CITY OF CAPE TOWN | ISIXEKO SASEKAPA | STAD KAAPSTAD

Civic Centre
12 Hertzog Boulevard
Cape Town 8001
P O Box 298, Cape Town 8000
Tel: 0214001300
Fax: 021400 1313

Iziko loLuntu
12 Hertzog Boulevard
Cape Town 8001
P O Box 298, Cape Town 8000
Umnxeba: 0214001300
Ifeksi: 021400 1313

Burgersentrum
Hertzog-boulevard 12
Kaapstad 8001
Posbus 298, Kaapstad 8000
Tel: 0214001300
Faks: 021400 1313

E-mail: mayor.mayor@capetown.gov.za
Website: http://www.capetown.gov.za
Ref:
Filename: C:\Documents and Settings\lschilder\Desktop\Letters typed for letterhead\LAND USE MANAGEMENT BILL B 27 Ogle settled.doc

OFFICE OF THE EXECUTIVE MAYOR

22 July 2008

The Chairperson

Portfolio Committee: Agriculture and Land Affairs

For attention: Mahdiyah Koff (Committee Secretary)

mfkoff@parliament.gov.za

LAND USE MANAGEMENT BILL B 27-2008 – DRAFT COMMENTS

Thank you for the opportunity to comment on this version of the Land Use Management Bill and for the extension until 23 July 2008 within which to submit these comments. The City would also like to have the opportunity to make verbal representations to the Portfolio Committee.

The comments are structured into general comments and specific comments on specific paragraphs of the Bill

GENERAL COMMENTS

1. Lack of participation/consultation with Local Government

The Bill was initially published for comment in Government Gazette no 22473 dated 20 July 2001. This Municipality submitted comments in response to this

THIS CITY WORKS FOR YOU ESI SIXEKO SISEBENZELA WENA HIERDIE STAD WERK VIR JOU

invitation. Weclogo (Western Cape Local Government Organisation) was given a further opportunity to comment in August 2002 and the City of Cape Town submitted its comments through this forum. Although the memorandum states that SALGA was consulted, it does not state when this consultation occurred and this municipality has not been given further opportunities to comment of the Bill since 2002. Many provisions in the Bill have changed substantially since the last round of participation.

It is submitted that a Bill which will have such a profound impact on the functioning of a municipality with regard to planning matters requires more detailed consultation with individual municipalities. There has been no attempt to engage with Municipalities since 2002. This should have been done whilst the Bill was still in the technical drafting stage and before it was sent to the Portfolio Committee. To this end we refer you to the provisions of section 154 (2) of the Constitution.

Furthermore, there has been an extremely short period given by the Portfolio Committee. The invitation to comment on the Bill was extended during recess and there has been less than 30 days in which to deliver written comment.

Given the manner in which a municipality functions, it has not been possible to obtain full comment from the various departments and political structures. The City of Cape Town requests the opportunity to make representations to the Portfolio Committee and must, in the light of the short time given to respond to the Bill, reserve its right to make additional comments at the Portfolio Committee hearings.

2. Constitutional concerns

There are a number of constitutional concerns with this Bill. In addition to the comments set out below, Advocate Binns Ward SC's has given an opinion on the Constitutionality of this Bill. This opinion is attached to these comments.

Part A of Schedule 4 of the Constitution sets out the functional areas of concurrent National and Provincial competence. These include:

- Regional Planning and Development
- Urban and Rural Development

Part B of Schedule 4 gives limits Provincial and National competencies to the extent set out in section 155 (6)(a) and (7) in respect of municipal planning. Thus Municipal Planning is a municipal function.

Part A of Schedule 5 sets out the functional areas of exclusive Provincial legislative competence. This includes:

- Provincial planning

Section 156 of the Constitution provides that:

(1) A municipality has executive authority in respect of and 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 Provincial or National legislation.

(2) A municipality may make and administer by-laws for the effective administration of the matters which is has the right to administer.

Section 155 (7) provides as follows:

"The national government, subject to section 44, and the provincial governments have legislative and executive authority 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 of their executive authority referred to in section 156 (1).

The power to 'regulate' has been described in the Constitutional certification judgment as a broad managing or controlling rather than a direct authorisation function.

Clause 2 of the Bill states that this is legislation envisaged in terms of section 44 (2) read with section 146(2) of the Constitution. Thus it is intended to serve as inter alia essential national standards in cases of a Schedule 5 functional competency and overrides Provincial legislation in relation to a Schedule 4 competency in the circumstances set out in section 146(2).

Section 44(2) provides as follows:

"Parliament may intervene by passing legislation in accordance with section 76(1), with regard to a matter falling within a functional area listed in Schedule 5, when it is necessary-

(a) to maintain national security

(b) to maintain economic unity

(c) to maintain essential national standards.

(d) to establish minimum standards required for the rendering of services; or

(e) to prevent unreasonable action being taken by a province which is prejudicial to the interests of another province or to the country as a whole.

"146 Conflicts between national and provincial legislation

(1) This section applies to a conflict between national legislation and provincial legislation falling within a functional area listed in Schedule 4.

(2) National legislation that applies uniformly with regard to the country as a whole prevails over provincial legislation if any of the following conditions is met:

(a) The national legislation deals with a matter that cannot be regulated effectively by legislation enacted by the respective provinces individually.

(b) The national legislation deals with a matter that, to be dealt with effectively, requires uniformity across the nation, and the national legislation provides that uniformity by establishing-

(i) norms and standards;

(ii) frameworks; or

(iii) national policies.

(c) The national legislation is necessary for –

(i) the maintenance of national security;

(ii) the maintenance of economic unity;

(iii) the protection of the common market in respect of the mobility of goods, services, capital and labour;

(iv) the promotion of economic activities across provincial boundaries.

(v) the promotion of equal opportunity or equal access to government services; or

(v) the protection of the environment.

(3) National legislation prevails over provincial legislation if the national legislation is aimed at preventing unreasonable action by a province that-

(a) is prejudicial to the economic, health or security interest of another province or the country as a whole; or

(b) impedes the implementation of national economic policy.

Comment

The Constitution does not define any of these functional areas described above, nor does any other legislation. No formal attempt has ever been made by government to determine the ambit of these functions. For example what is urban and regional planning? What is Provincial planning? What is municipal planning? There would appear to be overlaps between urban and regional planning and municipal planning. It is clear that there are also differences of opinion on the ambit of a law which sets out frameworks, norms and standards.

This leads to confusion and needless debate between spheres of government as to the ambit of legislative and often executive power in respect of the functions listed above. Recent case law namely *the City of Johannesburg Metropolitan Municipality vs Gauteng Development Tribunal and others WLD case no 6181/05,* which is only binding in Gauteng, gives an unduly narrow interpretation to these functions or urban and regional planning and municipal planning.

As indicated below, the White paper recognised this as a concern.

It has been requested a number of times that this issue be resolved before any law is created by any sphere of government. If the ambit of these functions could be delineated either by agreement or by legislation, in consultation with other spheres of government, it would be easier to ensure that the legislation created by the different spheres of government remained within their legislative competency and did not encroach on other sphere's powers.

It would also be easier to create a uniform system of legislation which interlocked with legislation created by other spheres of government.

This approach would be consistent with the provisions of co-operative governance as set out in section 41 (e), (f),(g) and (h) which requires spheres of government to co-operate with one another in mutual trust and good faith by inter alia: "co –ordinating their actions and legislation with one another."

Once some content has been given to these functional areas, some meaning can be given to the provisions in the constitution such as section 44(2) and 146 (2).

Even though the Bill claims to deal with norms and standards as set out in sections 44 (2) and section 146(2), the actual wording of many of the clauses of the Bill goes well beyond this power. This will be mentioned in more detail in the specific clauses of the Bill. Examples include the power to create by means of regulation, procedures for processing applications, advertising

applications, the nature of the conditions to be imposed, the criteria for consideration of applications. It sets the content for land use schemes. These provisions are no longer part of a framework but set the detail for municipal planning matters. Municipal planning matters are a schedule 4 B function. These clauses therefore do not fall within the powers set out in section 146(2) of the Constitution.

It is submitted that the Bill encroaches on municipal planning powers and prevents municipalities from creating by laws to deal with these issues.

This Bill conflicts with draft legislation being created at Provincial level. Whilst it is assumed that the Western Cape Provincial Government will submit its own comments, the Provincial legislation deals with many of the issues set out in this Bill. Furthermore, this draft contains a different decision making body, has provision for its own appeal tribunal, has different minimum procedures for applications and a completely different manner of deal with removal of tile deed restrictions. It is considered by the Municipality that both laws in certain respects overstep the powers conferred by the Constitution.

Land use matters are controversial and, in the Western Cape, are often challenged in the High Courts. It should not be for municipalities to have to determine, using the provisions of section 146 of the Constitution, which provision of the national law and the provincial law trumps the other.

This bill, in this respect does not assist in rationalising the fragmented planning legislation in fact it exacerbates the current situation.

This law does not constitute a framework for planning. It seeks to "micro manage" municipal matters, yet does not deal with the practical realities of processing and assessing planning applications on a daily basis. It prevents a municipality from creating by laws for municipal planning matters. It cannot stand on its own as a law dealing planning matters and is unconstitutional. The Bill goes beyond the power to regulate as set out in section 156(1) and does not constitute the norms and standards, policies or national policies as set out in section 146 (2). Many provisions of the Bill set out above, do not constitute maintaining essential national standards, establishing **minimum** standards required for the rendering of services; or preventing unreasonable action being taken by a province which is prejudicial to the interests of another province or to the country as a whole as provided for in section 44(2).

2. Compliance with the White paper on Spatial Planning and Land Use Management - July 2001

3.1 Defining the roles of different spheres of government.

The White paper recognised the importance of defining the roles of different spheres of government: "Efficient and effective planning requires integrated and co-ordinated effort from different spheres of government. This also suggests that planning should be a consensus building exercise about what should be done and how. This necessitates a clear definition of the roles and responsibilities of the different spheres of government, so as to avoid duplication, conflict and wastage of resources."

As indicated above, this has not been done.

3.2 The overlap between planning permission requirements and environmental impact requirements lead to an expensive duplication of efforts.

Whilst it is acknowledged that environment, planning and heritage reside in different ministries, there has been no attempt to create a framework to streamline the processes involved for planning, heritage and environmental applications. There is room to fuse such process and perhaps cross reference to processes in other laws.

There is no attempt to rationalise the appeals which are set in terms of various laws. A complex development application which requires an EIA in terms of the regulations promulgated under the National Environmental Management Act, a Heritage Assessment in terms of section 38 of the National Heritage Resources Act and a planning application in terms of planning law, could trigger 4 appeals under different laws. See section 62 of the Municipal Systems Act, the appeal mechanism in terms of this law to a Tribunal, the appeal provisions in NEMA and in the NHRA.

3.3 A national spatial planning framework.

The White paper suggested that there be provisions in the bill to develop national spatial frameworks formulated in response to specific needs and to give effect to national plans, strategies policies and laws. The purpose of these frameworks would be to promote intergovernmental integration though

ensuring a co-ordinated approach to land development. It would not the purpose of the plans to create a hierarchy of spatial plans across the country but rather to add and element of spatial co-ordination to national scale initiatives.

It is submitted that the requirement in clause 5 of the Bill to create norms and standards is not the same as creating a planning framework.

3.4 Procedures to facilitate appropriate development.

The Bill focuses on regulation and control and does not create a framework for facilitation. The amendment of the definition of "land use management" to include land development does not resolve this issue.

4. Issues not dealt with in the Bill

4.1 A framework for accelerated development

There is no framework for accelerated development of informal settlements.

4.2 The Act does not specifically bind the State and organs of state

Unlike other legislation such as NEMA and the NHRA, this Act does not seek to specifically bind the State and organs of state. Organs of state must be guided by the directive principles, but there is nothing to indicate that they will be bound to other provisions of the Act such as the Zoning Schemes created in accordance with this Act or other legislation

Existing Provincial Ordinances will remain in force. This is going to create confusion as to whether applications can still be submitted in terms of these Ordinances. It should not be up to individual Municipalities to make a determination in terms of section 146 of the Constitution about which provisions of the Provincial Ordinances are still in force and which provisions are either impliedly repealed or overridden by National legislation.

It is submitted that on these grounds alone, the Bill should be referred back for redrafting and further consultation.

Notwithstanding the above comments, specific comments have also been made on certain of the clauses in the Bill. It is hope that this will provide useful input during the re-drafting process.

SPECIFIC COMMENTS ON THE BILL

Ad clause 3 – Objects of the Bill

The objects of the Act are set out in this clause.

Clause 3(a) reads as follows:

"*provides for a uniform, effective, efficient and integrated regulatory framework for land use and land use management...*"

Since this Bill is legislation contemplated in terms 44 (4) as read with 146(2) of the Constitution, in regard to schedule 5 matters, the objects are limited to maintaining essential national standards, establishing **minimum** standards

required for the rendering of services; or preventing unreasonable action being taken by a province which is prejudicial to the interests of another province or to the country as a whole.

In regard to schedule 4 planning matters, it is limited to inter alia norms and standards and frameworks.

Thus the object as set out above is not consistent with the powers government seeks to invoke when creating the laws.

The Bill goes beyond the requirement to create framework and seeks to micro manage, often by means of regulations, municipal planning matters.

The Bill does not create an integrated framework in that no attempt is made to link this law to laws creating duplicate procedures such as the National Environmental Management Act (NEMA) and the National Heritage Resources Act (NHRA).

Furthermore the draft Western Cape Provincial law also seeks to create a "framework" for planning matters and it conflicts with the framework set out in this Bill.

Clause 3 (b) reads as follows:

"promote –

(i) co-operative governance;

(ii) socio-economic benefits

(iii) the achievement of land reform objectives

for persons and communities disadvantaged by unfair discrimination as contemplated in the Constitution."

This object is inadequate in that it seeks only to promote co-operative governance in certain circumstances namely those set out in this object.

One of the objects of the Bill should be to foster co-operative governance between spheres of government. This is especially important in the light of the powers of national and provincial government to intervene in planning decisions. Yet there are no provisions in the Bill dealing with co-operative governance. There is no requirement to consult with an affected municipality before determining that a matter is of provincial or national interest in terms of clauses 37 and 38. The Minister may exercise powers in terms of section 73(2) "after consultation with the municipality". This is not the same as requiring the exercise of the power "in consultation with the municipality".

Ad clause 4: Directive principles

Clause 4 (1)(e) *–the principle of fair and good governance to promote land use management measures that are taken timeously and in a democratic, participatory and lawful manner.*

It is going to be difficult to comply with this principle especially the requirement to take timeous decisions when there is still a fragmented procedure to be followed.

Clause 4 (2) – *public interest.*

It is suggested that the term be defined in this context. Presumably it is a requirement to have regard to the impact on society as a whole rather than just the applicant and immediate neighbours. See comments further on in the bill relating to the definition of "public interest" in Removal of restrictions applications.

Clause 5 – Norms and standards

This clause permits the Minister to determine and prescribe compulsory norms and standards for land use management. The contents of these norms and standards are then set out.

It is difficult to see where National government derives the power to permit the Minister to determine norms and standards. Section 44(2) requires Parliament, and not the Minister, to intervene by passing legislation. It does not refer to the Minister creating regulations.

It is difficult to see how the requirements of clause 5 (2) (b) comply with the requirement of "compulsory norms and standards"

CHAPTER 2 – Intergovernmental support

Ad clause 6 – National support and monitoring

This clause confers on the National Minister the power to provide support and assistance to inter alia municipalities. Section 155(6) confers the power to monitor and support local government on provinces, not on National

government or the National Minister. Therefore it is queried where the constitutional power for clause 6 comes from.

Ad clause 7

Ad clause 7(3)

This clause permits the Premier of a Province to identify matters of provincial interest in which provincial policies etc must apply by promulgating such in the Gazette. This issue is one which requires debate and discussion and is an area in which Province and Municipalities often disagree. More reliance should be placed on co-operative governance issues and the requirement to comply with section 36 of the Intergovernmental Relations Framework Act no 13 of 2005.

Furthermore, presumably a "provincial interest' must relate to Provincial competencies set out in the Constitution. Thus a description of what constitutes Provincial planning is crucial and therefore in respect of what functions can Province create such frameworks and policies. There is also no indication that such frameworks, norms and standards and policies must have a legislative basis to them.

It is noted that this chapter makes no reference to municipalities drafting legislation in respect of their competencies.

CHAPTER 3

General comment on this chapter.

This chapter seeks to create different decision makers at different spheres of government.

Since the regulator at municipal level deals with municipal planning matters, it is submitted that these clauses which seek to determine the nature of the decision maker at local government level do no fall within the powers conferred on National government in terms of section 146(2) of the Constitution. This is also not a power to regulate as described in section 155(7) of the Constitution.

Section 151(3) of the Constitution provides that a municipality has the right to govern on its own initiative, the local government affairs of its community, subject to national or provincial legislation, as provided for in the Constitution.

Section 151 (4) of the Constitution provides that the national or a provincial government may not compromise or impede a municipality's ability or right to exercise its powers or perform its functions.

Section 160(1) of the Constitution permits a Municipal Council to make decisions on the exercise of all powers and functions of the municipality.

Section 4 (1)(a) of the Municipal Systems Act no 32 of 2000 provides that the council of a municipality has the right to exercise the municipality's executive and legislative authority, and to do so without improper interference.

It is submitted that the clauses in this section, which seek to determine the decision making body of the Municipality, extends beyond the parameter of

setting norms and standards and frameworks and constitutes interference with a municipality's right to exercise its executive authority in respect of municipal planning matters. It is not part of the regulating function either. This constitutes encroachment on the functional and institutional integrity of another sphere of government which is prohibited in terms of section 41(g) of the Constitution.

It also impacts on the speed with which decisions are taken. This system, which is clearly premised on the DFA tribunal, does not allow for the delegation of decision making powers to individual officials on relatively simple matters such as a departure from the building line where there are no objections, a consent for a early childhood development centre (crèche) in cases where there are no objections, an amendment of conditions of approval or the approval of a site development plan. The fact that a municipal committee can delegate matters to an individual member, will alleviate the bottlenecks which arise in a large municipality.

Part 2

Provincial land use tribunals

General comment

The requirement for a Provincial Land Use Tribunal will conflict with the draft Provincial Bill permits the MEC to take decisions on Provincial matters.

Part 3

Functions of Land Use Regulators

Clause 33 – Change with approval of Land Use Regulator

Whilst it is required to describe the powers attributable to a land use regulator, it is submitted that National legislation should not be prescribing the body which takes decisions. This should be left to Provincial and municipal legislation.

In addition, clause 33(1)(a) is vague. It requires that land use regulator change the use, form or **function** of the land. If a commercial zone in zoning scheme regulations permits, single dwelling residential dwellings, blocks of flats and commercial buildings as of right, subject to different development envelops, no permission is required from the regulator to convert the block of flats into offices. However, this is a change of function of the land and in terms of this law, would require permission. There is therefore a conflict between the zoning scheme regulations and the requirements of this Act.

If this provision is intended to apply to areas which at present do not have land use schemes, then this must be made clear.

Ad clause 33 (2) – change with approval of land use regulator

It is noted that the applications contemplated **include** the applications listed as (a)-(e) in the rest of the clause. It is assumed that applications such as consent uses in the town planning schemes which are activities permitted with Council's consent, would also be permitted even if not specifically indicated in this list.

A consent use does not constitute an amendment to the town planning scheme. This list also does not include amendments to conditions of approval, approval of site development plans and the myriad of other applications which are made on a day to day basis. Furthermore, in the Western Cape, township establishment occurs by way of a rezoning to subdivisional area and then a subdivision application. Uses for the individual erven are confirmed at confirmation of subdivision stage. The fact that the land use rights are conferred at confirmation of subdivision is a requirement of the current provincial law. It is not found in the zoning scheme regulations themselves and such provision should be in the law, not the regulations. This is not contemplated here.

Again, this is the danger of a law seeking regulate/legislate on matters on which it is not constitutionally entitled to do.

Ad clause 34 – conditional approval

This clause is extremely vague. Why would conditions of approval be prescribed? Provisions which have material impact on developers, neighbours or decision makers should be in the body of the law (created by the appropriate sphere of government), not left to regulations.

There are no guidelines in the Act as to whether the conditions have to be directly related to the development, whether bulk service condition for payment by the developer can be levied, whether conditions can be imposed to deal with energy saving measures, climate change measures (especially

important in coastal areas) monetary contributions for open spaces, crèches, services and so on.

Again, the bill seeks by means of regulation to legislate on matters which constitute municipal planning matters and neglects to set the framework for these essential issues.

Clause 35- Restrictive conditions

Ad clause 35(1)

This seems to be a restatement of the common law as it applies at present. **See e.g. Ex parte Optimal Property Solutions CC 2003 (2) SA 136 (C)** and the authorities cited there. There may be 5000 owners in a township who are entitled to the benefit of a condition. It is impractical to obtain the written consent of 5000 people. This is not the general public but surely another method should be used. One does not need a statute to use this method.

Clause 35(3) refers to the fact that if a person is deprived of property, in appropriate circumstances, the decision maker may make an award for compensation. However, clause 35(2) provides that the removal must be effected in accordance with this Act and section 25 of the Constitution. Section 25(1) of the Constitution deals with deprivation of property and it does not require compensation if such deprivation is carried out in terms of a law of general application.

"(1) No one may be deprived of property except in terms of a law of general application, and no law may permit arbitrary deprivation of property."

It is only on the expropriation of property in terms of section 25(2) of the Constitution that compensation becomes an issue. If this law is going to create more onerous terms than those found in the Constitution in respect of compensation for a deprivation of rights, then the law itself should set out detailed guidelines for this.

It is noted that there is strong reliance on dealing with issues of detail through prescribing the manner in which these procedures take place. This indicates that the law has moved out of norms and standards and into prescribing issues which should be dealt with by other spheres of government.

Clause 36 - Jurisdiction of Land Use Regulators.

Ad clause 36(c)

It is questioned why the Tribunal of the province acquires jurisdiction in cases where an application directly affects land beyond the boundaries of a metropolitan or district municipality. Since there are wall to wall municipalities, there is no reason why the municipality within whose jurisdiction the application falls, cannot consult with the other municipality using co-operative governance mechanisms. The mere fact that a matter has an impact on adjoining municipality does not make it an issue of provincial interest.

It is not clear whether the "and" at the end of clause 36 (c) is meant to be conjunctive. If this is the case, who has jurisdiction if the application does not

directly affect land beyond the boundary of a municipality.

Why does the fact that the municipality is the applicant mean that the provincial tribunal must deal with the matter? This alone does not change the fact that an application is part of the municipal planning function of a municipality. It is noted that there is always the danger of institutional bias being raised when a municipality considers an application in respect of its own land, but the remedy is to apply to the High Court for review of the decision or possibly give a right of appeal to the Tribunal on these issues. There mere fact that it is municipal land should not oblige a municipality to refer the matter to the Provincial Tribunal. This should be an option which is available to the municipality.

What is the rationale for giving a provincial tribunal jurisdiction in an appeal? It is understood that an appeal mechanism is often placed in the law in cases where another sphere of government is acting under delegated authority. The appeal mechanism allows the body which delegated or assigned the matter to reconsider the decision. In the current constitutional context, municipal planning powers are conferred by the Constitution, not by another sphere of government. Thus the requirement for an appeal to this body is not understood.

Clause 37 – Jurisdiction where provincial or national interest is affected and clause 38 – application affecting the national interest

The criteria for determining that a matter is of national interest or provincial

interest and thus giving the National Minister or Province the power to decide on an application are very broad and even vague.

For example, a municipality may dispute that a provincial growth and development strategy contains only Provincial matters. What other "instruments" are referred to here. Do they require cabinet approval as policy, do they require statutory approval?

Provincial policy objectives could be so wide that all municipal planning applications could impact on these objectives. Who determines whether a particular application has a material impact on these objectives? There are no provisions relating to co-operative governance to encourage discussion on whether a matter will be dealt with by Provincial or municipal government. There is also the danger that a developer will attempt to mould an application to be either in the provincial interest or municipal interest in order to get a decision maker who he or she perceives will be the most sympathetic to the development.

The same concerns related to determining whether a matter is of national significance. Given the very broad brush approach of the National Spatial development perspective, how does a municipality debate the applicability in a particular instance with the Minister? Does the Minister have the capacity to take such a technical decision and within reasonable time frames?

Clause 39 – application to change land use form or function

It is noted that the form of notice to affected parties will be prescribed by regulation. Why is this necessary? The method of notification will depend on the nature of an application and its impact on people. The Municipal Systems Act prescribes forms of participation and Municipalities are able to create by laws for participation. If necessary, National government can assist Municipalities to create such By- laws by drafting model by laws. It is submitted that this power extends well beyond the parameters of norms and standards.

Clause 40 – Undue delay

This clause will require national government to set time frames for the processing of applications. Whilst national government may set a maximum time period, municipalities should be able to set their own time frames within the maximum period.

The periods must not be so unreasonable as to make it impossible to comply with them. The legislator must bear in mind that the requirements of other laws such as NERA and NEMA have to be complied with prior to a land use planning application being considered and this will have severe impacts on time frames.

Clause 41 – Procedures to be followed by Land Use regulator

Again this clause requires the land use regulator to adopt an administratively fair procedure in addition to the procedure which is prescribed. Surely the norm and standard in this case is the administratively fair procedure. Any

other procedures prescribed go beyond this and into interference with a municipality's ability to perform its functions.

Clause 42(3)(a)

Why cross reference to another law? Rather set out the powers in this law.

Clause 43

The process set out in this clause is unduly formalistic for the average rezoning, subdivision or departure application. There is no need for a procedure which mimics a court hearing. Again, municipalities should be entitled to set their own informal hearings which comply with the requirements of administrative justice.

Clause 44 – deciding on an application.

Whilst National Government may be able to set a framework for decision making, it is suggested that this clause goes beyond this by allowing for factors and timeframes to be prescribed.

Furthermore, clause 44(1)(c)(ii) is difficult to apply in practice – in a departure from the building line application, it is difficult to see how the granting or refusing of such application will comply with this factor. Furthermore, a rezoning of one erf to permit 4 dwellings will not impact on the transformation imperatives, unless the legislator requires a condition to be imposed that one of these units be for gap housing purposes.

Clause 44(2)

Despite the promises in the White Paper, it is clear that no attempt has been made to streamline the procedures of NEMA and planning legislation when an application in terms of both laws is required. This would seem to be part of the "framework" powers of National Government.

One would also expect in a new law on planning for the environmental factors and the information gathered in terms of any environmental investigation to be taken into account before taking a planning decision. Using the environmental information to inform a planning decision (not relying on a decision taken by the environmental department under NEMA) can only improve the quality and the sustainability of the decision taken.

The directive principles require the principle of sustainability to be factored into all decisions. Why then not require the planning decision to be taken after an environmental decision dealing with the listed activities in NEMA or as indicated above, by factoring in the information obtained in the EIA investigation into the planning decision. This would enhance the quality of decisions taken when environmentally sensitive areas are being considered. There are many land use applications which may have environmental or heritage impacts and these applications are not subject to an EIA or HIA in terms of the relevant laws. It is noted that there is no power to call for an environmental assessment in these circumstances. There should be room for the exercise of a discretion to call for a limited EIA if required even if not provided for in NEMA.

Clause 45 – Conditional approval

This is a repeat of clause 34 and the same comments apply.

Clause 46- Appeal

The comments on appeal as set out above apply here as well.

CHAPTER 4

Land use schemes

Clause 47(b) – Role of the executive authority

The wording of the provisions relating to the land use regulator make it impossible for municipalities to "assign" (surely delegate) responsibilities with regard to decision making to individual officials who are not members of the committee.

Clause 49 – Revision on redetermination of municipal boundary

This clause imposes an onerous obligation on the Municipality to revise its land use scheme to incorporate the changes imposed by the redetermination of the municipal boundary. Why not provide that the existing land use scheme of the incorporated portion shall be deemed to be part of the land use scheme of the area in which the land is incorporated?

Clause 50 – Adoption procedure

This clause requires the municipality to adopt a land use scheme following the procedures set in the MSA and having regard to NEMA. This clause also requires a land use scheme to follow the prescribed public participation procedures. It is submitted that it is not for National Government to prescribe further procedures. This is a municipal function and the municipality should be empowered to adopt those procedures on public participation which suit their community. It is sufficient in the National legislation to provide that municipalities should adopt by laws on public participation and for National and provincial government to either create a model by law or give the requisite support to those municipalities which require such support.

Clause 51 – alignment of land use schemes

Clause 51 (1) requires a municipality to align its spatial development framework and land use scheme to the framework for the IDP. To the extent that a land use scheme which sets out the development parameters for each zone, can align with the IDP, is this not already covered in the Municipal Systems Act and if so, why is it necessary to repeat it in this law? Furthermore, the aspect relating to land use schemes is repeated in clause 53 (1)(b).

Clause 53 – Contents of a land use scheme

It is considered that the creation of a land use scheme falls squarely within the ambit of Municipal planning. The provisions in this law should be limited to prescribing a framework.

A land use scheme can deal with many more issues than just those listed here. See for example the draft Western Cape Provincial land use management bill.

It is noted that there is no provision for secondary uses by means of consent uses.

There is no attempt to deal with the provisions of the Legal Success to the South African Transport Services Act which deals with the zoning of railway land.

Clause 54 – Legal status of a land use scheme

It is noted that this provision states that it binds the owner of land to which the scheme applies. There is no indication that the scheme applies to land belonging to an organ of state and thus an organ of state as owner is bound.

It should be specifically stated that organs of state are bound by these schemes.

Clause 55 – Enforcement of land use schemes.

A municipality has the power to enforce its scheme in terms of the municipal planning powers conferred on it by the Constitution.

It is considered that if National Government wished to set norms and standards or frameworks for this area, it would have considered some of the

more innovative enforcement mechanisms which a municipality may not have the power to create.

It is well known that there are not enough land use inspectors in municipalities. It is also well known that criminal prosecutions take an extremely long time to be processed by the courts and not all Magistrates in the criminal courts understand the importance of such prosecutions. Often magistrates undermine the enforcement strategies of a Municipality by postponing the hearing of a matter until such time as the land use application has been dealt with. This lenient approach leads to an increase in people who break the law and then seek retrospectively to remedy the breach.

The diaries of attorneys representing the accused are usually booked up 3 months in advance. If one adds this time period to that required in order to request further particulars to the charge sheet, answering the request for further particulars, postponing the case in order to allow the accused's representative to apply to the DPP to have the case withdrawn, it can easily take 6 months before a matter is ready for trial and another 6 months before the trial is completed.

Municipalities have the power in terms of section 118 of the Municipal Systems Act no 32 of 2000 (the MSA) to withhold rates clearance if rates for a particular period of time are outstanding. A registrar of deeds is prohibited from registering a property unless and until a municipality gives the certificate required in terms of section 118. A municipality is not entitled in terms of the MSA to withhold rates clearances for any other reasons.

If person wishes to transfer property at present they are also required to obtain a beetle certificate and an electrical certificate at their cost. It is suggested that a similar mechanism be put in place for land use matters.

Municipalities require framework legislation which permits them inter alia to require a land clearance certificate before the Registrar of deeds is permitted the register the transfer of a property. The land clearance certificate would state that the land use of the property is in accordance with its zoning and the buildings erected on the erf are in compliance with the development envelop prescribed by the zoning scheme or permitted by means of further approvals. The inspections could be carried out by companies who are determined to be competent to carry out this function, the fees would need to be prescribed and the owners who wish to transfer the land would need to pay for such a certificate in the same way they pay for beetle and electrical certificates.

No transfer of land could take place unless and until these contraventions have been ceased and unauthorised deviations from the zoning scheme either demolished or authorised.

This would dramatically cut down on the amount of work municipalities would have to carry out and would cut down on the amount of criminal prosecutions. This would foster a culture of compliance with laws rather than the current culture of "catch me if you can."

Clause 56 – Amendment of a land use scheme

There is no indication that a land use scheme includes a zoning map and that

in cases of a rezoning, there is no indication as to how the zoning map is to be amended. Is this to be left to the Municipal By law?

CHAPTER 5

Operational procedures for land use regulators

Clause 61 - Delegation of functions

As is already submitted, the determination as to which to whether a political body or an official takes a planning decision should be left to municipalities.

It is noted that a land use decision cannot be delegated to any other person than set out in the Bill. This means that a rezoning of one erf which attracts no objections cannot be dealt with by officials if they are not part of the Committee. This has an impact on the length of time it takes to process applications. Furthermore, this provision removes the power of Council to delegate powers on departures or consents or amendment of conditions to individual officials. Although the Tribunal may delegate to any individual member of the committee, it is submitted that 15 officials will not be sufficient to deal with the volume of applications which a municipality deals with.

It is also noted that there is no reference to the power to assign in terms of section 156(4) the administration of a matter listed in Part A of Schedule 4 and 5 to municipalities, in the circumstances set out in this section.

Clause 61 (3)

In the event that the Tribunal remains as the appeal body, it is submitted that legislation should clarify when rights accrue. This has been a longstanding problem with the provisions of section 62 of the MSA. The relationship between the appeal provisions set out in section 62 of the MSA and the proposed right of appeal to the Provincial review board and the appeal to the Appeal Tribunal must be resolved. There are potentially 3 appeal mechanisms available to disgruntled persons.

CHAPTER 7

Ad clause 72 – Regulations

Clause 72(d) permits the Minister to make regulations consistent with this Act for the procedures concerning the lodging of applications and the consideration and decision of such applications.

This is an area which falls into the municipal planning function.

Clause 72(i) permits the Minister to set a process for public participation in the preparation, adoption or amendment of land use scheme or the performance of any other function in terms of this Act.

Clause 72 (j) permits the Minister to set the operating procedures of a Committee.

It is submitted that these are all matters which are part of municipal planning. Furthermore, the provisions of section 44 of the Constitution require

Parliament to create legislation. There is no reference to the Minister being given the power to create subordinate legislation in terms of this section.

Clause 73 – Powers of Minister

Clause 73(1) gives the power, in the public interest, to exempt a piece of land or an area from one or more provisions of this Act. There is no limitation on this potentially unlimited power and there is no indication as to when such power will be used? It is possible for this to be used to resettle large numbers of people on land. There is no requirement to obtain the consent of the municipality in whose area of jurisdiction this falls and could impact on the zoning scheme in place in this municipality.

Clause 73(2) deals with the National Ministers powers to intervene in terms of clause 139(7) of the Constitution. This clause does not indicate that such intervention can only take place if the provincial executive cannot or does not adequately exercise the powers set out in this section.

Ad clause 73(2)(b) (ii) – there is no indication that the provisions of section 139 of the Constitution are wide enough to permit National Government to take this step.

Clause 74 – Non impediment to function in terms of this Act

This clause states that an exercise and performance of a function in terms of this Act may not be impeded on the ground that the value of the property is affected thereby.

This clause is vague.

Clause 77 – repeal of laws.

It is noted that this Bill seeks to repeal the Removal of Restrictions Act 84 of 1967 and the amendments thereto. It is understood that this Act was assigned to the Provinces. If this is the case, then it would not be possible for this Bill to repeal the matter.

Conclusion

In view of the concerns expressed above, it is respectfully suggested that the Bill be referred back to the technical drafters, that further detailed consultation take place and that a revised Bill be drafted.

Yours faithfully

GRANT HASKIN
EXECUTIVE DEPUTY MAYOR
Acting in terms of section 56 of the
Local Government: Municipal Structures Act