**Hon. M Rayi**

Select Committee on Economic and Business Development

Parliament

PO Box 15

Cape Town

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Attention Committee Secretariat: Grace Dinizulu

By email: ndinizulu@parliament.gov.za

Dear Honorable Rayi,

**CONSTITUTIONALITY OF KEY AMENDMENTS TO THE NATIONAL LAND TRANSPORT BILL [B 7 – 2016] AND OTHER RELATED CONCERNS**

Thank you for the opportunity to raise SALGA concerns about the National Land Transport Amendment Bill [B 7 – 2016] on 30 October 2018. As promised, we attach a copy of our comments as submitted, (headed SALGA COMMENTS ON NATIONAL LAND TRANSPORT AMENDMENT BILL [B 7 – 2016]) which explains our concerns in detail, including suggested amendments to the Bill aimed at addressing such concerns.

As organised local government, the South African Local Government Association, (SALGA), has serious concerns about the constitutionality of the current National Land Transport Amendment Bill [B 7 – 2016]. We have reviewed the Opinion of the Chief Legal Advisor and are not in agreement with the finding of that opinion, namely that the Amendment Bill is not unconstitutional.

As discussed, we are of the view that an independent legal opinion on the Constitutionality of the Amendment Bill needs to be sought. We therefore humbly request the Select Committee of Economic and Business Development to seek a legal option to examine the constitutionality of the Amendment Bill.

Our concerns on constitutionality arise from the fact that ‘municipal public transport’ is a Schedule 4B function, over which local government is given various powers and responsibilities in terms of the Constitution. Municipalities derive their power with respect to ‘municipal public transport’ from the provisions of Section 156(1). This section vests municipalities with "executive authority" and "the right to administer" the matter of municipal public transport. Section 151(3) of the Constitution provides that a "municipality has the right to govern, on its own initiative, the local government affairs of the community, subject to national and provincial legislation, as provided for in the Constitution". The use of the words "own initiative" indicates that the power for the municipal public transport function is not dependent on a decision of the Minister.

The current National Land Transport Act is framed in a manner that recognizes these constitutional dimensions. *The Amendment Bill, however, reverses this, making the exercise of these powers dependent upon decisions made by the national Minister of Transport,* which we maintain is *unconstitutional*. Whilst the Minister can set *norms and standards* for the exercising of the municipal public transport function, national legislation and the Minister cannot set criteria *to determine whether or not a municipality may exercise its power or function.* Municipalities draw their authority from the Constitution, and thus the power of a municipality to exercise the functions outlined in Schedule 4B is not dependent on enabling national legislation and cannot be constrained by national legislation.

Section 154(1) of the Constitution reads – “The national and provincial governments, by legislative and other measures, must support and strengthen the capacity of municipalities to manage their own affairs, to exercise their powers and to perform their functions”. It is common cause that not all municipalities have the capacity to exercise their powers in terms of the provisions of the Constitution as contended above.

Section 155(7) imposes an obligation on national and provincial governments to “see to the effective performance by municipalities of their functions in respect of matters listed in Schedules 4 and 5, by regulating the exercise by municipalities of their executive authority referred to in section 156(1).” *The effect of these provisions is that, except to the extent set out above, the executive authority over, or the power to administer, matters listed in Part B of Schedules 4 and 5 is vested in municipalities.* Parliament or a provincial legislature may not encroach on the powers, functions and structure of a local government to such an extent as to compromise the fundamental status, purpose and character of local government. Section 40 of the Constitution which deals with the three spheres of government, states that “each sphere must respect the status, powers and functions of government in the other spheres and “not assume any power or function except those conferred on [it] in terms of the Constitution. Thus national and provincial spheres cannot, by legislation, give themselves the power to exercise executive municipal powers or the right to administer municipal affairs. The mandate of these two spheres is ordinarily limited to regulating the exercise of executive municipal powers and the administration of municipal affairs by municipalities.”

Under our previous order, which embraced parliamentary sovereignty, municipalities were creatures of statute and enjoyed only delegated or subordinate legislative powers derived exclusively from ordinances or Acts of Parliament. Then local government was described as being mere local authorities entrusted to provincial councils to administer. Courts of the time confirmed this approach in various cases.

 However, the advent of the Constitution has enhanced rather than diminished the autonomy and status of local government where Local Government structures are given more autonomy, where this autonomy is not derived from anything given to them by the provinces. Subsection 40(1) of the Constitution entrenches the institutions of local government as a sphere of government and pronounces all spheres of government to be distinctive, interdependent and interrelated. Subsections 41(e) and (g) articulate and preserve the geographical, functional and institutional integrity of local government. In turn, subsections 43(c) and 151(2) confer original legislative and executive authority on municipal councils. The Constitution expressly precludes the national or a provincial government from impeding the proper exercise of powers and functions of municipalities. Thus a municipality has the right to govern the local government affairs of its area and community. However the duties, powers and rights of municipalities have to be exercised subject to national or provincial legislation as provided for in the Constitution.

While the national and provincial spheres enjoy legislative authority over matters entrusted to the local sphere, the Constitution does not empower these spheres to decide whether or not a municipality may exercise their executive authority, or to exercise the executive authority of municipalities. The role played by the national sphere in municipal affairs is restricted to regulating the exercise of power by municipalities. There is no constitutional provision that allows a member of Cabinet to intervene in the exercise of constitutional powers by municipalities. This intervention is at odds with the separation of powers created by the constitutional scheme mentioned earlier.

Apart from these concerns, there are other significant problems with the Amendment Bill which undermine a coherent exercise of public transport functions. These are dealt with in the attached submission.

SALGA recognizes that there are shortcomings in the current National Land Transport Act, including lack of provision for provinces to conclude new bus contracts. We also recognize the logic, embodied in the Amendment Bill, of enabling a joint exercise of powers between provincial and metropolitan governments in instances such as in Gauteng, where daily movement patterns cross extensively over municipal boundaries within a single, extended urban region.

However, the way the Amendment Bill is now framed is not only un-Constitutional but also runs counter to long standing national policy, starting with the 1996 Transport White Paper, continuing through policy and legislation adopted since then, and including the Integrated Urban Development Framework 2016.

SALGA is committed to working with the legislature in a spirit of co-operation to address these issues as speedily as possible, in pursuit of sound governance of public transport within the framework of co-operative government as set out in the Constitution.

Yours sincerely

**PARKS TAU**

**SALGA’S PRESIDENT**