

eTHEKWINI MUNICIPALITY

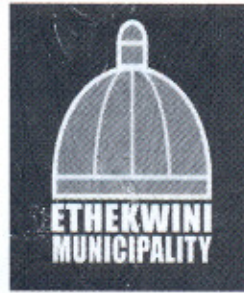
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**COMMENTS ON THE LOCAL GOVERNMENT: MUNICIPAL PROPERTY RATES
AMENDMENT BILL
[B - 2013]**

A. INTRODUCTION

The comments of eThekweni Municipality on the *Local Government: Municipal Property Rates Amendment Bill [B – 2013]* (hereinafter referred to as “the Bill”) appear overleaf.

Our Municipality is committed to assisting the Department of Cooperative Governance and Traditional Affairs in shaping an amendment Bill that not only achieves the objectives of national government, but also promotes, respects and advances the power and autonomy afforded by the Constitution to a municipality to levy and recover rates on property.

Please do not hesitate to contact us should you require further explanation on any of the points raised in this commentary.

B. COMMENTS ON THE BILL

1. Amendments to Sections 3, 8 and 17 of Act 6 of 2004- unconstitutional

1.1 The amendment to sections 3, 8 and 17 are not supported and are unconstitutional by virtue of national government over-prescribing to municipalities on areas which fall under a municipality's executive control and authority. Sections 3, 8 and 17 are, in general, limiting a Municipality's power and autonomy to levy and recover rates from various categories of property by prescribing the categories of properties and those exempted from the payment of rates.

1.2 Apart from the unconstitutionality of these amendments (which shall be dealt with as a separate section hereunder), subsection 8(1) and (2) do not speak to each other. Whereas subsection 8(1) refers to the 'usage' of a property as a criteria for determining differential rates, subsection 8(2) contains elements of 'ownership' when referring to the various categories of rateable property rather than 'usage'.

1.3. Further, it must be mentioned from the outset that we have taken notice of the gradual attempt by national government to exempt national and provincial structures from the liability of paying rates. By exempting these structures, the Municipality will be losing a large portion of revenue derived from rates. The shift shows that PBO and PSI would benefit by 88.4% while all other categories would increase by 5.4 % to absorb the shift in incidence. The Municipality can only be in a position to accept such exemptions if the shortfall in revenue is made up through government grants to municipalities. Failing this, the general body of ratepayers will suffer by virtue of increased rates being implemented to make up the deficit.

2. ****Constitutional Issues Surrounding the Proposed Amendment to Sections 3, 8 and 17 of Act 6 of 2004****

Amendments to sections 3, 8 and 17 of the Bill are unconstitutional in that they encroach on a Municipality's executive authority to impose rates in terms of the Constitution. In order to contextualise our assertion, we will outline the legislative provisions concerning the status of a Municipality under the provisions of the Constitution and the Municipal Property Rates Act, and thereafter move on to an application of these provisions in light of the proposed amendments.

2.1 Constitutional Framework

The following sections of the Constitution are of relevance with regard to a municipality's power and autonomy to govern on its own initiative the local government affairs of its community:

- a. Section 40(1) provides that the government of the Republic is constituted as the national, provincial and local spheres of government, which are distinctive, inter-dependent and interrelated;
- b. Section 41 deals with the principles of co-operative government and inter-governmental relations. Section 41(1) provides that all spheres of government and all organs of state within each sphere must, inter alia—
 - *respect the Constitutional status, institutions, powers and functions of government in the other spheres;*
 - *not assume any power or function except those conferred on them in terms of the Constitution; and*
 - *exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere;*
- c. Section 151 provides that the local sphere of government consist of municipalities which have the *right to govern on their own initiative the local government affairs of their communities*, subject to national and provincial legislation, as provided for in the Constitution. This section also provides that national or provincial government may *not compromise nor impede* a Municipality's ability or right to exercise its powers or perform its functions;

- d. Section 156(5) provides that a municipality has the right to exercise any power concerning a matter reasonably necessary for, or incidental to, the effective performance of its functions; and
- e. Section 229(1) expressly empowers a municipality to impose "rates on property and surcharges on fees for services provided by or on behalf of a municipality."

3.2 Other Legislative Framework: Municipal Property rates Act 2004

Our Constitutional power to impose rates is regulated in terms of the Municipal Property Rates Act, 2004 (Act 6 of 2004) ("MPRA"). The relevant provisions of the MPRA are as follows:

- a. The preamble to the MPRA specifically recognises that there is a need to provide local government with access to a source of revenue necessary to fulfil its developmental responsibilities and that income derived from property rates is a critical source of revenue for Municipalities to achieve their constitutional objectives;
- b. Section 2 affords a Municipality the express power to levy rates on property in its area; and
- c. Section 3 provides that the council of the Municipality must adopt a policy consistent with the MPRA on the levying of rates on rateable property in the Municipality. Under the provisions of section 3(3), the rates policy must provide for certain matters. Those matters which are specifically relevant are as follows:
 - the rates policy must determine, or provide criteria for the determination of categories of property for the purpose of levying different rates; and
 - the rates policy must take into account the effect of rates on the poor and include appropriate measures to alleviate the rates burden on the poor;

2.2 Application

- a. Section 8 of the MPRA guided the Municipality in formulating its rates policy with regard to imposing different rates for different categories of rateable property. This section was used as a guide by the Municipality in forming its rates policy. However, the proposed amendment now, in contrast, takes away any form of discretion that

the Municipality could exercise in formulating its policy regarding the categories and criteria. The amendment to section 8 of the Bill firstly makes it mandatory that the rates policy *must* (our emphasis) be determined according to the listed criteria and secondly, it *limits the criteria and categories for imposing rates*.

b. What is clearly evident from the above legal provisions are the following:

- the Constitution affords the Municipality considerable autonomy in performing its functions and achieving its constitutional objectives;
- the levying and recovery of rates forms an integral part of the duties and objectives of a Municipality since rates form a critical source of revenue for a Municipality; and
- the municipal autonomy provided for in the Constitution must necessarily apply to the power to levy and recover rates on properties in its area. *Any contrary suggestion would serve to impede a Municipality in the achievement of its constitutional objectives.*

c. The proposed amendments to sections 3, 8 and 17 of the Bill are inconsistent with the Constitution and, specifically with the *Municipality's autonomy* provided for in the Constitution.

d. A Municipality has the right to govern *on its own initiative* the local government affairs of its community. The restriction on the formulation of the rates policy with regard to the criteria and categories for imposing differential rates fetters that very power, to such an extent that the amendments *do not amount to a regulation of a municipality's power to impose rates on property, but instead amounts to the exercise of that very power.*

e. In addition, the amendments will directly affect the Municipality's ability to govern and achieve the objectives provided in section 152 and the developmental duties described in section 153 of the Constitution.

f. The central theme of section 41 is that the autonomy of a particular sphere of government must be respected and promoted. By restricting a Municipality's discretion in determining the criteria and categories for imposing rates directly violates section 41 by permitting the national sphere of government to effectively

limit and prescribe to a Municipality the basis on which rates may be levied. This is both *inconsistent with section 41 of the Constitution and is in fact contrary to the autonomy of the Municipality to impose rates provided for in section 229(1)*.

- g. Further, the proposed amendment to section 8 is in conflict with the discretion afforded on a Municipality by section 3(3) to determine the criteria and categories for imposing rates in its rates policy.

3. Amendment of Section 25 of Act 6 of 2004

It is submitted that the amendment of section 25 is badly worded and gives rise to confusion regarding its application. The 'holder' only has a right in the scheme and not the unit, as otherwise implied from the proposed amendment. Accordingly, section 25 must be redrafted in clearer terms.

4. Insertions of section 82A and 82B in Act 6 of 2004

The proposed reporting requirements on a municipality are onerous and time consuming. While the need to report to the Minister and the MEC is appreciated, the Municipality requires some assurance that all the time and energy spent in compiling such reports are not done in vain. Accordingly, as a municipality is obliged to compile and submit reports, the Minister and the MEC must similarly be obliged through legislation to attend to the reports and process them in a prescribed manner to achieve a listed identifiable objective. It is submitted that the drafter must include provisions in the Bill which detail what the Minister and MEC are expected to do with the reports submitted to them.

5. Amendment of section 78 of Act 6 of 2004, as amended by section 33 of Act 19 of 2008

It is submitted that the proposed addition of paragraph (h) should be amended to include the words "or category" after the "the value".

6. Suggested amendments to Act 6 of 2004 which are not mooted for change under the Bill

It is suggested that the following important amendments should be made to Act 6 of 2004 which are not addressed in the Bill:

6.1. paragraph (c) of the definition of "owner" should be amended by the removal of the phrase "or to whom it was granted in terms of legislation".

6.2. Section 28 (Recovery of rates in arrears from tenants and occupiers) does not provide a penalty in the event that the tenant or occupier fails to comply with the obligation placed on him or her to forward the rental due on the property to the Municipality in respect of arrear rates owed by the owner of the property; or to furnish the Municipality with information requested in terms of subsection 28(4). It is submitted that the amendment should allow a municipality to provide for such penalty in its credit control and debt collection policy and by-law.

Further, section 28 does not address the situation where the tenant or occupier pays rent to a third party rather than the owner of the property who has defaulted on paying rates. It is submitted that in light of this omission, section 28/ should be amended as follows:

"(1) If an amount due for rates levied in respect of a property is unpaid by the owner of the property after the date determined in terms of section 26(2), the municipality may recover the amount in whole or in part from a tenant or occupier of the property, despite any contractual obligation to the contrary on the tenant or occupier to the owner, third party or to any lessor if such third party or lessor is not the owner. The municipality may recover an amount only after the municipality has served a written notice on the tenant or occupier.

(2) The amount a municipality may recover from the tenant or occupier of a property in terms of subsection (1) is limited to the amount of the rent or other money due and payable, but not yet paid, by the tenant or occupier to the owner of the property, or to any third party or lessor if such third party or lessor is not the owner, arising out of the tenancy or occupancy of the property.

(3) Any amount a municipality recovers from the tenant or occupier of the property must be set off by the tenant or occupier against any money owed by the tenant or occupier to the owner, or to any third party or lessor if such third

party or lessor is not the owner, arising out of the tenancy or occupancy of the property.

(4) The tenant or occupier of a property must, on request by a municipality, furnish the municipality with a written statement specifying all payments to be made by the tenant or occupier to the owner of the property, or to any third party or lessor if such third party or lessor is not the owner, arising out of the tenancy or occupancy of the property, for rent or other money payable on the property during a period determined by the municipality.

C. CONCLUSION

We submit that the *Local Government: Municipal Property Rates Amendment Bill* be revised and amended accordingly, as per the comments above.



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