Bylaw-making powers and functions of local government in South Africa

Prof. Anél du Plessis
Faculty of Law, North-West University
South Africa
anel.duplessis@nwu.ac.za
Objectives

• Recent developments on “community resilience to hazards in a changing climate”
  • International level
  • African regional level
  • South Africa

• The role of bylaws as governance instruments

• The bylaw-making powers and functions of municipalities in South Africa

• The bylaw-making process and related procedures

• An analysis of some existing fire-safety bylaws
Recent developments of relevance
International level

• A growing focus on ‘city level’ / ‘local level’ governments to become agents of change and well-being in society

• Municipalities increasingly prominent in global negotiations on how to improve the work and living conditions and resilience of billions of people living on earth

• Some of the most recent international developments that have direct bearing on how South African municipalities set their priorities:
2 of the sub-targets:

* By 2020, substantially increase the number of cities and human settlements adopting and implementing integrated policies and plans towards inclusion, resource efficiency, mitigation and adaptation to climate change, resilience to disasters, and develop and implement, in line with the Sendai Framework for Disaster Risk Reduction 2015-2030, holistic disaster risk management at all levels.

* Support least developed countries, including through financial and technical assistance, in building sustainable and resilient buildings utilizing local materials.
(f) While the enabling, guiding and coordinating role of national and federal State Governments remain essential, it is necessary to empower local authorities and local communities to reduce disaster risk, including through resources, incentives and decision-making responsibilities, as appropriate;

(g) Disaster risk reduction requires a multi-hazard approach and inclusive risk-informed decision-making based on the open exchange and dissemination of disaggregated data, including by sex, age and disability, as well as on easily accessible, up-to-date, comprehensible, science-based, non-sensitive risk information, complemented by traditional knowledge;

(h) The development, strengthening and implementation of relevant policies, plans, practices and mechanisms need to aim at coherence, as appropriate, across sustainable development and growth, food security, health and safety, climate change and variability, environmental management and disaster risk reduction agendas. Disaster risk reduction is essential to achieve sustainable development;

(i) While the drivers of disaster risk may be local, national, regional or global in scope, disaster risks have local and specific characteristics that must be understood for the determination of measures to reduce disaster risk;

(j) Addressing underlying disaster risk factors through disaster risk-informed public and private investments is more cost-effective than primary reliance on post-disaster response and recovery, and contributes to sustainable development;
(g) Adopt and implement disaster risk reduction and management, reduce vulnerability, build resilience and responsiveness to natural and human-made hazards and foster mitigation of and adaptation to climate change;

78. We commit ourselves to supporting moving from reactive to more proactive risk-based, all-hazards and all-of-society approaches, such as raising public awareness of risks and promoting ex-ante investments to prevent risks and build resilience, while also ensuring timely and effective local responses to address the immediate needs of inhabitants affected by natural and human-made disasters and conflicts. This should include the integration of the “build back better” principles into the post-disaster recovery process to integrate resilience-building, environmental and spatial measures and lessons from past disasters, as well as awareness of new risks, into future planning.
Article 7

1. Parties hereby establish the global goal on adaptation of enhancing adaptive capacity, strengthening resilience and reducing vulnerability to climate change, with a view to contributing to sustainable development and ensuring an adequate adaptation response in the context of the temperature goal referred to in Article 2.

2. Parties recognize that adaptation is a global challenge faced by all with local, subnational, national, regional and international dimensions, and that it is a key component of and makes a contribution to the long-term global response to climate change to protect people, livelihoods and ecosystems, taking into account the urgent and immediate needs of those developing country Parties that are particularly vulnerable to the adverse effects of climate change.
African regional level

• Municipalities faced by significant urbanization – more and more people moving into cities and towns
• Vulnerabilities and risks (also fire risks) on the rise
• Serious need for resilience of people, infrastructure and ecosystems
• Especially in the face of limited resources
it bears the brunt of the impact of climate change. Africa shall address the global challenge of climate change by prioritizing adaptation in all our actions, drawing upon skills of diverse disciplines with adequate support (affordable technology development and transfer, capacity building, financial and technical resources) to ensure implementation of actions for the survival of the most vulnerable populations, including island states, and for sustainable development and shared prosperity.
National level – South Africa

• Same urbanization trends as in the rest of Africa
  • Mounting pressure on infrastructure, budgets and local governments

• Poverty levels and water scarcity intensify vulnerability and risk
  • Incidents such as chemical spills
  • Disasters following climate changes
  • Etc.
Urban resilience

Exposure to hazards, such as floods, earthquakes, fires, infectious diseases, industrial accidents, etc. in urban areas are increased as a result of high concentrations of people, buildings and infrastructure.

Urban areas contain high concentrations of people, homes and other buildings, and infrastructure. This increases exposure to hazards, such as floods, earthquakes, infectious diseases, crimes, fires, transport and industrial accidents. Urban growth and development generate and amplify risks, which have the potential to undermine efforts to transform urban areas and to create spaces of opportunity, investment and safety. For instance, economic growth may encourage in-migration and urban sprawl, which, if poorly managed, can drive poverty and the expansion of settlements into unsafe areas. New and continued human settlement or infrastructural developments in high-risk areas, such as floodplains, will increase exposure to hazards and flooding, which will result in losses to government, the private sector and communities. Investments in reducing disaster risks can largely protect both the
What is the message, globally and in SA national policy?

• In 2018, urban risks are real and intensifying for various reasons, globally and in South Africa.

• Urban resilience is not only the ‘task’ of municipalities but local government remains the ultimate frontline actor.

• Urban resilience has many faces. In African context it is mostly related to identifying risks, reducing vulnerabilities and improving on adaptive capacity – of people, communities and local governments themselves.
Why is all of this **relevant** for the discussion on “The Strategic Role of Fire Services in Building Community Resilience to Hazards in a Changing Climate”?

What are the **risks** to resilience in your own municipality, generally?

Where does ‘**fire safety**’ fit into the bigger scheme of things? What is the role of fire safety and prevention practitioners and professionals?
What does your municipality’s IDP determine about community resilience in your municipal area...?
Bylaws as governance instruments
Municipalities responsible for ‘local governance’

• In terms of the Constitution, local government is an autonomous yet interdependent sphere in a 3-sphered government

• Ito s 2 of the Local Government: Municipal Systems Act, a municipality comprises the following: political office bearers; the administration (officials) and local communities

• The political office bearers govern together with the administration – equal focus on councilors and officials!

• Municipalities ‘govern’ by way of a matrix of different governance ‘tools’
Municipalities need ‘instruments’ to govern

Section 11(3) of the LG: Municipal Systems Act
A municipality exercises its **legislative or executive authority** by -

(a) developing and adopting **policies, plans, strategies and programmes**, including setting targets for delivery;

(b) **promoting and undertaking development**;

(c) establishing and maintaining an **administration**;

(d) **administering and regulating its internal affairs** and the local government affairs of the local community;

(e) implementing applicable national and provincial legislation and its by-laws;
(f) providing municipal services to the local community, or appointing appropriate service providers in accordance with the criteria and process set out in section 78;

(g) monitoring and, where appropriate, regulating municipal services where those services are provided by service providers other than the municipality;

(h) preparing, approving and implementing its budgets;

(i) imposing and recovering rates, taxes, levies, duties, service fees and surcharges on fees, including setting and implementing tariff, rates and tax and debt collection policies;

(j) monitoring the impact and effectiveness of any services, policies, programmes or plans;

(k) establishing and implementing performance management systems;
(1) promoting a safe and healthy environment;

(m) passing by-laws and taking decisions on any of the above-mentioned matters; and

(n) doing anything else within its legislative and executive competence.

(4) A decision taken by a municipal council or any other political structure of the municipality must be recorded in writing.
Municipal governance instruments

Governing based local environmental governance instrumentation

Command and control based instruments
- Bylaws
- Law enforcement

Incentive and disincentive based instruments
- Co-operation agreements
- Public private partnership
- Structural instruments

Agreement based instruments
- Procedural instruments
- Public private partnership
- Co-operation agreements

Civil based instruments
- Participation

Information based instruments
- Conflict resolution
- Civil action and private prosecution
- Alternative dispute resolution
“Command and control” – instruments

• Bylaws
• Local norms and standards
• Enforcement of provincial / national legislation
• Compliance through the work of compliance officers eg local EMIs and municipal courts
“Incentives and disincentives” - instruments

• Financial or non-financial – instruments aimed at changing behavior by means, other than ‘command and control’

• Typical examples are subsidies and rebates or heavier tax or municipal fees
“Agreement-based” instruments

• Agreements between municipality and residents or businesses in local community

• MoUs, PPPs etc.

• Not enforceable; but what are possible mutual benefits?
“Civil-based” - instruments

• Governance instruments that involve the community directly eg:
  • CBOs and NGOs
  • Structural instruments eg. community involvement in committees and involvement in meetings where IDPs etc. are discussed
Remember 1!

The instruments by means of which to govern we find in a combination of the Constitution of the Republic of South Africa, 1996, framework local government legislation (eg. the Systems Act), and sector-specific legislation such as the Fire Brigade Services Act, the National Veld and Forest Fire Act and the National Building Regulations and Building Standards Act.
Remember 2!

To be effective in any sector of local governance (such as fire safety), a combination of governance instruments should be used.

Don’t be misguided by the fact that in this presentation we only focus on BYLAWS.
Bylaw-making powers & functions of local government
A quiz
Quiz: true or false

1. A municipality may make bylaws on any matter it has the need to regulate

2. A municipality derives its bylaw-making power from provincial law

3. A municipality may make bylaws even if a national act regulates the same matter eg. hazardous substances

4. It is best for all municipalities to have a standardised bylaw on fire safety and prevention
Quiz: true or false

5. A bylaw applies only to citizens living in the area of the municipality.
6. Officials of a municipality may also be found to contravene a bylaw of the municipality.
7. Bylaws cannot create criminal offences for which one may get a jail sentence.
8. Bylaws can only be enforced by Magistrate Courts.
The bylaw-making powers of local government

• Determined by the Constitution and national law

• Bylaw-making is part of the “legislative” power of municipalities

• Municipalities have specifically allocated functions for which bylaws may / must be developed
Framework legislation applicable to local government

- Local Government: Municipal Systems Act
- Local Government: Municipal Structures Act
- Local Government: Municipal Finance Management Act
Local government and the Constitution

The Constitution concerns local government in three different ways:

- Municipalities incur duties from the rights of people entrenched in the Bill of Rights
- Powers, objectives and nature of local government are described in Constitution
- Relationship between local government and other 2 spheres is addressed in Constitution
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<th>The constitutional framework</th>
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**Bill of Rights**

- S 7(2)
- S 24
- S 27(1)(b)
- Etc.

**Cooperative Government**

- S 40
- S 41
Chapter 7

• S 151 Status of municipalities
• S 152 Objects of LG
• S 153 Developmental duties of LG
• S 156 Powers of LG

Schedules 4B & 5B

• 4B “Functional (local government) areas of concurrent national and provincial legislative competence”

• 5B “Functional (local government) areas of exclusive provincial legislative competence”

• Fire fighting services = 4A
The Constitution further determines:

- **Legal status** of municipalities
- Basic **functions** of municipalities
- Municipal **structures**
- Areas of **municipal competence**
- Nature and functioning of **inter-governmental relations**
- **Fiscal management**
Municipalities have the mandate (constitutional instruction) and authority to govern the legal and natural persons within their demarcated areas of jurisdiction.

“The governing function of municipalities is put into effect by means of a) legislative measures and b) measures adopted by the municipal executive.”

Nel and Du Plessis in Du Plessis “Environmental Law and Local Government in SA” (2015: 44)
2-pronged governing authority

Legislative

Executive
Important to understand what is meant with **EXECUTIVE** and **LEGISLATIVE** powers....

**Legislative power** is the authority to create, change and revoke legal rules. At municipal level this power is executed by the Council.

**Executive power** is the authority to execute legal rules. The areas over which municipalities execute executive power are listed in the Schedules to the Constitution.
Executive authority refers to “the **authority to implement national, provincial and municipal laws**” and the “daily running and management through **planning and decision-making** of a particular public service or matter.”

(Steytler and De Visser in Woolman et al (2011: 22-44))
Legislative authority

- Municipal councils are deliberative legislative assemblies with legislative authority guaranteed in Constitution
- **Authority to develop & adopt implementable and enforceable bylaws**
- **Schedules 4B and 5B are NB!**

“The linking of municipal legislative authority to the administration of various matters does not limit local government’s legislative power. ... An inferior legislative role for municipalities cannot be reconciled with s 43 of the Constitution.”

(Steytler and De Visser in Woolman et al (2011: 22-44)
However:

“Original powers are not boundless. A municipality must exercise its legislative, executive and administrative authority within the parameters set by national and/or provincial law. An important consequence of the constitutional encouragement to municipalities to govern on their own initiative is that, should there be no national or provincial law on an original local government matter, there is no limit on the municipality’s scope to determine the content of its legislative, executive or administrative decisions. The only limits are those imposed by the Constitution itself.”

(Steytler and De Visser in Woolman et al (2011: 22-46))
Schedule 4(b)

- Air pollution
- Building regulations
- Child care facilities
- Electricity and gas reticulation
- Fire fighting services
- Local tourism
- Municipal airports
- Municipal planning
- Municipal health services

Local government shares powers with national and provincial government
Schedule 4(b)

- Municipal public transport
- Storm water management systems in built-up areas
- Trading regulations
- Water and sanitation services limited to potable water supply systems and
- Domestic waste-water and sewage disposal systems
Schedule 5(b)

- Beaches and amusement facilities
- Billboards and the display of advertisements in public places
- Cemeteries, funeral parlours and crematoria
- Cleansing
- Control of public nuisances
- Control of undertakings that sell liquor to the public

Local government shares authority with provincial government.
Schedule 5(b)

- Facilities for the accommodation, care and burial of animals
- Fencing and fences
- Licensing and control of undertakings that sell food to the public
- Local amenities
Schedule 5(b)

• Local sport facilities
• Markets
• Municipal abattoirs
• Municipal parks and recreation
• Municipal roads
• Noise pollution
• Pounds
Schedule 5(b)

• Public places
• Refuse removal, refuse dumps and solid waste disposal
• Street trading
• Street lighting
• Traffic and parking
Constitution - S 151(3)

A municipality **HAS THE RIGHT TO GOVERN**, on its own initiative, **THE LOCAL GOVERNMENT AFFAIRS OF ITS COMMUNITY**, subject to national and provincial legislation.
A municipality **MAY MAKE AND ADMINISTER BYLAWS** for the effective administration of the matters which it has the RIGHT TO ADMINISTER.
National and provincial governments **MUST ASSIGN** to a municipality ... a Sched 4a or 5a matter which necessarily relates to local government if:

a) That matter would most effectively be administered locally

b) The municipality has the capacity to administer it.
A municipality **HAS THE RIGHT TO EXERCISE ANY POWER CONCERNING A MATTER REASONABLY NECESSARY FOR, OR INCIDENTAL TO, THE EFFECTIVE PERFORMANCE OF ITS FUNCTIONS.**
Why should your municipality have an up-to-date and relevant bylaw regulating fire safety and prevention?
Critically important to remember:

A municipal bylaw is as much “law” as any other legislation in South Africa. There is no hierarchy in terms of the importance or relevance of law!
The bylaw-making process and related procedures
Framework legislation applicable to local government

- Local Government: Municipal Systems Act
- Local Government: Municipal Structures Act
- Local Government: Municipal Finance Management Act
CHAPTER 3
MUNICIPAL FUNCTIONS AND POWERS

8. General empowerment
9. Assignment of functions or powers to municipalities generally by Acts of Parliament or provincial Acts
10. Assignment of functions or powers to specific municipalities by acts of executive or by agreement

10A. Funding and capacity building
11. Executive and legislative authority
12. Legislative procedures
13. Publication of by-laws
14. Standard draft by-laws
15. Municipal code
12. Legislative procedures

(1) Only a member or committee of a municipal council may introduce a draft by-law in the council.

(2) A by-law must be made by a decision taken by a municipal council -

(a) in accordance with the rules and orders of the council, and

(b) with a supporting vote of a majority of its members.

(3) No by-law may be passed by a municipal council unless -

(a) all the members of the council have been given reasonable notice; and

(b) the proposed by-law has been published for public comment in a manner that allows the public an opportunity to make representations with regard to the proposed by-law.

(4) Subsections (1) to (3) also apply when a municipal council incorporates by reference, as by-laws, provisions of -

(a) legislation passed by another legislative organ of state; or

(b) standard draft by-laws made in terms of section 14.

13. Publication of by-laws

A by-law passed by a municipal council -

(a) must be published promptly in the Provincial Gazette, and, when feasible, also in a local newspaper or in any other practical way to bring the contents of the by-law to the attention of the local community; and

(b) takes effect when published or on a future date determined in or in terms of the by-law.
14. **Standard draft by-laws**

(1)

(a) The Minister, at the request of organised local government representing local government nationally, or after consulting the MECs for local government and organised local government, may by notice in the *Gazette* -

(i) make standard draft by-laws concerning any matter, including standard draft rules and orders referred to in section 160(6) of the Constitution, for which municipal councils may make by-laws; and

(ii) amend any standard draft by-laws made in terms of subparagraph (i).

(b) Before making any standard draft by-laws or amendment in terms of paragraph (a), the Minister must -

(i) publish the proposed standard draft by-laws or amendment in the *Gazette* for public comment; and

(ii) consult the Cabinet member concerned if those standard draft by-laws or amendment affect that Cabinet member's area of responsibility.

(2)

(a) An MEC for local government, on request by organised local government: representing local government in the province, or after consulting the Minister and organised local government, may by notice in the *Provincial Gazette* -

(i) make standard draft by-laws concerning any matter for which municipal councils in the province may make by-laws; and

(ii) amend any standard draft by-laws made in terms of subparagraph (i).

(b) Before making any standard draft by-laws or amendment in terms of paragraph (a), the MEC must -

(i) publish the proposed standard draft by-laws or amendment in the *Provincial Gazette* for public comment; and

(ii) consult the MEC concerned if those standard draft by-laws or amendment affect that MEC's area of responsibility.

(3)

(a) A standard draft by-law or an amendment of a standard draft by-law is applicable in a municipality only if, and to the extent and subject to any modifications and qualifications, adopted by the council of that municipality.

(b) The repeal of a standard draft by-law after it has been adopted by a municipality does not affect the continuation of that by-law in that municipality.
15. **Municipal code**

(1) A municipality must compile and maintain in bound or loose-leaf form, and when feasible also in electronic format, a compilation of all its by-laws, including any provisions incorporated by reference as by-laws of the municipality.

(2) This compilation, to be known as the municipal code, must be -

(a) constantly updated and annotated; and

(b) kept at the municipality's head office as the municipality's official record of all applicable by-laws.

(3) The municipality, at the request of a member of the public, must provide that person with a copy of or an extract from its municipal code against payment of a reasonable fee determined by the municipal council.
Analysing existing fire-safety bylaws
Preamble

The Municipal Council of The City of Cape Town recognises: —

- that everyone has the constitutional right to an environment that is not harmful to their safety or well-being;
- that losses due to fire and the subsequent economic and social impact on people, property and infrastructure causes unnecessary hardship;
- that the protection of all sectors of the community against fire is an important aspect in the development and sustainability of the economy;
- that certain aspects of the daily existence need to be controlled in such a manner as to prevent and reduce the effects of fire on the community as a whole;
- that the community has a vital role to play in achieving the objectives of this By-law, and
- that the benefits of a fire-safe environment should be accessible to all.

Purpose and scope of this By-law

The purpose and scope of the By-law is:

- to promote the achievement of a fire-safe environment for the benefit of all persons within the area of jurisdiction of the Municipality;
- to repeal all existing relevant by-laws of the Municipality;
- to provide for procedures, methods and practices to regulate fire safety within the area of jurisdiction of the Municipality.
CITY OF JOHANNESBURG METROPOLITAN MUNICIPALITY

EMERGENCY SERVICES BY-LAWS

(Published under Notice 826 in Gauteng Provincial Gazette Extraordinary No 179 dated 21 May 2004, as amended by Notice 1118 dated 31 August 2011 in Provincial Gazette No 194)

The Municipal Manager of the City of Johannesburg Metropolitan Municipality hereby, in terms of section 13(a) of the Local Government Municipal Systems Act, 2000 (Act No. 32 of 2000), publishes the Emergency Services By-laws for the City of Johannesburg Metropolitan Municipality as approved by its Council, as set out hereunder.

CITY OF JOHANNESBURG METROPOLITAN MUNICIPALITY

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7. Safety fire-breaks required

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KNYSNA MUNICIPALITY
BY-LAW RELATING TO COMMUNITY FIRE SAFETY

Under section 156 of the Constitution of the Republic of South Africa, 1996, the Knysna Municipality enacts as follows -

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<td>Portable metal containers for compressed gas basic design, manufacture, use and maintenance.</td>
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<td>SANS 10087: Part 1</td>
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<tr>
<td>SANS 10089: Part 1</td>
<td>The petroleum industry, Part 1: Storage and distribution of petroleum products in above ground bulk installations.</td>
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<td>SANS 10089: Part 2</td>
<td>The petroleum industry, Part 2: Electrical installations in the distribution and marketing sector</td>
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<td>SANS 10105: Part 1</td>
<td>The classification, use and control of firefighting equipment, Part 1: Portable fire extinguishers.</td>
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<td>SANS 10108</td>
<td>The classification of hazardous locations and the selection of apparatus for use in such locations.</td>
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<thead>
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<th>TITLE</th>
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<tbody>
<tr>
<td>National Environmental Management: Air Quality Act, 2004</td>
<td>Act 39 of 2004</td>
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<tr>
<td>Conservation of Agricultural Resources Act, 1983</td>
<td>Act 43 of 1983</td>
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<tr>
<td>Forest Act, 1984</td>
<td>Act 122 of 1984</td>
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</table>
What do we learn from these 3 bylaws?

• The names of fire-safety bylaws and content differ
• Fires-safety bylaws intersect with several other areas of governance eg. building of infrastructure and roads and water services bylaws
• The definitions-clause is very important e.g. what is regarded as a “building”
• The bylaw must not contravene other law – including privacy rights of community members
• Some actions prohibited eg. certain types of fires
• Some actions required eg. firebreaks, emergency evacuation plans and application for a permit
• Some exemptions from the application of the bylaw
• Bylaws create offences and penalties – maximums prescribed into national law
• Bylaws provide for ‘notices’ where people contravene the bylaw (ie. administrative procedures)
What do we learn from these 3 bylaws?

• Bylaw to provide for delegations in the municipality – Chief Fire Officer and MM
• Bylaws provide for ‘notices’ where people contravene the bylaw (ie. administrative procedures)
• Bylaws provide for reporting procedures
• Bylaws provide for record-keeping
• A bylaw can be used to reinforce compliance with national law eg. when bylaw states that vehicle operators must obtain a dangerous goods certificate into the National Road Traffic Act
What do we learn from these 3 bylaws?

• An indemnity clause may be necessary – excluding liability on the part of the controlling authority, the municipality or a member of service for damage or loss caused by acts in good faith in accordance with bylaw

• Possible to provide for the declaration of ‘fire control zones’

• Bylaws contain Schedules with forms for the public to use

• Bylaws contain Schedules referring to national legislation informing the bylaw

• Bylaws contain Schedules referring to the relevant SANS codes
What do I miss from these bylaws?

• Technologically advanced warning or information sharing systems eg. **social media communication** with community members

• **Principles** underpinning the bylaw – especially in relation to risk and vulnerability (reminded of international developments)

• Measures for **inter-municipal or intergovernmental cooperation**

• Measures related to **public awareness and fire-safety education** in the municipality

• Establishment of **coordinating bodies** in the municipality – a municipal committee involving different kinds of experts, local government officials and community organisations, for example?

• Little acknowledgment of the relevance of the **Disaster Management Act** and the **National Environmental Management Act**, for example.
Final quiz
(for discussion)
On the basis of today’s discussion:

1. What do you find to be missing in your own fire-safety bylaw?
2. What do you regard as the 3 most important matters to be covered in a fire-safety bylaw and why?
3. Where do you start if you want to develop a new fire-safety bylaw or amend an existing bylaw?
4. Why is the Constitution, local government law and the list of other national legislation relevant for the way in which a fire-safety bylaw is designed?
5. What may be unique features of fire-safety bylaws in South Africa, compared with other countries?
6. Is public participation compulsory before and after the adoption of the fire-safety bylaw as well as with the declaration of fire control zones?
7. Who is responsible for keeping a municipality’s fire-safety bylaw up to date and relevant?
8. May a municipal bylaw place a total ban on fireworks?
Thank you.