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Select Committee on Economic and Business Development

Parliament

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**RE: SALGA COMMENTS ON NATIONAL LAND TRANSPORT AMENDMENT BILL [B 7 – 2016]**

Thank you for the opportunity to comment on the National Land Transport Amendment (NLTA) Bill (B 7—2016). While SALGA agrees with some of the changes in the proposed National Land Transport Amendment Bill (B 7—2016) amending the National Land Transport Act (NLTA) of 2009, we are concerned that the proposed legislative changes will make the Act, as amended, inconsistent with the Constitution of South Africa.

The approach taken in the Amendment Bill fundamentally changes the existing National Land Transport Act in ways which we believe are inconsistent with both the Constitution and sound public transport management.

In addressing the problems in the NLTA, the proposed Amendment Act, while making some improvements, creates new difficulties in implementing a sound system of decentralization in public transport. In particular, it, firstly, does not sufficiently recognize the constitutional powers of local government in public transport and, secondly, creates new and unnecessary implementation challenges and potential disruption to existing services, or services being negotiated by municipalities.

Our main concern relates to the manner in which decentralization is dealt with in the Amendment Bill, as well as a number of more detailed issues which will cause unnecessary difficulties if not addressed. SALGA is committed to working with all parties to devise legislative approaches which enable effective management of public transport in line with long standing national policy principles and which are consistent with the Constitution. This submission outlines our concerns and proposes specific changes to the amendments.

**CONSTITUTIONAL AUTHORITY FOR MUNICIPAL PUBLIC TRANSPORT**

The approach taken in the Amendment Bill fundamentally changes the existing National Land Transport Act, in ways which we believe are inconsistent with both the Constitution and sound public transport management.

Section 156 of the Constitution reads as follows:

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| 156. Powers and functions of municipalities |
| 1. A municipality has executive authority in respect of, and has the right to administer ­ |
|  a. the local government matters listed in Part B of Schedule 4 and Part B of Schedule 5; and |
|  b. any other matter assigned to it by national or provincial legislation. |
| 2. A municipality may make and administer by-laws for the effective administration of the matters which it has the right to administer. |
| 3. Subject to section 151(4), a by-law that conflicts with national or provincial legislation is invalid. If there is a conflict between a by-law and national or provincial legislation that is inoperative because of a conflict referred to in section 149, the by-law must be regarded as valid for as long as that legislation is inoperative. |
| 4. The national government and provincial governments must assign to a municipality, by agreement and subject to any conditions, the administration of a matter listed in Part A of Schedule 4 or Part A of Schedule 5 which necessarily relates to local government, if ­ |
|  a. that matter would most effectively be administered locally; and |
|  b. the municipality has the capacity to administer it. |
| 5. A municipality has the right to exercise any power concerning a matter reasonably necessary for, or incidental to, the effective performance of its functions. |

While the function of “Public transport” is contained in Schedule 4 Part A, the function “Municipal Public Transport is contained in Schedule 4 Part B.

The Constitution positions local government as one of the three spheres of government and invests that sphere with constitutionally protected powers. Municipalities derive their power with respect to municipal public transport from the provisions of Section 156(1) and Part B of Schedule 4 of the Constitution. This section vests municipalities with "executive authority" and "the right to administer" the matter of municipal public transport. Executive authority encompasses authority to implement national, provincial and municipal laws, as well as the right to administer the daily running and management (through planning and decision-making) of municipal public transport. A municipality is expressly vested with authority to make and administer by-laws for the effective administration of municipal public transport.

There has been a shift away from the hierarchical division of government power between the three spheres of government in favour of local government which is interdependent (subject to constitutional restraints), inviolable and having the latitude to define and express its unique character. Accordingly, the power for municipal public transport is vested in municipalities as a sphere of government.

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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 word "govern" contemplates policy making and rule, standard and principle making.15. The use of the words "own initiative" suggests that the power for the municipal public transport function is not dependent on enabling national legislation .16

The use of the word "right", in relation to the local sphere of government, leads to the conclusion that municipalities have an entitlement to govern the function of municipal public transport which can be claimed and defended in terms of the Constitution.

While it is clearly difficult to distinguish between “public transport” and “municipal public transport” the manner in which the legislative amendments as they now stand give power to the minister to allow or disallow municipalities to contract public transport services implies that none of the services dealt with in the legislation can be regarded as “municipal public transport”. Yet previous Constitutional Court judgements, such as that which has defined the scope of “municipal planning”, have resulted in very significant powers being given to municipalities[[1]](#footnote-1).

**NATIONAL POLICY CONTEXT**

SALGA comments are made within the context of the national policy and legislative framework, including

* The Constitution of the Republic of South Africa (1996),
* The National Transport White Paper (1996),
* National Transport Master Plan 2050
* Public Transport Strategy and Action Plan,
* National Development Plan 2030, and the
* Integrated Urban Development Framework

The 1996 White Paper on Transport, the Public Transport Strategy and Action Plan, 2009 National Land Transport Act (“NLTA”), National Master Plan 2050 (NATMAP) and the more recent Integrated Urban Development Framework (IUDF) all support decentralization of land transport functions to local government.

The purpose of national policy is to consolidate responsibility for public transport at the lowest appropriate level. This approach goes back to the 1996 White Paper on Transport, which states, inter alia, that

The principle of subsidiarity and devolution of public passenger transport functions, powers and duties to the lowest appropriate level of government is confirmed.

The purpose of consolidating responsibility for public transport in one place is that this facilitates what the 1996 White Paper referred to as *integration* and *inter-modalism*. In the current fragmented system, where different spheres of government are responsible for different modes, each authority tends to prioritise the particular mode for which it has responsibility rather than the interests of the passenger.

Consolidating and integrating responsibility for public transport makes it possible for a single public authority (eg a metropolitan government) to prioritize user needs, ensuring the best mix of modes is available, and facilitating seamless movement across different modes, integrated ticketing, etc. The 1996 White Paper also stressed the need to integrate land use and transport responsibilities because of the importance of land use in determining the patterns of transport demand.

This approach was confirmed in all policy and legislative documents since then, including the latest draft White Paper on Transport.

**THE NLTA AMENDMENTS**

The National Land Transport Act (Act 5 of 2009) sought to drive the program of decentralization. One of the mechanisms to do so was to no longer provide for provinces to be bus contracting authorities, other than in respect of existing contracts provided for under s46 of the Act (the contracts in terms of which services such as PUTCO, Golden Arrow Bus Services (GABS), Buscor, Interstate, etc. are provided). It was intended that these s46 contracts be assigned to local governments, which could then renegotiate them to bring them in line with their Integrated Transport Plans, and subsequently put them out to tender again, having restructured the basis of the tenders if necessary.

It could be argued that the approach taken in the current National Land Transport Act proceeds from the view that the legacy services currently provided by provinces are in all cases “municipal public transport”; this would explain why no provision is made for provinces to be bus contracting authorities other than in respect of existing contracts. While we do not necessarily agree fully with such a view, the opposite view implied by the amendments that none of the services dealt with in the legislation are “municipal public transport” is incorrect.

In hindsight, completely removing provinces right to conclude new contracts, as was done in the 2009 NLTA, was not practical. In many cases local municipalities do not have the capacity to take over the s46 contracts, or were unwilling given the financial risks it entailed. There are also cases where it makes sense for provinces to be the contracting authority; for example, in some of the smaller cities and towns, where the services provide a mainly rural/urban linkage, operating extensively across municipal boundaries.

In Gauteng a different challenge arises because in some respects the adjacent metropolitan authorities of Johannesburg, Tshwane and Ekurhuleni form a single, extended urban region, so mechanisms are needed for co-operation between them.

The amendments address these problems in two key ways by providing for:

* Provinces to conclude new bus contracts;
* The creation of transport authorities whereby provinces and municipalities can agree to exercise their power jointly in instances such as those of Gauteng.

**SHORTCOMINGS OF THE ADJUSTMENTS**

* 1. **Removal of the provision for assigning s46 contracts**

Section 7(m) of the Amendment Bill amends section 11 of the current Act by substituting the following clause for clause 11.6 of the current act:

‘‘(6) **[Subject to section 21, where]** Where a province is performing **[a function contemplated in subsection (1)*(a)*]** the function of acting as contracting authority for contracts concluded under the Transition Act on the date of commencement of this Act, it must continue performing that function, **[unless that function is assigned to a municipality by the Minister]** until those contracts have lapsed or expired or been cancelled, or replaced by other contracts or arrangements in terms of this Act.’’ [yellow highlight added for emphasis]

The words **“unless that function is assigned to a municipality by the Minister”** have been deleted.

Restructuring the legacy s46 bus contracts is one of the most challenging issues to be addressed in the reform of public transport, which government has so far failed to achieve over more than 15 years of trying.

For a successful transition from these contracts, the authority around which responsibility for public transport is being consolidated (which, in terms of the new amendments, may be a metropolitan or local government, an entity as provided for in the new section 12, or in some cases a province) should be in charge of the process of restructuring the legacy contracts. This enables such a body to ensure that the way restructuring is done supports the strategy going forward.

For example, if a municipality has an approved Integrated Transport Plan and an approved Integrated Public Transport Network Plan where they wish to divide an existing very large legacy contract into a number of smaller contracts and tender these out on a staggered basis to enable a more competitive system, this should be permitted. Other municipalities may wish to combine and restructure various existing contracts together. Introducing the new contracts requires controlling how the old contracts are brought to a close. To have one authority (a province) responsible for terminating one contract and another authority (e.g. a metropolitan municipality) responsible for introducing its successor – which succession must happen without a break in service delivery – raises institutional and operational impracticalities.

The amendment as it stands removes the provision for assigning the legacy contracts to municipalities. This means that **even where a municipality has been approved by the Minister in terms of the new s11 provisions to conclude contracts, or through an exemption, the Minister may not assign the s46 contracts to it**.

This removal of the provision for assignment also contradicts s156(4) of the Constitution, as shown above, which mandates the assignment to municipalities of ‘necessarily related’ functions where such functions would be ‘most effectively administered locally’ and the municipality ‘has the capacity’ to do so.

Given the arguments set out above, not only must the deletion of the words “unless that function is assigned to a municipality by the Minister”be reversed, but the Act must also provide for assignment to whatever body is created for joint exercise of power in terms of section 12.

**Recommended change to Amendment Act:**

1. The proposed amendment 7(m) to section 11(6) should be changed and the deletion

**[unless that function is assigned to a municipality by the Minister]**

should be reversed, i.e. that these words remain in the section, as they are.

1. The words “or provincial entity or similar body as provided for in section 12” should be added so that the retained clause reads

**unless that function is assigned to a municipality, or provincial entity or similar body as provided for in section 12**

* 1. **Uncertain process of decentralization of public transport**

**Summary of problem**

While the existing legislation sought to compel a process of decentralization which in some cases would be inappropriate, the amendments now create **new problems** in implementing appropriate forms of decentralization.

The powers that some municipalities **are already exercising** are **removed** subject to an uncertain process of either exemption or ministerial approval. This will create significant contractual uncertainties, and undermine municipalities currently in negotiations related to the conclusion of new contracts. This will, in turn, create confusion in the implementation of public transport programs with potentially serious service delivery implications.

Services at risk include all existing IPTN services such as Johannesburg’s Rea Vaya, and Cape Town’s MyCiTi – including all processes underway to roll those processes out further, or provide new services in other cities.

The approach embodied in the amendments as they now stand is that, while under the existing NLTA there is assumed devolution to municipalities, the amendments now **remove all existing municipal powers** to conclude road based public transport contracts and **give the Minister the power to decide whether a municipality should be given this authority**. On a blanket basis the powers are taken away – even where municipalities are currently exercising them – and then given back on a piecemeal basis in a manner which lacks transparency and requires the national Minister to apply his/her mind to the details of every municipality. It adds complexity and is likely to result in time delays, and gives the Minister unfettered power not only to decide on what basis to allow municipalities to exercise their functions but also to judge whether they have met the criteria s/he has set. The scope for disruption as a result of the required decision making process, is enormous, affecting services used by hundreds of thousands of commuters every day.

The basis upon which the Minister is supposed to decide is set out in the new section 11.10 (d), which is discussed further below. While the Minster is investigating, considering and deciding the matter, all powers will effectively have been removed from municipalities. Realising that this creates significant problems where municipalities are already exercising these powers, the drafters of the amendments have provided for a mechanism whereby the Minister may temporarily exempt municipalities from having to get his/her approval based on the process delineated in terms of section 11.10 (d) – an exemption which can be withdrawn at any time.

The approach needs to be reworked for the following reasons:

1. It creates an **unnecessary interruption** in cases where a municipality is already exercising its powers, and makes addressing this interruption **dependent upon the Minister taking a number of decisions**. There is always the possibility of time delays, decisions being subjected to legal challenge, or other unanticipated problems.
2. While the legislation gives some guidance to the basis upon which the Minister may decide whether a municipality qualifies to conclude public transport, the Minister is given **unconstrained power to decide** both **what criteria** the municipality must meet to qualify, and **whether the municipality has met the criteria**. Furthermore**, no obligation** is placed on the Minister to **explain his/her decision**. Based on the principle of transparency, the development and finalisation of such an evaluation framework must include municipalities.
3. The exemption clause provides for a process that could easily become complex and long, is dependent upon the Minister taking action, and can be reversed at any time. This creates **significant uncertainty**, making it very difficult for municipalities and service providers to make the kind of contractual commitments required for a sound public transport system.
4. Where a municipality is already exercising a power (e.g. if it has commenced negotiations with relevant operators) it is not clear **whether the municipality can continue while waiting for the Minister to make a decision,** or if s/he **decides not to grant the exemption**. This raises concerns, for example, as to whether functions and their associated contracts must be returned to the province or national government? How will this to be done? What are the implications if the province is not in a position to take over such functions? Must any negotiations around new contracts cease?

These challenges are all relevant, even if all public transport functions are defined as Schedule 4A functions. But where a public transport function qualifies as “municipal public transport” and is therefore a Schedule 4B function – over which “municipalities have executive authority in respect of, and… the right to administer” the proposed Amendment Act is clearly inconsistent with the Constitution.

Overall, the proposed changes make decentralisation, including exercise of a Schedule 4B function, unpredictable and dependent upon the decision of the national Minister and his administrative officials. This encroaches on the executive authority of municipalities for municipal public transport.

**Clauses giving rise to the problem**

The clauses contained in the amendments that cause the above mentioned challenges are outlined below, followed by recommended amendments. The relevant changes introduced by the amendments are as follows:

In terms of 7(h) of the Amendment Bill, Section 11.1(c) (xxvi) of the NLTA is amended to make the right of municipalities to conclude road based contracts subject to written certification by the Minister that the municipality has complied with the ‘requirements and criteria’ set out by the Minister. Section 11.1(c) sets out the roles of municipalities, with the new section 11.1(c) (xxvi) reading that:

11.1(c) The municipal sphere of government is responsible for….

 ‘‘(xxvi) concluding subsidised service contracts, commercial service contracts, **[and]** negotiated contracts, and stopgap contracts contemplated in section **[41(1)]** 41A with operators for services within their areas, subject to subsections (6) and (9) and after following the prescribed procedures: Provided that the municipality meets the requirements and criteria prescribed by the Minister under subsection (10)*(d)* and the Minister has certified in writing that it has complied;’’ [yellow highlight added for emphasis]

Meanwhile the basis upon which the Minister may prescribe requirements and criteria is set out in a new 11.10 (d) which states that the Minister:

may prescribe requirements and criteria with which municipalities must comply in order to conclude contracts contemplated in subsection (1)*(c)*(xxvi), in consultation with the Minister responsible for local government matters, which may include, but are not limited to the following:

(i) that the Municipality concerned has prepared an acceptable integrated transport plan;

(ii) that the municipality possesses the necessary capacity to enter into and manage such contracts; and

(iii) that the quantity and nature of subsidised public transport services, the demographics and size and distribution of population in the area, among other relevant factors, will justify the contract or contracts.

[yellow highlight added for emphasis]

While the amendment offers three areas where the Minister may prescribe requirements and criteria, it does not compel the Minister to do so in respect of these areas, and furthermore, places no limits on what could be prescribed. Furthermore, there is nothing to ensure that the process is conducted speedily by the Minister – potentially causing delays which could be highly detrimental to the municipality; and no mechanism ensuring transparency, such as an obligation on the Minister to give reasons which the municipality can either challenge or address.

The new exemption clause reads as follows, providing for extensive procedural steps and engagements prior to the possible granting of an application (adding significantly to risk of municipalities currently using such powers):

‘‘(1A) *(a)* A municipality may, in writing, apply to the Minister for exemption from the proviso in subparagraph (xxvi) of subsection (1)*(c)*, and must furnish the Minister with reasons for such application.

*(b)* In order to enable the Minister to make a decision on such an application, the Minister may call for further information from such municipality.

*(c)* The Minister may, in writing and within a period of not more than 60 days of receipt of the application, refuse to grant exemption with reasons or grant exemption, subject to such conditions as he or she may deem fit.

*(d)* If any such condition is not complied with, the Minister may, in writing, withdraw the exemption concerned or determine new conditions.

*(e)* The Minister may, from time to time, review any exemption granted or condition determined in terms of this subsection, and if he or she deems it necessary, withdraw such exemption or delete or amend such condition.’’;

The exemption clause similarly gives far too much power to the Minister in the exemption process, including the power to withdraw the exemption whenever s/he wants to determine new conditions for granting exemption.

**Recommended amendments**

This section needs to clearly state that it refers to the public transport function and not the municipal public transport function. The changes proposed below refer to the public transport function as per Schedule 4 Part A.

In this section words added to the draft wording of the Bill are in bold and underlined, and words that are deleted are in bold and in square brackets (eg **[deleted]**).

1. Provision must be made to a) avoid powers being withdrawn once they have already been exercised, including in cases where municipalities are currently exercising such powers; and b) ensure assessment of compliance is not delayed and reasons are given if municipality is deemed non-compliant.

The amendment to 11.1(c) xxvi as contained in 7(h) should be revised to read that:

‘‘the municipal sphere of government is responsible for:-

(xxvi) concluding subsidised service contracts, commercial service contracts, **[and]** negotiated contracts, and stopgap contracts contemplated in section **[41(1)]** 41A with operators for services within their areas, subject to subsections (6) and (9) and after following the prescribed procedures: Provided that the municipality meets the requirements and criteria prescribed by the Minister under subsection (10)*(d)* and the Minister has certified in writing that it has complied; **with the further proviso that a) where a municipality has requested such responsibilities the Minister shall, within 60 days either certify such compliance or furnish reasons why the municipality is deemed not to have complied; and b) where a municipality has previously concluded any such contracts the responsibilities provided for in this subsection shall not be withdrawn;**

1. Provision must be made to restrict the scope upon which the Minister can determine whether a municipality can exercise the powers in 11.1(c), and the speed with which s/he does so. The requirements and criteria are currently too open ended and should be restricted to only the three areas denoted, and a clause should be added to ensure that the Minister publishes the criteria and requirements and the mechanism for assessing compliance within a reasonable time.

The amendment 11.10(d) as contained in 7(n) of the Amendment Act should be adjusted to the effect that ‘the Minister’:

**“shall** **[may] within 180 days of the gazetting of this amendment act** prescribe requirements and criteria with which municipalities must comply in order to conclude contracts contemplated in subsection (1)*(c)*(xxvi), in consultation with the Minister responsible for local government matters, which **[may include, but]** are **[not]** limited to the following:

(i) that the Municipality concerned has prepared an acceptable integrated transport plan;

(ii) that the municipality possesses the necessary capacity to enter into and manage such contracts; and

(iii) that the quantity and nature of subsidised public transport services, the demographics and size and distribution of population in the area, among other relevant factors, will justify the contract or contracts; **and**

**determine a reasonable, transparent and fair process for assessing such compliance;”**

1. Even if the changes are made to 11.1(c) and 11.10(d) changes are also needed to clause 11.1A to ensure the exemptions process is dealt with speedily.

‘‘(1A) *(a)* A municipality may, in writing, apply to the Minister for exemption from the proviso in subparagraph (xxvi) of subsection (1) *(c)*, and must furnish the Minister with reasons for such application.

*(b)* In order to enable the Minister to make a decision on such an application, the Minister may **within 30 days** call for further information from such municipality.

*(c)* The Minister **shall** [may], in writing and within a period of not more than 60 days of receipt of the application **or such further information as requested**, refuse to grant exemption with reasons or grant exemption, subject to such conditions as he or she may deem fit, **failing which the exemption shall be deemed to have been granted without conditions**.

*(d)* If any such condition is not complied with, the Minister may, in writing, withdraw the exemption concerned or determine new conditions.

***[(e)* The Minister may, from time to time, review any exemption granted or condition determined in terms of this subsection, and if he or she deems it necessary, withdraw such exemption or delete or amend such condition.]**’’;

* 1. **Further changes that compromise decentralization and good governance**

**Right of national government to conclude contracts with operators**

In the NLTA (11.1(a) (xi)) national government is only given scope to “act as contracting authority for subsidised service contracts, interim contracts, current tendered contracts and negotiated contracts concluded in terms of the Transition Act”. This has been amended to allow national government to conclude new contracts, with the replacement of 11.1(a) (xi) with the following in terms of 7(a) of the Amendment Act. Section 11.1(a) (xi) now states that ‘the national sphere of government is responsible for:

‘‘(xi) concluding subsidised service contracts, negotiated contracts, and stopgap contracts contemplated in section 41A, with operators;’’;

This has the potential to create significant confusion, where a municipality is already responsible in an area, and compromise accountability. No good reason has been provided for extending national government’s responsibilities into these types of operations; the rationale is thus unclear. There may be some scope for doing so where contracts cross provincial boundaries, but this needs to be stated. Certainly, to reduce confusion in accountability, it should not be done without the agreement of relevant provincial or municipal contracting authorities.

**Recommended amendment:**

‘‘(xi) concluding subsidised service contracts, negotiated contracts, and stopgap contracts contemplated in section 41A, with operators, **provided that the municipal or provincial contracting authorities which are responsible for the area in which the contracted operations are located agree to this in writing**;”

**Significant restrictions placed on range of functions which national and provincial government may devolve to municipalities.**

In the NLTA as it currently stands national government may assign any of its twelve functions listed under 11.1(a) to municipalities. This is in line with section 156(4) of the Constitution. This has now been changed so that only the operating licence function may be assigned, as follows:

‘‘(2) The Minister may assign **[any]** the function contemplated in subsection (1)*(a)*(viii) to a province or municipality, subject to sections 99 and 156(4) of the Constitution and sections 9 and 10 of the Systems

Act, to achieve the objectives of the Constitution and this Act.’’; [yellow highlight added for emphasis]

Section 11.3 which provides for assignment of provincial responsibilities to municipalities has been deleted. This is unnecessarily restrictive and no good reason has been provided for this restriction.

Section 11.4 which provides for municipalities to request such assignments has been similarly amended.

**Recommended amendments:**

1. Amendment 7(j), which amends 11.2 should be deleted.
2. Amendment 7(k), which amends 11.3 should be deleted.
3. Amendment 7(l), which amends 11.4 should be deleted.

**Failure to provide for the devolution of the rail function**

The rail White Paper contemplates the devolution of rail responsibilities to municipalities. Currently the legislation provides for various rail related planning to be done by municipalities in consultation with PRASA. This is acceptable under the current arrangements, and likely to be so for some years to come. However, **the process toward devolution of rail should be provided for.**

Section 11.1(c) (v) and (xix) are being amended to ensure that municipalities do their planning with respect to rail ‘in consultation with state owed rail operators’ – or ‘in agreements with PRASA’. This should only hold to the extent such matters are not devolved to the municipality

**Recommended amendments:**

1. Proposed amendment of section 11.1(c):

“financial planning with regard to land transport within or affecting its area, in consultation with state-owned rail operators in the case of rail matters **until rail responsibilities affected by such planning have been devolved to the municipality**, with particular reference to transport planning, infrastructure, operations, services, maintenance, monitoring and administration, with due focus on rehabilitation and maintenance of infrastructure;’’

1. Similarly, the proposed amendment in 11.1(c) (xix) should be amended to read:

‘‘(xix) in relation to the planning functions contemplated in paragraph (iv) provide for **[include]** service level planning for passenger rail on a corridor network basis in **[consultation]** agreement with the **[South African Rail Commuter Corporation]**’ Passenger Rail Agency or other rail service providers **until rail responsibilities affected by such planning have been devolved to the municipality**;’’.

**Operating licenses for services crossing municipal boundaries**

Section 12 of the amendment act amends section 18 of the NLTA to now state that the Municipal Regulatory Entity only decides on granting operating licences for services wholly within their areas. This can give rise to significant problems where an operator provides a service which emanates from outside a municipality, but most of the service is actually situated within the municipality.

It may be possible that the municipality is trying to restrict operators in the border area of the municipality but they get around this by applying to the province and then operate mainly within the municipality. There is significant potential in this case for an operator to play the province and the municipality off against one another. The proposed amendment should therefore be changed to ensure that the province decides on the licence in consultation with the Municipal Regulatory Entity.

The same difficulty arises in s32 of the Amendment Act, which amends section 54 (2) of the NLTA.

Currently section 54 provides for operating licences for services which cross municipal boundaries to be applied for through the Municipal Regulatory Entity. The current NLTA reads:

(2) A person wishing to undertake an intra-provincial service—

*(a)* taking place in the area of the municipality to which the operating licence function has been assigned; or

*(b)* starting in the area of that municipality and also taking place in the area of another municipality, must apply to a municipality referred to in paragraph *(a)* for the necessary operating licence.

This has been replaced with the following:

‘‘(2) A person wishing to undertake a service provided wholly within the area of jurisdiction of a Municipal Regulatory Entity must apply to that Entity.’’

A way to address the problem that has now been created, and to make it consistent with what is being proposed for the new section 18 is to amend 54.3 as follows:

**Recommended amendments:**

1. The amendment to section 18 should add the words underlined and in bold.

Section 18 of the principal Act is hereby amended—

*(a)* by the substitution for subsection (1) of the following subsection:

‘‘(1) A **[municipality to which the operating licensing function has been assigned under section 11(2)]** Municipal Regulatory Entity must receive and decide on applications relating to operating licences for

services wholly within **[their areas]** the area of jurisdiction of the municipality concerned, excluding applications that must be made to the National Public Transport Regulator **[or a]** and applications for intraprovincial services where the services cross the boundary of that municipality, which must be made to the Provincial Regulatory Entity**, who must decide on such applications in consultation with the Municipal Regulatory Entities of the affected municipalities.**’’

1. For consistency with the above section 54.3 should be amended as follows:

“(3) A person wishing to undertake a service other than one contemplated in subsection (1) or (2), must apply to the Provincial Regulatory Entity of the relevant province for the necessary operating licence, **which the Provincial Regulatory Entity must decide on in consultation with the Municipal Regulatory Entities of the affected municipalities**.”

* 1. **Complicating the process of transformation through empowerment of minibus-taxi operators**

Section 41 of the existing NLTA provides for negotiating new contracts with existing operators to provide services. In instances such as the implementation of Rea Vaya or MyCiTi existing operators have been given the option either to continue to operate as they are doing until their licence expires, take compensation and leave the industry (this has been attractive especially to older operators who wish to retire), or take compensation and contribute this to the formation of new companies which the city will negotiate with for the provision of new 12 year contracts.

The key point is that the negotiation of the new contract needs to be done with those taking compensation and intending to stay and provide new services, not those who have left and retired.

The existing clause 41(2) reads

41. (2) The negotiations envisaged by subsections (1) and (2) must where appropriate include operators in the area subject to interim contracts, subsidised service contracts, commercial service contracts, existing negotiated contracts and operators of unscheduled services and non-contracted services.

The draft Amendment Act has amended this to read

41. (2) The negotiations envisaged by [subsections (1) **[and (2)]** subsection (1) must where appropriate include affected operators **[in the area**] on the relevant route or routes subject to interim contracts, subsidised service contracts, commercial service contracts, existing negotiated contracts and operators of unscheduled services and noncontracted services, but the contracting authority may exclude from the negotiations operators or classes of operators—

(a) in terms of regulations made under section 8(1)(d); or

(b) where the contracting authority has made an offer in writing to an individual operator or class of operators in the prescribed manner and they have rejected the offer in writing within 42 days or have failed to respond to the offer within that time. [yellow highlight added for emphasis]

Our concern is with the inclusion of the term ‘affected’ and reference to ‘on the relevant route or routes’. We are concerned that this is too restrictive of who the municipality must negotiate with in bringing into being the new contracts. For example, it may be more appropriate for the municipality to negotiate with broader groups of operators in a given area, rather than those that are directly operating on the relevant routes who may have accepted compensation and decided not to invest in a new vehicle operating company, specifically to ensure effective empowerment and building of strong new vehicle operating companies into the future. This will also assist with future competition when the tendering stage of contracting commences. Secondly, reference to “routes” are too restrictive, since sometimes the impact is on services despite the rationalized services taking another alignment, e.g. where it serves the same origin / destination pair.

**Recommended amendments**:

The amendments to the first part of 41. (2) should be reversed so as to read:

41. (2) The negotiations envisaged by [subsections (1) **[and (2)]** subsection (1) must where appropriate include **[~~affected]~~** operators **in the area** **[~~on the relevant route or routes]~~** subject to interim contracts, subsidised service contracts…..

The new additions at the end of 41. (2) can remain.

* 1. **Deletion of requirement to provide insurance cover**

Section 62(1) sets out the requirements that must be met before granting an operating licence.

Requirement 62(1) (f) has been deleted by clause 37 of the Amendment Act as indicated here:

**62.** (1) an operating licence may only be issued if the applicant—

*(a)* has applied in terms of this Act and applicable provincial laws;

*(b)* has furnished a valid tax clearance certificate from the South African Revenue Service certifying that his, her or its tax affairs are in order;

*(c)* has signed a statement to the effect that he or she or it will comply with labour laws in respect of drivers and other staff, as well as sectoral determinations of the Department of Labour;

*(d)* has submitted a current roadworthy certificate, which was issued for the vehicle not earlier than the prescribed point in time, or a duly certified copy of such a certificate, as well as proof that the vehicle is properly licensed and has a national information system model number allocated to it;

*(e)* in the case of renewal, transfer or amendment, has returned the previous licence issued for the same service to the entity issuing it; and

[(*f)* has submitted proof of insurance cover as prescribed;] and

***(g)*** has submitted any other proof, information or document as prescribed or required by the relevant entity. [yellow highlight added for emphasis]

While insurance of the vehicle itself should not be a requirement, insurance of damage to people/passengers, etc. and third party vehicles should remain as a requirement. This is what should be prescribed, and words to that effect could be added.

 62. (1) (f) “has submitted proof of insurance cover **in respect of injury or death of passengers and third parties** as prescribed; and”

* 1. **Substitution of section 47 of Act 5 of 2009 (Conversion of permits to operating licences and of indefinite period operating licences to definite period licences, and rationalisation of operating licences)**

A more structured, planned and systemic approach and process is required, with mechanisms to terminate or convert to a more structured licensing option to assist municipalities. This is a long drawn out process which has impacted on operational, strategic and negotiation frameworks including negotiations toward implementation of Bus Rapid Transit (BRT) programs.

* 1. **Amendment of Section 84 - Tourist Transport Services**

At present municipalities are not included nor consulted in the tourist transport services (“red bus”) process. These applications are processed by the National Public Transport Regulator. These operations occur in the municipal jurisdictional space and functionally depend on key municipal assets. An amendment must be made to section 84 whereby municipalities are included and consulted in the application for tourist operations processes provided for in Sections 80 – 84 of Act 5 of 2009.

**CONCLUSION**

SALGA is committed to working with all parties to devise legislative approaches which provide for effective management of public transport in line with national policy principles and which are consistent with the Constitution.

We are deeply concerned that the National Land Transport Amendment (NLTA) Bill (B 7-2016) undermines the executive authority of municipalities for municipal public transport as per the Constitution, and even to the extent this is not the case has introduced processes which are poorly conceived and could lead to uncertainty and disruption of services. We trust that consideration of our submission will lead to changes which ensure that the Amendment Bill is in line with the Constitution and the powers and functions of municipalities for municipal public transport; and supports sound and practical arrangements for all public transport.

Yours sincerely;

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**PARKS TAU**

**PRESIDENT OF SALGA**

Date: 28 September 2018

1. Note that the public transport function is more like the ‘planning’ and ‘electricity reticulation’ functions in that the Constitution lists all these under Schedule 4B and less like the ‘housing’ function; there is no ‘municipal housing’ function listed in 4B. [↑](#footnote-ref-1)