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MUNICIPAL DEMARCATION BOARD

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Hon SL Tsenoli
Chairperson
Portfolio Committee on Provincial and Local Government
PO Box 15
CAPE TOWN
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6 February 2009

Dear Mr. Tsenoli

**PUBLIC HEARING ON THE CONSTITUTION 16TH AMENDMENT BILL, 2009
AND THE CROSS-BOUNDARIES LAWS REPEAL AND RELATED MATTERS
AMENDMENT BILL, 2009: MONDAY, 9 FEBRUARY 2009: 14H00**

Thank you for your letter dated 5 February, 2009, and for the kind invitation to the MDB to submit comments, and to attend the above-mentioned public hearing.

As you may be aware the Board's term of office lapsed on 31 January 2009, and the appointment of a new Board is expected in the near future. I am thus submitting comments that have not been considered or approved by the Board.

In general I welcome the introduction of the two Bills to amend Provincial boundaries to relocate Merafong City into Gauteng province.

It should be noted that changes to provincial boundaries fall outside the mandate of the Board. This is a function of the legislatures.

However, changes to municipal boundaries are a sole mandate of the Board in terms of section 155(3)(b) of the Constitution, 1996, read with the Local Government: Municipal Demarcation Act, 1998. The independence of the Board in performing this function was emphasised by the Constitutional Court in 1999. In the 1999 Western Cape/KZN case the Court said, amongst others, *"The purpose of section 155(3)(b) may well have been to guard against political interference in the process of creating new municipalities, and to this extent the function of determining municipal boundaries is entrusted to an independent authority... it means that the provincial government must establish municipalities in accordance with the boundaries as determined by the Demarcation Board..."*

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Mr E H Morare

the Demarcation Board should determine boundaries in accordance with the criteria and procedures it should be able to do this without being constrained in any way by the national or provincial governments...."

In the Matatiele case, the Court, also referred to its judgment in the 1999 Western Cape/KZN case on the constitutionality of the Structures Act, 1998, where it was held that the constitutional "authority to determine municipal boundaries vests solely in the Demarcation Board."

You will recall that the 1996 Constitution did not make provision for cross-boundary municipalities. The Constitution was amended by the Constitution 3rd Amendment Act, 1998 to deal with the issue of cross-boundary municipalities – Sec 155(6)(A) was inserted.

The Board was established on 1 February 1999, and undertook a massive rationalisation of municipalities in 1999/2000, as provided for in Section 25 of the Demarcation Act, 1998. The number of municipalities was reduced from 843 to 284.

Due to the interdependence of people, communities and economies across provincial boundaries, the Board opted to demarcate a number of municipalities across provincial boundaries.

Merafong City Local Municipality (CBLC8), and West Rand District Municipality (CBDC8) were amongst the municipalities that became cross-boundary municipalities on 1 December 2000. (See map "CBDC8")

Due to a number of practical problems such as the question of joint administration by two provinces, it became clear that the demarcation and establishment of cross-boundary municipalities created more problems than anticipated, and the Board recommended in 2002/3 that legislation be amended to do away with cross boundary municipalities.

In 2005 the then Minister of Provincial and Local Government requested the Board to move both Merafong City and Westonaria from West Rand District Municipality to Southern District Municipality (now Kenneth Kaunda District Municipality).

The Board tested public opinion on the matter and decided to withdraw the redetermination of the municipal boundaries as requested by the Minister. Notices in this regard were gazetted on 18 October 2005.

A further request from the Minister to only move Merafong City from West Rand to Southern DM, was gazetted on 31 October 2005.

The demarcation process was then overtaken by the legislative process - the Constitution 12th Amendment Bill, 2005 and the Cross-boundary Municipalities Laws Repeal and Related Matters Bill, 2005. As there was no longer legislative provision for cross boundary municipalities, the Board followed the provisions of two Acts which was promulgated on 23 December 2005, and confirmed the inclusion of Merafong City into Southern District Municipality. This Board decision was gazetted on 27 December 2005. The result of the Constitution 12th Amendment Act, 2005 and the Cross-boundary Municipalities Laws Repeal and Related Matters Act, 2005, is reflected on the attached map ("DC40").

On 29 October 2008 the Minister of Provincial and Local Government informed the Board of his intention to initiate legislation to move Merafong back to Gauteng, and on 11 November 2008 the Minister requested the Board in terms of section 22 of the Demarcation Act, 1998, to re-determine the boundaries of Kenneth Kaunda and West Rand District Municipalities.

The Board initiated the demarcation process on 17 November 2008, and has already completed the consultation process required by section 26 and 21 of the Demarcation Act, 1998. In its notices the Board clearly indicated that the re-determination of the municipal boundaries is subject to an appropriate amendment to the Constitution.

The Board is ready to confirm the inclusion of Merafong into West Rand, and this will be done as soon as the President has determined the commencement date of the Constitution 16th Amendment Act, 2009. The attached "DC48" maps shows the effect of the Constitution 16th Amendment Bill, 2009 and the Cross-boundary Municipalities Laws Repeal and Related Matters Amendment Bill, 2009.

Though it may be argued by some that Parliament is usurping the authority reserved for the Board in terms of section 155(3)(b) of the Constitution, it should be pointed out that in the *Matatiele* case the Constitutional Court pointed out that the MDB's authority to determine municipal boundaries is limited by Parliament's authority to establish provincial boundaries.

However, it is recommended that the Portfolio Committee notes that the process to re-determine municipal boundaries in terms of the Demarcation Act, 1998, is only concluded when Section 23 of the Demarcation Act, 1998 has been complied with.

In terms of this Section the IEC must express a view as to whether the representation of voters in councils is affected. Should the IEC express a view that representation will be affected such a redetermination only takes effect from the date of the next local elections, which in this case is 2011.

In 2008 section 23 of the Demarcation Act was amended by the Local Government Laws Amendment Act, 2008, and it provides that, should the IEC

express a view that voter representation will not be affected, the re-determination takes effect on the commencement date of the municipal financial year following the date of publication of the notice effecting such re-determination.

Compliance with section 23 of the Demarcation Act, 1998, may be superfluous as Section 2(4)(a) of the Cross-boundary Municipalities Laws Repeal and Related Matters Act, 26 of 2005 (the 2005 Act, read with section 8 of the Cross-boundary Municipalities Laws Repeal and Related Matters Amendment Bill, 2009 (the 2009 Bill), provides that, despite any applicable provision of the Municipal Demarcation Act, 1996, the proposed demarcation by the MDB as indicated by maps 4, 5 and 14 of General Notice 1490 of 28 November 2008, is regarded as a demarcation of the MDB of the municipalities indicated in Schedule 4 of the 2009 Bill, with effect from the date of coming into operation of the Constitution 16th Amendment Bill.

It may be advisable for the Portfolio Committee to engage its legal advisors, the IEC and the responsible departments on the need for the IEC to comply with section 23 of the Demarcation Act, 1998.

Furthermore, it is recommended that the Portfolio Committees also consider the advisability to continue with the description of the geographic areas by way of reference to maps in Schedule 1A to the Constitution.

Reference to municipal names or codes may be a better option, and will no doubt remove the need to amend the Constitution every time when a provincial boundary needs to be changed.

As you may be aware there are a number of cases registered with the Department of Justice and the DPLG which may require further amendments to the Constitution. The more prominent ones are Moutse (Mpumalanga/Limpopo), Matatiele (Eastern Cape/KZN), Phokwane/Ba ga Mothibi villages/Jan Kempdorp (Northern Cape/North West), the Ramagodi Village (North West/Gauteng), Timbavati Nature Reserve (Mpumalanga/Limpopo) etc.

As the Board can no longer demarcate municipal boundaries across provincial boundaries, the Constitution will again have to be amended if these cases were considered favourably by the relevant government departments, and ministers.

However, by referring to names or codes in Schedule 1A to the Constitution, the Board will be able to attend to these cases and make recommendations to Parliament. Parliament can then by way of a motion (instead of passing a Bill) ensure that the Board's recommendation is passed with a supporting vote of at least two thirds of the members of the National Assembly, and the supporting vote of at least six provinces as required by Section 74(3) of the Constitution. Only minor amendments to the Constitution may be necessary to accommodate this proposal.

With regard to the possible impact of the Constitution 16th Amendment Bill, 2009, and the Cross-boundary Municipalities Laws Repeal and Related Matters Amendment Bill, 2009 on the Board's ward delimitation process it would be appreciated if the following can be taken into consideration:

The Board closed changes to municipal boundaries at the end of August 2008 to empower the IEC to demarcate and align voting district boundaries to municipal boundaries, and to allow sufficient time for the Board to plan for the ward delimitation process.

As a result of the request from the Minister pertaining to Merafong, the re-determination process had to be re-opened, and will only be finalised after the date on which the Constitution 16th Amendment Act, 2009 takes effect.

The Board plans to commence with the ward delimitation process, for the 2011 local elections, in April 2009, and the Board's planning will not be adversely affected if the Constitution 16th Amendment Act, 2009, become effective by March 2009.

The ward delimitation process is subject to the number of councillors, which must be gazetted by the MECs responsible for local government. Half of the number of councillors represents wards.

The MECs cannot determine the number of councillors without a formula which is to be gazetted by the Minister of Provincial and Local Government in terms of section 20 of the Structures Act, 1998.

On the other hand, the Minister again cannot publish the formula without having the national common voters roll, divided into municipal segments at his disposal, as the formula must be based on the number of voters registered on the municipal segment of the national common voters roll. The Minister must also determine the date of the voters roll being divided into municipal segments.

In 2004 the Minister determined the date on which the national common voters roll was certified by the IEC (20 February 2004) as the date for the number of voters on the municipal segment of the national common voters roll.

Should the same be applied in 2009 the IEC will probably certify the national common voters roll soon after the election date for national and provincial elections has been proclaimed, and divide the national common voters roll into municipal segments so that the Minister can publish the formula.

To ensure an orderly process, it is hoped that the two Bills currently before Parliament will be promulgated, and will come into operation before the national common voters roll is divided into municipal segments. This will empower the

IEC to divide the national common voters roll into municipal segments taking into account the extended number of voters in West Rand and the reduction of the number of voters in Kenneth Kaunda. Alternatively, and at the latest, the legislation should come into operation before the MECs determine the number of councillors for each municipality. This will empower the MEC for local government in Gauteng and North West to apply the formula and to determine the correct number of councillors for the two affected District Municipalities.

This represents the ideal for an orderly process.

However, should it not be possible for the President to proclaim, at an early stage, the date on which the Constitution 16th Amendment Act, is to take effect, alternative and special arrangements will have to be made pertaining to date on which the national common voters roll is divided into municipal segments, and the determination of the number of councillors, which will, as in 2004/5, delay the delimitation of wards, and adversely affect the consultation process on wards.

The Board would like to recommend that the Structures Act, 1998 – especially the sections and Schedules pertaining to the number of councillors and ward delimitation – be reviewed. Unlike Parliament and the provincial legislatures, the number of councillors and the number of wards in municipalities change every 5 years. This has a disruptive effect on planning, structures, administrations and service delivery.

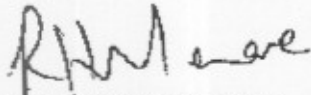
With regard to the Board's function to advise MEC on the capacity of municipalities, so as to empower the MECs to adjust powers and functions between district and local municipalities, I wish to inform you that according to the Board's records the MEC for local government in North West adjusted, in terms of Section 85 of the Structures Act, the district functions of solid waste (Section 84(1)(e)), roads (Section 84(1)(f)), cemeteries (Section 84(1)(i)), and Fire fighting (Section 84(1)(j)) from Kenneth Kaunda District Municipality to Merafong City. Once the process to move Merafong City to West Rand District Municipality, has been completed, the MEC responsible for local government in Gauteng will need to review the capacity of West Rand District Municipality and, if the district municipality has the necessary capacity, readjust these functions to the district municipality.

You are aware of the fact that the definitions of the municipal functions and the adjustment of powers and functions between district and local municipalities is an ongoing bone of contention. In the last year (2008) MDB Chair, supported by National Treasury, argued very strongly for the repeal or suspension of section 85 when the Local Government Laws Amendment Bill, 2008 was considered by the Select Committee on Local Government and Administration. The Board still believes that Sections 84 and 85 of the Structures Act, 1998 are stumbling blocks in the way of stability and service delivery at local level.

With regard to the last function of the Board, namely district management areas, I wish to inform you that no district management area will be affected by the two Bills.

I wish you every success in the deliberations on the two Bills, and trust that they will come in operation in good time so as to ensure that the Board's ward delimitation process is not adversely affected.

Yours faithfully



HILLARY MONARE
CEO: MUNICIPAL DEMARCATION BOARD.