Appendix 1: THE EXISTENCE OF A REASONABLE APPREHENSION OF BIAS ON THE PART OF THE EAP: GROUNDS FOR JUDICIAL REVIEW

In the COMMENTS in regard to Phase 1, NEAG stated repeatedly that it was of the view that the EAP was biased. The EAP responded briefly and without justification that it is 'independent'. This section of the appeal will further substantiate NEAG's apprehension about the existence of bias.

<u>The legal framework governing the independence of EAPs</u>

Regulation 17(a) of NEMA provides that an EAP *must* be independent and objective. Section 1 of Regulation 543 of the Act defines an ‚independent' EAP as one that has no business, financial, personal or other interest in the activity, application or appeal in respect of which that EAP is appointed. Furthermore, this section provides that, for a EAP to be ‚independent' there are ‚*no* circumstances that *may* compromise the objectivity of that EAP... in performing such work'.

Regulation 17(f) provides that the EAP *must* disclose *to the applicant and the competent authority* all material information that reasonably has or may have the potential of influencing the objectivity of its report.

The Environmental Impact Assessment Regulations therefore provide that the most important requirement of an environmental assessment practitioner that he or she be independent. They also require that the work of an EAP is performed in an objective manner, even if this results in views and findings that are not favourable to the application.

A Purposive Interpretation

How should these rules and regulations be interpreted? For instance, should Regulation 17(a) which provides that an EAP should have no business, financial or other interest in the relevant activity, application or appeal be interpreted narrowly? Or should it be interpreted broadly, to mean that an EAP should recuse itself or be disqualified from conducting an EIA when it has private interests in a firm which *may* benefit from the relevant activity?

In the *Bato Star* case the Constitutional Court committed the judiciary to a contextual and purposive approach to interpretation. Therefore in asking

whether a potential conflict of interests exists, and whether it has been managed correctly, a formalistic technical approach confined to the letter of the law is insufficient. We should have regard to the purpose of the legal framework governing conflicts of interest with regard to EAPs. What is required is to consider the provisions in their context, with regard to, *inter alia,* the purpose of NEMA, constitutional provisions, international law and the factual matrix that constitutes the background of the application.

a. International law

Article. 8.5 of the United Nations Convention Against Corruption, which South Africa has signed and ratified, provides that '(E)ach State Party *shall* endeavour, where appropriate and in accordance with the fundamental principles of its domestic law, to establish measures and systems requiring public officials to make declarations to appropriate authorities regarding... benefits from which a conflict of interest may result with respect to their functions as public officials.' Furthermore, States Parties are *required* to take disciplinary measures against officials who violate these systems.

Public officials are defined in Art 2 (a) of UNCAC as 'any person' who 'performs a public function... or provides a public service, as defined in the domestic law of the State Party'.

The Code of Ethics to which all members of the International Association for Impact Assessment subscribe provides an ethical framework for EAPs. This code requires that members must "at all times place the integrity of the natural environment and the health, safety and welfare of the human community above any commitment to sector or private interests".

b. Domestic law

Section 8(1) of the South African Constitution provides that the Bill of Rights binds all 'organs of state', which includes 'any functionary or institution... exercising a public power or performing a public service in terms of legislation'.

In the era of the outsourcing of core democratic functions to private bodies, this provision has 'momentous implications for... private bodies that... exercise public functions' (Hoexter, 2016, p. 125). 'This power is lways subject to constitutional control... ' (*AAA Investments (Pty) Ltd v Micro Finance Regulatory Council* 2002 (1) SA 343 at para. 29.)

The EAP is conducting a public participation process. Aside from conducting an election, it is difficult to imagine a function that could be closer to the essence of the concept of democracy enshrined in Section 1 of the

Constitution. The firm is therefore exercising a public power in terms of legislation (the National Environmental Management Act 107 of 1998). It is therefore considered to be an organ of state in terms of the Constitution and a public official in terms of UNCAC.

In terms of s 233 of the Constitution and case law, South African legislation must be interpreted to harmonise with UNCAC (*Binga v Cabinet for SWA* 1988 (3) SA 155 (A) at 160).

The Promotion of Administrative Justice Act 3 of 2000 (PAJA) provides a definition of administrative action that encompasses the conduct of private actors performing a public function in terms of an empowering provision (Hoexter, 2016, p. 126). International treaties including UNCAC, even when they have not been incorporated into domestic law, provide international standards for assessing whether an administrative discretion has been exercised lawfully or reasonably' (*Progress Office Machines CC v SARS* 2008 (2) SA 13 (SCA). Therefore Chand's conduct is likely to amount to administrative action, and it can and should be assessed in terms of relevant provisions of UNCAC.

Section 1 of the Constitution articulates the founding value of democracy, of which participatory democracy is a vital part. The placement of

the word democratic' in Section 1 highlights the importance of this concept in the architecture of our consitutional democracy. The values of transparency and accountability in the public administration are enshrined in the Constitution (as 1, 2, 8, 32, 33 and 195). They, together with the principle that all state power is subject to the rule of law (s 1) and must be exercised rationally run through the jurisprudence of the Constitutional Court (see for instance the *Pharmaceutical Manufacturers* decision).

A purposive interpretation of the regulations in terms of this legal framework can only lead to the conclusion that any actual or potential conflict of interests on the part of an organ of state must be dealt with in a manner that priotises the values of democracy, accountability, transparency, honesty and integrity in the public administration. The scheme of UNCAC gives rise to the inescapable conclusion that the declaration and active, effective management of actual or potential conflicts of interest are essential bulwarks against influence peddling, favouritism and other forms of corruption. They should be generously interpreted and given their full effect – the protection of democratic processes from hidden corporate influences by means of the active deployment of constitutional principles of transparency and accountability in all activities of organs of state.

c. Factual context

We are living in a country in the throes of dealing with massive endemic corruption. All decisions by organs of state must be beyond reproach and must be seen to be free of any possibility of corruption. This is particularly the case when the organ of state is interacting with the private sector, and even more so when it deals with the construction industry which has a reputation internationally for collusion and corruption (see for instance Bowen, P., Edwards, P., and Cattell, K., 2012, pp. 1-17).

The Competition Tribunal and the Competition Commission have repeatedly found that the construction industry in South Africa is riven with different forms of corruption (see numerous media articles on this subject and the archived decisions of these institutions).

The utmost care should therefore be taken to ensure that all transactions between the public sector and the construction industry should conform to the highest legal and ethical standards.

It is evident that neither the applicant, nor the EAP, nor the CA have exercised this level of care in this matter, since information regarding the EAP principal's position on the Board of Martin and East is readily available in the public domain as the result of the most cursory Google search.

Application of the legal framework to the facts

In this context, no EAP should ever conduct public participation processes on behalf of the state and simultaneously sit on the Board of any construction company. EAPs should guard against the potential conflicts of interest which automatically arise from these dual roles.

Websites SearchWorks and Linkedin list Ms Chand as a director of a construction company. Was this conflict of interests declared in line with the appropriate legal framework and, if so, was it managed by the applicant and CA in accordance with this framework?

The construction company of which Ms Chand is a director is Martin and East. This is the construction company which was awarded the tender for the extension of the major route Kommetjie Road. In the initial planning application for the extention of Kommetjie Road, the construction of Houmoed Road was originally conceived as an auxillary part. The proximity of these two projects – in time, geographically and in the consecutive planning applications – give rise to a reasonable apprehension in the mind of an ordinary person that the EAP conducting the EIA for Houmoed Road may not be independent and objective. At the very least, the fact that the principal of the EAP is on the

Board of any construction company nad particularly this one, does not demonstrate integrity on behalf of the EAP. At worst, it demonstrates the existence of a potential conflict of interests which could be an indicator or actual or potential corruption. This situation should have been assiduously avoided by the EAP and/or the applicant and CA.

The EAP is required to declare any potential conflict of interests to the applicant and the CA. We are not aware whether this required declaration in fact occurred; there is no declaration of any conflict of interests in the Base Assessment. Indeed, in an otherwise detailed and comprehensive CV in the Base Assesssment, Ms Chand does not state that she is a Director of Martin and East. Why was this information witheld?

We are of the firm view that, in light of the above information, the EAP should have recused itself from conducting this process, distancing itself from any apprehension which could arise in the mind of the reasonable person that the principal of the EAP may be biased in favour of her other employer.

In the current context, where public concern about corruption is the major theme in South African politics, the failure of the EAP to recuse itself or relinquish its position on the Board of Martin and East is a lapse of judgement on its behalf. Organisations performing public functions with public money

must be seen to be beyond reproach, beyond any suspicion of influence peddling or favouritism. This is not the case here.

Management of conflicts of interest

If the EAP did declare a conflict of interests to the applicant and the CA, then it follows that they must be aware of the existence of a potential conflict of interests. In any event, the information is readily available as the result of a cursory Google search, and therefore the applicant and the CA *should* be aware of the existence of a potential or actual conflict of interests. The question then arises: How did the applicant and CA manage this conflict of interests? Its decision in this regard could be subject to judicial review and would be weighed against several criteria.

Regulation 18(1) of NEMA provides that if the competent authority (CA) at any stage of considering an application has reason to believe that an EAP *may* not comply with the requirements of Regulation 17, then it *must* suspend the application until the matter is resolved. Did this happen?

Regulation 18(3) provides that if the authority is notified by an Interested and Affected Party (IAP) of suspected non-compliance with Regulation 17 then it *must* investigate the matter. Regulation 18(1) provides for the

disqualification of the EAP *if it does not meet the criteria* of Regulation 17, the foremost of which is independence.

International treaties including UNCAC, even when they have not been incorporated into domestic law, provide international standards for assessing whether an administrative discretion has been exercised lawfully or reasonably (*Progress Office Machines CC v SARS* 2008 (2) SA 13 (SCA)).

Since the NEMA regulations must be interpreted in harmony with UNCAC, and the decision of the applicant and the CA to continue its contract with the EAP must also be evaluated in light of UNCAC, it is useful to turn for interpretive guidance to instruments of international law which, while not treaties, are relevant to their interpretation (*Marshall NO and Others v Commissioner, South African Revenue Service* 2018 (ZACC) 11 para 9).

The International Code of Conduct for Public Officials contained in the annex to the General Assembly Resolution 51/59 of 12 December 1996 provides that public officials 'shall not undertake... activity outside the scope of their office which will impair public confidence in the impartial performance of their functions and duties' (cited in Nicholls, D., Maton., B. & Hatchard., J., 2017, p. 523).

According to the OECD Recommendations of the Council on Guidelines for Managing Conflict of Interest in the Public Service, conflicts of interest should be managed by, *inter alia,*:

1. the diverstment of the interest by the public official;
2. recusal of the public official from involvement in affected decision-making processes;
3. restriction of access by the public official to particular information;
4. resignation of the public official from the conflicting private-capacity function;
5. resignation of the public official from their public office.

(cited in Nicholls, D., Maton., B. & Hatchard., J., 2017, p. 523).

Outcomes

NEAG hereby calls upon the competent authority to investigate whether this declaration was made in terms of Regulation 18(3) if such investigation has not yet taken place. In this event, we draw the attention of the CA to the following binding legal precedents regarding bias in administrative decision-making: *BTR Industries*; *S v Roberts; Rose v Johannesburg Local Road*

Transportation Board (a particularly relevant dictum); and *Bam-Mugwanya.* These precedents make it clear that the test for bias is not the existence of bias, but the reasonable apprehension in the mind of an ordinary person that bias *might* be present.

If the declaration was made by the EAP and the applicant and the competent authority decided that the EAP was still competent to conduct the EIA; alternatively since the applicant and the CA should have been aware of the conflict of interests, we are of the view that these decisions of the applicant and the CA undermine public confidence in the process in that they result in the existence of a reasonable apprehension of bias. This probably constitutes strong grounds for judicial review of the entire process. NEAG therefore submits that the EIA does not meet the requirements for a lawful and procedurally fair process in terms of NEMA read with the abovementioned legal framework and reserves its rights to take the decision of the CA on review.