The process invalidity, constitutional invalidity and technical shortcomings and errors of LUMB makes the current draft fundamentally flawed, undemocratic, unconstitutional and, in at least some provinces, impossible of implementation, as is shown below.

1. FUNDAMENTALLY FLAWED PROCESS

The process followed in the drafting of LUMB was entirely deficient – not necessarily i.t.o. the motions that were gone through, but owing to the fact that lip service was largely paid to inputs given during that process. In this regard it must be noted that paragraph 7 of the Memorandum on the Objects of LUMB is misleading, because the steps listed there were largely followed on the basis of going through the motions in order to justify the drafters' predetermined views on how LUMB should look. The latter conclusion is demonstrated by the fact that many crucially-necessary and well-motivated concepts that were contained in many inputs, were simply ignored if they were not in line with the LUMB drafters' predetermined views. The process followed in the drafting of LUMB did not in the least comply with the process principles required to be followed with such legislation. Since seven years ago the National Department was informed of grave misgivings of principle and detail which needed to be addressed – virtually all of which were ignored despite sound motivations supplied. Throughout this time crucial stakeholders were also often ignored insofar as opportunities for practical participation were concerned – and to the limited extent that stakeholders were invited to meetings, et cetera, most inputs given on such occasions were almost totally ignored as is clear from the latest draft of LUMB. There are therefore serious and legitimate grounds for the process which culminated in LUMB, to be declared invalid.

2. TECHNICAL WEAKNESS AND FAULTS

LUMB contains grave and fundamental terminological/definitional and other technical and professional shortcomings. For example, the Definitions clause contains many terms and concepts that are unacceptable to provinces with non-Gauteng-based land use planning systems. Gauteng-based concepts and terminology cannot be enforced everywhere in the place of the respective equivalents that are known and in wide use in particular provinces. Only one among many specific terminological points is mentioned here, i.e. that "town planning scheme" is an invalid term under which to include all current zoning schemes, as zoning in at least three provinces (which have wall-to-wall-zoning) includes rural land and rural land usage, which cannot validly be included under the term "town planning" (not even by way of definition as is done).

Some other of the most-unacceptable technical faults illustrate to what extent LUMB falls foul of logic and correctness. For example, in Clause 50(1) an additional paragraph (c) is needed, to read: "(c) the relevant Chapter of the Ordinance or Act dealing with land use planning and management in the province concerned". Similarly in the first line of Clause 50(2), the words "or of the Ordinance or Act dealing with land use planning and management in the province concerned" must be added after "Municipal Systems Act". Furthermore, 4th and 5th subclauses need to be added to Clause 50, to refer to municipal adoption and provincial approval of zoning schemes. This is essential to ensure that provincial and regional planning and development are not compromised by parochial local interests that may prevail in the drafting of a zoning scheme – the point being that with wall-to-wall municipalities and zoning, it cannot be reasoned that all effects of zoning will be confined within the boundaries of each municipality and will therefore only comprise municipal planning. The probability of regional and/or provincial interest being affected by such a Scheme is so high as to be inevitable.

Furthermore there are clauses that give powers now vesting in the Provinces, to the National Minister, and these are further examples of measures that fly directly in the face of the principles, intentions and letter of the National Constitution which enshrines the rights and obligations of provinces (inter alia) in land use planning and management.

There are many points of fundamental unacceptability in the latest draft. For example, in Clause 3, principles such as efficiency, integration and cooperative governance are laid down; yet LUMB is neither efficient nor integrated, nor does it achieve cooperative governance – in fact in the latter case it achieves the opposite, as provincial government is written out of the land use system. Furthermore, forward planning is ignored as an objective. In fact LUMB is entirely unstrategic and devoid of forward planning.

Clause 4 prescribes the democratic principle for LUMB – yet *the entire Bill is undemocratic*, as it forbids democratically-elected office-bearers from taking part in land use decision-making, with the exception of the National Minister. The democratic principle is apparently good enough for the national sphere but not for the provincial and municipal spheres.

In Clause 6 the attempt to impose "land use schemes" as a land use control mechanism bears no relationship to the actual position on the ground and legally – in at least the Western Cape and also in some other provinces. It is also not clear whether a "land use scheme" is to consist of only zoning regulations or also the zoning map, or in fact also, as in some provinces, would include a departure-and-consents register.

Under Clauses 6 and 7 the National Minister will in effect usurp powers that fall under the Provinces' constitutional regulation, support and monitoring functions. In Clause 7, for instance, only "Supervision" is mentioned – apparently in ignorance of the Provinces' constitutional regulation, support and monitoring functions.

In Chapter 3 the term *land use regulator* is used in a confusing way, more-or-less interchangeably with *land use committee*. It is not clear when the one or the other is meant, nor in fact even whether there is a distinction between the two terms, and if so, what the distinction is. Of course, if there is no distinction, only one term should be used consistently. Further to the above, there is no logic in referring to decision-makers in two of the three spheres as "land use regulators" yet to those in the middle sphere as "tribunals". There is no logic behind the National Minister and the municipal decision-making body being "land use regulators' while the provincial decision-making body is a "tribunal", in contrast to the term used for the two spheres on either side of it.

Clause 9 comprises micro-management and furthermore falls foul of the principle of representative government. In Clause 10 reference is made to qualifications OR experience – yet surely both are a prerequisite. In Clause 11, the principle of disqualification is negative, and above all *the disqualification of all elected representatives in the municipal and provincial spheres* (but not the National Minister) is totally unacceptable.

In Clause 12, the burocratic committee considering AND DECIDING all land use matters flies in the face of the very principle of democracy established in South Africa in 1994. In Clauses 20 and 21, the tribunal concept in the provincial sphere replacing representative decision-making is not only unconstitutional but also falls foul of the principle of democracy. Furthermore there is a contradiction between clause 20(2) and clause 21(6). Clauses 22 and 23 contain similar unacceptable aspects to those mentioned earlier in relation to the same burocratic and undemocratic principle being applied in the municipal sphere.

Clause 24 contains no mechanism for re direction, nor states who resolves thereupon. Clause 32 hangs in the air with no mech anism involved. With reference to Clause 36: District municipalities tend to equate func ional regions, and in fact in the Western Cape this is 100% so. Therefore district-munic pal planning is in effect regional planning, and regional planning is a provincial constituti nal function. It follows that issues and matters of both district municipal and provincial im pact are provincial functions, and that there can therefore *not* be a "fourth sphere" in terms of planning, as is effectively created in LUMB.

In general, Chapters 3 and 4 contain a co nfusing mixing of zoning and subdivision and of subdivision and townships, and also a lac k of provision for parameter departures – all of which point not only to lack of knowledge of, but also to disregard for the practices and realities of, land use planning and mana gement on the part of the drafters of LUMB. Furthermore the proposed entry point for applications seems to be the sphere where the decision will be made (here reference is made to cases that are by their inherent nature in different spheres – not to cases that change in sphere because of appeals). Entry points in the different spheres would be im practical for various reasons, mostly reasons of capacity and of public understanding. *The only practical entry point is the municipal sphere*, so that provincial and national ca ses can then proceed to the provincial sphere and national cases further on to the nation al sphere.

Moreover, LUPO's extremely successful and desirable use-it-or-lose-it principle (i.e. the lapsing of unused rights – which seems to have been brought into LUMB in regard to conditions but not in general) was totally ignored by the drafters of LUMB. This fact also points to the drafters' lack of insight rega rding land use planning and management and above-all their disregard for what is desira ble and needed.

With two levels of appeal being provided for, appeals on minute matters will seemingly flood the National Minister's office – which will create huge problems of both principle and practice.

In Clauses 47 to 51 the provinces are being blatantly written out of land use management.

Clause 50(3) is so confusing and un-understandable that it must be mentioned as an example of the drafters having had insufficient knowledge of and insight into land use planning and management.

Clause 53 says nothing of SDFs and provincial policy. The whole SDF concept seems to be ignored, with direct links being made between IDPs and zoning schemes. *Anyone involved in municipal and provincial planning knows that SDFs come in-between.* And of course the provinces being ignored, is here as unacceptable as elsewhere.

Municipalities being "allowed" by LUMB to make bylaws and to go to court, is tautological, as municipalities can do both anyway. Apart from this kind of legal drafting exposing the drafters' lack of insight into the field of LUMB, it also shows up LUMB's discrimination against provinces, as the national sphere once again engages directly with the municipal sphere. With reference to clause 63 to 65 and elsewhere, e.g. clause 76: Once again, the provincial sphere is nowhere, and is being discriminated against as throughout LUMB. LUMB's disregard for the rights and duties of provinces and for the constitutional functions and obligations of provinces makes the Bill fundamentally unacceptable.

Lastly the schedule 1 list of zonings is utterly inadequate. This is probably one of the most blatant examples of the LUMB drafters' lack of knowledge of, and lack of insight into, their subject matter.

3. THE WRONGLY-NAMED AND UNDEMOCRATIC "TRIBUNALS"

The proposed "Tribunals" in the provincial sphere are examples of unacceptability as a question of fundamental principle, as they (like the municipal "land use regulators") fly directly in the face of the principle of representative decision-making that is a cornerstone of land use planning and management in the Western Cape and should be so throughout South Africa. Decision-making through appointed bodies reflects an attempt to take effective decision-making that affects the people directly, out of the hands of the people's representatives and their delegates and to put it in the hands of appointed bodies. In counter to the above it may be said that there are shortcomings to representative decision-making, e.g. that elected representatives can be influenced unduly to take non-professional decisions. This argument, in turn, can be countered with the well-known saying that *democracy is the worst form of government except all others* – which can be paraphrased in this context as: *representative decision-making is the worst form of decision-making except all others*. The only form of land use planning and management decision-making that should be acceptable, *and the only form that is acceptable in the Western Cape*, is direct decision-making by the people's representatives in the form of Councils or their Council Committees, and in the form of the Premier or his/her Minister concerned – a principle which can also be applied through delegated decision-making with appeal to the elected representatives concerned. Given the above, the relevant chapters of LUMB that attempt to institute burocratic decision-making, with their undemocratic basis, are rejected out of hand as a question of fundamental principle.

4. FORWARD PLANNING, ZONING AND SUBDIVISION AS BASIC CONCEPTS WHICH LUMB GETS ALL WRONG

There are critical shortcomings in LUMB in regard to forward planning, zoning and subdivision, which would render LUMB impossible of implementation in the Western Cape and also some other provinces in LUMB's current form. For example, there is no forward planning chapter in LUMB. This is probably the result of the drafters' (Old-Transvaal-based) confusion between zoning and forward planning, two concepts that crucially need to be separated for land use planning and management to operate functionally and optimally in 21st-Century South Africa. It is fundamentally wrong to attempt to fulfil the function of land use planning and management without a forward planning chapter being part of the enabling legislation. Following upon the above, a basic goal of LUMB must be to provide for the Government's National Spatial Development Perspective (NSDP) to be approved i.t.o. law – to give it the status and applicability that it deserves, and to bring an end to the current situation of certain provinces simply ignoring it.

There are many essential zoning and subdivision concepts and measures missing from LUMB, for example, among others –

- lapsing of upgradings of land use rights if not utilised;
- compensation/betterment;
- establishment of the principle of subdivision before actual subdivision;
- the cadastral linkage and confirmation of subdivision approvals;
- basis of evaluation, and
- contravention rectification.

In the Western Cape it would be impossible to undertake 21st-century community-based land use planning and management in the absence of such crucial measures and concepts – of which LUMB's drafters seem to be entirely unaware.

The disadvantages of the lack of a forward planning chapter in LUMB are also underlined by the lack of a consistency-ruling technical linkage between zoning and forward

planning. Similarly LUMB lacks a clea separation of, and a principle-of-subdivision linkage between, zoning and subdivision. *There must therefore be three clear chapters dealing with forward planning, zoning and subdivision*, with a consistency-ruling linkage between the first two and a principle-of-subdivision linkage between the latter two. Instead of forward planning being left to informal processes as LUMB by implication does (effectively rendering such planning useless because it can then be breached by the first party that decides that it is no longer in its interest to adhere to the "agreed-upon" plan), the forward planning process must be legislated for so that there can be level playing fields and predictability in land use planning and the faith that plans will not be breached without cause. This principle (that forward planning must be provided for by statute) should then also be applied to the NSDP and therefore *LUMB must specifically provide for process evaluation and approval of the NSDP.*

Prescribing the process principle of planning is the way to prevent old-style blueprint and bottom-drawer planning from continuing to be practised in future. The process principle of planning, which is the modern replacement for the old-style blueprint planning, prescribes the principle of products from the general to the specific each being taken through phases that each contain a draft-participation-adoption sequence. The purpose is to achieve the result that a product known to interested and affected parties and on which successive phases can be built, will exist at the end of each phase, and that the final say over contentious issues will still rest with the decision-maker who bears the ultimate responsibility for the success of the plan. The above reflects the process principle of planning that should be legislated for in order to make continuation of the old-style blueprint planning impossible.

There appears to be a vague and clumsy attempt in LUMB to deal with the complex matter of land use applications being inconsistent or in conflict with forward planning. This matter, i.e. the consistency ruling and conformity principle, must be fully and properly dealt with.

5. THE TIER VS SPHERE PRINCIPLE OF GOVERNMENT

The LUMB drafters are (not only presumably, but by their own admission as can be seen in paragraph 8 of the Memorandum on the Objects of LUMB) under the impression that the old tier-principle of government that had applied under the previous dispensation, is still applicable, as opposed to the new constitutional sphere principle of government which the LUMB drafters should have honoured. Fact is that constitutionally the old tier principle of government was turned through ninety degrees – and instead of three tiers of government lying like three layers above and below each other, we now have three spheres of government standing like pillars next to each other. LUMB is not only technically in conflict with this principle but also reflects outmoded thinking and an outdated approach to the current realities of South Africa. Constitutionally the provinces already have many of the functions and obligations that are contained in LUMB, and therefore cannot be given it by a National Minister in terms of a specific Act. Nor, moreover, can the provinces find their constitutional functions and obligations being taken away by National Government.

LUMB reflects constitutionally-outmoded thinking and an outdated approach, and is invalid insofar as its detail is concerned, as the provinces already have certain functions and obligations constitutionally – which LUMB can neither take away (as is mostly attempted) nor, as in some cases, gracefully grant to the provinces. The problem of principle involved here, is also encapsulated in paragraph 8 of the Memorandum on the Objects of LUMB where, as already mentioned above, reference is made to the "tiers of government" instead of "spheres of government". This reference shows that LUMB is rooted in the philosophy of Central Government sitting at the top of a pyramid of

authorities that are for all purposes subservient to Central Government – as opposed to the actual constitutional situation of the three spheres of government being legislatively competent within their constitutional competencies. In general this approach reflects the wider problem that LUMB had presented from the outset: LUMB is rooted in outmoded philosophies dating from decades back (pre-1986 in the Cape's case) and from more recent Old-Transvaal legislation, views and practices.

6. THE MYTH OF STANDARDISATION

A point that actually does not need to be addressed here because mandatory national land use legislation containing compulsory detail would be unconstitutional in any event, is the basic rationale for LUMB in its current form. Instead of producing a Bill that, when enacted, would lay down and enforce the necessary principles and broad outlines for land use planning and management in South Africa, LUMB's drafters proceeded from the point of departure that standardisation of detail is necessary *because national operators in the land use field find it problematic and cumbersome to have to deal with different provinces' land use planning and management legislation*. Even though this rationale cannot overrule the National Constitution and can therefore not make the unconstitutional LUMB constitutional, it is in any event addressed here as it would be an unacceptable rationale anyway even if it were constitutional. The answer to this "standardisation" rationale is that *national operators are sufficiently few, and sufficiently large and capacity-laden*, that it is far better that they make the "sacrifice" of having to deal with different provincial land use planning and management acts, than the reverse – i.e. that the far larger numbers of operators, provincial and local authorities, public representative bodies, et cetera have to adapt fundamentally-ingrained methods and terminologies to Gauteng-based methodology and terminology simply for the sake of standardisation.

Virtually all the terminology and methods that are being attempted to be unconstitutionally enforced from Gauteng, are utterly foreign to at least three (probably four or possibly even five) of the provinces.

This disadvantage is serious and wipes the standardisation rationale off the table, because it would be grossly wrong to force thousands of regionally-oriented authorities and other organisations, companies and people, to have to adapt to new and strange methodologies and terminologies simply to achieve standardisation *for standardisation's sake in the interest of comparatively few national operators*. The standardisation rationale of LUMB stands to benefit comparatively few (but highly capacity-laden) national private and public operators at the cost of far greater numbers of, but far less capacity-blessed, provincially- and locally-bound operators, authorities and people. In view of this, the standardisation rationale, in addition to being unconstitutional, is also fundamentally unacceptable given current realities in South Africa.

7. CONSTITUTIONAL INVALIDITY

Paragraph 8 of the Memorandum states, inter alia, that: "The Bill provides for the uniform regulation of land use management in the Republic and the provisions thereof will affect all three tiers of government. Provinces will still have the competence to legislate on those functional areas mentioned in Schedule 5 to the Constitution. However, such legislation will be subject to section 146(2) of the Constitution, which determines that national legislation prevails over provincial legislation, subject to certain conditions."

However, *the crucial gist and content, spelling out the clear purpose, of section 146(2) of the Constitution, is omitted and ignored*, namely the following: "National legislation ... prevails over provincial legislation if any of the following conditions is met: The national legislation deals with a matter that cannot be regulated effectively by legislation enacted

by the respective provinces individually; 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 norms and standards, frameworks and national policies; or the national legislation is necessary for the maintainance of national security, the maintainance of economic unity, the protection of the common market in respect of the mobility of goods, services capital and labour, the promotion of economic activities across provincial boundaries, the promotion of equal opportunity or equal access to government services, or the protection of the environment."

These specific situations set out in section 146(2) of the Constitution, are clearly not applicable to land use planning and management in South Africa *in the sense of detail measures ostensibly being necessary* – except, of course, if the parochial interests of comparatively few national operators outweigh the practical regional and local interests of communities throughout South Africa. Therefore an invalid and misleading reference to the Constitution is made in paragraph 8 of the Memorandum on the Objects of LUMB. Section 146(2) of the Constitution was clearly aimed at the emergence of very serious circumstances around the factors listed. It cannot credibly be claimed that any of those factors currently present insurmountable problems in the land use field.

LUMB is, almost as a whole, ultra vires the National Constitution, as it legislates for provincial and municipal planning which is not the function of Central Government. At most (*and this is needed*) Central Government can legislate and enforce *principles* of land use planning and management (inclusive of a broadbrush plan for the country as a whole) – as opposed to legislating the detail methodology of land use planning and management on a compulsory basis, which will be unconstitutional if done. The detail measures of LUMB can validly serve as a model for provinces that wish to adopt them voluntarily. If it is countered that Clause 2 and certain other similar clauses render LUMB constitutional, that counter-argument would not stand, as those clauses do not address the constitutional problem *but merely postpone it*.

The solution to the constitutional problem lies not in those clauses but in a further clause that would be needed – i.e. a measure to the effect that the *principles* of LUMB would be mandatory, with the detail serving as a model for voluntary implementation, wholly or partially, by the provinces. *LUMB must be constitutional up-front instead of consigning the resolution of its unconstitutionality to the future*. The above aspect represents a prime example of the ignoring of inputs through the process. From the start participants in the process required an additional clause to the effect that the principles of the Act should be binding nationally but the detail methodologies, terminologies and procedures should either be adopted by provinces voluntarily or provinces should make the nationally-binding principles applicable to their own land use planning and management legislation. Such an additional clause would have made LUMB acceptable in provinces with non-Gauteng-based land use planning systems, *and would moreover also have made LUMB constitutional.* Virtually all content misgivings and especially also the unconstitutionality of LUMB would have been resolved.

Chapter 7 and other clauses of LUMB provide for land use planning and management principles that are supported and that represent the kind of principles that can validly and constitutionally be enforced nationally. Furthermore LUMB contains principles that, if put generally, would be valid – but in the form that the principles are set (addressing the municipal sphere directly and bypassing the provinces, and furthermore prescribing specific measures as opposed to principle, and also being undemocratic), the clauses concerned are ultra vires the National Constitution. Furthermore it would be highly undesirable, and even impossible, to attempt to change the Western Cape's and certain other provinces' zoning and subdivision terminology. LUMB must honour process requirements and principles of forward planning and zoning without which the Western

Cape and certain other provinces with th ir unique circumstances cannot function land-use-wise. For the rest the entire Bill suf ers from the unconstitutionality caused by the shortcomings referred to above, and n oreover is also fundamentally unacceptable because of the almost complete ignorinç of provincial rights, functions and obligations and of democratic principles that resulted rom the whole approach contained in LUMB.

There are also some more specific examp es of unconstitutionality that are a direct affront to provincial and municipal autonomy. It s clear from the above that the current draft of LUMB is fundamentally flawed for the rea: on of its unconstitutionality, but in addition also *as it is rooted in undemocratic and p rofessionally-outdated land use management philosophies not suited for the New South Africa*.

8. CONCLUSIONS

The Land Use Planning Bill is fundamen ally flawed in many respects, and is therefore unacceptable as a question of principle. For instance, the provinces as political entities are entirely ignored – which is not only u ndesirable given the Provinces' experience and expertise in regard to land use planning and management, but is also unconstitutional and moreover *undemocratic* (the latter conclusion flowing from the total banning of elected representatives from the "lan d use regulator" and "tribunal" concepts). Furthermore it is not understood how the N lational Department can justify micro-managing from Pretoria while those who are attempt ng the micro-managing have shown throughout the process that they lack experience in he principles of process and also fall short on the technical knowledge and skills invc ved in land use planning and management. Principles, terminology, rights and duties that have developed for very good reason cannot simply be swept away by a stroke of the pen under the misleading argument that nation-wide operators want a unified system to enrich themselves at the cost of provincial, regional and local interests *and moreover at the cost of the democratic principle* (which is being sacrificed in fav our of burocratic rule and blue-print planning). Furthermore LUMB is entirely control-ori ented and contains virtually no hint of forward planning and the need for strategic thinkin g and action.

Further to the above, the drafters of LU MB have consistently for years ignored many inputs given repeatedly – mostly not eve n responding to the substance of the points of content submitted to them. An example of a strong indication that the inputs were often probably not even read (let alone being ncorporated or responded to), is the choice of poor wording for a *land unit* or *land parc el* or *portion of land* – which in the later drafts became, contrary to technical and legal r equirements, "piece of land", and has remained that despite this point being shown out i n inputs. Another blatant example of probable proof that many inputs were ignored, is hat the obsolete reference to "tiers" instead of "spheres" of government in the Memoran dum on the Objects of LUMB was pointed out in inputs, yet was retained, despite its bla ant obsolescence, in the latest version of the Memorandum. There are many more examples of this tendency, for instance the insistence on trying to replace the zonin concept which is ingrained in three Provinces' wall-to-wall land use systems, with the "la nd use scheme" concept *simply for the sake of blindly making a change*.

The bottom-line is that LUMB attempts t artificially enforce the old-Transvaal system of land use management from apartheid day s, onto the entire country.

Francois Theunissen
M.P.A., M.T.R.P.
17 July 2008