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LEGAL OPINION
[Confidential]

TO: M B N Dambuza,MP
Chairperson: Portfolio Committee on Human Settlements

COPY: Secretary to Parliament

DATE: 04 September 2013

SUBJECT: Housing Development Agency Regulations

LEGAL ADVISER: Ms V Ngcobozi
Parliamentary Legal Adviser

REFERENCE NUMBER: 206/13

MESSAGE : Attached please find draft regulations with tracked changes
for your attention

GOVERNMENT NOTICES

DEPARTMENT OF HUMAN SETTLEMENTS

No. R. _____

2013

HOUSING DEVELOPMENT AGENCY ACT, 2008

**HOUSING DEVELOPMENT AGENCY REGULATIONS ON PRIORITY HOUSING
DEVELOPMENT AREAS**

I, ~~Tokyo Mosima Gabriel Sexwale~~, The Minister of Human Settlements has hereby under section 32 read together with section 7(3)(c) of the Housing Development Agency Act, 2008 (Act No. 23 of 2008), and after consultation with the Agency and Parliament, make the Regulations in the Schedule.

SCHEDULE

ARRANGEMENT OF REGULATIONS ON PRIORITY HOUSING DEVELOPMENT AREAS

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23. ~~Offences and Penalties~~
- 24.3 Short title

Comment [v1]: There is no empowering provision for the Minister to regulate on offences and penalties.

Comment [v2]:
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Chapter 1 Interpretation

Definitions

1. In these Regulations, any word or expression to which a meaning has been assigned in the Act has a meaning so assigned, and, unless the context indicates otherwise –

“circumstances of priority” means circumstances which relate to the housing conditions of people, particularly those in the low income groups of society, which give rise to priority to provide shelter or to upgrade areas or to re-develop precincts in a manner which applies accelerated methods for the delivery of housing at a large scale in an integrated and sustainable manner;

“declare” means declaration of a priority housing development area by the Minister referred to in regulation 5;

“department” means the national department of human settlements;

~~**“priority housing development plan”** means a development plan referred to in regulation 8;~~

“housing development” means a housing development as defined in the section 1 of the Housing Act, 1997 (Act No. 107 of 1997), to be implemented on a declared priority housing development area and relating to circumstances of priority, which is of national importance and executed in accordance with an approved development plan;

“implementation protocol” means an implementation protocol as defined in the Intergovernmental Relations Framework Act;

~~**“intergovernmental relations Framework Act” means the Intergovernmental Relations Framework Act, 2005 (Act No.13 of 2005);**~~

~~**“Minmec”** means Minmec as defined in the Intergovernmental Relations Framework Act, 2005;~~

“municipality” means the local authority in whose area of jurisdiction the priority housing development area is located;

“priority housing development area” means a priority housing development area as defined in the Act;

Comment [v3]: Already defined in the Act.

“preliminary declaration” means a preliminary declaration by the Minister, leading up to the declaration of a priority housing development area, referred to in regulations (2) and (3);

“priority housing development plan” means a development plan referred to in regulation 8;

“protocol subscriber” means a signatory to an implementation protocol as referred to in regulation 19;

“the Act” means the Housing Development Agency Act, 2008 (Act No. 23 of 2008)

Chapter 2

Declaration of a priority housing development area

Motivation for a preliminary declaration of a priority housing development area

2. (1) The Agency may identify circumstances of priority in a province and municipality, after having consulted with the relevant provincial and municipal authorities.

(2) The Agency must submit a proposal to the Minister for consideration of a preliminary declaration of a priority housing development area.

(34) The proposal contemplated in sub regulation (2) must contain at least the following-

(a) a motivation and reasons in support of the preliminary declaration;

- (b) the nature of the circumstances of priority in the particular province and municipality;
- (c) details and proof of the consultative processes, including the intergovernmental relations structures, undertaken with the provincial and municipal authorities;
- (d) conditions relating to -
 - (i) a mandate given by the relevant province or municipality, to the Agency to compile and develop a development plan;
 - (ii) a proposed budget to cover the costs of compiling and developing the development plan;
 - (iii) proposed time periods within which the development plan must be finalised and submitted to the Minister for approval; and
 - (iv) a mandate given to the Agency by the Minister to liaise with relevant organs of state and where necessary, the private sector.

Preliminary declaration of a priority housing development area

3. (1) The Minister may, after consultation with Minmec, consider and approve a preliminary declaration of a priority housing development area.

(2) After the conclusion of a preliminary declaration of a priority housing development area, the Agency must take the following steps towards consider

- (a) the conclusion of an implementation protocol;
- (ba) the scope of the intended housing development;
- (cb) the envisaged technical, institutional and financial requirements to implement the housing development plan; and

Comment [v4]: What happens if he does not approve, give reasons perhaps or what?

- This needs to be kept up.

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~~(d)(e)~~ — the Intergovernmental Relations GR structures to facilitate the implementation of the implementation protocol.

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Actions to finalise the priority housing development plan

Comment: [v5]: Timeframes for each step to be clearly stated

4. (1) Prior to the finalisation of the priority housing development plan, the following ~~must occur~~ Agency must-

(a) engagements and communications with relevant participating organs of state and other housing institutions to ensure their commitment;

Comment: [v6]: Participation of other ministers must be clear

(b) engagements and communications with the Minister regarding -

(i) progress achieved;

(ii) obstacles experienced and attempts made to resolve obstacles;

(iii) matters which require special attention, or assistance or intervention by the Minister;

(iv) delays experienced and extension of time required to finalise the development plan;

(v) changes or circumstances which affect or require the contents of the development plan to be changed;

(vi) any other influences affecting the outcome of the intended housing development; and

(vii) any other aspects which the Agency deems necessary to refer to and communicate with the Minister;

(c) ~~attempts being made to~~ resolve issues or deadlocks occurring between-

(i) the Agency and other housing institutions, or other organs of the state or protocol subscribers; or

- (ii) organs of state and protocol subscribers; or
- (iii) the community and organs of state, ~~which includes provincial and municipal authorities;~~ or
- (iv) any other person or party participating in the development of the development plan and the implementation of the housing development.

Comment [v7]: Timeframes to be specified

Comment [v8]:

(2) If an organ of state refuses or fails to cooperate with the Agency in compiling and developing a development plan, ~~then~~ that organ of state must, at the request of the Agency, give written reasons for its failures to cooperate or respond to any request of the Agency.

(3) The Agency must refer the matter to the Minister for his or her intervention to resolve the matter. ~~may where necessary, assist or intervene, in the resolution of the matter.~~

(4) The Agency must, in consultation with relevant participating parties, submit the development plan to the Minister for approval.

Comment [v9]: Who are the participating parties

Declaration of a priority housing development area

5. (1) Before a priority housing development area is declared by the Minister, the Agency must ensure that –

- (a) all legal requirements and directives have been complied with for the declaration of a priority housing development; and
- (b) the priority housing development area will conform to the integrated development plans and provincial spatial development frameworks applicable at the time in the area to be declared a priority housing development area.

(2) The declaration contemplated in sub-regulation (1) must be done by way of a publication of a notice in the Government Gazette, which notice must contain at least the following information –

- (a) the objective of the housing development area;
- (b) a cadastral description to identify the location of the priority housing development area; and
- (c) the name by which the housing development will be known or identified.

(3) The declaration of a priority housing development area will mark the commencement of a housing development, which is of national priority.

Chapter 3

Priority Housing Development Plan

Details to be contained in the priority housing development plan

6. (1) The priority housing development plan must at least contain the following information, clearly set out and described -

- (a) the name, location of, municipal district and provincial locality of the land ~~or landed property~~ to be declared a priority housing development area;
- (b) the type of development;
- (c) the target community ~~or communities~~ affected by the priority housing development area, either directly or indirectly as affected parties;

Comment [v10]: What is the meaning of this? Department to explain.

- (d) the objectives of the priority housing development area;
- (e) a motivation in regards to the priority for declaring the land or ~~landed property~~ as a priority housing development area;
- (f) the strategic content pertaining to implementation methods to be followed;
- (g) all technical and feasibility studies done, or results to be obtained relevant to the implementation process and procedures of the priority housing development area;
- (h) funding requirements and the alignment of commitments to fund the priority housing development area and the various participating parties and role players having committed or required to commit;
- (i) the implementation protocol concluded and signed by the relevant participating parties and role players;
- (j) the implementation arrangements, including the identity and particulars of an implementing agent;
- (k) the implementation, governance and oversight structures;
- (l) risk mitigation management provisions and structures;
- (m) the reporting mechanisms;
- (n) the planning alignment approvals and related arrangements regarding the implementation and finalisation of the priority housing development area;
- (o) governmental policy and legislation compliance, including spatial planning and land use management legislation, the National Development Plan, provincial and municipal policies and legislation;

- (p) a closure strategy of the housing development, if sufficient information is available at the time when the development plan is presented for approval, alternatively, provision to be made for a closure strategy to be supplemented to the priority housing development plan; and
- (q) any other details or requirements which the Agency may require to be included and described in the development plan.

Consultative and participatory process

7. (1) The Agency in compiling the development plan must allow for broad consultation with provincial and municipal authorities, other participating organs of the state, other participating housing institutions and the private sector participants, which have been invited to participate in the housing development.

(2) A record must be kept by the Agency of the consultative process followed and the inputs and comments received from the various parties consulted.

(3) It will be and remains the obligation of the municipality to solicit and consult with the community of the municipality in terms of the relevant legislation applicable to municipalities in regards to community participation.

(4) Any interest or objection expressed by a party affected by the priority housing development area must be recorded and kept by the Agency.

Comment [v11]: Till when and the Agency must do what with it?

Presentation of priority housing development plan

8. (1) The Agency must submit the priority housing development plan to the Minister for consideration and approval.
- (2) After the approval of a final development plan by the Minister, that document will be put forward and tabled at the Minmec for consultation.
- (3) The priority housing development plan and all annexures and/or changes thereto will be kept and filed by the Agency for record purposes.

Amendment or withdrawal of the priority housing development plan

9. (1) A development plan may be amended or withdrawn Only with the consent and approval of the Minister in consultation with affected organs of state, a ~~development plan may be amended or withdrawn~~
- (2) Any amendment or changes effected to a development plan will require to be done so by way of an addendum to be added to the original approved development plan for record purposes.
- (3) The Agency will fully motivate and give reasons to the Minister for purposes of amending or withdrawing a development plan.

Chapter 4

Funding of a priority housing development area

Recognition of a priority housing development area programme

10. (1) The Agency must-

- (a) compile and submit a programme plan to the Minister to prioritise funding for~~recognise~~ the priority housing development as a dedicated national housing programme in line with this~~the~~ Housing Act, 1997;and
- (b) submit annual budget plans reflecting the financial requirements over the term of each financial year to fund the declared priority housing development areas.

Funding the implementation of a priority housing development area

11. (1) A defined quantum of funding for a priority housing development area will be made available through existing human settlements grants frameworks.

(2) The funding contemplated in sub regulation (1) must cover funds for development planning, capital requirements for bulk infrastructure, project packaging and capacity mobilisation.

(3) Funding will remain with mandate holders and will be released when needed during the roll out of the priority housing development plan.

(4) Funding commitments and sequence of release will be stipulated by each party in the implementation protocol contemplated in regulation 19.

Comment [v12]: Department was given strict instructions by the Committee to ensure that this provision is beefed up with all the details of funding, where is it going to come from, how is it going to be channelled for this purpose, Which grant is it coming from MIC or what.

Comment [v13]: Funding and infrastructure should be in place before the plan-funding commitment must be clear.

Chapter 5

Implementation Protocol and Closure of a housing development

Implementation in accordance with priority housing development plan

12. (1) A housing development will be implemented in accordance with the approved priority housing development plan.

(2) The implementation of a priority housing development requires from the Agency and all relevant participants to meet their obligations, responsibilities and duties during and after implementation.

(3) The Agency may from time to time identify circumstances which may cause a delays on the progress of the housing development and take remedial steps to combat those delays.

Coordination and monitoring of a priority housing development area

13. (1) The Agency must co-ordinate and monitor the implementation and performance of the housing development and protocol subscribers.

Comment [v14]: Timeframes to be specified

(2) If a protocol subscriber fails to perform, the Agency must request the non-performing party to provide written reasons for its non-performance, and ~~may~~ must refer the matter to the Minister for intervention resolution.

Implementing agent

14. (1) The Agency may appoint an implementing agent on terms and conditions agreed to between the parties, if the Agency does not intend playing the role of an implementor.

(2) Depending on the nature of the housing development, more than one implementation agent may be appointed.

(3) An implementing agent must report directly to the Agency at regular intervals and in a manner required by the Agency on all matters relevant to the implementing agent's roles, functions and responsibilities.

Comment [v15]: Specify what is regular timeframes to be specified

(4) The implementing agent may not cede or assign any of its rights, functions or obligations to a third party without the written consent and approval of the Agency.

(5) If an implementing agent does not fulfil its roles or obligations, then the Agency may terminate the appointment and replace the implementing agent with another or take over all or certain functions of the implementing agent.

Participation by other role players

15. The role players, in particular the provincial and municipal authorities, other organs of the state and other housing institutions participating in the housing development, in whichever capacity, will prioritise their participation to assist in the implementation of the housing development, which amongst others includes –

- (a) calling of special meetings;
- (b) adopting special resolutions;
- (c) implementing special measures; and
- (d) prioritising budgets and commitments,

to accommodate the housing development as a national priority.

Closure of a housing development

16. (1) The priority housing development plan contemplated in regulation 15 must provide for a closing down strategy.

(2) The closing down strategy, contemplated in sub-regulation (1), must address at least the following-

- (a) the continuation or non-continuation of the Agency's participation in the housing development;
- (b) the handing over procedures of identified responsibilities, authorities, functions and, where applicable, assets including buildings and services from one party to another, which relate to the housing development and the future management, ownership and control of the housing development after the closing down strategy event;
- (c) the financial implications regarding the closing down or handing over of the housing development, as contemplated in sub-regulation (2)(b) and the impact which such handing over process will have on the Agency, or the party taking over the respective roles, functions, duties and assets; and
- (d) any other aspect or circumstances required to be addressed;

Conversion of existing projects into priority housing development areas

17. (1) The Minister may, in consultation with Minmec, intergrate or convert an existing housing project to a priority housing development area.

(2) The project contemplated in sub regulation (1) will be dealt with as having been pre-approved and the provisions contained under Chapter 2 of these regulations will apply with the necessary changes required.

Chapter 6

Inter-governmental Collaboration

Implementation protocol for a housing development

18. (1) The Agency must develop an implementation protocol to be concluded by respective organs of state, at national, provincial and local government level, and other housing institutions in accordance with section 35 of the Intergovernmental Relations Framework Act, 2005, and where applicable enter into a separate agreement with the private sector, to provide mechanisms and procedures of facilitating, assisting, supporting and funding the planning and implementation of the priority housing development area.

(2) The implementation protocol will determine the terms and conditions of each protocol subscriber.

(3) It will be the duty of the Agency to effect changes or amendments to the implementation protocol, as approved by the Minister, which must at all times align to the priority housing development plan.

(4) If the housing development requires the participation of the private sector, a separate agreement will be entered into with that party.

(5) The implementation protocol must indicate a contact person –

(a) who will act as the duly authorised representative of the protocol subscriber;

(b) who will be vested with the necessary authority to bind the protocol subscriber in terms of decisions which has to be taken, save where the principal of the authorised representative has directed differently;

(c) who will be the party with whom the Agency will liaise and correspond with; and

(d) must inform the Agency of any changes in regards to the authorised representation and the position of the representative.

(6) The Agency must keep a separate register of protocol subscriber, which register will be the proof of the protocol subscribers' participation.

Community participation

19. (1) All aspects of community participation in a priority housing development area must, to the extent required in terms of municipal and local government legislation remain the function of the municipality.

(2) Community participation remains an integral part of the municipality's obligations in terms of the municipality's subscription to the implementation protocol to advise and keep the Agency informed of the communities' exercise of their rights to participate in the decision making process of the municipality and of any presentations, representations or complaints laid by the community in respect of the priority housing development area.

Essential elements of cooperation

20. (1) The Agency will at all times be entitled to rely upon the full cooperation and support of other organs of the state to achieve the planning, implementation and funding of the priority housing development area in a manner contemplated in terms of the Inter-g~~o~~overnmental Relations Framework Act, 2005 and in this regard every protocol subscriber and participating party will be deemed to have –

(a) committed to expedite and fast-track the subscriber's functions and duties; and

(b) guaranteed performance in terms of any financial undertaking or commitment given by that subscriber to the Agency.

(2) The Agency may at any time request from a protocol subscriber and be entitled to receive from that subscriber an undertaking reaffirming the subscriber's financial commitment, upon which document the Agency will be entitled to rely, for