation in local urban planning, the master plan, should rely heavily on participatory procedures in order to establish its provisions, as determined by Article 40. Specifically, the master plan approval process requires public hearings and debates, and full disclosure of documents and information, as determined in subsections I through III in its fourth paragraph.

81. In order to accomplish all these participatory goals, Law no. 10,257 dedicates its Chapter IV to the democratic management of the city, which is here fully reproduced and translated in order to achieve optimal fidelity:

Chapter IV

On the Democratic Management of the City

Art. 43. In order to ensure the democratic management of the city, the following instruments, among others, shall be used:

I - collegiate departments of urban policy, in national, state and municipal levels;

II - public debates, hearings and consultations;

III - conferences on urban interest topics, in national, state and municipal levels;

IV - popular proposition of bills and urban development plans, programs and projects.

Art. 44. At the municipal level, the participatory budgeting determined by item f of subsection III of Article 4 of this Law shall include the conduction of public debates, hearings and consultations over the yearly budgets,¹⁷ as mandatory conditions for their approval by municipal councils.

Art. 45. The managing agencies of metropolitan areas and urban clusters shall include mandatory and significant individual and collective¹⁸ participation in order to ensure the direct control of their activities and the full exercise of citizenship.

82. Amongst these participatory instruments, the ones that stand out as particularly typical in Brazilian public administration are the Public Policy Councils and the Sectorial Conferences – respectively, subsections I and III of Article 43.

83. Public Policy Councils are collegiate agencies composed equally of governmental and civil society members, holding powers to decide matters regarding their fields of expertise. In these councils, the government gives up part of its decisional competency, with democratic intentions.¹⁹

84. Sectorial Conferences, in turn, are temporary instances of deliberation and participation aiming to provide directives for national, state and municipal public policy. They are called by the public agency in charge of the specific policy, and are usually composed equally of governmental and civil society representatives.²⁰

¹⁶ NIEBUHR, Karlin Olbertz. *Operação urbana consorciada*. Belo Horizonte: Fórum, 2011.

¹⁷ The original redaction refers to all three types of budgetary acts in Brazilian public finance law.

¹⁸ The original wording comprises particular categories for collective participation.

¹⁹ PEREZ, Marcos Augusto. *A Administração pública democrática: Institutos de participação popular na Administração pública*. Belo Horizonte: Fórum, 2004. P. 142.

²⁰ BRASIL. *Conferências nacionais, participação social e processo legislativo (Série Pensando o Direito)*. Brasília: Ministério da Justiça, 2010. P. 15.

85. These instruments should be real institutional spaces for dialog and approximation between the State and citizens regarding public policy and, specifically for this study, urban policy. These instruments are deeply tied to each other, in an almost pendular movement between the composition of the councils and the organization of the conferences: usually the councils organize the conferences, and in the conferences the composition of the councils is defined. Thus, the Sectorial Conferences are broader participatory spaces, but short in duration; whereas, the Public Policy Councils are perennial, although heavily delegated regarding social participation.²¹
86. Finally, it may be said that the Public Hearings – subsection II of Article 43 – are the simplest and most common participatory instruments. There are no particular standards for these hearings; the criteria widely adopted to assess their adequacy, nonetheless, is based on the vast publicity of the public call, the varied composition of the participatory group and the weight given to the conclusions of the hearings.
87. Establishing the Statute of the Metropolis, Law no. 13,089 of 2015, follows the democratic line of action that comes from Law no. 10,257. One of the specific directives for the interfederative governance of metropolitan areas and urban clusters, as determined by subsection V of Article 7 of Law no. 13,089 is “the participation of the civil society’s representatives in the decision making process, in the monitoring of services and in the development projects of common interest public functions”.
88. In order to fulfill this directive, the interfederative governance entity shall be structured in order to comprise, between its departments, a deliberative collegiate body with representation from the civil society (Article 8, subsection II), a measure that should also be observed by the National System of Urban Development (Article 20).
89. Finally, just as the master plan regulated by Law no. 10,257, the integrated urban development plan for a metropolitan area or an urban cluster regulated by Law no. 13,089 should rely heavily in participatory procedures in order to establish its provisions, as determined in Article 12. Thus, the integrated urban development plan approval process demands public hearings and debates in all affected municipalities, and full disclosure of documents and information, as determined in subsections I and II of its second paragraph.
90. Due to all these provisions, the critical analysis conducted in this study adopts as a premise the quality and effectiveness of the participatory process in order to assess the adequacy of the urban review processes.

2.4 Administrative procedures

91. The detailed analysis of the legal framework regarding urban management in Brazil along with the description of the distribution of competencies and participatory instruments, this study reaches the point where it is possible to describe the administrative review procedures of urban development projects, specifically regarding environmental licensing.
92. In order to achieve this goal, the paper presents flowcharts of the procedures, from proposal through approval and, finally, their review or appeal. Separate flowcharts are produced for the project review process and for the environmental and neighborhood impact assessments.
93. As exposed by the introductory portion of this topic, some issues are particularly evident: the criteria to determine whether an urban development project should be submitted to specific environmental impact assessment and the consequent government tier competent for conducting the review.
94. Elements of social review in such processes, regarding specially stakeholder identification and engagement, and transparency and information disclosure, with special care to the nature and relevance of such interventions; and overall technical and political assessment of urban, environmental, social and economic impact of urban development projects, including mitigation of negative externalities and enhancement of positive ones.
95. As a consequence of the distribution of competencies in Brazilian urban law, previously exposed, it is noteworthy that the procedures described are not necessarily homogeneous in the several governmental entities involved.
96. Since several competencies are bestowed to state and municipal level entities, and as the national legal framework establishes only general regulations,²² review procedures by those entities may vary. Thus, the procedures described are based, when necessary, in Paraná State and Maringá City provisions.
97. The connectors adopted in the flowchart take the procedure to complementary reviews, like the environmental impact assessment (Diagram II) or the neighborhood impact assessment (Diagram III), described below.
98. Regarding environmental impact assessments, CONAMA Resolution no. 237, of 1997, determines that project proponents may apply to three types of environmental licenses: preliminary license, in order to study and develop the project; installation license, through which the construction of the enterprise is permitted; and operation license, that allows the enterprise to fulfill its core activities (Article 8). Therefore, with regard to urban development reviews, the preliminary license is the most related environmental review procedure.

²¹ GREGO-SANTOS, Bruno. Controle Social e Responsabilidade dos Orçamentos Públicos. In: GREGO-SANTOS, Bruno; CARVALHO NETO, Joaquim Mariano Paes de; BERNARDO, Leandro Ferreira; FRACALLOSSI, William (orgs.). *Temas Avançados da Advocacia Pública IV: Advocacia Pública e Combate à Corrupção*. Curitiba: ESAPR, 2014. P. 121-176.

²² In this context, Law is the name by which the piece of legislation is called in the Brazilian legal system; a translation of the Portuguese Lei.

99. As already exposed in the “distribution of competencies” section above, the role of the governmental entities in urban development environmental reviews is rather passive. Thus, it is noteworthy that, regarding urban licensing environmental reviews, the governmental competencies are only related to the analysis of the studies and the appreciation of the conclusions, and not to the concrete composition of environmental impact assessments. CONAMA Resolution no. 1 of 1986 determines that the studies and documents that compose the environmental impact assessment should be “submitted” to the competent governmental entity (Articles 3 and 10), since it will be conducted by an independent private multidisciplinary team, funded by the entrepreneur (Articles 7 and 8).
100. In order to obtain the environmental licenses, the undertaker shall conduct the environmental impact assessment studies, including (i.) an environmental diagnosis of the full influence area, describing resources and iterations of the current environmental situation of physical, biological and socio-economic features of the area; (ii.) an analysis of the project’s environmental impacts and its alternatives, both positive and negative; (iii.) an outline of mitigating measures for negative environmental impacts, and an assessment of their efficiency; (iv.) a program of monitoring and follow-up of positive and negative impacts (Article 6).
101. These studies will result in a report “reflecting the conclusions of the study”, comprising at least (i.) the project’s goals and justifications, its relation and compatibility with public policy, plans and programs; (ii.) the project’s description and its technological and locational alternatives, with full technical assessment; (iii.) the synthesis of the environmental diagnosis’ results; (iv.) the description of the probable activities’ environmental impacts; (v.) the assessment of the future environmental quality of the area, comparing different alternative scenarios including the project’s abortion; (vi.) the description of the expected effect of mitigation measures for the negative impacts, mentioning the ones that could not be avoided; (vii.) the impact monitoring and follow-up program; (viii.) conclusive recommendations on the most favorable alternative (Article 9).
102. It is also noteworthy that, in most cases, although urban development reviews are a municipal competency, environmental reviews of urban projects are usually under state competency. This circumstance renders the environmental reviews in urban development project licensing subject to two – or sometimes, as the cases studied below, three – government tiers, which brings several issues to be addressed in the critical analysis.
103. The analysis to be conducted in the neighborhood impact assessment, regulated by Articles 36 through 38 of Law no. 10,257, shall assess positive and negative impacts of the project over the quality of life of implied and neighboring populations, considering at least the resulting populational density, urban equipment, territorial use, real estate growth, traffic and transportation, ventilation and lighting, and scenery and heritage (Article 37).
104. The decision whether to submit a project to the neighborhood impact assessment procedure shall be made under criteria elected by municipal law, as determined by Article 36 of Law no. 10,257.

2.5 Management of legislative changes and stability

105. Being an instrument of urban regulation, the master plan is an essential piece of urban law. However, the urban master plan is bound not only to this legal nature, but to urbanism in a general perspective.
106. That being said, an issue to be essentially addressed in this study is the legislative process for master plans alterations, and their role in the current (in)stability of the main reference in local urban law.
107. As an instrument that comprises several instances of traditional and scientific knowledge for its formation – including, but not limited to, architecture, urbanism, geography, biology, meteorology, sociology, law, among others – the master plan is made effective through law, but is not only a piece of legislation. This circumstance is recognized in Brazilian urban law by Article 40 of Law no. 10,257, which states that the master plan, as the basic instrument of urban development and expansion policy, is approved by a municipal Law²³; that is, the piece of legislation is not the master plan, but rather the vehicle by which the master plan becomes legally binding.
108. Thus, as already addressed in the topic dedicated to the participatory issues, the fourth paragraph of the same Article determines that the legislative process of bills related to the master plan – originally approving or later altering it – should be deeply democratic, demanding public hearings and debates, and full disclosure of documents and information.
109. It may be said, then, that the legislative procedure regarding the urban master plan is one of a special nature, diverse from the common creation or alteration of law. Probably due to this special need for legitimacy and stability, several municipalities determine in their Organic Laws²⁴ that the urban master plan is subject to the legislative procedures of Complementary Laws – as opposed to the simpler procedures of ordinary Laws – that require, among other elements, a qualified parliamentary quorum and multiple Council sessions for bill approval.
110. This does not imply that the master plan should not be changed. On the contrary, the third paragraph of Article 40 of Law no. 10,257 determines that the master plan should be reviewed, at least every ten years, in order to keep up with the urbanistic needs of a given city.

²³ The Organic Law is, for Brazilian municipalities, the legal instrument analogue to the Federal and State Constitutions.

²⁴ MEDAUAR, Odete. O direito administrativo em evolução. São Paulo: Revista dos Tribunais, 2016.

111. Nonetheless, alterations to the urban master plan should not be conducted by the flow of random – or not so – circumstances, resisting the economic pressure that comes from urban development enterprises. Given the importance of such issues as the origin of several problems in Brazilian urban management, the stability of the master plan is adopted as a criterion to assess the environmental reviews of urban development projects in this study.

2.6 Judicial review

112. Finally, a short notice on Brazilian administrative law needs to be presented regarding judicial review of administrative procedures. This is due to the particular progression that administrative law was subject to in Brazil, and to how these factors influence the enforcement of urban law.

113. Being a part of state – or public – law, urban law is bound by the fundamental rules applied in administrative law. And, in administrative law – at least in the system and tendencies in which Brazilian administrative law is inserted – the bind between administrative decision making and law may vary.

114. Theoretically, the acts of the Public Administration may be bound, when the law determines the exact choice to be adopted in a determined scenario, or discretionary, when subject to the factual findings of the public agent.

115. Thus, bound administrative acts would be fully subject to judicial review; otherwise, discretionary administrative acts may be reviewed by the judiciary only in its formal features, since its merit – the content of the discretionary decision making process delegated by law to the agent – could only be decided by the competent administrative agent.

116. Usually, licensing procedures would be bound administrative acts, while planning activities would be discretionary. This is observed when one admits that absolute binding to written law is impossible, since the law, as Medauar (2016) stresses, could not encompass provisions to regulate all of reality's situations.²⁵

117. Nonetheless, the current scenario in Brazilian administrative law – and, by consequence, in urban law – is that of an expansion of this binding nature of law over prior discretionary decision making.

118. A special field of study analyzes the self-containment of judicial review over the democratic results of public hearings. Thus, regarding participatory instruments, the judiciary must refrain itself from interfering in the legal procedure and from creating participatory instances other than those legally provided,²⁶ as explained above.

119. As a consequence of these tendencies, judicial review of administrative decisions in Brazil has grown to very large proportions. Several lawyers – including attorneys, prosecutors, judges, authors, etc. – understand that judicial intervention in administrative affairs should be as broad as possible, which leads to a scenario in which several licensing procedures tend to deadlock due to judicial review.

3 MUNICIPAL AUTONOMY CASES IN URBAN DEVELOPMENT

121. As stated in prior sections of this paper, the proposed analysis, based on the detailed description of the legal framework for reviewing and licensing urban development projects, consists of two different cases: firstly, the municipal autonomy for urban planning led to unwanted social and environmental results; secondly, the lack of municipal autonomy for environmental licensing led to unwanted social and urban results.

122. The first study analyzes the New Downtown Maringá (Novo Centro de Maringá) brownfield project, in which environmental and social reviews contradicted other existing policies. Authors credit the urban issues regarding this project to the distortion of the original Oscar Niemeyer project,²⁷ a factor that is directly linked to the City's autonomy to conduct urban development policy.

123. The second study is dedicated to the Green Diamond Residential greenfield project, in the Marialva city outskirts – located in the Maringá Metropolitan Area – where the environmental review was appealed and ended up blocking the project. In this case, the urban development project had licensing problems that were amplified by the fact that all three tiers of government were involved,²⁸ resulting in the stoppage of the project due to the lack of municipal autonomy to conduct the process.

124. The apparently contradictory nature of both cases – in which both autonomy and lack of autonomy lead to unwanted results – combined with the detailed description of the framework, is the background to the critical analysis of the study. This critical analysis will assess whether the existing legal and institutional framework is adequate to address the risks and impacts of the project, and enables the project to achieve objectives materially consistent with the social and environmental reviews.

125. The complexity of the analysis comes precisely from the said contradiction, outlined by the necessary summary of the identified challenges, the strengths and weaknesses of the legal and institutional structure for social and environmental review. Finally, the theoretical and practical backgrounds of the assessment will lead to critical conclusions so as to improve the design of environmental law and the process for urban development in Brazil, taking into account the capacity building needed to support this improvement.

²⁵ BIM, Eduardo Fortunato. A autocontenção judicial no Direito Administrativo participativo: O caso das audiências públicas ambientais. Revista Digital de Direito Administrativo, Ribeirão Preto, v. 2, n. 1, p. 37-70, 2015.

²⁶ ANDRADE, Carlos Roberto Monteiro de; CORDOVIL, Fabiola Castelo de Souza. A cidade de Maringá, PR: O plano inicial e as "requalificações urbanas". Scripta Nova, Barcelona, v. 12, n. 270, p. 53, aug. 2008.

²⁷ GREGO-SANTOS, Bruno. Ação de Nunciação de Obra Nova Urbanística. Revista de Direitos Difusos, São Paulo, v. 13, p. 119-130, 2013.

²⁸ ANDRADE, Carlos Roberto Monteiro de; CORDOVIL, Fabiola Castelo de Souza. A cidade de Maringá, PR: O plano inicial e as "requalificações urbanas". Scripta Nova, Barcelona, v. 12, n. 270, p. 53, aug. 2008.

3.1 New Downtown Maringá

126. As stated in the presentation above, the first case study in this paper, unveiled below, analyzes the New Downtown Maringá (Novo Centro de Maringá) brownfield project. In this case, environmental and social reviews that composed the urban development project analysis contradicted prior urban policies, incurring a distortion in the undertaking of the original Oscar Niemeyer's project.²⁹

127. As analyzed, this is a factor directly related to the City's autonomy to conduct urban development policy, an issue addressed in the critical analysis.³⁰

3.1.1 Overall background

128. The city of Maringá has its origins in a colonization project, founded by the Northern Paraná Land Company (Companhia de Terras do Norte do Paraná) and developed by the Northern Paraná Development Company (Companhia de Melhoramentos do Norte do Paraná). In order to establish the colonization settlements, several cities were founded, Maringá among them.

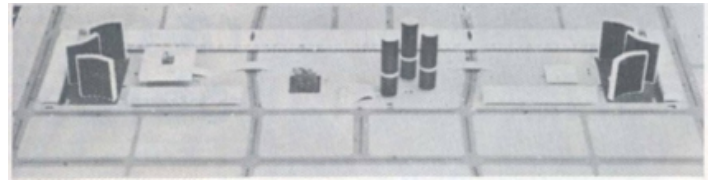
129. Therefore, the initial settlement of Maringá was constructed according to an urban plan, in order to constrain its growth to an organized progression. It was to be expected, however, that this original urban ideal would need adaptations and improvements during time, as it was effectively changed.

Image III - New Downtown Maringá region during development



Source: O Diário.

Image IV - Rendering of the original development project



Source: Revista Tradição, aug. 1991.³¹

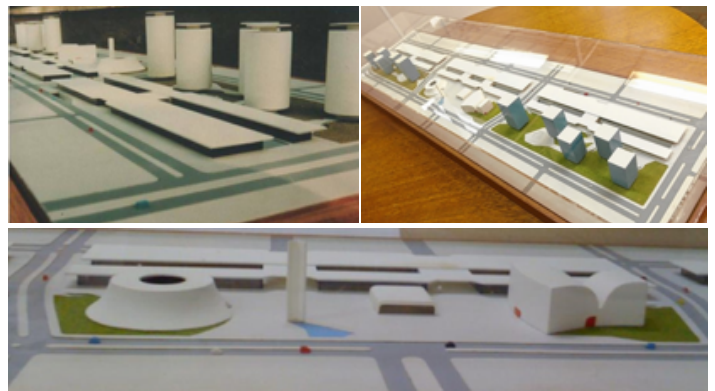
130. One of the areas that were object to a repurpose is the railroad station and train maneuver field, originally located in the central region of the city. Aligned both vertically and horizontally along the central urban axis, this area of several blocks held potential to radically change the urban landscape of Maringá. Since the 1970s the local population had been questioning such a fracture in the urban continuum by the presence of an almost unsurpassable rail infrastructure complex.

3.1.2 From the Agora to the New Downtown

131. In order to repurpose the railroad station and the train maneuver field areas, enclaved as they were in the heart of Maringá, the municipal government commissioned, in 1985, a project by Oscar Niemeyer, the most internationally prominent Brazilian architect.

132. The Agora Project "proposed a new urban, architectonic and occupational concept" to these areas, with the design of three superblocks, the central one being fully public in its destination.³²

Images V, VI and VII - Architectural Models for the Agora Project



Sources: Museu da Bacia do Paraná³³, Gazeta do Povo³⁴ and O Diário.

²⁹ Disclaimer: All case descriptions produced in this paper are based on data gathered from official and academic publications, with special attention to the papers and Articles produced by researchers at the State University of Maringá's Branch of the Metropolis' Observatory.

³⁰ ANDRADE, Carlos Roberto Monteiro de; CORDOVIL, Fabiola Castelo de Souza. A cidade de Maringá, PR: O plano inicial e as "requalificações urbanas". Scripta Nova, Barcelona, v. 12, n. 270, p. 53, aug. 2008.

³¹ ANDRADE, Carlos Roberto Monteiro de; CORDOVIL, Fabiola Castelo de Souza. A cidade de Maringá, PR: O plano inicial e as "requalificações urbanas". Scripta Nova, Barcelona, v. 12, n. 270, p. 53, aug. 2008.

³² CORDOVIL, Fabiola Castelo de Souza; RODRIGUES, Ana Lúcia. Segregação socioespacial e a negligência ao patrimônio construído: Legado dos projetos e práticas do poder público municipal em Maringá - PR (Brasil). Scripta Nova, Barcelona, v. 16, n. 418, p. 41, nov. 2012.

³³ SALVATICO, Tatiane; KJBASKI, Derek. Projeto de Niemeyer para Maringá não foi executado por completo. Gazeta do Povo, Curitiba, 6 dec. 2012.

³⁴ ANDRADE, Carlos Roberto Monteiro de; CORDOVIL, Fabiola Castelo de Souza. A cidade de Maringá, PR: O plano inicial e as "requalificações urbanas". Scripta Nova, Barcelona, v. 12, n. 270, p. 53, aug. 2008.

133. Such a project could hold the potential to revolutionize the entire city. The open concept of the public spaces, with wide squares and public buildings, could bring urban structures and monuments to a central location that would not be as well located otherwise.
134. However, soon the alterations to the Agora Project began. The project suffered its first revision in 1990 and, during that decade, it was completely disfigured: at the end of 1992 the avenues crossing the area were opened, in order to create 206,600 square meters of development space; in 1993, under pressure from the real estate market, the minimal lot area was reduced by four times, and the use coefficient expanded by one third. Finally, the project was renamed as “New Downtown Maringá”.³⁵
135. Currently, none of the original public structures exists, and the area has been almost fully destined to private developments of apartment buildings.

3.1.3 Real estate market and environmental impact

136. Several scholars tend to find the real estate market pressures as the cause for the disfigurement of the Agora Project, resulting in the New Downtown Maringá. During the city's history, several of these waves were observed, with “deliberate degradation processes, followed by the private appropriation of originally public and collective buildings and spaces, parallel to the deepening of socio-spatial segregation”.³⁶
137. Surprisingly, this is not the first nor the last time these maneuvers are observed, since they were responsible for the private appropriation of areas that originally corresponded to the Rail Station and to the Bus Station and, currently, may also be observed in the Eurogarden project, that intends to repurpose the former Airport area.
138. The concerns of these scholars may be better comprehended when one observes the central location of the New Downtown Maringá in relation to the overall urban plan:

Image VIII - Location of the Development



Source: Google Maps.

139. It may be said, thus, that in such cases municipal governments fail to comply with their central roles in urban policy and law, with the capture of these activities by private actors. Although some development activities are better conducted by private investors, the central legislative and administrative activities regarding urban planning – especially regarding the preservation of public and collective structures and spaces – should never be delegated to private biased actors.³⁷
140. Currently, there are several concerns regarding the impacts – mainly environmental ones – of the New Downtown in Maringá. The choice for the tunneling of the rail system, with the constant transit of flammable and dangerous products in bulk in a confined space right under the central part of the city, has impacts that are not yet fully assessed.
141. This case shows clearly the several impacts that unlimited municipal autonomy in urban matters has over the quality and reliability of environmental reviews of urban development, and takes us to its counterpart below.

3.2 Green Diamond Residence

142. The second case subject to the present study consists in a greenfield land parceling project, named Green Diamond Residence, in the Marialva city outskirts – located in the Maringá Metropolitan Area. In this case, the urban development licensing procedure, including the environmental review, was appealed and ended up deadlocked, condemning the project.
143. This is a case in which the urban development project had licensing problems that were amplified by the fact that all three tiers of government were involved,³⁸ resulting in the stoppage of the project by the lack of municipal autonomy to conduct the process.³⁹

3.2.1 Overall background

144. In early 2012, the Green Diamond Residence urban development project was submitted to the Marialva municipal government, in an urbanistic licensing procedure for greenfield land parceling.
145. The location of the development highlighted in the image above shows that even though it is located in Marialva territory, it is intended for the Maringá population. The parceling undertaking was presented to prospective buyers as a luxury gated community, composed of around 2,500 lots covering an area of 2,481,509 m² (two million, four hundred eighty-one thousand, five hundred and nine square meters).

³⁵ CORDOVIL, Fabíola Castelo de Souza; RODRIGUES, Ana Lúcia. Segregação socioespacial e a negligência ao patrimônio construído: Legado dos projetos e práticas do poder público municipal em Maringá - PR (Brasil). Scripta Nova, Barcelona, v. 16, n. 418, p. 41, nov. 2012.

³⁶ DI SARNO, Daniela Campos Libório. Elementos de direito urbanístico. São Paulo: Manole, 2004. P. 45.

³⁷ GREGO-SANTOS, Bruno. Ação de Nunciação de Obra Nova Urbanística. Revista de Direitos Difusos, São Paulo, v. 13, p. 119-130, 2013.

³⁸ Disclaimer: All case descriptions produced in this paper are based on data gathered from official and academic publications, with special attention to the Ação de Nunciação de Obra Urbanística nº 0003238-41.2012.8.16.0113, a case heard by the Public Law Section of the Marialva Regional Forum of the Maringá Metropolitan Area Judicial District.

³⁹ Information provided by the Marialva City Attorney General's Office in the Ação de Nunciação de Obra Urbanística nº 0003238-41.2012.8.16.0113, heard by the Public Law Section of the Marialva Regional Forum of the Maringá Metropolitan Area Judicial District.

Image IX - Location of the Development

Source: Google Maps.

146. The request was submitted to the adequate participatory council, which rejected the urbanization of such an isolated rural area. Nonetheless, the proponent obtained the approval directly from the City Council, that expedited an approval under the form of a legislative act. According to the Municipal Urban Planning and Development Department, there was evidence of prompt sale of lots at this time.⁴⁰

147. Handling this direct legislative approval, the proponent required General Public Directives for the development project – despite the Municipal Environmental, Urban Planning, Education, Public Health and Sanitation Departments' contrary opinions – in April 2012. However, the Directives were not expedited since the proponent failed to present the necessary documents, including real estate registries and the Preliminary Environmental License, under the competency of the state government.

Images X and XI - Remoteness of the Development

Source: Judicial procedure.

148. During these procedures, the municipal government received several consultations of prospective lot buyers, indicating that the lots were being offered to the public without the proper license. The Municipal Urban Planning and Development Department notified the proponent about the irregularity.

149. During the site survey, between July and September 2012, the Municipal Urban Planning and Development Department detected construction works already being conducted, including native vegetation removal, which led to multiple administrative fines and the suspension of the urban development review procedure.

150. In October 2012, the Marialva City Attorney General's office took legal action against the proponent, and the judge in the public law section of the Marialva Regional Forum of the Maringá Metropolitan Area Judicial District granted an injunction that fully blocked any progress of the development in November 2012.

Images XII and XIII - Suppression of vegetation

Source: Judicial procedure.

151. Since then, the development project has been subject to several review and licensing procedures and instances, and the site remains embargoed.

3.2.2 Urban licensing and environmental review

152. The complexity of the case is highlighted when the analysis scope is steered towards the urban licensing procedures, especially regarding environmental and heritage reviews. According to the undertakers' declarations,⁴¹ their behavior was caused by the inertia of licensing authorities.

153. Even though five years have passed by, the development project is still subject to several assessments from diverse governmental entities, from municipal, state and federal levels.

154. In this scenario, and taking into consideration the detailed description of the legal framework above, the case ended up being subject to three tiers of governmental review, regarding three different aspects of the development project.

155. In the first place, the municipal government holds the power to review and license the urban policy aspects of the development project. Thus, as the procedure outlined in Diagram I indicates, the initial municipal consent regarding the viability of the undertaking was key to the following procedure.

⁴⁰ Information provided by the proponent in the Ação de Nunciação de Obra Urbanística nº 0003238-41.2012.8.16.0113, heard by the Public Law Section of the Marialva Regional Forum of the Maringá Metropolitan Area Judicial District.

⁴¹ Information provided by the proponent in the Ação de Nunciação de Obra Urbanística nº 0003238-41.2012.8.16.0113, heard by the Public Law Section of the Marialva Regional Forum of the Maringá Metropolitan Area Judicial District.

- In so far as the consent was denied by the competent Municipal Urban Development Council – a participatory instance with deliberative powers on urban policy – the procedure should have been immediately terminated.
156. However, whatever the motivations were, the City Council⁴² – the legislative branch of municipal entities – decided to directly grant legislative consent. This procedure is evidently contrary to the applicable regulations, exposed in the chapter dedicated to the social protagonism and transparency. The Brazilian urban policy framework is deeply based in democratic management principles and, thus, this direct legislative consent is far from compliant with Law no. 10,257 and other provisions analyzed.
157. Also, the Municipal Government failed to objectively conduct the urban review procedure. After the injunction was judicially granted, instead of abiding to a strict schedule and prescribed procedures, the Municipal Governments continued requesting adjournments – twice from September 2013 to April 2014, and three times between December 2016 and May 2017 – but the procedure remains unconcluded.
158. The second tier involved in the procedure is the Federal Government, which holds the competency to review the project regarding cultural and historical heritage. On the news that there were archeological remains of indigenous occupations in the land under parceling,⁴³ the National Historical and Artistic Heritage Institute (Instituto do Patrimônio Histórico e Artístico Nacional - IPHAN), a national agency responsible for heritage protection, determined in August 2013 the complete shutdown of the undertaking for a period of 24 months, in order to proceed with “heritage prospection and education” in the area.⁴⁴
159. As a consequence, the Federal Prosecution Office (Ministério Público Federal - MPF), in October 2013, recommended the urban review procedure and the environmental review procedure to be halted until the final appreciation of the case by the National Historical and Artistic Heritage Institute.⁴⁵
160. The archaeological prospections were conducted by the Archaeology Department of the State University of Maringá, with final report in November 2013. However, the report was found insufficient by the National Historical and Artistic Heritage Institute in December 2015.⁴⁶ Thus, although it had consented with the conduction of environmental public hearings in May 2014,⁴⁷ the prospection procedure was still halted by November 2016.⁴⁸
161. Finally, the state government was involved in the review procedures, as Paraná State regulations give them the competency for environmental review and licensing of such projects.
162. As outlined in Diagrams I and II, environmental reviews are crucial to the urban development licensing procedure, since the Preliminary Environmental License is a requisite for the urban review procedure in the General Public Directives stage. Thus, a procedure that is being conducted by the municipal government has to wait for the State Government to rule the environmental review.
163. Also, in the Marialva City case study, although the facts started prior to Law no. 13,089 of 2015 – the Statute of the Metropolis that created the interfederative governance system – that Marialva City is a part of the Maringá Metropolitan Area, the procedure needed the consent of the metropolitan authority, according to Article 13 of Law no. 6,766. At the time, and still to this date, the metropolitan authority is supported by the state government and, thereby, the state government is involved.
164. Although the request for the Preliminary Environmental License was presented by the proponent before the Environmental Institute of Paraná (Instituto Ambiental do Paraná - IAP) in mid 2012,⁴⁹ only in September 2013 and December 2014 were the public hearings conducted, and only in May 2015 was the Multidisciplinary Technical Commission designated for the analysis of the corresponding environmental report.⁵⁰ Besides, the state competency over this review led to the intervention of the State Prosecution Office (Ministério Público do Estado do Paraná - MPPR), in order to achieve the adequate conduction of the hearings.⁵¹
165. As a consequence of this scenario, since all the procedures in the three governmental tiers are interconnected and none of them was concluded, all the reviews of the development project are halted, with special attention to the environmental review, considerably delayed and incomplete.

3.2.3 Issues regarding national, state and local competencies

166. Evidently, the “Green Diamond Residence” case is a notable example of an urban development project where the environmental and social review was appealed and ended up blocking the project, with dire consequences to both the proponent and the community. More specifically, it may be said that the lack of municipal autonomy for environmental licensing – or the multiple governmental instances – led to unwanted social and urban results.

⁴² In Portuguese, Câmara Municipal.

⁴³ There is no notice in the Ação de Nunciação de Obra Urbanística nº 0003238-41.2012.8.16.0113 about how the IPHAN gained knowledge about the existence of such archeological findings.

⁴⁴ IPHAN Ordinance no. 35, of 2013, Process no. 01508.0000134/2013-13.

⁴⁵ MPF Letter no. 988/2013-GAB/PRM, Recommendation nº 1/2013.

⁴⁶ IPHAN Letter no. 260/2015-CNA/DEPAM, Technical Opinion no. 760/2015-CNA/IPHAN.

⁴⁷ IPHAN Certificate no. 2/2014-PR.

⁴⁸ IPHAN Letter no. 1.123/2016-PR.

⁴⁹ IAP Letter no. 123/2012-DIRAM/DLE, of September 2012.

⁵⁰ IAP Ordinance no. 85, of May 2015, Process no. 07.951.906-5.

⁵¹ MPPR Letter no. 12.171.019-6, of October 2013.

167. Given the news that several lots were sold before the final approval of the project, in direct violation of Article 50 of Law no 6,766, it may be expected that several families were harmed, whether by the conduct of the undertaker or by the lack of surveillance by the Public Administration.⁵² In any case, without any attempt to determine the liable party, it is a fact that the overall urban development review – especially the Environmental Impact Assessment – failed enormously.
168. Even though both Article 7 of CONAMA Resolution no. 237 of 1997 and Article 13 of Complementary Law no. 140 of 2011 determine that enterprises and activities should be licensed or authorized by only one governmental entity and level of competency, it is clear that the overlap of powers to review and license the several aspects of urban development projects menaces the adequate assessment of the environmental impact of such ventures.
169. Also, it is clear that the mechanisms for social review and participatory management of urban policy are, at best, fragile. The effectiveness of such mechanisms in the case is near to null, since they were solemnly bypassed by the so-called “traditional” politics. The cooptation of participatory instances is a rather common issue in Brazil and, thus, demands special treatment by the present paper.
170. These issues steer the analysis, also, to the lack of stability of local legal frameworks in Brazil. In the case of Marialva City, the Master Plan, created in 2009, has surprisingly been subject to ninety-one major alterations: three to its Main Instrument, one to the Road System Act, fifty-one to the Urban Zoning Act, fourteen to the Land Parceling Act and twenty-two to the Construction Code. Evidently, as the sheer amount of alterations suggests, very few of these modifications adequately addressed social and environmental stakes and most of them had merely formal participatory procedures.
171. Finally, the effectiveness of the judicial review over the administrative procedures is in jeopardy. The case shows that, in practice, the administrative instances were transferred to the judicial stage, and the main judicial process regarding the case progressed for almost five years without even a lower instance ruling.
172. Therefore, the final movement of this study is dedicated to extracting propositions out of the critical analysis of the cases described.

4 CRITICAL ANALYSIS AND PROPOSITIONS

173. The two cases presented and analyzed provide this study with a plethora of questions in need of answers. The main issue that rises from the confrontation of the two cases is the role of municipal autonomy in the quality of environmental reviews in urban development.

174. In the New Downtown Maringá case, a brownfield project is analyzed in which environmental and social reviews contradicted prior existing policies, with the disfigurement of the original Agora Project. As exposed, this is a factor directly related to the City’s autonomy to conduct urban development policy, since there are no other instances of urban policy stability control. Thus, municipal government is able to constantly alter urban zoning and policy, without care to the continuity of urban development, apparently by the pressures of private investors.
175. The Green Diamond Residence case, on the other hand, is a greenfield project in which the environmental review was appealed and ended up blocking the project. In this case, the urban development project had licensing problems that were amplified by the fact that all three tiers of government hold competencies to review different aspects of the project, resulting in its stoppage by the lack of municipal autonomy to conduct the process.
176. Thus, a supposed contradiction underlies both cases: an unlimited municipal government leads to severe urban policy problems, as a constrained municipal government results in serious risks to the sustainability of urban development by weakening environmental reviews. Nonetheless, the contradiction is only apparent and not evident since none of the extreme situations could lead to a successful outcome; in fact, the conclusion to be made is heavily supported by the balance in the establishment of municipal autonomy, by combining effective interfederative governance with the development of local government capabilities.

4.1 Effectiveness of environmental reviews of urban development projects in Brazil

177. With all factors given, urban development licensing in Brazil passes through some severe problems that are evidently related to multifactor scenarios characteristic of Brazil.
178. Specifically regarding environmental reviews in urban development, a study conducted by the Brazilian Institute for Applied Economic Research (Instituto de Pesquisa Econômica Aplicada - IPEA) assessed these issues by directly asking state and local governments. The study reveals that decentralization of the licensing procedures is essential to its effectiveness, but with care to the adequate political and institutional mechanisms; also, it is necessary to create adequate technical referentials in order to support homogeneous licensing decisions. Regarding the allocation of competencies exposed in chapter 2.2, municipal governments rarely structure themselves in order to conduct environmental reviews, which leads to the prioritization of state governments in this field, with little to no exchange of information between government tiers. Also, in order to improve reviews, it is necessary to simplify procedures, making them more efficient; the solution should reside, also, in reducing the

⁵² Statistically, in the Marialva Regional Forum of the Maringá Metropolitan Area Judicial District there exists one case in the Small Claims Section, four cases and one class action in the Civil Section, and one case in the Criminal Section; in the Maringá Regional Forum of the Maringá Metropolitan Area Judicial District there are seven cases in the 1st Civil Section, eight cases in the 2nd Civil Section, one case in the 3rd Civil Section, nine cases in the 4th Civil Section, five cases in the 5th Civil Section, three cases in the 6th Civil Section, five cases in the 7th Civil Section, four cases in the 1st Small Claims Section, and three cases in the 3rd Small Claims Section; in a total of 51 (fifty one) cases to be heard by the Justice.

duration and cost of administrative procedures, alongside with the deepening of social protagonism. Finally, the study reveals that a considerable amount of time and effort is dedicated to the sometimes exaggerated judicial and prosecutorial review.⁵³

179. The confrontation of these conclusions with the two cases studied leads to the outline of the main problems faced in environmental reviews and urban development steering in Brazil, especially regarding municipal autonomy, as exposed below.
180. First, the legal framework itself is considerably poor. Due to the noteworthy autonomy of local governments in establishing urban regulations – within, of course, general rules from federal and state governments – cities struggle with both heavy pressure from real estate investors and lack of capacity to conduct urban policy. It is especially noticeable that many local urban policy regulations are only copied from other cities, making several dispositions useless and lacking others that are essential. This leads to the next two problems.
181. Local governments in Brazil have no hierarchy or classification and, thus, all local governments hold rather similar duties. Altogether, cities with a few thousand people and cities with a few million people have the same responsibilities in urban policy but, of course, have very different capacities, both technically and politically. The lack of specialized personnel is evident in several smaller cities.
182. Another problem is, evidently, corruption. The combination of unstructured governments, complex and lengthy procedures, and intricate regulations leads to a scenario of incentives for corruption, since some economic agents would think it is easier and cheaper to just pay their way through licensing. Of course, this reveals a notable fragility of policy enforcement, unjust cities, and environmentally hazardous urban development enterprises.
183. The fourth problem that has to be addressed is the conflicting allocation of roles in environmental licensing in Brazil. The government branch responsible should be chosen based on the activity and area of impact, before an environmental impact assessment procedure should be initiated. However, urban development projects have a broad spectrum of externalities to be prevented or mitigated, and sometimes two or even three tiers of government are involved, leading to a slower and sometimes contradictory procedure.
184. These factors may lead to a fifth problem, related to a merely formal character of urban development licensing. Despite being instruments of environmental, social and economic protection – bringing democratic rule to the conduction of urban policy – these procedures may lead to mere legitimization of otherwise harmful undertakings.

185. Finally, legal uncertainty rises as a severe problem. Urban policy rules and regulations tend to be seen as fragile and subject to the discretion of public officers, with constant changes to urban development plans. Excess of judicial reviews tend to rise from these situations, aggravating the reliability issues experienced.
186. All these problems gravitate around the issue of municipal autonomy, control and accountability regarding environmental reviews in urban development projects licensing. Thus, this is the main issue approached by the perspective outlined which leads to the proposals of balance between municipal capabilities and interfederative governance.

4.2 Challenges and future perspective

187. Given that the examples chosen as provocation for the debate carried out in this study are both from cities in the same metropolitan area, located in the Paraná State, the outline of the regional challenges in such State is useful for the construction of a future broader perspective. This vision may be thoroughly extrapolated to represent the situation of urban environmental public policy all over the country.
188. In this scenario, a study conducted by the Paraná Institute for Economic and Social Development (Instituto Paranaense de Desenvolvimento Econômico e Social - IPARDES) proposes four essential measures for the improvement of environmental reviews in urban development: first, the Paraná State's own environmental institute should broaden its role within the State, nearer to the local governments; second, both the state government and other institutions should act in the improvement of the municipal governments' capacity to conduct the environmental licensing procedure, since between the 399 municipalities in Paraná, only the capital city of Curitiba has its own urban environmental licensing structure; third, the Paraná State's environmental review capacity should also be improved in order to overcome the growing demand for environmental reviews; and finally, the technology instruments for the collection and organization of data in environmental reviews should be deeply improved in order to multiply the capacity of these agencies.⁵⁴
189. Another challenge that still lacks proper assessment is the stability of the legal framework, especially in local governments. This challenge is deeply related to the frequent co-opting nature of the participatory mechanisms in Brazil,⁵⁵ through which the governments merely use the democratic spaces of purely formal participatory procedures as a governability instrument, disguising rather malicious intentions as democratic voice.
190. Thus, a future perspective may only be outlined through the abandonment of the merely formal and procedural controls over the Public Administration in Brazil. This is an issue already deeply assessed in another work,⁵⁶ but that remains current due to its omnipresence in the Brazilian State.

⁵³ MOTTA, Diana Meirelles da; PÉGO, Bolívar (orgs.). Licenciamento ambiental para o desenvolvimento urbano: Avaliação de instrumentos e procedimentos. Rio de Janeiro: IPEA, 2013.

⁵⁴ INSTITUTO Paranaense de Desenvolvimento Econômico e Social; INSTITUTO de Pesquisa Econômica Aplicada. Licenciamento ambiental para fins urbanos no Estado do Paraná. Curitiba: IPARDES/IPEA, 2010.

⁵⁵ TATAGIBA, Luciana; TEIXEIRA, Ana Claudia Chaves. Democracia representativa e participativa: ¿complementariedad o combinación subordinada? Reflexiones acerca de las instituciones participativas y la gestión pública em la ciudad de São Paulo (2000-2004). In: CLAD; ESPANHA. Contraloría y participación social em la gestión pública. Venezuela: CLAD, 2007. P. 38-44.

⁵⁶ GREGO-SANTOS, Bruno. Extrajudicial contractual dispute settlement in public administration. 2015. Thesis (Doctorate in Law) – Faculty of Law, University of São Paulo, São Paulo, 2015.

191. The habit of adopting formal and procedural controls in order to transform administrative conduct constitutes, by itself, one of the main barriers to such a transformation. The detachment between the posture of public administrators and the legally established evolution movements appears to be typical of the Iberoamerican public administration's cultural scenario. Thus, the balancing of municipal autonomy should rely on more than simple legal acts.

4.3 Obstacles to improvement

192. The assessment of challenges and perspectives thoroughly conducted in this study draws a palpable scenario regarding the improvements needed on the current Brazilian environmental reviews in urban licensing. Thus, a brief description of the obstacles that could prevent these challenges from being met is key for concluding the analysis.

193. Initially, it is evident that the lack of democratic intentions is still common in the conduction of public affairs in Brazil. Although, of course, it can not be generalized, several public authorities still lack the commitment to the democratization of public policy; thus, strategies are needed in order to overcome the resistance imposed by current governmental structures.

194. Regarding this resistance, another related obstacle to be surpassed is the natural rigidity of organizations and institutions, both public and private. The transformation of the current scenario and, even simpler, the effective adoption of changes already underway in legislation rely heavily on the adherence of public officers. As long as the contemporary nomenclatura resists the evolution, changes will be deemed difficult, although not impossible.

195. This resistance finds support in the difficulties in legal reform that are typical to the Brazilian legal system. While, as exhaustively exposed in the legal framework description, Brazilian urban policy law keeps up with global tendencies, some adjustments necessary to adapt these models to the national reality are paralyzed by the Brazilian legal rigidity.

196. When one adds the current political instability to this circumstance, the result is an evolution horizon too far to be effective; thus, extra doses of political will and social pressure are needed in order to make improvements to the legislative process a priority.

197. Another obstacle that defies the improvement of environmental reviews of urban development in Brazil is the relevance of economic power in urban projects. Urban development – and, by consequence, urban policy – is still widely seen as a business and, sadly, the problems described in the cases may be deemed as “business as usual”. A deeper publicization of the development directives is key.

198. Finally, this paper concludes that the challenges outlined are greatly prevented from being met by the weaknesses of municipal governments. According to the Brazilian Institute of Geography and Statistics (Instituto Brasileiro de Geografia e Estatística - IBGE), only 50% of Brazilian cities have a master plan as of 2015, while 12,4% are preparing their master plans and 37,6% have none. Also, only 30,4% of the municipalities are prepared to conduct environmental review procedures.⁵⁷

199. The strengthening of municipal governments is essential to the balance between private and public forces in the steering of urban development.

4.4 Capacity building and the role of metropolitan administration

200. Throughout this study, analyses were conducted in order to detect problems in urban development environmental reviews that come from extreme autonomy or extreme restraint of local governments.

201. In a very complex way, city autonomy is the source and the solution for these problems. That is to say, we sustain that the denouement for these problems lies with the adequate balance of municipal autonomy regarding urban policy.

202. The keynote of Habitat III was the strengthening of local protagonism, and this focus on capacity building and municipal empowerment may pave the path towards this equilibrium. The development of urban management independence in relation to the private sector economic interests, in order to avoid the situation in which “the businessmen build the city”,⁵⁸ is key to the solution; nonetheless, as exposed above, the mere adoption of rules and regulations that establish such independence is unsatisfactory.

203. Private initiative is essential for the city's dynamism and for the adequate allocation of urban development investment burdens. However, in a context in which “the entrepreneurial logic of largest benefit with the smallest charge not rarely goes against the will of the environmental law”, private developers tend to design their undertakings in order to stand just shy of the limits for more complex environmental licensing procedures, as exposed by Cunha Filho (2016).⁵⁹ This intricate scenario reveals the need for governmental initiatives that are not determined only by objective legal criteria – especially regarding cumulative environmental urban licensing – but by reasonably discretionary urban authority initiative.⁶⁰

204. Thus, as already discussed, the mere adoption of formal and procedural controls over urban environmental licensing ends up ruining the municipality's own capacity to manage the city. This is the current context in Brazil.

⁵⁷ BRAZIL. INSTITUTO Brasileiro de Geografia e Estatística. Perfil dos Municípios brasileiros. Brasília: IBGE, 2015. P. 18.

⁵⁸ ANDRADE, Carlos Roberto Monteiro de; CORDOVID, Fabiola Castelo de Souza. A cidade de Maringá, PR: O plano inicial e as “requalificações urbanas”. Scripta Nova, Barcelona, v. 12, n. 270, p. 53, aug. 2008.

⁵⁹ CUNHA FILHO, Alexandre Jorge Carneiro da. In: CUNHA FILHO, Alexandre Jorge Carneiro da; NERY, Ana Rita de Figueiredo; ARAÚJO, Alexandra Fuchs de (coords.). Direito urbanístico: Ensaios por uma cidade sustentável, da formulação de políticas à sua aplicação. São Paulo: Quartier Latin, 2016. P. 137-155.

⁶⁰ CUNHA FILHO, Alexandre Jorge Carneiro da. In: CUNHA FILHO, Alexandre Jorge Carneiro da; NERY, Ana Rita de Figueiredo; ARAÚJO, Alexandra Fuchs de (coords.). Direito urbanístico: Ensaios por uma cidade sustentável, da formulação de políticas à sua aplicação. São Paulo: Quartier Latin, 2016. P. 137-155.

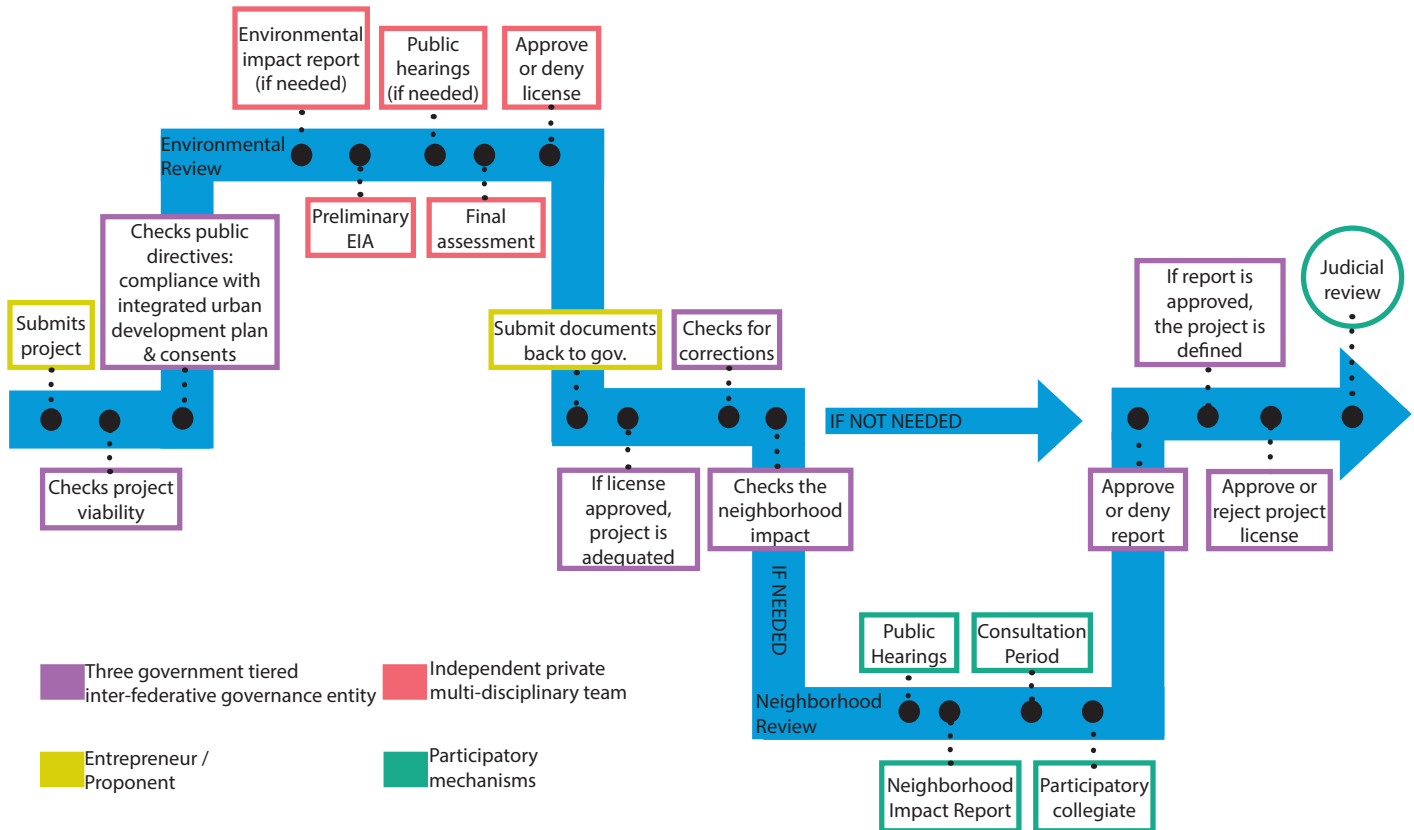
205. In order to address such a problem, we believe that the strengthening of local governments' autonomy should be accompanied by the broadening of the "interfederative governance" concept. Thereby, not only metropolitan regions and urban clusters would rely on a special sphere of decision making regarding urban policy, but every local government in need of support would have access to it, at the same time being adequately monitored. Of course, this sort of solution should be structured in order to comply with and respect local populations' and authorities' autonomy and influence.
206. It is not the case that public agents are obliged not only to comply, but to build an environment in which, when confronted with choice, they actively opt for the best realization of urban public interest. The success of this initiative would come from the optimal combination between the mobilization of public opinion and social reviews, the efficient demonstration of positive results and the national coordination of incentives to regulate action.⁶¹
207. In conclusion, self containment of established powers is key to avoid abuse against the urban environment.
- ## 5 CONCLUSION
208. As stated in the original proposal, the case study of environmental impact assessment in urban development licensing procedures in Brazil is a fertile ground for research. Brazilian governments, central, regional, and local, still struggle with the duties related to policy enforcement, and at the same time urban growth is pressing for fast and easy expansion.
209. In this scenario, municipal capacity development is essential. Thus, the study of Maringá City's metropolitan area case is a rare opportunity to assess the characteristics of relatively new settlements with strong economic growth, leading to a myriad of outcomes able to guide local governments in Brazil and abroad on how to build strong institutions in favor of environmentally, socially and economically friendly urban policy.
210. The main conclusions of this study, due to their complexity and plurality, are better exposed throughout its development. Altogether, it is noteworthy that all of them lead towards the proposals above, in a logical and, why not to say, necessary way.
211. The legal framework related to urban management and policy in Brazil is rather labyrinthine. The complexity of the rules and regulations – typical of Brazilian law – is often counter-productive and, alongside with the allocation of competencies between administrative spheres, procedures design and judicial review tend to render urban development reviews long and difficult.
212. This scenario leads to sensitive problems regarding social participation and transparency, as well as the management of legislative changes and policy stability, whereby the best public results are frequently surpassed by private interests.
213. Under this context, the two cases exposed and deeply analyzed reveal the threats to social interest that come from the apparently contradictory issues regarding municipal autonomy. Whereas in the New Downtown Maringá case the absolute lack of control over municipal initiatives led to unwanted results, the negative results in the Green Diamond Residence come precisely from the lack of municipal control.
214. Thus, some barriers arise in solving the apparent contradiction. The critical analysis and propositions that compose the final conclusions reveal that formal and procedural controls lack effectiveness in transforming the public agents' conduct. A strategical change is needed in order to address the exposed issues with real positive results.
215. Under the vision constructed here, the search for balance in municipal autonomy is key. A combination between capacity development and support and supervision from an interfederative governance structure – complying with all the parameters discussed above – seems to be the way towards better conduction of urban policy in Brazil, and may serve as a model for countries with similar issues.

⁶¹ GREGO-SANTOS, Bruno. Extrajudicial contractual dispute settlement in public administration. 2015. Thesis (Doctorate in Law) – Faculty of Law, University of São Paulo, São Paulo, 2015.

Brazil

The Urban Development Review Procedure, including Environmental Review and Neighborhood Review

*There is no legally specified timeframe



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06

Columbia University Expansion into West Harlem, New York City

Sheila Foster



Harlem neighborhood, Manhattan, New York @Shutterstock

I. BACKGROUND¹

A. Columbia University's Expansion Proposal

In July 2003, Columbia University announced its thirty-year plan to build an eighteen-acre science and arts complex in West Harlem just north of its historic Morningside Heights campus and two miles south of its uptown medical center.² Columbia's plan would change the physical and socioeconomic layout of the target area. The plan involved massive growth of its existing campus, requiring significant re-zoning of the area targeted for construction. At the time of its announcement, Columbia already had purchased nearly half of the site and expected to acquire the other half through private sales, or from City and State agencies that owned large parcels in the proposed footprint.³ By the time that the plan was approved by the New York City Council in December 2007, Columbia controlled all but a very few properties on the proposed expansion site. Its evolving plan for the new campus had expanded to include a new business school, scientific research facilities (including laboratories), student and staff housing, and an underground gym and pool.

Columbia's announcement set in motion a complex, multi-level legal and political process which ultimately led to the project's approval and commencement. The construction process for Columbia's new campus continues today, as do the local tensions around its expansion into a historically low-income, ethnic minority neighborhood.

¹ Much of the background on Columbia's expansion are contained in Sheila R. Foster & Brian Glick, *Integrative Lawyering: Navigating the Political Economy of Urban Redevelopment*, 95 Cal. L.Rev.1999 (2007).

² See Charles V. Bagli, *Columbia Buys Sites and Assures Neighbors*, N.Y. Times, Apr. 21, 2004, at B8; Charles V. Bagli, *Columbia, in a Growth Spurt, Is Buying a Swath of Harlem*, N.Y. Times, July 30, 2003, at A1.

³ Bagli, *Columbia in a Growth Spurt*, supra

1. Motivations for Building a New Campus

Columbia's stated goals in embarking on this project were twofold: first, to allow it to "fulfill its role as a leading academic institution" by enabling it to expand and modernize its facilities and, second, to "facilitate the revitalization, improvement, and redevelopment" of a portion of the targeted section of West Harlem by allowing greater density and a wider variety of land uses, within the context of the surrounding neighborhood.⁴ The University wanted to create a campus environment conducive to multidisciplinary collaboration. But it also promised to leave parts of the new campus open to the public, and to promote businesses to move into the area.

The expansion of the University makes sense if one considers the competitive nature of American universities, particularly the most elite. Columbia is in constant competition with the other Ivy League schools such as Cornell, Yale and Harvard universities, as well as its downtown Manhattan rival New York University. These universities compete for students, faculty, staff, funding, media attention, rankings, and much more.⁵ The other Ivy League and top national schools have far more space than Columbia, and Harvard University and the University of Pennsylvania, the two other big city Ivies, had recently completed major expansions. To remain competitive, Columbia had to find a way to increase its campus footprint. Expanding north into more of West Harlem was the obvious and only real option for such growth near the University's existing facilities. Columbia and allied institutions already used the narrow strip of Harlem adjoining the Hudson River and Riverside Park on its west.

2. Details of the Expansion Plan

Designed to fit within the existing street grid on the blocks along Broadway west to 12th Avenue from the triangle where 125th Street crosses 129th Street north to 133rd Street—and on the east side of Broadway from 131st to 134th Street—the campus plan encompasses more than 17 acres with publicly accessible open space, tree-lined sidewalks and innovative buildings whose very transparency encourages shared knowledge and social engagement.⁶

The Final EIS project description described it as:

"[totalling] approximately 6.8 million gross square feet (gsf) above and below ground. Such development would consist primarily of community facility uses serving the University, with street-level retail and other active ground-floor uses. The remaining 18 acres within the Project Area would consist of 9 acres located primarily between Twelfth Avenue and

*Marginal Street and east of Broadway (which are estimated to result in another 329,500 gsf of commercial and residential development); and 9 acres between Marginal Street and the pierhead line, of which 2 acres comprise the area of the new West Harlem Waterfront park and 7 acres comprise City-owned land under water."*⁷

Columbia had accumulated the capital to fund this expansion without direct government financing and, as a nonprofit, it was exempt from paying real property taxes to the city government.⁸ It assembled a high-powered team to plan the new campus, including a world-class architect, Renzo Piano, who developed an open, modern glass design concept. Piano was paired with the top firm of Skidmore Owings and Merrill as architect of record, responsible for construction drawings and administration.⁹

The University also retained top law firms and had well-staffed in-house engineering and facilities departments and the funds to outsource any work that proved beyond the capacity of these departments. To manage relations with Harlem, City officials, and community groups, Columbia appointed as Executive Vice President for Government and Community Affairs Maxine Griffiths, an African American woman with deep roots in Harlem who had served on the City Planning Commission under the City's only Black mayor and who had more recently taught urban planning at the University of Pennsylvania.¹⁰

3. Barriers to the Proposed Plan

Any attempt to clear a major site in the densely residential neighborhoods of Central Harlem to the east or the Upper West Side to the south would involve huge political as well as financial costs. The University was very concerned to keep peace with nearby communities, especially Harlem. It would go to great lengths—short of not expanding—to avoid repeating the traumatic events of Spring 1968, when its plan to build a gymnasium on the hill separating Morningside Heights from Central Harlem sparked angry community protest and a widely publicized, week-long student occupation of main campus buildings.¹¹

The University was aware that its expansion would be seen as yet another force in the larger gentrification of the area, threatening the displacement of longtime residents and businesses. The expansion would certainly lead to the displacement of homes, successful businesses and at least one church.¹² As such, the school promised to take preventative measures, but in the end there was still a very high potential that the project would accelerate gentrification of the historically African American area.

⁴ N.Y. City Dep't of City Planning, Manhattanville in West Harlem Rezoning and Academic Mixed-Use Development Final Environmental Impact Statement Ch. 1 at 161, November 16, 2007 [hereinafter Final EIS], available at <https://www1.nyc.gov/site/planning/applicants/env-review/manhattanville-west-harlem.page>

⁵ By Columbia's calculations, Harvard, Yale, and Princeton each have more than double the square feet of space per student, according to planning documents. Foster and Glick, Integrative Lawyering, at 2008. Its rivals' science research labs and performing arts venues, and their housing, gym and other facilities, are ever more lavish and up-to-date. See Bagli, Columbia in a Growth Spurt, supra.

⁶ Columbia Manhattanville, <http://manhattanville.columbia.edu/campus>

⁷ FINAL EIS Chapter 1, at 1.

⁸ Except that in New York, charitable nonprofit corporations like Columbia University pay neither real property tax nor the "payments in lieu of taxes" required by many jurisdictions. See N.Y. Real Prop. Law §§ 420-a to 420-b.

⁹ See Danielle Wolfe, Planning Ahead for Columbia Expansion, Real Est. Wkly., Nov. 22, 2006, at 23 (describing those involved in the project).

¹⁰ See Foster and Glick, Integrative Lawyering, at 2009.

¹¹ See Daphne Eviatar, The Way We Live Now: 5-21-06: Dispute: The Manhattanville Project, N.Y. Times, May 21, 2006, § 6 (Mag.), at 632. See generally Jerry L. Avorn, Up Against the Ivy Wall: A History of the Columbia Crisis (Robert Friedman ed., 1968) (providing a detailed account of the 1968 uprising and the resulting violence based on the first-hand experiences of students, faculty, administrators, local government representatives and members of the Harlem community).

¹² See Relocation of Local Church Provides More Space to Grow, Columbia University, Manhattanville, News, April 7, 2010 available at: <http://manhattanville.columbia.edu/news/relocation-local-church-provides-more-space-grow>; New Home, Same Dinosaur: Popular West Harlem, Restaurant Moves to West 125th Street, Columbia University Facilities, News & Announcements, available at: <http://facilities.columbia.edu/new-home-same-dinosaur-popular-west-harlem-restaurant-moves-west-125th-street/> [The restaurant's relocation is part of the University's extensive effort to help organizations and businesses in Manhattanville find alternative or improved space within the local community.]; Florida Displaced by Columbia's Manhattanville Expansion Reopens, Hamilton Heights Sugar Hill, West Harlem, News, available at: <http://westharlemcpo.org/news/florida-displaced-by-columbias-manhattanville-expansion-reopens/>

The area of West Harlem targeted for expansion was only beginning to recover from a steep economic decline. Once a thriving port and business district with small factories, such as Studebaker Auto, dairies and other light industry and shops, it had fallen victim in the mid-twentieth century to the country's first wave of de-industrialization, as capital moved first to the suburbs and Southern states and then offshore to the global South in pursuit of cheaper land and labor. At the time Columbia announced its expansion, the area was currently under-developed, consisting for the most part of auto body shops, self-storage warehouses, meat-cutters, gas stations, fast-food outlets, social-service offices, a bus-maintenance garage, various odds and ends, and a valued supermarket that would not have to be displaced.¹³

Taking all of this into account, Columbia's planners were able to outline a site which would offer adequate expansion while directly displacing at most one hundred forty households and a number of small businesses and service agencies.¹⁴

4. Public Reaction to the Plan

Public officials and the media hailed Columbia's vision of an ultra-modern world-class university research center rising in place of the area's aging warehouses and car shops as a major advance. Some local elected officials voiced cautious support, and some established social agencies accepted Columbia's plans along with its generous financial assistance.

In Harlem, however, and in the uptown Dominican community that surrounds Columbia's medical center and has spread south toward the expansion site, residents met the news with a mixed response. Some residents and community members urged all out mobilization to stop Columbia. Still others advocated collective bargaining with the University to gain a binding contract that guarantees substantial benefits for local residents in exchange for their support of (or at least acquiescence in) an expansion that—in the view of those activists—they could not stop but only marginally reshape.

B. Potential Impacts from the Proposed Expansion

The University's plans raised several environmental, physical, social, cultural and economic issues.

1. Environmental Impacts

For example, thirty years of construction would spew a huge volume of dust and particulate matter into neighborhoods whose residents already suffered extraordinary concentrations of asthma and other respiratory ailments.¹⁵ The gas stations, block-long diesel bus maintenance garage, car shops, and similar ground-polluting uses scattered throughout the expansion footprint would require thorough remediation (which might, in turn, exacerbate air pollution).¹⁶

The University also planned to build a major bio-research facility to experiment with "Level 3" substances, including contagious airborne viruses, such as SARS (as well as HIV/AIDS, which is not contagious and has killed thousands of Harlem residents), and many in the community distrusted its promise to eschew work with dreaded "Level 4" substances, such as Ebola and anthrax.¹⁷

2. Built Environment/Housing Impacts

The potential harms from Columbia's expansion extended far beyond traditional environmental and open space issues. Columbia is converting what was once affordable housing (among other things) into university space, and plans to draw in more students and professors with this expansion.¹⁸ This influx of people, along with the reutilization of space, means that there will be less affordable housing in the area, regardless of whatever mitigating measures Columbia has decided to implement.

The expansion would demolish five apartment buildings that initially housed some one hundred thirty-two to one hundred forty low income households. While two of those buildings had been emptied temporarily for renovation, the other three were fully occupied. One had completed publicly-funded renovation and now housed formerly homeless families who received supportive services on site. Two others had been designated for publicly-funded renovation and transfer to resident co-operative ownership through the City's Tenant Interim Lease (TIL) program.¹⁹

¹³ See Timothy Williams, *Land Dispute Pits Columbia vs. Residents in West Harlem*, N.Y. Times, Nov. 20, 2006, at B1 (noting that the area has been dominated by industrial uses since the Industrial Revolution).

¹⁴ One hundred forty apartments is the figure that was used by expansion opponents. Columbia, however, claimed that it would directly eliminate only one hundred thirty two residential units. See Final EIS. The small businesses were estimated to have about 1200 employees. See, e.g., Bob Roberts, *Open University, City Limits*, Dec. 2004.

¹⁵ See Final EIS, Ch. 22.

¹⁶ Final EIS Ch. 22.

¹⁷ Final EIS Ch. 22.

¹⁸ See Final FEIS Chapter 1.

¹⁹ Although in the course of the public process evaluating the proposal, there were clarifications of how much TIL tenants were impacted. In its final Environmental Impact statement, Columbia reported that although previous estimates were that 84 residents were participating in city's TIL program, that estimate was erroneous. In fact, 11 of the 38 city run units were not currently participating in the TIL program." Final EIS Ch. 4.

²⁰ Foster and Glick, *Integrative Lawyering*, supra, at 2013.

Though it promised to find the tenants “comparable” housing nearby, these tenants were excluded from the negotiations and skeptical of the outcome.²⁰

3. Social, Cultural and Economic Impacts

With much of Central Harlem already gentrifying, housing demand from Columbia students and staff, other middle-upper income people, and bio-tech businesses attracted by access to the University threatened substantial “secondary displacement” by driving nearby rents well beyond the means of the working poor Dominican and African American households living near the proposed expansion site.²¹

In 2008, the United States Census found that for the first time since the 1930’s, less than half of Harlem residents were black, and black residents only counted for 40% of the population.²² While this cannot be solely attributed to Columbia, it is clear that the racial makeup of the area is changing and to say that the University’s expansion has nothing to do with this change is to turn a blind eye to the impact it would, and is, having on Harlem.

Jobs and local small businesses were also at issue. A number of businesses and social agencies would be displaced. The University estimated that twelve hundred workers would be affected, but argued that many would remain employed at new locations and that the expansion would create far more jobs than it eliminated.²³ Community activists, however, questioned how many and what types of new jobs would really be available to local residents. Indeed, to date various local restaurants have also been forced to relocate.²⁴

II. THE LEGAL AND REGULATORY FRAMEWORK

At the local municipal level, the expansion plan moved through the city government’s environmental and land use review processes. The land review process ensures that the developer’s application for approval of the project is complete and technically accurate. The environmental review’s purpose is to disclose and analyze potential impacts that the development proposal may trigger. Combined, both processes ensure a thorough review of the impacts of project approval on the neighborhood, on various stakeholders, and on the overall urban environment.

Upon completion of these two reviews, the public review of the application begins. These processes provided opportunities for public hearings, written comments, and an opportunity to mitigate the impacts of the proposed expansion plan. As such,

various stakeholders as well as organized community interests directly impacted by the plan are provided an opportunity for education, advocacy, and bargaining.

At the same time that these local administrative processes were proceeding, Columbia initiated New York State’s process for exercising its power of eminent domain—the constitutional power that entitles state and local governments to “take” private property for a public purpose. Alongside these two formal legal procedures, the community and Columbia also prepared to negotiate a community benefit agreement (CBA). What happened on one level could affect dynamics on other levels.

A. The Land Use Review Process (ULURP)

To move forward with even the first phase of its planned expansion, Columbia needed the entire area to be re-zoned to allow increased density and “academic mixed use.” In New York City, re-zoning, like many other major municipal land use decisions, requires approval through the City Charter’s Urban Land Use Review Procedure (ULURP).²⁵ Key participants in the ULURP process are the Department of City Planning (DCP) and the City Planning Commission (CPC), the relevant Community Board (CB), the Borough President (BP), the Borough Board (BB), the City Council (Council) and the Mayor.

The ULURP process entails the following steps: the filing of an application, certification, community board review, borough president review, CPC review, City Council review, and finally mayoral review.²⁶ The procedure begins with an application to, and pre-certification by, the DCP. While this step has no specified time limit, applicants may appeal to CPC for certification after six months.²⁷ After this initial step the community board notifies the public, holds hearings, submits recommendations to CPC. This second step takes 60 days. The application then goes to the borough president and borough board, wherein both have 30 days to act on the application, and to hold a public hearing if desired. This brings the ULURP process up to 90 days. After review by the BP and BB, the CPC holds a public hearing, approves or disapproves applications, this step also takes 60 days.

In total, the ULURP process takes at least 150 days before CPC approval. At this stage city council also has the opportunity to review the application for 50 days. If the council does not act, the CPC decision is final. After City Council review, the application is then passed to the Mayor who has 5 days to act on Council approval. If this happens, The Mayor sends it back to the city council, which has 10 days to override the mayor’s action (e.g. veto) by a 2/3 vote.

²¹ See also Robin Pogrebin, A Man About Town, In Glass and Steel, N.Y. Times, Jan. 5, 2005, at E1; David Osborne, Welcome to Harlem, NYC; Ten Years Ago It Was the No-Hope Ghetto—Now Everybody Wants a Piece of It, The Indep. (London), Feb. 13, 2000, at 1

²² See Sam Roberts, No Longer The Majority Black, Harlem Is in Transition, N.Y. Times, Jan. 5, 2010

²³ See Final EIS Chpt 22.

²⁴ Relocation of Local Church Provides More Space to Grow, Columbia University, Manhattanville, News, April 7, 2010 available at: <http://manhattanville.columbia.edu/news/relocation-local-church-provides-more-space-grow>; New Homre, Same Dinosaur: Popular West Harlem, Restaurant Moves to West 125th Street, Columbia University Facilities, News & Announcements, available at: <http://facilities.columbia.edu/new-home-same-dinosaur-popular-west-harlem-restaurant-moves-west-125th-street/> (“The restaurant’s relocation is part of the University’s extensive effort to help organizations and businesses in Manhattanville find alternative or improved space within the local community.”); Floridita Displaced by Columbia’s Manhattanville Expansion Reopens, Hamilton Heights Sugar Hill, West Harlem, News, available at: <http://westharlemcpo.org/news/floridita-displaced-by-columbias-manhattanville-expansion-reopens/>

²⁵ See N.Y. City, N.Y., City Charter § 197-c.

²⁶ The ULURP process is outlined on the city’s website. NYC Planning, Applicant Portal, Application Process Overview, available at: <http://www1.nyc.gov/site/planning/applicants/applicant-portal/application-process.page>

²⁷ NYC ULURP Chart <https://www1.nyc.gov/assets/planning/download/pdf/applicants/applicant-portal/lur.pdf>

²⁸ See N.Y. City, N.Y., City Charter § 192-e; 62 R.C.N.Y. § 5-01 (describing the rules of procedure for City Environmental Quality Review (CEQR)); Cyane Gresham, Note, Improving Public Trust Protections of Municipal Parkland in New York, 13 Fordham Envtl. L.J. 259, 285-86 (2002) (explaining that where a ULURP application is necessary, it “will not go through without the necessary environmental review,” which, in the New York City, is CEQR).

B. The Environmental Impact Assessment Review Process

Before starting ULURP, a proposal of any significant potential environmental impact must first move well along in the City Environmental Quality Review (CEQR) process.²⁸ The CEQR process is a local implementation of the State of New York's environmental impact assessment process. The state process, contained in the NY State Environmental Quality Review Act (SEQRA), is designed to incorporate the consideration of environmental factors into the existing planning review and decision making processes of state, regional and local government agencies at the earliest possible time. Although, the statute is clear that "it is not the intention of SEQRA that environmental factors be the sole consideration in decision making."²⁹

At various points in the process, individuals and groups are allowed to submit written comments after public hearings on both the draft scope (scoping document) of the project's impact and the draft of the environmental impact statement (EIS) itself. The project sponsor, Columbia, then must respond in writing to each comment and these comments can influence local officials as well as increase disclosure of the impacts of the project.

1. The State and City Environmental Review Processes

There are three types of actions that start SEQRA/CEQR inquiry—type I, type II, and unlisted actions.³⁰ Type I activities are those that will have a significant impact on the environment and require completion of a long "environmental impact assessment form" (EAF) which is evaluated by the lead agency to determine if a full environmental impact assessment statement (EIS) is required. Type II activities are pre-determined to not have a significant impact on the environment.³¹ Environmental impact statements are required when it is determined the existence of adverse impacts which will be significant enough to warrant a heightened level of analysis, or closer look.³² If there is a finding of "no adverse" impacts or no "significant" adverse impacts, then there is no need to prepare an EIS.

Under SEQRA/CEQR, most discretionary land use actions considered by the City Planning Commission (CPC) are subject to the full environmental impact assessment process. That is, they require a full EIS and a process with public input and mitigation measures. In implementing the SEQRA/CEQR process, City agencies are thus required to "assess, disclose, and mitigate to the greatest extent practicable the significant environmental consequences of their decision to fund, directly undertake, or approve a project."³³

2. Opportunities for Public Participation

The environmental review process involves a number of steps, which allow for public review and comment, and are synchronized with the ULURP timetable. Combined, the ULURP and the SEQRA/CEQR processes offer several opportunities for community input and for legal intervention.

Public hearings, with opportunity to submit written comments, occur at various junctures. These start early on with a DCP hearing in the community on the developer's draft scope of its Environmental Impact Statement (EIS). Subsequent public hearings are held at several stages of ULURP, which starts when the City Planning Commission (CPC) certifies that the developer's draft EIS is ready for public release (in that it includes adequate disclosure of risks from the project and adequate plans to mitigate those risks). The community board then has 60 days to hold hearings and render an advisory opinion.

The process repeats, with shorter and longer time limits, at the Borough President's office, the CPC, and the City Council. The Council and Mayor (who holds no hearings) have ultimate authority to approve or reject the process. Though much of the testimony and comments focus on the overall project plan, the vote is on the specific proposal triggering ULURP—in this case, the University's application to re-zone West Harlem to accommodate its expansion plan—and both the CPC and the Council have authority to amend that proposal.

3. The Potential for (and Limits of) Community Leverage

Given the opportunities for public comment and input, it was possible for community groups and neighbors concerned about Columbia's expansion plans to obtain some leverage through this process to bargain with the city and the University to mitigate impacts. However, it is highly unlikely that these land use review processes can be utilized to stop the project all together for a number of reasons. First, the courts will not consider a legal challenge to the proposal until the entire process is completed, including the issuance of the final EIS (which occurs shortly before the final phase of the ULURP process). By that point, the project is a *fait accompli*.

Second, even when a legal challenge is brought, courts will not second-guess approval of a land use proposal, or the approval of a an EIS, so long as the reviewing government body (here the city) provides a "reasonable basis" for its conclusion. In other words, courts give considerable deference to the final judgment of the reviewing agency or official decision maker.

Finally, Columbia, as a nonprofit institution, was in a position to wait for the process to play itself out, and to withstand any delays that result from public opposition, without hemorrhaging money. The threat of delay was not so serious for Columbia,

²⁸ 6 NYCRR § 617.1 (c).

²⁹ 6 NYCRR § 617.4, 617.5, 617.6

³⁰ Unlisted activities either don't exceed the threshold for type I actions (significant impact), or are not classified as either Type I or Type II activities.

³¹ 6 NYCRR § 617.7(a). "To require an EIS for a proposed action the lead agency must determine that the action may include the potential for at least one significant adverse environmental impact. . . . To determine that an EIS will not be required for an action , the lead agency must determine that either there will be no adverse environmental impacts or that the identified adverse environmental impacts will not be significant."

³² NYC, CEQR Technical Manual, March 2014, at 67.

as it would be for a for-profit developer seeking to build in the City. In fact, because of its proposed expansion, it was likely able to attract more money from its alumni and other private donors invested in strengthening the reputation of the University through this expansion.

C. Eminent Domain

1. Condemning Private Property

As Columbia moved slowly through the municipal land use review process, it simultaneously contracted with New York State’s Empire State Development Corporation (ESDC) to trigger the agency’s powers to “take” private property, against the wishes of the landowners, in support of the University’s expansion. The Fifth Amendment to the U.S. Constitution gives states (and by extension, local governments) the power to expropriate private property so long as it furthers a “public use” and the state pays “just compensation” to the property owner (usually the fair market value of the property). This is referred to as the state’s eminent domain power. The power of eminent domain is not limited to the government; private entities can also use eminent domain if allowed by the law and if used for a project deemed to be for public use.

The University needed to invoke the legal process of “condemnation” in order to exercise the state’s eminent domain power to acquire any properties it could not purchase on the open market, because the owners refused to sell. This process, to obtain eminent domain authority, provided an additional opportunity for community participation and Community Board comment at the separate public hearings ESDC must hold before approving the “general project plan” for any development that it assists by invoking its eminent domain power.³⁴

Under a quirk of New York law, the University also needed to use eminent domain to acquire full title to the physical infrastructure/area under the prospective site for a major part of its new campus. Specifically, Columbia’s draft EIS discussed the potential use of eminent domain to acquire the land from holdouts and the land under the streets for the underground part of their campus.³⁵

2. The Scope of Public Use

Some months after Columbia contracted with the State agency, ESDC, the Supreme

Court of the United States ruled in *Kelo v. City of New London*³⁶ that the power of eminent domain can be used to seize private property for transfer to developers for purely economic development purposes. Previous Supreme Courts cases interpreting the Fifth Amendment’s taking clause had upheld the use of eminent domain mostly in cases where property was acquired for public infrastructure (such as roads or railroads) or when property was located in an area deemed “blighted” (such as urban slums). *Kelo*’s expansive interpretation of “public use” to include taking of private property for economic development projects proved highly controversial and ignited a firestorm of public opposition to the use (or abuse) of eminent domain by cities and localities.³⁷

Federal constitutional law is simply a floor of constitutional protection, above which individual states can go to protect fundamental rights—including private property rights. Thus, in the wake of *Kelo*, many states passed laws making clear that private property within their borders could not be taken strictly for economic development projects.

However, there was no post-*Kelo* groundswell of opposition in New York, and no major legislative effort to restrict eminent domain by outlawing economic development takings in the state. It would also be difficult to appeal to state lawmakers to change the law in New York State, as other states had done to limit the reach of *Kelo*. Recent efforts in other parts of the City to stop the State from using eminent domain on behalf of private developers had fallen flat.³⁸ Nor did New York state courts offer any better prospect of success under the State constitution.³⁹

As such, under *Kelo*, any chance of stopping Columbia’s use of eminent domain would likely fail in federal court.⁴⁰ Moreover, the University’s strong support among City and State political, economic and cultural elites made it highly unlikely those leaders would seriously consider blocking Columbia’s expansion by withholding the State’s power of eminent domain.

D. Bargaining with Developers

1. Extracting Public Benefits

Given that neither the City Planning Commission (CPC) nor the City Council seemed inclined to block Columbia’s rezoning proposal, a major community effort could persuade them to exercise their City Charter authority to “approve with modifications” the project.⁴¹ Under New York City’s interpretation of the U.S. Supreme Court’s

³⁴ See N.Y. Em. Dom. Proc. Law § 201 (describing the necessity of public hearings in the eminent domain process).

³⁵ Columbia can acquire the land under the streets from the city only if that land ceases to be used as a public space. See N.Y. City, N.Y., City Charter § 383 (“The rights of the city in and to its . . . streets, avenues, highways, . . . and all other public places are hereby declared to be inalienable; but upon the closing or discontinuance of any street, avenue, . . . or other public place, the property may be sold or otherwise disposed of as may be provided by law. . . . Nothing herein contained shall prevent the granting of franchises, permits, and licenses in respect to inalienable property.”); N.Y. Gen. City Law § 20(2) (“Subject to the constitution and general laws of this state, every city is empowered . . . to acquire real and personal property within the limits of the city, for any public or municipal purpose, and to sell and convey the same, but the rights of a city in and to its waterfront, ferries, bridges, wharf property, land under water, public landings, wharves, docks, streets, avenues, parks, and all other public places, are hereby declared to be inalienable, except in the cases provided for by subdivision seven of this section.”) (emphasis added).

³⁶ 545 U.S. 469 (2005)

³⁷ See e.g. Marc Milhaly and Turner Smith, *Kelo’s Trail: A Survey of State and Federal Legislative and Judicial Activity Five Years Later*, 38 Ecology Law Quarterly 703 (2011)

³⁸ See Charles V. Bagli and Robin Shulman, *Transforming Bronx Terminal Market, But At a Steep Price*, N.Y. Times, Oct. 24, 2005, at B1 (describing opposition to the Bronx Terminal Market plan); Nicholas Confessore, *Another Step For Downtown Brooklyn Project*, N.Y. Times, Dec. 16, 2005, at B10 (describing opposition to Atlantic Yards plan).

³⁹ See Giovanna D’Orazio, Comment, *Taking Private Property to Build an Urban Sports Arena: A Valid Exercise of Eminent Domain Powers?*, 69 Alb. L. Rev. 1135, 1136-44 (2006) (describing New York state law allowing the taking of private property for public purposes or benefit rather than public use).

⁴⁰ For this project, Columbia invoked both the classic justification of “blight,” see *Berman v. Parker*, 348 U.S. 26 (1954), and an expansive version of the alternative justification accepted in *Kelo*. Columbia’s expansion offers not only economic development (within and near the site, and for the City as a whole), which satisfied the Court in *Kelo*, but also improvement of the City’s cultural, education, intellectual and scientific life. The University’s September 2006 draft submission to ESDC, obtained by the Columbia Spectator under the NYS Freedom of Information Law, makes both arguments: that the area is blighted and that Columbia’s planned use is a “civic project.” See *Manhattanville in West Harlem: Land Use Improvement and Civic Project General Project Plan*, Columbia University (Sept. 2006) (on file with authors); see also Erin Durkin & Anna Phillips, *Draft Plan Provides for Eminent Domain*, Colum. Daily Spectator, Jan. 31, 2007, at A1.

decision in *Nollan v. California Coastal Commission*,⁴² the City can impose only those requirements or modifications that can reasonably be viewed as addressing needs directly created by the project.⁴³ Project modifications beyond those with a “reasonable nexus” to the public impact of the proposed project and those “roughly proportional to the size of the project impact” would be unconstitutional under the Supreme Court’s opinion in *Nollan* and its companion case *Dolan v. City of Tigard*⁴⁴ (“the *Nollan/Dolan* standard”).

The *Nollan/Dolan* standard allows a great deal of leeway for the city to extract from project developers a number of concessions or conditions before project approval (again, so long as those conditions have a reasonable nexus to the project and are proportional to the project impacts). For example, the CPC or Council could reduce building height limits, prohibit certain types of bio-research, require enhanced public transit, and increase environmental and public health safeguards. Most significantly, the report that the City Law Department invokes to guide City action under *Nollan* expressly authorizes measures “needed to deal with ‘secondary displacement’” caused by a project.⁴⁵

2. Community Benefit Agreements

Another legal tool that all parties were aware of once Columbia introduced its expansion proposal was the use of Community Benefit Agreements (CBAs) in highly contested urban development projects in other American cities. Pioneered in Los Angeles at the start of this century, CBAs stand outside of the normal government process as private, legally binding contracts between community groups and developers.⁴⁶ It has become “standard practice” in cities around the country for developers of major projects to negotiate with neighborhood and other groups to negotiate these CBAs.

CBAs are contracts that “almost always contain wage and hiring goals and may also include a grab bag of concessions, like a day care center, a new park, free tickets to sports events and cash outlays to be administered by the groups themselves.”⁴⁷ City officials often play important background roles in the bargaining process, and the City is sometimes made an additional party to strengthen capacity to monitor and enforce compliance.

A CBA could pin down Columbia’s promises and commit it to specific measures to mitigate secondary displacement and other harms from its expansion. Beyond that, a CBA could require the University to provide substantial funds, resources and staff for better schools, health centers, and other urgently needed community services and facilities. These could be viewed as compensation (or even reparation) for the University’s annexation of an area that might otherwise have been developed

to the greater benefit of the surrounding communities, especially since the area’s prospects were beginning to pick up with the coming of the food market, two new restaurants and the waterfront park along with the economic development of nearby Central Harlem.

III. THE COMPETING INTERESTS AND STAKEHOLDERS

There were a number of local and state interests with an important, or potentially important, stake in the process and outcome of Columbia’s proposed expansion. Among the relevant stakeholders, the City administration, the City Council, and possibly a New York State agency would all have to cooperate in and approve Columbia’s expansion. Within West Harlem, the local community board, local elected officials, and an array of other community interests were mobilizing to intervene in the development process. This section briefly discusses each of these stakeholders in turn.

A. The Mayor and City Administration

Then Mayor Michael Bloomberg dealt with development largely through his powerful Deputy Mayor for Development, Daniel Doctoroff. Doctoroff oversaw the Department of City Planning (DCP) and other municipal agencies which deal with land use and development. He also helped the Mayor pick the majority of the City Planning Commission (CPC), including its chair.⁴⁸ Columbia’s expansion fit well with Bloomberg and Doctoroff’s articulated vision for the City.⁴⁹ Importantly, neither man, both of whom came from the private sector before entering city government, viewed manufacturing as an engine of economic growth. They were committed to increasing the City’s affordable housing supply, but mostly outside of Manhattan. They seemed comfortable with exiling the City’s working class and poor from Manhattan and reserving the island’s more costly land for corporate and financial offices, museums, universities, medical, bio-tech and related research facilities, cultural institutions, and high-end hotels restaurants and residences.

While Columbia could expect its plans to receive a generally warm reception from the City administration, their interests were not precisely aligned. The Mayor sought to ensure that the resentment of Columbia’s expansion would not rub off on him in Harlem or in the uptown Dominican community.⁵⁰ To that end, his administration would push for—and maybe help fashion and fund—a “community benefits agreement” (CBA) designed to secure social peace. DCP technocrats might also negotiate marginal improvements, and the CPC might impose some limited modifications, within parameters set by Bloomberg and Doctoroff.

⁴¹ N.Y. City, N.Y., City Charter §§ 197-c(h), 197-d(c)

⁴² 483 U.S. 825 (1987).

⁴³ The City Law Department relies upon *The Role of Amenities in the Land Use Process*, Special Comm. of the Ass’n of Bar of N.Y. City (1988), available at <http://www.abcnyc.org/pdf/report/RoleofAmenitiesintheLandUseProcess.pdf>

⁴⁴ 512 U.S. 374 (1994)

⁴⁵ *Id.* at 30.

⁴⁶ See, e.g., Julian Gross, with Greg LeRoy and Madeline Janis-Aparicio, *Good Jobs First, Community Benefits Agreements: Making Development Projects Accountable* 9 (2005), available at <http://www.goodjobsfirst.org/sites/default/files/docs/pdf/cba2005final.pdf>

⁴⁷ See Terry Pristin, *Square Feet: In Major Projects, Agreeing Not to Disagree*, N.Y. Times, June 14, 2006, at C6.

⁴⁸ The Mayor appoints the chair (who also directs the DCP) and six members. The five elected borough presidents each select one member, as does the elected city-wide “Public Advocate,” a kind of ombudsperson. See N.Y. City, N.Y., City Charter § 192(a).

⁴⁹ See Adam Brodsky, *Gotham Gets Grand*, N.Y. Post, May 16, 2004, at 29 (“And now—because Deputy Mayor Dan Doctoroff fantasizes about hosting the Olympics and Mayor Mike needs a legacy—[New York] is headed for hyper-change with a dazzling array of giant new projects. If even a fraction get built, it’ll be hard to recognize much of the city in 10 or 20 years.”); Jonathan Mahler, *The Bloomberg Vista*, N.Y. Times, Sept. 10, 2006, § 6, at 66 (“[T]o continue to grow, the city was going to have to undergo a period of hyperactive development.”); Sam Roberts, *Wave of Development, Cleared for Takeoff*, N.Y. Times, Jan. 1, 2007, at B3 (describing the mayor’s plans to initiate growth and development in a number of fora, including subway expansions, the Atlantic Yards complex, and low-income housing, as having a “pro-growth, long-range theme”) (quoting Robert D. Yaro, the president of the Regional Plan Association).

B. The City Council

In addition to the mayor's office, the Columbia expansion plan also implicated the City Council. If the City Council views a project as essentially local, it routinely accedes to the wishes of the neighborhood or area's Council member. In this case, the City Council member for West Harlem, Robert Jackson, had initially endorsed the expansion, but he pulled back in response to community opposition.⁵¹ If the Council, however, viewed Columbia's expansion to be of City-wide significance, its response would depend upon the stance of the Council speaker and the intensity of pressure from the Mayor's office.

The Council had recently approved, over the vehement opposition of a local Council member (and other local elected officials), a proposal, heavily promoted by Bloomberg and Doctoroff, to level residential neighborhoods to build a Football/Olympic stadium and large, upscale office and apartment buildings on the west side of mid-town Manhattan.⁵² With West Harlem's council member not even in opposition, there was no indication that the Council would resist Columbia's plan to displace mainly low-end small businesses in order to build world-class research, educational, and cultural facilities. Still, major public protest in Harlem and uptown or strong opposition from Black and Latino Council members might lead the Council to seek some trade-offs or impose some modifications.

C. The State Government

Columbia also would need cooperation (mainly to exercise the state's eminent domain power) from the New York State Empire State Development Corporation (ESDC), governed by a board that is controlled by New York State Governor (at the time Elliot Spitzer).⁵³ Then Governor Spitzer, the scion of a wealthy real estate family, was expected to be friendly to the expansion plan and to Columbia's interests more generally. At the same time, however, Spitzer had built his reputation on exposing and fighting corporate abuse and had campaigned as a strong proponent of affordable housing.⁵⁴

Moreover, his Lieutenant Governor, David Patterson, had long served as State Senator from West and Central Harlem, where he had been a vocal critic of gentrification. While not likely to block expansion altogether, the State administration under Spitzer and Patterson was expected to press Columbia to provide affordable housing and otherwise address the problem of secondary displacement.

ESDC action in support of Columbia's expansion might require approval from the State's Public Authorities Control Board (PACB), which includes a representative of the Governor, State Senate Majority Leader, and State Assembly Speaker and can act only with their unanimous agreement.⁵⁵ It was the Speaker's refusal to approve State funding that stopped the Football/Olympic stadium project after the City Council, Mayor, and ESDC had all approved it.⁵⁶ However, Since neither the considerations said to underlie that veto nor any others seemed to apply in Columbia's case, there was no reason to anticipate trouble from the PACB.

D. Other Elected Officials

In addition to Robert Jackson, eight other elected officials represented at the time some part of West Harlem. One of those, the recently elected Manhattan Borough President Scott Stringer, appoints Manhattan community boards and has an advisory role in the City's land use review process. Although Stringer is a liberal Democrat and had no vote in the land review process he seemed to lack the political clout to make a significant impact on Columbia's plan.

Foremost among the local elected officials is Upper Manhattan's representative in the U.S. Congress, Charles Rangel. As Harlem's acknowledged political leader and chair of the U.S. House Ways and Means Committee, which controls funding important to Columbia and the City and State governments, Rangel wields great influence. Consequently, no one wants to cross him.

Soon after Columbia disclosed its plans, Rangel told community activists that he and Jackson would spearhead a community bargaining process with Columbia. At the first meeting between Columbia and community representatives, Rangel insisted that he and other Harlem elected officials have a major role in any negotiation between Columbia and the community.⁵⁷ His and other officials' goals and plans, however, remained a mystery, though they did obtain seats on the Local Development Corporation (LDC) formed to negotiate a CBA and some provided the LDC with helpful staff support.

E. The Community Board

New York City established Community Boards as part of liberal efforts to address the upheavals of the 1960s through decentralization and opportunity for grassroots

⁵⁰ James Traub, Bloomberg's City, N.Y. Times, Oct. 2, 2005, § 6 (Magazine), at 21 (describing the mayor's effort to gain support in Harlem).

⁵¹ In subsequent public discussions of Columbia's expansion, he urged the University and community to "reach a consensus" so he would not have "to vote on this particular matter." Dalton Walker, Columbia Rules Out Evictions in Expansion Plan, N.Y. Times July 23, 2007 at B2.

⁵² See Charles V. Bagli, The Jets Miss a Deadline For a West Side Property, N.Y. Times, July 23, 2005, at B3 (discussing the proposed complex); Mike McIntire & Jim Rutenberg, After Stadium Bid Fails, a Disheartened Bloomberg Worries for City, N.Y. Times, June 8, 2005, at B6 (discussing the failure of the plan).

⁵³ The Empire State Development Corporation is the umbrella organization for the Urban Development Corporation, which is its biggest component and which handles mostly publicly oriented companies. The ESDC was created by the Urban Development Corporation Act, passed initially in 1968, and amended in 1975. This Act states that the nine directors of the corporation are to be the superintendent of banks (appointed by the Governor) the chairman of the New York State science and technology foundation, and seven directors to be appointed by the governor with the advice and consent of the state senate. The governor is to choose the chairman and two others, who serve at his pleasure, and the four remaining are to serve terms of four years each from their appointment (and these directors may be removed by the governor only for cause). The governor may also appoint a president of the corporation with the advice and consent of the state senate who shall serve at the pleasure of the governor, and he has the power to "appoint a business advisory council for urban development, to advise and make recommendations to the corporation with respect to development policies and programs and to encourage maximum participation in projects of the corporation by the private sector of the economy." McKinney Unconsolidated Laws § 6254 (2000).

⁵⁴ See Charles V. Bagli, Spitzer Signals Desire to Keep Starrett City Affordable to the Middle Class, N.Y. Times, Feb. 2, 2007, at B1 [hereinafter Bagli, Spitzer Signals Desire]; Christopher Grimes & David Wighton, The "People's Lawyer" Who Took on Big Business and Is Now Wooing the Voters, Fin. Times (London), Dec. 24, 2004, at 11 (discussing Spitzer's wranglings with big corporations and executives).

⁵⁵ Section 51 of the New York Public Authorities Law requires PACB "approval of the financing and construction of any project proposed by . . . [the] New York state urban development corporation [the Empire State Development Corporation]." N.Y. Pub. Auth. Law § 51 (McKinney 2004). Columbia had indicated that it interprets Section 51 as requiring PACB approval for ESDC cooperation even though it seeks no state assistance in financing or construction of its expansion.

⁵⁶ See Mike McIntire & Jim Rutenberg, After Stadium Bid Fails, A Disheartened Bloomberg Worries for City, N.Y. Times, June 8, 2005 at B6.

participation in municipal decision-making.⁵⁸ Appointed by each Borough President (from Manhattan, Brooklyn, Bronx, Queens, Staten Island) in consultation with local City Council members, and provided with modest City-funded staff and office space, the fifty-member boards serve as the official voices of their communities. They have a formal advisory and public hearing role in the City's land use regulatory process (described below) and the right to propose a local master plan with official advisory status if adopted by the City Planning Commission (CPC) and City Council.⁵⁹

The City is divided into fifty-nine (59) community districts, each with a population of roughly one hundred thousand. Manhattan Community District 9 (CB9), which encompasses Columbia's expansion site, is more or less equally divided among African Americans on the east and northeast, Dominicans to the north, and Whites to the south, yielding an ethnically fragmented district with a divided and relatively weak community board. The Black population in District 9, moreover, is split along class lines between low-income tenants in the public housing projects and well-off owners of high-end brownstones and river view condominiums.

Over the years, the better off and more politically connected Black professional and business people have predominated on the Board, along with white property owners and the white graduate students concentrated in the southern end of the district near Columbia's main campus. At the time that Columbia proposed its expansion plan, and through the approval process for the plan, the Manhattan Community Board included only two representatives of the growing, mainly working poor Dominican community that is the most vulnerable to gentrification.⁶⁰

Despite its varied demographic base, District 9's community board (CB9) had labored for years to put together its own unified master plan for the area. The West Harlem section of CB9's plan calls for mixed light manufacturing, commercial and affordable residential use plus waterfront development, improved schools and services, a CBA with any outside developer, and no eminent domain.⁶¹ Pursuant to these guidelines, Columbia could expand piecemeal on the land and buildings it already owned, but would be unable to construct an integrated new campus with anywhere near the capacity and facilities it claimed to need. CB9 was committed to fighting for its vision of neighborhood development.

F. Other Community Players

In addition to the formal community voice channeled through the community board, an array of community groups within and around CB9 actively responded to

Columbia's planned expansion. The main community group which represented the low-income, ethnic minority communities most impacted by the proposal was the West Harlem Environmental Action (WE ACT). WE ACT was thrust into the center of the development proposal given its long history of work in the community and its ability to influence local elected officials.

WE ACT had established its reputation by building community power to improve environmental protection, health policy, and quality of life in African American and Latino/a communities. Its main focus for many years had been the location of environmental hazards, especially the concentration in Northern Manhattan of asthma- and cancer-inducing diesel bus depots.⁶² It also led successful efforts to have New York State's Department of Conservation adopt an agency-wide environmental justice policy.⁶³ In the process, WE ACT had grown to a full-time paid staff of fourteen and developed a sophisticated "inside-outside" strategy involving work with elected officials, foundations, and Columbia University public health researchers as well as community residents and activists. Gaining national and even global prominence, WE ACT began to expand its vision of environmental justice to encompass sustainable and equitable development.⁶⁴

Economically well-off, White commercial property owners formed the "West Harlem Business Group" and retained a prominent liberal lawyer to stop Columbia from using eminent domain. Largely White, anti-gentrification activists who had long battled with the University over land use organized against this latest expansion through a new "Coalition to Preserve Community." The remaining TIL tenants fought to save their buildings or, at the very least, stay together nearby in other buildings that they could cooperatively own through the same City program. The uptown Hispanic, Dominican political leadership, including Manhattan Community Board 12, the site of Columbia's medical campus, offered to join forces to bargain with Columbia over its expansion plans in both areas, but CB9 leaders rebuffed these offers.

IV. THE COLUMBIA EXPANSION PROJECT PROCESS AND APPROVAL

The local community board, CB9, unsuccessfully sought to have the City Planning Commission (CPC) approve its own master plan for the community first and to disqualify any part of Columbia's plan that conflicted with the community board's plan. Instead the CPC agreed to certify the two plans simultaneously, so that the

⁵⁷ Foster and Glick, *Integrative Lawyering*, supra, at 2032.

⁵⁸ Community boards were established by the New York City Charter. See N.Y. City, N.Y., City Charter § 2800. Amy Widman, *Replacing Politics With Democracy: A Proposal for Community Planning in New York City and Beyond*, 11 J.L. & Pol'y 135, 144 (2002).

⁵⁹ See N.Y. City, N.Y., City Charter § 197-a. This is known as a "197-a Plan," named after the city charter section that authorizes a community board to propose such a plan for adoption by the City Planning Commission and City Council as an advisory guideline for future development of the area. Community boards or others who propose any such plan "shall submit the plan together with a written recommendation to the city planning commission for determinations" after a public hearing. Id. The City Planning Commission is then to determine whether it approves the plan and, if so, is to prepare the environmental analysis for the plan. See N.Y. City, N.Y., City Charter § 197(b). Whenever a plan is proposed that would affect a particular community board, the plan must be referred to those community boards, and then a public hearing is to be held. See id. § 197(c). The approval of the community boards, or lack thereof, does not actually regulate development—it is seen as a form of advisory opinion.

⁶⁰ Dominicans have moved south from uptown to occupy most of the area due north of the expansion site, including many units of the formerly state subsidized Riverside Park Community Houses. They live mostly in rental units, many in buildings too small to be protected under New York's rent regulation laws. See N.Y. Comp. Codes R. & Regs. tit. 9 § 2100.2(f). The other neighborhoods surrounding the expansion site are not at serious risk for secondary displacement. Due east and south east of the expansion site are federal low-income public housing projects which will remain. To the northeast and northwest are expensive homeowner brownstones and riverfront condos. To the south are housing and facilities largely owned by Columbia and other institutions; for example, Union Theological Seminary, the Riverside Church, and The Jewish Theological Seminary. See Columbia Final EIS, Ch. 10.

⁶¹ See Community Board 9 197-a Plan, Pratt Inst. Ctr. For Cmty. & Envtl. Dev. (June 17, 2005).

⁶² See Michael Specter, *Harlem Groups File Suit to Fight Sewage Odors*, N.Y. Times, June 22, 1992, at B3; WE ACT, WE ACT History, <http://www.WEACT.org/history.html>

⁶³ See Erin M. Crotty, *Comm'r, N.Y. Dep't of Envtl. Conservation, Commissioner Policy 29: Environmental Justice and Permitting*, (Mar. 19, 2003), <http://www.dec.ny.gov/regulations/36951.html>

⁶⁴ When the only remaining accessible section of Harlem's Hudson River waterfront was slated in the late 1990s for development into high-end condos and hotels, WE ACT initiated a "community visioning" process and political campaign that saved the area for community recreational and educational use. It continued to lead community efforts to monitor and facilitate public development of the waterfront park, including piers into the Hudson and closing of an adjacent street. See *West Harlem: Master Plan Toward a New Waterfront—125th St. to 137th St., Broadway to the River*, W. Harlem Plan Update (N.Y. City Econ. Dev. Corp.), Summer 2002, http://neighbors.columbia.edu/pages/manplanning/pdf-files/Harlem_Piers.pdf

community board's plan would be taken into consideration, though not necessarily followed, by CPC and the City Council in their deliberations over Columbia's rezoning proposal.⁶⁵

CPC certified both Columbia's and CB9's plans on June 18, 2007. West Harlem activists protested that the University and City were trying to slip Columbia's plan through during summer months when many people are on vacation and the community board does not regularly meet.⁶⁶ The Board quickly approved its own plan and scheduled a public hearing on Columbia's proposal for August 15, 2007.

Community advocates and their legal team explored several modes of intervention in this ULURP process, ranging from written comments and litigation to community education, organizing, testimony, lobbying, and other efforts to put pressure on decision makers.⁶⁷

A. Public Testimony and Comments

The main obstacle to CPC or City Council modification of Columbia's plan was not legal authority but political will. The CPC commissioners were political appointees, though some had years left on their terms and histories that suggested potential for sympathy with the community's needs. They and most City Council members harbored grander political ambitions leaving them loathe to step out of line. To have any chance of winning real gains in the ULURP processes, community residents would have to mobilize to wield political power. Towards that end, the main community group leading the effort was WE ACT, the environmental justice organization mentioned earlier.

WE ACT's organizing, program and legal teams launched an ambitious program of community education, organizing and action. They encouraged and helped residents to take maximum advantage of opportunities for public participation in ULURP hearings. They also proposed a "lobbying" campaign via postcards, faxes, emails, letters, personal visits, and—if need be—other potentially more media-attracting, creative and confrontational modes of dialogue. The goal was to deepen residents' understanding of the multi-level decision processes, to prepare them to intervene in ULURP through testimony, written comments, a postcard campaign, and other direct efforts to influence key decision makers, and to elicit their CBA suggestions and encourage their involvement in formulating the community's CBA platform.

The public hearing on the draft scope of Columbia's EIS in mid-November 2005 offered the first official forum for the community to express its views on Columbia's expansion plans. Subsequent ULURP hearings, including on the Draft EIS, offered other opportunities. WE ACT devoted major legal resources to these events. They and their legal team prepared bi-lingual community handouts on the ULURP and CEQR procedures, CBAs, examples of what other universities had done for adjacent

communities, and the main issues raised by Columbia's plan, including housing, jobs, and the environment.

WE ACT organizing staff set up pre-hearing workshops in the African-American and Dominican neighborhoods near the site to help residents understand the multi-level processes and prepare to testify at the hearing. More than eighty residents, plus local elected officials, WE ACT staff, other community activists and even some Columbia students offered testimony critical of the expansion plan. The hearings dragged on for hours, with Columbia and elected officials allowed to speak first, while residents who had waited patiently were allowed only three minutes apiece before being cut off curtly, and many had to leave before they had the opportunity to speak.

B. The Final Impact Assessment Statement and Mitigation Measures

In the end, WE ACT was able to shape the contents of both the Draft and Final EIS through its organized efforts to ensure public input at various points in the process. In this way the needs of the community were taken into account including the potential socioeconomic and physical impacts of the project, most of which were catalogued in the Draft EIS along with additional impacts on historic resources in the area. Importantly, the Final EIS specifically addressed the community concerns and comments made on the Draft EIS including two major issues that had not been raised in the draft: the environmental justice implications of the expansion and the lack of community outreach by the university. The Final EIS also was required to, and did, set out specific ways to mitigate the impacts identified in the EIS.

Perhaps the biggest concession made by Columbia was the promise to include measures to mitigate the social and physical impacts from gentrification, or displacement, of residents and businesses from the area. Although it is notable that between the Draft and Final EIS, many businesses within the project area had already moved.⁶⁸ Moreover, the Final EIS was able to settle issues regarding mitigation of impacts on traffic flow patterns in the area, on stormwater systems, transit and pedestrian conditions. It also found that there would be very few significant pollution impacts but identified changes in construction activity during the expansion development to mitigate negative air quality impacts⁶⁹ and potential cumulative environmental impacts given the density and proximity of the expansion site to other neighborhoods and populations.⁷⁰ The main environmental concern seemed to be particulate air pollution from construction, while the impact on climate change was deemed minimal despite the potential of greenhouse gas emissions over the 30 year expansion timeline.⁷¹

Regarding some of the more significant mitigation measures for the socioeconomic impacts identified, Columbia made the following concessions in the Final EIS:

⁶⁵ If CB9's plan were approved, the City Planning Commission and City Council would have only to "consider" that plan before approving the University's plan under ULURP. See N.Y. City, N.Y., City Charter § 197-a.

⁶⁶ Josh Hirschland, *Protestors Decry Timing of Environmental Impact Statement*, Colum. Daily Spectator, June 1, 2007.

⁶⁷ See Foster and Glick, *Integrative Lawyering*, at 2035-2053

⁶⁸ "Since the issuance of the DEIS, several Project Area businesses-- including U-Haul, Admiral Electric Corp., storage for Architectural Antiques, and Pathways to Housing-- have vacated the Project Area sites on which they operated. For purposes of the FEIS analysis, they are identified as existing businesses that would be directly displaced by the Proposed Actions." FEIS Ch. 4 pg 8 fn 1

⁶⁹ For example, The Final EIS indicates that an emission reduction program would be instituted for any construction on some project sites, implemented through E-designations. The program would include early electrification to ensure that large generators are not used on the sites, the use of particular controls for all diesel engines, and the use of Tier 2 certified engines or cleaner equipped with particular tailpipe controls. With these measures in place, the EIS found no significant adverse PM2.5 impact would occur as a result of construction on those sites. FEIS Ch 21 pg 6

- Since the issuance of the Draft EIS, Columbia acquired control of three sites outside of the project area to provide relocation for new, permanent, and affordable replacement housing for tenants currently living in buildings in the project area. The tenants would voluntarily relocate from project area units when their new replacement housing is constructed. By 2030, it is anticipated that all residents in the project area would be directly displaced from the project area and relocated to new housing within the study areas.⁷²
- Under a “socioeconomic reasonable worst-case development scenario,” the Draft EIS had identified the maximum unmet demand for Columbia students and faculty within the project area to be estimated at 839 units. Columbia proposed a \$20 million fund to develop or preserve affordable housing to mitigate this impact.
- In addition, in the Final EIS Columbia proposed three additional measures to reduce the potential demand for housing in the project area by its employees and graduate students. These include:
 - converting its current stock of housing for retired faculty to available housing for new faculty members
 - developing a graduate student residence outside of the project area to accommodate graduate students and post-doctoral researchers
 - launching a residential loan assistance program for faculty to encourage ownership by faculty outside of the project area.

Each of these additional programs would mitigate the impact of new faculty and students seeking to use existing housing stock in the area, reducing the potential displacement of existing residents.⁷³

- Efforts to mitigate the adverse impact on open space and existing historical/cultural resources included:
 - Creation of publicly accessible space and development of additional community facilities in the area
 - Relocation of the historic “Cotton Club,” the site or proposed new commercial and retail space, within the immediate area

C. The Eminent Domain Fight

In West Harlem, the few remaining holdout commercial property owners attempted to ride the wave of rising resentment against the Supreme Court’s recent Kelo decision authorizing the use of eminent domain for purely economic development purposes. Their West Harlem Business Group (WHBG), led and financed by two non-resident White owners of multiple commercial buildings in the expansion site,

mounted a major campaign to focus community struggle on opposing eminent domain in the context of the Columbia expansion project. Their lawyer, a prominent local civil liberties lawyer, framed the group’s position as a populist opposition to Columbia’s bullying, and the owners gathered support from the Coalition to Preserve Community and local tenants associations to insist that Columbia “take eminent domain off the table” as a pre-condition to any negotiations.

Nevertheless, the Empire State Development Co. (ESDC) in 2008 voted to use eminent domain to acquire the remaining parcels of land necessary for this project. While their argument that the project served the public was initially rejected by the lower court, the NY Court of Appeals eventually agreed to allow the ESDC to utilize eminent domain for the project. ESDC had argued that the area being taken over by Columbia was blighted—meaning that it was in substantial decline—and thus consistent both with the Supreme Court’s previous cases on eminent domain and with Kelo’s even broader interpretation of public use or purpose. These findings were challenged under New York’s economic development law and a plurality of the state’s lower court concluded that “ESDC’s determination that the project has a public use, benefit or purpose is wholly unsupported by the record and precedent.”⁷⁴

The New York Court of Appeals reversed, however, finding that Columbia’s project is “at least as compelling in its civic dimension” as the private development in a similar case in Brooklyn, New York involving a new stadium. Unlike the Nets basketball franchise, Columbia University, though private, operates as a nonprofit educational corporation. Thus, the court held that concern that a private enterprise will be profiting through eminent domain is not present.⁷⁵ Furthermore, the Appellate court agreed with ESDC that the area was blighted, citing multiple studies.⁷⁶ Since there was a record to support that the Project site was blighted before Columbia began to acquire property in the area, the court deferred to ESDC’s finding and indicated that the issue was beyond further judicial review.

D. Community Benefits Agreement

Alongside the municipal and state processes, a third expansion decision process unfolded within the community and between it and the University. During the first phase of this third process, the community was determining what it wanted from the University in terms of funds, services, facilities, modification of expansion plans, and access to facilities on the new campus. In the second phase, the community would negotiate with the University to hammer out a binding contract by which it agreed to accept and possibly support expansion in exchange for specific benefits. Given that there is no real possibility of stopping the expansion, and only small hope of modifying it through the land use review and environmental impact assessment processes, the CBA negotiation process offered the community its main opportunity to protect and advance its interests.

⁷⁰ Some mitigation could not be identified, for instance, to reduce the “loss of sunlight on the playground” in the area.

⁷¹ Climate change did not, however, appear to be a significant area of public concern, nor activism or lobbying.

⁷² FEIS Ch4 pg 14

⁷³ FEIS Ch. 23, 4-5.

⁷⁴ Matter of Kaur v. N.Y. State Urban Dev. Corp., 15 N.Y.3d 235, 248 (2010)

⁷⁵ Matter of Kaur v. N.Y. State Urban Dev. Corp at 258.

⁷⁶ Citing a study which unequivocally concluded that there was “ample evidence of deterioration of the building stock in the study area” and that “[s]ubstandard and unsanitary conditions were detected in the study area.” Moreover, it found that, since 1961, the neighborhood has suffered from a long-standing lack of investment interest. Matter of Kaur v. N.Y. State Urban Dev. Corp at 257.

1. Negotiating the Agreement

Columbia was under intense pressure to enter into such a community benefits agreement. Deputy Mayor Doctoroff and other City leaders insisted it. Doctoroff moved behind the scenes to orchestrate bargaining between the University and the community. He allocated \$250,000 in City funds to support community participation in CBA negotiations, and he worked to prod and assist the parties to reach an agreement which enabled Columbia to expand without major community protest. When the community took longer than expected to build the trust and capacity required for effective bargaining with Columbia, the Deputy Mayor slowed down the municipal review process in the hope that a CBA could be negotiated before the expansion plan reached the City Council.

Columbia and Doctoroff quickly moved to undermine an effort to negotiate with the community more broadly through community based groups and other interests. They insisted instead on negotiating only through Community Board 9. CB9, however, obtained a persuasive legal opinion that it could not act effectively as a CBA coalition because, as an agency of the City, it did not have statutory authorization to negotiate with Columbia and lacked independent capacity to sue to enforce a contract.⁷⁷ It therefore formed a separate nonprofit tax exempt corporation, “D9 Local Development Corporation” (LDC), to negotiate and contract with the university.⁷⁸ Creating a nonprofit corporation in New York takes only a week or two. The political struggle over how to structure the new LDC, who would be represented and who would control, lasted more than a year.⁷⁹

In July 2007, with the ULURP land review process already underway, the LDC was only beginning to assemble a team of experts, complete community consultation, formulate a CBA platform and negotiate with Columbia. Late in 2006 the LDC and University exchanged letters that indicated interest in addressing the same basic issues: housing, education, health, jobs, environment, etc., though not in the same manner or scope. By that time the LDC had organized itself into eleven working groups ranging from housing, business and economic development, employment and jobs, education, historic preservation, transportation, environmental stewardship, research and laboratory activities, and green spaces.⁸⁰ The goal was to assess what the community most needs—within and beyond the expansion site—and what Columbia is in position to provide.

2. The Final Agreement

The CBA, finalized on May 18, 2009, is a 49 page document reflected the negotiated agreement between Columbia and the “West Harlem Local Development Corporation” (the LDC). The CBA promises a total of \$160 million to the community.⁸¹ The University committed to a package of community benefits and mitigations in connection with the expansion project in exchange for a promise by the community not to bring a lawsuit or litigation against it. The benefit package includes:

- a Benefits Fund of \$76 million
- an Affordable Housing Fund of \$20 million (to provide a range of flexible and affordable financing products to community-based and private developers)
- up to \$4 million for related legal assistance benefits (attorneys who would assist local tenants with anti-eviction/anti-harassment legal assistance)
- in-kind benefits of up to \$20 million in access to University facilities, services and amenities
- a \$30 million commitment to establish a Community Public School in conjunction with its Teachers College.

The CBA promises to provide West Harlem residents with “new local jobs and economic opportunities” for the “benefit of the local community.” It promises to use “good faith efforts” to utilize up to 50% of Minority, Women-Owned, and Local (MWL) businesses as part of its construction workforce. The University also promises to undertake efforts to expand other employment opportunities for local residents, including helping them to obtain apprenticeship positions and Union membership in the construction trade association, an important entry point into the construction industry.

In addition, the University agreed in the CBA not to ask the State’s ESDC to exercise its power of eminent domain to “acquire residential properties or churches” in the project areas. And the University accepts that the ESDC will monitor its activities relating to residential relocations from the project area (part of the mitigation efforts in the final EIS).

3. Assessing the Agreement and its Impact

At first glance the CBA is aimed to protect the socioeconomic interests of the residents and most neighborhood businesses and community groups believe that the university has upheld its end of the bargain.⁸² For instance, the University has created the Construction Trades Certificate Mentorship Program, a free program to train local small businesses in construction. According to one report, 42 percent of the total money Columbia spent on construction in the third quarter of 2014 was paid to MWL-owned companies, and 34 percent of the total funds the University spent from August 2008 to September 2014 was paid to MWL companies.⁸³ Additionally, 47 percent of the total workforce hours on the site in the third quarter of 2014 were worked by MWL-owned companies, according to the cited report.

However, many local residents believe that Columbia continues to underserve the neighborhood. Rents have already begun to skyrocket in the area and many local

⁷⁷ Memorandum from the Brennan Center for Justice to Members of the Rezoning Task Force of Community Board 9 (Nov. 12, 2004)

⁷⁸ A Local Development Corporation (LDC) is a special type of New York State nonprofit. N.Y. Not-For-Profit Corp. law § 1411

⁷⁹ CB9 eventually agreed on an LDC board of 13, later expanded to 17, and then to 26 to accommodate representatives of each elected official whose district includes any part of community district 9. Foster and Glick, *supra*, at 205, fn.9

⁸⁰ See Jimmy Vielkind, *How to Mediate Manhattanville: A New Negotiating Partner is Born*, City Limits WKLY, Dec. 4, 2006, at 1 (discussing the formation of working groups for CB9).

⁸¹ See generally West Harlem Community Benefits Agreement, May 2009. available at: <https://gca.columbia.edu/content/community-benefits-agreement-document>

businesses within the project area have stopped operating or vacated the area. These developments and the obvious rapid changes to the area based on the new campus' already imposing footprint in the neighborhood suggest that the CBA may not be as impactful as many had hoped—although it did force Columbia to consider certain factors that may have gone ignored and was successful in getting Columbia to promise significant financial contributions. Of the promised \$160 million investment, \$44 million has already been spent.⁸⁴

In the end analysis, it is clear that the Columbia expansion (which is still ongoing and will be for some time) has had a tremendous impact on the West Harlem community and northern Manhattan more generally. However, it is difficult to objectively measure the discrete impacts of this project given that it is only one of a number of large-scale development projects (Hudson Yards is another⁸⁵) reshaping the social and economic landscape in one of the world's most prominent global cities. One would have to carefully study and then disentangle the independent and interdependent relationships among these projects to isolate Columbia's discreet impacts on the West Harlem community. Such an undertaking is beyond the scope of this study.

What one can say, with certainty, is that Columbia's footprint is intensely palpable by the naked eye and profoundly felt at both the neighborhood and street level. Columbia has significantly contributed to changing face of West Harlem, much as it did decades ago in another part of Harlem where its main campus sits and is popularly referred to as "Morningside Heights." Perhaps the one objective measurement or indication of how much Columbia has contributed to this change is the scope of the CBA and its financial and other promises to mitigate its impact. Beyond that, it may be years and many academic studies before we can truly appreciate the full impact of this development project on the community and the city as a whole.

V. CONCLUSION

Columbia's proposed expansion has brought to the foreground a set of evolving dynamics of the urban political economy and the related legal and regulatory processes involving land use review and environmental impact assessments. As has long been true of American city politics, various local stakeholders compete and sometimes cooperate with city officials to influence urban development decisions in a sort of unbalanced pluralist dance. At least since the 1970s urban development in U.S. cities has become increasingly more decentralized—physically, economically, and politically—and specialized in its upward class transformation and economic conversion of cities. From roughly the 1930s to the 1970s, centralized, top-down management of redevelopment (government) funds characterized much of urban development in central cities. Fueled by the Works Progress Administration (WPA), highway program and so-called "urban renewal" policies, federal funds often flowed

directly through local planning and development agencies into local construction projects. The federal aorta of money that ran from Washington, D.C. into local redevelopment agencies financed local development, especially urban renewal, and enabled money to be spent in largely unaccountable ways.

Urban development politics and economics have become even more decentralized and diffuse since the 1970s in no small part due to what urbanist Paul Kantor has called "the exhaustion of urban renewal as a form of urban entrepreneurship." With the loss of federal funding and other public sources of redevelopment money, development in cities has now shifted away from large scale land clearing projects to more piecemeal redevelopment, which requires cities and municipalities to compete for "footloose" investors and industries, who now have enormous power to control and shape redevelopment policies in cities. As cities grow increasingly dependent upon private capital and resources and stymied by competition with other municipalities for those resources, their leverage over developers has seriously declined, as has their ability to control their social and economic destiny. Private investors acquire tremendous bargaining advantages or "rents," including new sports stadiums, operating and tax subsidies, shares in parking garages, and concessions, which diminish the regulatory power, and ultimately the resources, of local governments. In this new political economic environment, the city is now a weaker player in a larger system of political bargaining that drives urban development. Consequently, much of the onus of attending to communities' economic and social welfare has shifted to communities themselves.

The initiating driving force behind this plan was a non-governmental actor, Columbia University, which is not very different in its general role in the development process from any other private business or developer. Columbia brought its own substantial capital and an armada of experts, technicians, and public relations specialists. Though the University was not seeking public subsidies or loans, it would need regulatory approval and other important cooperation from city and state government. At all levels, however, government was in a secondary, reactive position: it could mandate disclosure, set time lines, and ultimately vote the project up or down, but it had only limited capacity to shape the project.

The impacted communities, their organizations, and their leaders were fragmented across lines of race, nationality, class, geography, personal and institutional interest, and political ideology. Different community interests and groups sought to form coalitions to consolidate their power in order to influence the ultimate deal between Columbia and the City, and between themselves and Columbia. Their combined resources and capacity were miniscule in comparison to those of the University. An array of elected officials and business and property owners also attempted to intervene in sporadic efforts to advance their own diverse interests. Even though more formal avenues exist for public participation in development decision, land use decisions primarily respond to individual development projects that often result from the local government striking a bargain with the individual property

⁸² The Ties that Bind: Checking in on the Community Benefits Agreement Six Years Later, available at: <http://features.columbiaspectator.com/eye/2015/03/25/ties-that-bind/> Another report from a consulting firm to the Columbia expansion project reported that about 51.8% (\$31 million) of the total construction spending to date was paid to minority, women, and local businesses (MWL), and a total of 174,454 workforce hours (67.2 percent) were performed by MWLs, excluding special construction services. West Harlem Development Corporation, Update on Progress of Community Benefit Agreement, available at: <http://www.westharlemdc.org/whdc/news/whdc-news/whdc-updates-community-on-progress-of-community-benefits-agreement/>

⁸³ The Ties that Bind, *supra*.

⁸⁴ <https://www.elegran.com/blog/2016/11/-columbia-university-west-harlem-expansion->

⁸⁵ <http://www.hudsonyardsnewyork.com/>

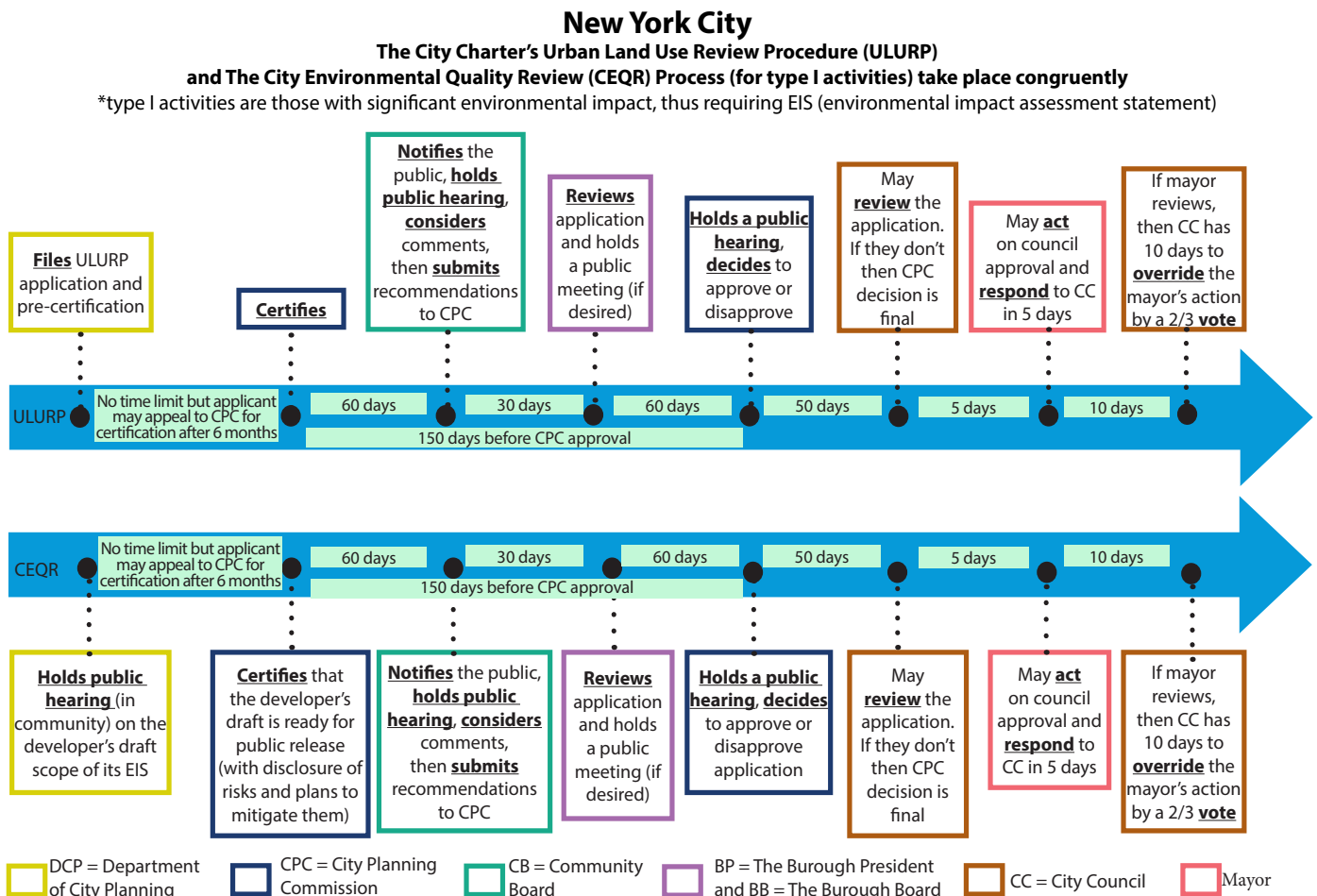
owner or developer. Public hearings, advisory committees, and devolution of land use planning discussion and analysis to smaller units of the urban polis have characterized this era of increased participation in local government.

Nevertheless, the limits of this formal participatory governance are starkly obvious, particularly to those least able to participate in local government decisions because they lack social and economic influence. Even though more formal avenues exist for public participation, land use decisions primarily respond to individual development projects that often result from the local government striking a bargain with the individual property owner or developer. Thus, while public modes of discourse surrounding overall urban land use and specific development projects have remained over time, a form of interest bargaining that reflects the larger political economy of urban development now supplements them. That is, development incentives have lined up such that affected communities now view themselves as potential players in, as opposed to passive recipients of, the “bargain” struck between developers and the city.

The emergence and increasing prominence of community benefit agreements is a potent reflection of the changed political dynamic of urban development. As enforceable agreements between community groups and developers, CBAs represent a fundamental break with the traditional posture of developers and local governments toward low-income communities affected by major projects. Within a

CBA framework, both developers and communities face incentives to participate and negotiate with one another: developers bargain directly with the community as a way to win its backing for the project or, at least, neutralize its opposition, and communities participate out of a desire to mitigate negative development impacts and maximize development benefits. There is an arguably redistributive aim to the community’s willingness to bargain directly with the developer. Projects that are in significant part subsidized by taxpayer funds are now going to finance affordable housing, jobs, environmental, and infrastructure amenities, and other “benefits,” thus returning some of that money to the public/community.

As such, the rise and utility of CBAs render the “game” of urban development highly textured and dependent not only upon the particular constellation of players in the place where development occurs but also upon the particular development project being contested. The costs and benefits of a project are often not fixed but depend upon the choices players make—choices that are shaped throughout the process of land use review (including the environmental impact assessment process), negotiation between the developer and the city, between the city and the interested public, among stakeholders and interests within that public, and between the developer and the interested public. How this game plays out is a crucial factor in determining the opportunities and challenges presented to its participants in different local contexts and along different facets of a development project.



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HS Number: HS/076/18E

ISBN Number (Series): 978-92-1-133365-7

ISBN Number (Volume): 978-92-1-132816-5

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