



ENFORCEMENT & PROSECUTION MASTER CLASS

Learning Notes

07 – 08 FEBRUARY 2019

Moses Mabhida Stadium, PBC 1

1. INTRODUCTION AND BACKGROUND

While municipalities are mandated to effectively provide service delivery to people within their jurisdiction, they are also responsible for developing By Laws to regulate these services and other matters. They derive these powers from the Constitution of South Africa, and carry out the task in an impressive manner. However, the enforcement of these By-Laws is weakened by the array of challenges that enforcers are confronted with. Weakened enforcement and prosecution mechanisms can leave municipalities at the risk of being compromised.

One factor that is synonymous to the discourse of enforcement of prosecution is the rise of the informal economy as it directly challenges the status quo. As it is one of the most sustainable economic models, its existence will not cease. The most pertinent consideration in this context is to reconcile the promotion of the informal economy and the enforcement of By-Laws. Therefore, the adoption of a multi-disciplinary approach is essential in making this a reality.

In the spirit of knowledge sharing, enforcing policies and improving service delivery, MILE in partnership with KZN- COGTA and EThekweni Municipality's Development Planning, Environment & Management Unit hosted a Workshop on Enforcement and Prosecution, from 7-8 February 2019 at the Moses Mabhida Stadium. Participants from various municipalities in KwaZulu-Natal learned about the Context and Legislative Transition, Building Inspectorate Interventions, Reviewing Enforcement and Prosecution among other pertinent aspects of enforcement, through informative presentations by EThekweni Municipality.

2. AIMS AND OBJECTIVES

The main purpose of the workshop was for municipalities to share experiences in all matters pertaining to enforcement and prosecution.

3. DETERMINATION OF EXPECTATIONS

Participants were given the opportunity to express their various expectations from the workshop. These were written on key cards and arranged thematically. They were categorically ranked as follows:

Expanding Knowledge on By-Law Enforcement;

Sharing of Experiences/Solutions;

Building Control Enforcement;

Unpack Protection Services;

Informal Economy Enforcement;

Stakeholder Engagement;

Budget and Legal Fees;

Training and Development; and

Land Use Management

The exercise was aimed at assessing whether the workshop empowered the participants to an extent that meets their expectations towards the end of the workshop.

4. STRUCTURE OF THE DOCUMENT

This document reflects key outcomes that were deliberated during the workshop, and serves as an internal resource to guide further work in positively contributing to further work of Enforcement and Prosecution in the various municipalities that were in attendance. It does not provide a verbatim of proceedings but however emphasises central themes that emerged from discussions. For detailed presentations, kindly access them on the MILE website on www.mile.org.

5. Context and Legislative Transition



Enforcement Staff Compliment

The size of Enforcement departments vary from municipality to municipality. In the establishment of an Enforcement department, the following considerations must be made:

- Geographical size of the municipality;
- Support;
- Functions of the Enforcement Officer;
- SLAs with functional support services;
- Good relationship with Magistrate Court;
- Smaller municipalities need multi skilling rather than specialization.

Essentially, these departments should comprise of an Enforcement Officer to enforce Land Use Management. Moreover, a Peace Officer also plays a crucial role in this department. Seizing of objects must be carried out by a Police Officer. Ideally the organogram should comprise of a Director, Senior Managers, Admin Support, Enforcement Officer/ Assistant.

Political Interference

The issue of political interference is a very prevalent challenge confronting enforcers in their line of duty. It is crucial to always bear in mind that they are mandated by the Act to enforce the law and there are no alternatives to work around this. However, this is where tactful management play an important role because it results in a win-win situation. Confidence in enforcing By-laws is key in ensuring compliance.

Photographic Evidence

In the enforcement fraternity it is a well-known fact that the main purpose of seizing evidence is to make a strong case in the prosecution process. When Enforcement Officers partake in prosecution matters, they take on the role of state, and must prove beyond reasonable doubt. Taking photographs of evidence is also permitted and accepted as evidence by the courts. However, allowance for rebuttal increases as opposed to real evidence. If there are no storage facilities available, creativity to increase evidence weight in court is advised as an interim measure. For example, a piece of machinery in operation can be videorised to demonstrate the level of noise, and the accused can be photographed next to the evidence.

Ingonyama Trust Board (ITB) Land

- **Serving Notices**

The Spatial Planning and Land Use Management Act 16 of 2013, generally referred as SPLUMA and the National Building Regulations and Building Standards Act 103 of 1977 share the same stance regarding all matters of land development in South Africa. The pieces of Legislation are all-encompassing and do not have any exclusions when it comes to geographical areas of enforcement. This essentially means that SPLUMA and the National Building Regulations Act is applicable to ITB areas and therefore notices are to be served to people developing the structures. Notwithstanding the existence of “tenants” on ITB land, they are also bound by these Acts. Ethekeini Municipality has adopted this stance as the safety of people should be ensured at all times. It is the responsibility of the municipality to ensure that the Buildings are safe and will not collapse. However, the success of this will not be possible without exercising cooperative governance with Tribal Authorities, which is clearly set out in the Constitution. However, the challenge lies in that SPLUMA and the National Building Regulations Act has not been effectively implemented in rural areas. Obtaining the ITB lease document would be ineffective in this scenario, as the tenant would have accrued certain rights to that property.

- **Deeds Registration**

South Africa is slowly advancing towards deeds registration of ITB land as the national building regulations, “...any person who is entitled to the benefit of the use of such building or land or who enjoys such benefit, shall be deemed to be the owner of such building or land.” However, the successful facilitation of this process lies in consultation and buy-in of traditional leadership. For a number of years, efforts have been made to establish protocol as vicarious liability is a risk.

LED Projects in conflict with By-Laws

The rise of informal economy in South Africa has yielded many positive outcomes and created various opportunities for emerging entrepreneurs. Departments with vested interests in business development tend to be in support of the informal sector and often assist traders in securing spaces to trade. However, Land Use Schemes have not caught up and transformed to accommodate informal trading. In the case of eThekweni, street trading by-laws specifically pertaining to enforcement of street trade were developed. Furthermore, the City’s response to informal economy is inclusive of the Inner City Thekweni Regeneration and Urban Management Programme (iTrump), which aimed at stimulating private sector interest while fulfilling the needs of individuals that use public spaces.

However, trading in Durban is regulated and permits are sought through the Informal Trade Department which is linked to the Business Support Unit. Permits state the conditions and terms of trade. Illegal trade is prone to enforcement and seized perishables are stored in the

Metro Police pound. This demonstrates that the City has everything in place to deal with this new aspect of enforcement and is linked to Town Planning.

Resolution: Park discussion of ITB LAND and COGTA is to decide on the way forward

Evictions

The law takes a very clear stance on evictions, and entails that alternative space must be provided in the application of enforcement. However, in reality, enforcers are confronted with the challenge of not having any alternative space available. Owners of private land (including municipalities) can press trespassing charges with SAPS and approach the courts for legal relief ie an order for persons to not invade land. If they proceed, they are in contempt of the order and prone to an arrest by the SAPS. If municipalities are faced with this issues, exploring developmental avenues first are advisable. Punitive measures should be a last resort.

6. Supporting Building Inspectorate Interventions



Notices on unapproved plans

In eThekweni, it is possible to take action on unapproved occupied buildings through issuing an Unauthorized Occupation notice.

Legal implications of not having Building Control Officers

Smaller municipalities are faced with doubling up and multiskilling due the minimal staff compliment. At times, Town Planners also perform the duties of Building Control Officer due to this reason. This is deemed as irregular. EThekweni is not faced with this issue as it is a metropolitan municipality and functions are separated in accordance with the separate legislation.

The National Building Regulations and Building Standards Act prescribes the qualification of Building Control Officers. Examples of these tertiary qualifications extend to Architecture, civil engineering, structural engineering, etc. Municipalities without an appointed Building Control Officers are completely at risk of court action, as any decision made (approval or refusal) without a recommendation by a Building Control Officer (with the required qualifications) are deemed null and void.

There are many of court case examples asserting these requirements

Intellectual Property Rights to systems

In 2010, an electronic system called BPM was implemented. The intended purpose was to extend it to all branches including Land Use Management, Development Applications, Building Inspectorate, and feeding up to Enforcement and Prosecutions. Unfortunately, the system was not stable and disused before other branches could implement it as well. The City had rights to the system. BPM has been replaced by a new system called .Net, which is in the testing environment with pilots running in a few regions.

Rate Code Change

This is also applicable on privately owned buildings which are decaying. This is because decaying buildings already fall in the category of abandonment. The Rate Code Change is entrenched in the City's Rates Policy.

Circulation of Plans

The National Building Regulations in section 6 sets out the functions of Building Control Officers, while section 7 gives guidance on Approval by Local Authorities in Respect of Erection of Buildings. Therefore, if a municipality fails to grant or refuse approval timeously, the applicant can approach the court for a decision, and this is according to section 8.

7. Reviewing Enforcement & Prosecution, & Positioning



Budgeting for an Enforcement department

It is important to bear in mind that budget grading and salary scales differ from municipality to municipality. Overall costs are inclusive of human resources, incidentals, fleet, and IT. Different levels of enforcement would derive differing costing estimates.

Elevating status of Enforcement Officers

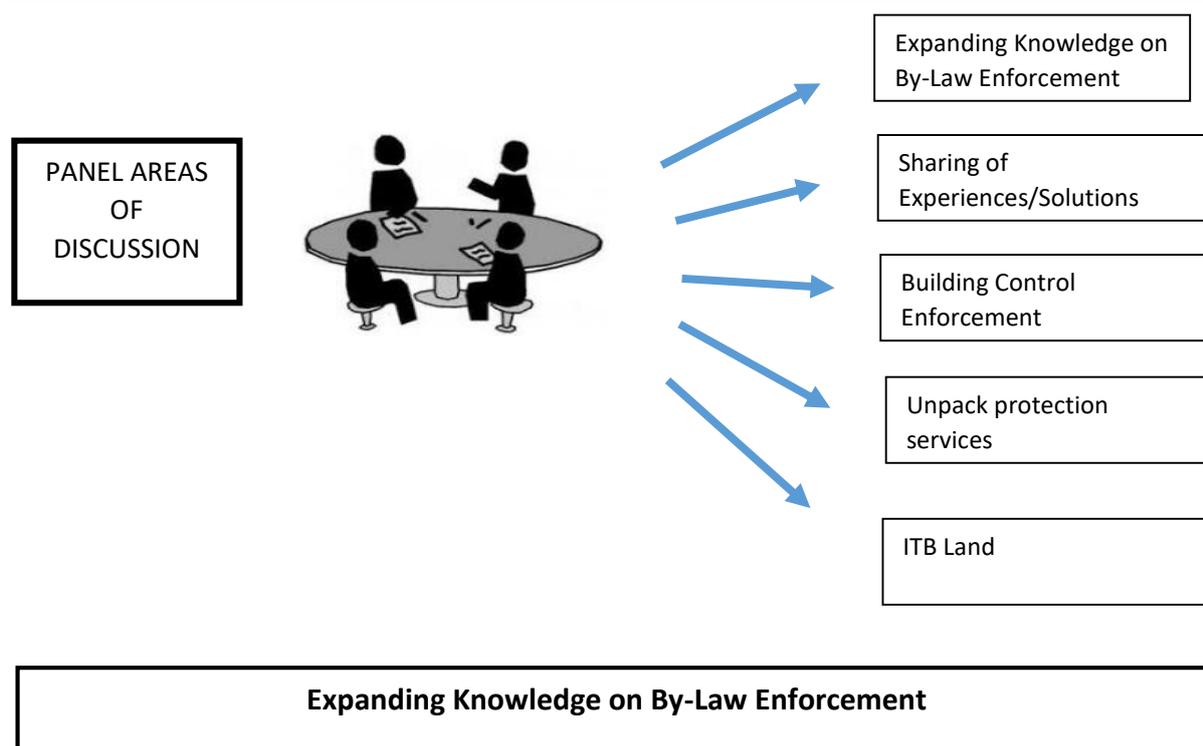
Enforcement Officers are vulnerable to attacks while carrying out their duties. Thus, the issue of elevating their status arose while undertaking a SWOT Analysis for Enforcement in eThekweni. Peace Officer training was facilitated and accreditations were conferred to the Enforcement Officers. They were now empowered by Section 334 of the Criminal Procedure Act, and could fully exercise their duties as Peace Officers. The issue of firearms and protective wear such as bullet proof vests has been raised in a number of conversations. One perspective of this is that these factors might encourage aggression and confrontation. A developmental and multidisciplinary approach in this case is very necessary, as teamwork is very important.



KEY LESSONS LEARNED

- Political Interference in Enforcement;
- Challenges regarding ITB Land;
- SPLUMA inconsistencies;
- Rate Code Change for illegal issues;
- The importance of a multi-stakeholder approach;
- Entering complaints electronically;
- MDTTs;
- EThekweni organogram for Enforcement;
- Legislation in enforcement ie. SPLUMA, National Building Regulations;
- Dangers of Planners approving plans without Building Inspector qualifications;
- Importance of other professions in Inspections;
- Peace Officers and Enforcement;
- Enforcement can't be Directorate under Planning (there is going to be conflict);
- Multiskilling is important and shared services; and
- Informal Economy.

8. Moving from Theory to Practice – Panel & Open Mic Discussion



Enforcement vs Land Use Planning applications

The eThekweni Land Use Management branch received complaints which were directed to the complaints management system register. They were allocated to both Professional and Technical Planners. There was a challenge of not effectively dealing with complaints, as the branch also had other functions to perform. In response, Planners were asked whether they would like to deal with Contraventions, and some happily obliged on a voluntary basis. From that point onwards, they were referred to as Contravention Officers, allocated to Durban's five planning regions (Outer West; Inner West; Durban Central; Durban South; and Durban North). Their cases are handed over to Enforcement.

Capacity shortage in smaller municipalities

Smaller municipalities are under-resourced and some are not in a position to start Enforcement departments. This gap is being realised by business owners who proceed with constructing boarding and lodging facilities at their own peril without obtaining the necessary approvals. A possible solution to address this issue is by raising rates through Treasury for illegal uses, it would be a considerable deterrent. Planners are already stretched out in their duties with dealing with applications and making decisions. The prioritization of resources is also a credible approach whereby contravention issues are targeted once a week as a team. Multiskilling is an immediate viable option as there is a shortage of Building Inspectors.

Rates Policy

If a municipality wishes to change its Rates Policy, it must do so now. The Rates Policy review in eThekweni is between August and September, and submissions are thereafter made for approval by December. Advertisements are made for public comments and that process usually unfolds until the end of January. At this stage it is critical to have all the necessary provisions in the Policy so that they are accommodated in the budget, which is to be approved by March. Therefore, in order to make substantial progress, action must be taken now to be accommodated in the next financial year.

It is worth noting that the process of increasing rates is not hugely administrative. After the changes on the Rates Policy have been effected, Planners undertake normal site inspections and issue Section 76 Notices in terms of Municipal By-Laws. Weekly Joint Advisory Committee meetings convene to review contraventions, and standard forms are filled and signed. Thereafter they are sent to the Valuation department for rates increase.

Brief Outline – Process of requesting amendments to Rates Policy

- A synergetic relationship with the Valuations department is crucial.
- Agree on the rating category ie illegal, abandoned etc. This is crucial because the category ties in with the rest of the Rates Policy.
- The Rates By-Law must be taken into careful consideration, as they must be in line with the Rates Policy inclusive of the categories.

Overall intention of rates increase for illegality

The purpose of eThekweni's adoption of a strong stance of financially challenging people for transgressions is to discourage illegal use. The overall intention is to intervene and deter people from starting and encourage the right way of doing things. The increase in rates is a secret tool that is used to discourage illegality and it is in the Planner's discretion to increase rates, depending on the unique circumstances of each case. This principle is also applicable on illegal buildings and not only on Land Use Management.

Strong Partnerships with communities and stakeholders

It is impossible for municipalities to always single-handedly have the finger on the pulse in its operations. Therefore, establishing and retaining strong partnerships with communities and stakeholders such as NGOs is crucial. Having these synergies are beneficial as they can be an early warning system when construction takes place and early intervention can happen, especially in the smaller municipalities.

After-effects of Rate Code Change

Historically, the Rate Code Change started as a deterrent, then became a tool and is now a process. There are a number of avenues that can be explored in dealing with non-compliance. In this regard, the Rate Code Change can be linked to the Credit Control Policy by structuring tariffs for illegal use. In credit control, there is a mechanism for “sterilizing property” through disconnections, restriction of supply, etc. To make this a reality, there must be a provision in the Application Services Contract that is dedicated to breaching and consequences.

There has been a lot of debate around taking punitive measures against retrospective wrongdoings in applications. Although there is potential to benefit, but eThekweni took this stance as it essentially wants to encourage compliance. Benchmarking with other municipalities who have adopted a different approach can also be considered.

Penalty Clause

There is a Penalty Clause in the eThekweni Rates By-Law.

Student accommodation

There are cases whereby tertiary institutions approach surrounding property owners to accommodate students. This may put pressure on Planning departments as these properties have not sought the necessary approvals to accommodate students. However, this should not be the case as it does not infringe on Land Use Management. These circumstances are more about the management of students. If property owners receive NSFAS subsidies from universities for accommodation purposes, then the onus is on universities to compile a management plan for students to comply. This issue also extends to Building Control in terms of health and safety, illegal operations, unsafe situations, etc. Another perspective that is applicable is nuisance, as there might be issue of noise and so forth. Municipalities can also make the following considerations:

- Is there a By-Law on nuisance?
- Scenario planning which warrants an integrated response

Property registered under Trustees

When it comes to applying enforcement to property that is registered under multiple Trustees, it is often a challenge to determine where to direct a Notice. It is important to first obtain information on all the trustees. A useful tool that is also utilised by the eThekweni's Enforcement department is WinDeed, which avails information on Trust details. Another effective option to explore is the Deeds Office in Pietermaritzburg.

Qualifications for approving Building Plans

In South Africa there is no qualification required to approve building plans. However, Building Control Officers are required to possess relevant qualifications. According to legislation, Building Control Officers are required to provide recommendations to Local Authorities, which can be delegated down to individuals or Committees, depending on Municipalities. In essence, Planners are at liberty to approve building plans. If qualifications for Building Control Officers and Local Authority delegations are not in place, then decisions are automatically flawed.

ITB Land

COGTA-ITB Relations

The issue of ITB land is very topical as there are substantial scores of people moving away from cities and re-settling in rural areas to build their homes in vast amounts of land. This method is attractive as there is no accrual of rates for the land they build on, and in reality they are not submitting building plans. The one side of the debate promotes compliance ie submission of building plans, rates etc in these areas. The other side of the debate disagrees with this notion, as a number of issues such as electricity, services, earth numbers etc would be raised. Overall, a strong position must be taken by ITB and COGTA on this issue to eliminate inconsistencies. However, in terms of legislation, SPLUMA, the National Building Regulations and the Constitution cover traditional areas.

There is an opportunity to strengthen relations between COGTA, municipalities and ITB on this issue. The desired partnership is developmental rather than being punitive. The synergistic relationship could facilitate the usage of drone technology, providing guidance on flood lines and swamps, improve land allocation, advice on Land Use in these area etc. The point is to advise and not to interfere. Therefore buy-in from Traditional Leadership and communities is crucial.