

Briefing Note: Housing Development Agency Regulations, 2011

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Background

1. The Minister of Human Settlements (the Minister) submitted the draft Housing Development Agency Regulations, 2011 (the draft Regulations) to the Speaker of the National Assembly on 12 June 2012. The draft Regulations were tabled in the Assembly and referred on 28 June 2012 to the Portfolio Committee on Human Settlements and the Interim Joint Committee on Scrutiny of Delegated Legislation (the Committee) for consideration and report (ATC, 28 June 2012).
2. Our Office was requested to comment on the draft Regulations.

Regulatory framework

3. The draft Regulations were submitted for consultation in terms of section 32(1) of the Housing Development Agency Act, 2008 (Act No. 23 of 2008) (the Act).
4. Section 32(1) of the Act provides that "the Minister must, after consultation with the [Housing Development] Agency and Parliament make regulations regarding—
 - (a) meetings to be held by the Board;
 - (b) regularity of meetings;
 - (c) special meetings;
 - (d) the taking of decisions at meetings;
 - (e) convening of meetings and notices of meetings;
 - (f) meetings by telephone or video conference or other means of communication;
 - (g) quorums at meetings;
 - (h) adjournment of meetings;
 - (i) the person presiding at meetings;
 - (j) minutes;
 - (k) resolutions signed by members of the Board;

- (l) execution of documents; and
- (m) the proceedings of the Board.”

[Emphasis added.]

5. Section 32(2) of the Act provides that “the Minister may, after consultation with the Agency and Parliament, make regulations regarding—
 - (a) any matter that this Act requires or permits to be prescribed; and
 - (b) generally, any ancillary or incidental, administrative or procedural matter that it is necessary to prescribe for the proper implementation or administration of this Act.” [Emphasis added.]
6. The Committee must, amongst others, scrutinise delegated legislation that requires consultation with Parliament in accordance with the criteria set out in the interim Rules applicable to the Committee (ATC, 19 April 2011, Rule 3(2)(iii) read with rule 4(1)).

Advice

7. The draft Regulations deal with the issues provided for in section 32(1) of the Act. It is necessary to compare the provisions of the draft Regulations with the criteria set out in interim rule 4(1).
8. There are no provisions imposing levies, taxes or duties.
9. The draft Regulations appear to comply with the procedural aspects pertaining to the draft Regulations insofar as Parliament is being consulted in the process. I am not aware of whether the Agency has been or will be consulted.
10. The draft Regulations do not impinge on the jurisdiction of the Courts.
11. There is no provision for retrospective operation of the draft Regulations. Draft regulation 14 provides that the Regulations come “into effect on publication.”
12. The draft Regulations conform to the objects of the Act.

13. Except for my comments here, the provisions of the draft Regulations do not appear to make unusual use of powers conferred by the Act.

13.1 The Act confers powers on the Minister to make regulations. The Minister is doing so in respect of section 32(1) of the Act. In addition to the specific provisions of subsection (1), subsection (2) of section 32 provides that the Minister may make regulations regarding, "generally, any ancillary or incidental, administrative or procedural matter that it is necessary to prescribe for the proper implementation or administration of this Act." Draft regulation 13 provides that "[a]ny person who fails to comply with these regulations is guilty of an offence and is liable upon conviction to a fine or imprisonment not exceeding a period of six months, or to both a fine and such imprisonment." In other words, the provision creates an offence with penalties. The question is whether the Minister is empowered, through either subsection (1) or (2) of section 32 to create criminal offences visited by criminal penalties?

13.2 It is clear that subsection (1) does not authorise the Minister to create criminal sanctions in respect of the issues that must be regulated through regulations. Although subsection (2) is open to interpretation, in my view the provision allows for the making of regulations of an administrative or procedural nature necessary for the proper implementation or administration of the Act. The Minister is not empowered to make regulations that create criminal offences. By way of comparison, the empowering provision in the Promotion of Access to Information Act, 2000 (Act No. 2 of 2000), section 92, was specifically amended in 2003 to amend the Promotion of Access to Information Act, 2000, to sanction the punishment for failure to comply with certain regulations (see Judicial Matters Second Amendment Act No. 55 of 2003). Creating a criminal offence in regulations must be authorised by the empowering Act. It follows that the Minister, through draft regulation 13, creates an offence with a penalty which are not authorised by the provisions of either section 32(1) or 32(2) of the Act. I therefore advise that draft Regulation 13 be omitted.

13.3 Furthermore, the offence created by the draft Regulation is not specific in requiring negligence or intent or both as generally required when defining a statutory offence.

14. Subject to the comments below, the draft Regulations are properly drafted.

14.1 Draft regulation 5(1)(a) appears somewhat contradictory in permitting the adjournment of meeting at which a quorum is present "with the member's consent". The provision appears to allow the adjournment of a meeting with one member's consent. If this is the case, this provision appears inconsistent with the purpose of conducting business only when a quorum is present in terms of draft regulation 4(1). In my opinion the plural "members" must be used, as is the case with draft regulation 5(1)(b). However, in the latter instance, the form of the verb "directs" must be corrected to "direct".

14.2 Draft regulation 6(2) provides for the appointment of a member of the Board from amongst the members to preside at the meeting in the absence of the Chairperson, Deputy Chairperson, or an appointee by the Minister in terms of section 9(2)(c) of the Act. Firstly, the proviso "unless the Minister has appointed a Chairperson in terms of section 9(2)(c) of the Act" appears contradictory as the absent Chairperson is appointed by the Minister. So I would suggest omitting this phrase. Secondly, the provision in draft regulation 6(2) must be read with section 9(3) of the Act, which provides that "executive members may not be the Chairperson or Deputy Chairperson of the Board or members of any committee of the Board." Pursuant hereto, section 9(5) of the Act provides that the "Board may designate any other non-executive member to act as chairperson if both the Chairperson and the Deputy Chairperson are absent or unable to perform any function." [Emphasis added.] However, the qualification on the appointment of an acting chairperson is not clear in the draft Regulations. Therefore I advise that draft regulation 6(2) must either explicitly refer section 9(5) of the Act or be deleted as the Act already provides for the same.

14.3 The numbering after draft regulation 9 requires correction.

15. The draft Regulations do not trespass on personal rights and liberties, including those set out in the Bill of Rights, in a manner inconsistent with the Constitution.

16. The draft Regulations do not amount to substantive legislation.

From: Frank Jenkins
To: Shonhiwa, Jessie
Date: 2012/07/17 04:19 PM
Subject: Re: regulations to be scrutinised by committee
Attachments: Housing Development Agency Regulations.doc

See attached.

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>>> Jessie Shonhiwa (Jessie Jantjies) 2012/07/17 03:18 PM >>>

Hi Frank,

Thank you for the draft opinion on the Housing Agency Regulations. I just realised that the Tabled Regulations do not contain draft Regulations 10 and 11. They jump straight from 9 to 12 in their numbering.

In this regard, please amend your opinion to include a note on "improper drafting" under paragraph 13 of your opinion? I apologise for the late request.

Kind regards,
Jessie

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