LRC

LEGAL RESOURCES CENTRE

SUBMISSION

TO THE CHIEF DIRECTOR: SPATIAL PLANNING AND LAND USE MANAGEMENT, DEPARTMENT OF RURAL DEVELOPMENT AND LAND REFORM

and to

SELECT COMMITTEE ON LAND AND ENVIRONMENTAL AFFAIRS,

(NATIONAL COUNCIL OF PROVINCES)

In re:

SPATIAL PLANNING AND LAND USE MANAGEMENT BILL, 14 of 2012

by

The Legal Resources Centre

25 May 2012

1. INTRODUCTION

1.1. The Legal Resources Centre (LRC) is an independent non-profit public interest law clinic which uses the law as an instrument of justice. It works for the development of a fully democratic South African society based on the principle of substantive equality, by providing free legal services for the vulnerable and marginalised, including the poor, homeless, and landless people and communities of South Africa who suffer discrimination by reason of race, class, gender, disability or by reason of social economic or historical circumstances. The LRC, both for itself and in its work, is committed to:

1.1.1. Ensuring that the principles, rights and responsibilities enshrined in the Constitution are respected, promoted, protected, and fulfilled;

1.1.2. Building respect for the rule of law and constitutional democracy;

1.1.3. Enabling the vulnerable and marginalised to assert and develop their rights;

1.1.4. Promoting gender and racial equality and opposing all forms of unfair discrimination;

1.1.5. Contributing to the development of a human rights jurisprudence; and

1.1.6. Contributing to the social and economic transformation of society.

1.2. The LRC has been in existence since 1979 and operates throughout the country from its offices in Johannesburg, Cape Town, Durban and Grahamstown.

1.3. The LRC represented and continues to represent citizens and communities in litigation involving:

- customary law and its status
- communal land and new development on communal land including mining
- environmental regulation and mining.

1.4. We appeared on behalf of clients in the Constitutional Court in the matters of *Bhe*,[1] *Richtersveld*[2] and *Shilubana*.[3] Our clients include the communities that successfully challenged the constitutionality of the Communal Land Rights Act of 2004.[4]

1.5. The LRC also represents a number of communities in court litigation and administrative representations concerning the impact of the Traditional Leadership and Governance Framework Act including the communities of Daggakraal, Pilane and Xalanga. Client communities concerned with the award of mining rigts without community consent include Sekuruwe, Xolobeni and Wonderfontein/Umsimbithi.

2. BACKGROUND TO LAND USE MANAGEMENT POLICY AND LEGISLATION IN SOUTH AFRICA

2.1. Before 1994, land use in South Africa was primarily governed by four provincial ordinances: Transvaal Province's Ordinance 15 of 1986; Cape Province's Land Use Planning Ordinance 15 of 1985; Orange Free State's Townships Ordinance 9 of 1969; Natal Province's Town Planning Ordinance 27 of 1949.

2.2. The problem with these ordinances is that they apply only in territories that formed part of the old Cape, Natal, Orange Free State and Transvaal Provinces. They have no application to the former independent homelands (Transkei, Bophuthatswana, Venda and Ciskei) or self- governing territories (Gazankulu, KaNgwane, KwaNdebele, KwaZulu, Lebowa and QwaQwa).

2.3. The development of nine provinces has meant that there has been further fragmentation as each province may be subject to a multiplicity of territorially-based legislative regimes.

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[1] *Bhe and Others v Khayelitsha Magistrate and Others* (CCT 49/03) [2004] ZACC 17; 2005 (1) SA 580 (CC); 2005 (1) BCLR 1 (CC) (15 October 2004).

[2] *Alexkor Ltd and Another v Richtersveld Community and Others* (CCT19/03) [2003] ZACC 18; 2004 (5) SA 460 (CC); 2003 (12) BCLR 1301 (CC) (14 October 2003).

[3] *Shilubana and Others v Nwamitwa* (CCT 03/07) [2008] ZACC 9; 2008 (9) BCLR 914 (CC); 2009 (2) SA 66 (CC) (4 June 2008).

[4] *Tongoane and Others v The Minister of Agriculture and Land Affairs and Others* CCT 100-09. The Legal Resources Centre, with Webber Wentzel attorneys, represented four communities Kalkfontein, Makuleke, Makgobistad and Dixie in a challenge on the constitutionality of the Communal Land Rights Act of 2004. The Act was declared unconstitutional by the Constitutional Court in May 2010. Prior to the institution of legal proceedings on the CLRA, the LRC and its clients made extensive written and oral representations to the department and to parliament on the problematic and unconstitutional aspects, both procedural and substantive, of the CLRA Bill.

2.4. In 1995, the **Development Facilitation Act 67 of 1995 (DFA),** was enacted to, amoung other things, "introduce extraordinary measures to facilitate and speed up the implementation of reconstruction and development programmes and projects in relation to land."[5] The DFA was intended to provide for a stop-gap, pending the enactment of comprehensive land use legislation that would rationalise the existing laws.[6]

2.5. In 1999, the Development and Planning Commission (DPC), which was established in terms of section 5 of the DFA, produced a **Green Paper on Development and Planning (Green Paper)**.

2.5.1. The Green Paper described and assessed the historical background to spatial planning in South Africa and the way it developed since 1994 from a legal, procedural and policy point of view.

2.5.2. The recommendations made by the DPC in the Green Paper included:

- using the DFA and its principles in an amended form as the basis of *national enabling legislation for integrated development planning;*
- rewording, re-ordering and expanding the DFA principles so that they can be more widely understood;
- embarking on a campaign to communicate and educate people about the DFA and its principles;
- *rationalising the legal framework by assisting provinces to repeal all existing provincial planning legislation and enacting a single piece of planning legislation within a national framework*;
- requiring all spheres of government to produce integrated development plans and developing land development management systems which support these plans;
- clarifying the roles of the different spheres of government and the framework for decision making;
- setting up forums to improve co-ordination and integration of land development at government level;
- *putting clear decision-making power in the hands of appropriately qualified people, within a broader framework of plans approved by political decision makers;*

[5] Preamble to the DFA.
[6] Budlender et al *Juta's New Land Law* (Juta & Co Ltd, Kenwyn 1998) at 2A-9 to 2A-10.

- speeding up land development approvals;
- further decentralising decision-making to local government, within a broader framework of national and provincial integrated development plans;
- acting together with educational and professional institutions to address capacity constraints by monitoring, providing assistance and reviewing technical training. (Emphasis added.)

2.6. In July 2001, the Ministry of Agriculture and Land Affairs published the **White Paper on Spatial Planning and Land Use Management (White Paper)** which was gazetted on 20 July 2001.[7]

2.6.1. The White Paper draws on the work of the DPC, the Green Paper as well as the extensive inputs received during a rigorous and wide ranging consultation process following the publication of the Green Paper. The White Paper also builds on the concept of the municipal integrated development plan (`IDP'), as provided in the Municipal Systems Act, 23 of 2000.

2.6.2. Essential elements of the new system proposed in the White Paper included:

- Principles: The White Paper established principles and norms aimed at achieving sustainability, equality, efficiency, fairness and good governance in planning and land use management.
- Land use regulators: A category of authorities was established who are able to take the different types of decision falling into the realm of spatial planning and land use management. The most prevalent of these would be municipalities.
- IDP-based local spatial planning: The White paper sets out the minimum elements that must be included in a spatial development framework.
- A uniform set of procedures for land development approvals: The White paper proposes one set of procedures for the whole country to facilitate national capacity building within land use regulators as well as performance management of the system.
- National spatial planning frameworks: The White Paper proposes a policy framework for sustainable and equitable spatial planning around national priorities.

[7] This was gazetted on the same date as the draft Land Use Management Bill.

2.7. The White Paper was gazetted alongside the first draft of the **Land Use Management Bill (LUMB)** in 2001.

2.7.1. Role-players were given 28 days to comment on the LUMB, 2011. Major objections to the Bill were raised in this short period. The Bill was then shelved after this for almost 6 years.

2.7.2. In 2007, the LUMB was re-introduced. The LRC, on the 25 June 2007, made submissions on the LUMB, 2007 draft to the Department of Housing. The main submissions included that :

2.7.2.1. the Bill did not work to rationalize and consolidate planning legislation at provincial and municipal levels;

2.7.2.2. the Bill would undermine and conflict with provincial and local government efforts to rationalize planning systems – it would increase legal uncertainty and create parallel procedures and institutions;

2.7.2.3. the Bill did not consider the practical implications of the lack of capacity at a municipal level – it set wholly unrealistic targets for municipalities to adopt a land use scheme for its area within five years;

2.7.2.4. the Bill will lead to the repeal of the DFA, and therefore the discarding of provisions in the DFA which deal with national framework planning with adequacy and precision and further which established the terms of reference for the DPC;

2.7.2.5. the Bill was unconstitutional because it repeals laws, such as the Removal of Restrictions Act 84 of 1967, which have been assigned to provinces in terms of the interim Constitution, without ensuring that proper protections are put in place;

2.7.2.6. the Bill was unconstitutional because it encroached on areas of exclusive provincial legislative competence;

2.7.2.7. the law reform and consultation process was wholly inadequate;

2.7.2.8. the Bill does not promote co-operative governance.

2.7.3. In 2008, the Land Use Management Bill was introduced into parliament.[8] It was criticised for its centralised control mechanisms and would not have passed constitutional muster. The portfolio committee made a few changes and the Bill [B27B-2008] was presented for a second reading in the National Assembly, but was not taken further.

2.8. On 18 June 2010, the Constitutional Court in *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others*[9] (DFA judgment) confirmed an order of the Supreme Court of Appeal which declared Chapters V and VI of the DFA unconstitutional and thus invalid.

2.8.1. Jafta J, writing for a unanimous Court, held that the Constitution envisages a **degree of autonomy for the municipal sphere**, in which municipalities exercise their **original constitutional powers** from undue interference from the other spheres of government.

2.8.2. Jafta J held that powers to consider and approve applications for the rezoning of land and the establishment of townships are elements of **"municipal planning"** an exclusive municipal function assigned to municipalities by section 156(1) of the Constitution read with Part B of Schedule 4.

2.8.3. Therefore, Chapters V and VI of the DFA were found to be constitutionally invalid because they assign exclusive municipal powers to organs of the provincial sphere of government.

2.8.4. The order of invalidity made by the Constitutional Court was suspended for 24 months to allow Parliament to remedy the defects in the Act, or to pass new legislation. The deadline imposed by the Court is the **17 June 2012**.

[8] Government Gazette No 30979 of 15 April 2008.
[9] [2010] ZACC 11; 2010 (6) SA 182 (CC) ; 2010 (9) BCLR 859 (CC).

2.9. On 6 May 2011, a draft **Spatial Planning and Land Use Management Bill, 2011 (SPLUMB, 2011)** was gazetted as a remedy in response to the DFA judgment.

2.9.1. In Government Notice which called for submissions, it was stated that the Bill would replace the DFA and other pieces of legislation.

2.9.2. The LRC made submissions on SPLUMB, 2011, which we outline below.

3. PROBLEMS IDENTIFIED WITH THE SPLUMB, 2011

3.1. On 7 June 2011, the LRC made submissions to the Department of Rural Development and Land Reform on the SPLUMB, 2011. The LRC's overarching submission was that the department "needs to develop a negotiated process to provide for meticulously designed and implemented procedural systems based on the knowledge that land development applications require a number of approvals. The guidance and coordination needs to be provided by overarching framework legislation. The process will require on-going negotiations and support to ensure that provincial laws are drafted in terms of concurrent legislative powers."[10]

3.2. More specifically, the submissions of the LRC included comment on:

3.2.1. the need for rationalisation and alignment across the three spheres of government;

3.2.2. the absence of any reference to 'land reform' in the Bill;

3.2.3. the failure of the Bill to be logically set out powers and functions creating difficulties to ascertain the link between various levels of Spatial Development Framework's;

3.2.4. the failure of the Bill to make any contribution to better integration and co-ordination of planning legislation;

3.2.5. the inconsistency of the Bill regarding the jurisdiction of spheres of government;

[10] LRC Submissions, 7 June 2011.

3.2.6. the failure of the Bill to set out reasonable legislative and other measures in order to achieve stated norms and standards for land use management;

3.2.7. the need for detailed provisions on principles about process, participation, capacity-building and conflict resolution – principles which are articulated in the DFA.

3.3. In light of the above submissions, the LRC articulated that the suggested way forward was an alternative vision developed with full participation of stake holders and recognition of the all important contribution to be made by the communities directly affected.[11]

3.4. The LRC did not get a reply from the department. The LRC was not invited to discussions about the comments on the 2011 draft bill and the formulation of the amendments thereto culminating in the publication of the 2012 draft billat the end of April 2012 of the draft bearing the date 21 February 2012.

3.5. The most important amendments in bill 14 of 2012 compared with the 2011 draft are the following:

- The Objects of the Act are included in section 3;
- A section on municipal differentiation has been inserted in section 11. This requires national and provincial government, when they monitor and give support to the performance of the functions of municipalities, to take into account the unique circumstances of each municipality including factors such as the category of municipality and the financial resources of the municipality.
- Section 23, a section on the role of executive authority, gives authority to a traditional council to participate in the development, preparation and adoption or amendment of a land use scheme.

[11] Ibid at para 35.

- Certain sections have been removed including: the introduction of further development principles; the establishment, composition and functions of provincial planning tribunals; the Chapter on the provision of services; the section on the application of the Bill to other land use laws; and default regulations which were previously in Schedule 4.

- A section on the enforcement of land use schemes is added in section 32. This section deals substantively with how a municipality can enforce its land use scheme in the event that there is contravention;

- The structure of chapter 6 on Land Development Management has been improved by dividing the chapter up into separate parts dealing with different sections: (A) municipal land use planning; (B) municipal planning tribunals (C) Processes of Municipal Planning Tribunals and (D) Related Land Development Matters. This structure aids the reader and does improve the logical flow of the Bill. Part (C) is an entirely new section which deals with the process of applications for land development.

3.6. Significantly, between the 2011 and 2012 publications, the following important planning instruments were also published:

- *Guidelines for the formulation of spatial development frameworks* by the Department of Rural Development and Land Reform;[12]

- *Green paper on Land Reform, 2011* published by the Department of Rural Development and Land Reform;[13]

- *National Development Plan* published by the National Planning Commission.[14]

3.7. These instruments deal with a number of matters addressed in the draft bill under consideration.[15]

[12] 2011.
[13] 30 September 2011.
[14] 11 November 2011.

3.8. However, the SLUMB, 2012 shows no appreciation for these instruments nor give any indication of how the various instruments will articulate.[16]

3.9. These submissions will proceed to consider general challenges to the SLUMB, 2012 draft.

4. OVER-ARCHING CONCERNS WITH SLUMB, 2012

4.1. **Failure to include space for alternative development paradigms**

4.1.1. The Bill in its current form fails to address adequately the complex reality of the South African rural landscape. It is hard to see how the Bill could address this complexity if its intention to do so does not go beyond its preamble and objectives.

4.1.2. It is common cause that the South African rural landscape is one still plagued not only by the gross inequality in land and service allocation of the apartheid era, but also with the reality of different operating notions of ownership and land rights. It is the latter state of affairs that makes it difficult for rural communities to assert their voices in the development discussion in South Africa. For this and other reasons, we argue that the Bill should provide for effective mechanisms to facilitate the participation of communities *in their own development and on their own terms*.

4.1.3. Below, we will further elaborate on the fact that, while our Constitution already recognised customary law as an independent source of law, the rights arising from such law – to land and resources – remain largely unrecognised.

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[15] • the Green Paper on land reform emphasises culturally appropriate development;

• the Guidelines for the Formulation of Spatial Development Frameworks (draft 8) Prepared for Department of Rural Development and Land Reform emphasises extensive public participation in plans and budgets as envisaged by sections 151(1) (e), 152 and 195(e) which obliges municipalities to encourage the involvement of the public and communities in local government matters including policy-making;

• The National Development Plan envisions massive irrigation schemes that will transform rural landscapes and the small scale farming sector on a scale across the boundaries of local and district municipalities.

[16] Paragraph 7 of the memorandum to bill 14 – 2012 asserts that the department worked closely with the presidency in finalizing the bill

This section addresses a broader group, however. It addresses not only those with insecure tenure, but also small scale farmers and the landless who assert nothing more than a right to live and eat.

4.1.4. Any legislation that deals with land use management and planning must prioritise rural communities who were and continue to be the most marginalised and vulnerable. The legal basis for this submission is found in section 9 of the Constitution, and in the legislation that gave effect to this section. The Preamble to the Promotion of Equality and the Prevention of Discrimination Act 4 of 2000 reads:

"Although significant progress has been made in restructuring and transforming our society and its institutions, systemic inequalities and unfair discrimination remain deeply embedded in social structures, practices and attitudes, undermining the aspirations of our constitutional democracy.

The basis for progressively redressing these conditions lies in the Constitution which, amongst others, upholds the values of human dignity, equality, freedom and social justice in a united, non-racial and non-sexist society where all may flourish;

[…]

Section 9 of the Constitution provides for the enactment of national legislation to prevent or prohibit unfair discrimination and to promote the achievement of equality;

***This implies the advancement, by special legal and other measures, of historically disadvantaged individuals, communities and social groups who were dispossessed of their land and resources, deprived of their human dignity and who continue to endure the consequences**."*

4.1.5. The failure as yet of the legislature to give effect to section 25(6) of the Constitution of ensuring security of tenure for people on communal land is but one reason for the continued marginalisation of rural communities. The status of living customary law as the law of the people and the institutions that govern them remain greatly contested – including the ability of these contested traditional structures to speak on behalf of their communities.[17]

4.1.6. Those rural communities who share land and resources, but who fall outside traditional leadership structures are ignored when traditional councils start speaking on behalf of rural South Africa.

4.1.7. Section 23 (2) of the Bill, which states that "A Traditional Council may, subject to the provisions of section 81 of the Local Government Municipal structures Act, 1998 and the Traditional Leadership and Governance Framework Act, 2003, participate in the development, preparation and adoption or amendment of a land use scheme by a municipality."

4.1.8. It is submitted that giving a Traditional Council this authority allows for an undemocratically elected body to participate in an administrative decision which should, under the constitution, vest exclusively in the hands of the Municipality.

4.1.9. Further, and in line with what is outlined above, giving a Traditional Council the power to speak on behalf of the entire rural community, may ignore the interests of marginalised minorities and even the majority of the members of the community.

4.1.10. The solution, we suggest, is to facilitate participation and meaningful involvement of the communities themselves in decision making about

[17] This contestations has come to a head with the recent controversy and public hearings surrounding the Traditional Courts Bill B 1 of 2012. However, the disputes about the boundaries and leadership of traditional communities as entrenched by the Traditional Leadership and Governance Framework Act of 2003 have reached a point where some provinces, notably Limpopo, have appointed Commissions to deal with the mounting number of complaints.

development, and direct participation in development projects that would impact upon them.

4.1.11. Such an approach would be in line with South Africa's regional obligations in this regard.[18]

4.1.12. The *African Charter on Human and Peoples' Rights*, to which South Africa acceded to on 9 July 1996,[19] provides that 'all peoples'

> *shall pursue their economic and social development according to the policy they have freely chosen.*[20]

4.1.13. The African Commission on Human and Peoples' Rights[21] has given a definitive interpretation of the socio-economic rights contained in the

[18] In this instance, the country's obligation is to give legislative effect to the rights contained in the Charter. Article 1 of the Charter provides: Article 1 of the African Charter provides: *The Member States of the Organization of African Unity parties to the present Charter shall recognize the rights, duties and freedoms enshrined in this Chapter and shall undertake to adopt legislative or other measures to give effect to them.*

[19] This instrument is binding upon South Africa.
Section 231 of the Constitution states:

> "231 International agreements
>
> (1) The negotiating and signing of all international agreements is the responsibility of the national executive.
>
> (2) An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3).
>
> (3) An international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time.
>
> (4) Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.
>
> (5) The Republic is bound by international agreements which were binding on the Republic when this Constitution took effect."

[20] Article 20(1) of the African Charter.

[21] The African Commission on Human and People's Rights ("the African Commission") is the body enjoined to interpret the African Charter and ensure that states parties comply with their obligations. It is required to "formulate and lay down, principles and rules aimed at solving legal problems relating to human and peoples' rights and fundamental freedoms upon which African Governments may base their legislations." It is also empowered to "Interpret all the provisions of the present Charter".

Charter (but for the notable exclusion of group rights).[22] This interpretation is binding upon the signatories to the Charter.[23]

4.1.14. The Commission has found that the notion of 'peoples' can denote a community within the geographical boundaries of a country.[24] The right to development has been found to belong to communities as peoples – in particular where such a community finds itself outside the mainstream development paradigm.

4.1.15. There can be no doubt that South Africa is inhabited by various different cultural groupings with different notions of development, both in the former homelands and beyond. While this Bill cannot ignore such a discussion and the impact it should have on development-related decisions at all levels of government, we suggest that its international obligations requires it to go further. These obligations include to:

- Bear in mind that the implementation of economic, social and cultural rights in Africa requires taking into account the totality of the way of life and the positive cultural values of individuals and peoples in Africa to ensure the realisation of the dignity of all persons;[25]

- Regard as vulnerable and disadvantaged all 'landless and nomadic pastoralists, workers in the informal sector of the economy and subsistence agriculture'; and[26]

- Devise national plans and policies and periodically reviewed these, on the basis of a participatory and transparent process. They should take into account all other national plans, including where appropriate, poverty alleviation plans and policies **whilst also ensuring that the special needs of members of vulnerable and disadvantaged groups are met.**[27]

[22] Contained in the *Principles and Guidelines on the Implementation of Socio-Economic Rights contained in the African Charter*. See www.achpr.org.
[23] The Principles and Guidelines emphasize that all rights recognised in the African Charter must be made effective under national legal systems
[24] Principles and Guidelines: *Peoples are, for the purpose of these guidelines, any groups or communities of people that have an identifiable interest in common, whether this is from the sharing of an ethnic,3 linguistic or other factor.4 Within the scope of these guidelines peoples are therefore not to be equated solely with nations or states*
[25] Preamble.
[26] Definitions.
[27] Para 26 of the Principles and Guidelines.

4.1.16. In this regard, we reiterate our concern that the only platform the Bill provides rural communities on communal land at present is through the highly contentious institution of traditional councils. As pointed out, the failure of many of these institutions to properly represent the needs and preferences of their communities are currently the subject of various different courts cases and procedural complaints and can as such not provide the only avenue for rural communities to participate in this all important discussion.

4.2. **Failure to include development principles relevant to the <u>principle of sustainability</u>**

4.2.1. Section 24 of the Constitution states:

> "Everyone had the right-
>
> (a) To an environment that is not harmful to their health or well-being; and
> (b) To have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that –
> (i) Prevent pollution and ecological degradation;
> (ii) Promote conservation; and
> (iii) *Secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development*."

4.2.2. It is essential that the principle of sustainability be factored into all decision making concerning land use change and land development. The sustainability of a development is its ability to continue operating beneficially (not necessarily in the same form) for an indefinite period.

4.2.3. The definition of sustainability in the The Brundtland Commission is that:

> "(h)umanity has the ability to make development sustainable - to ensure that it meets the needs of the present without compromising the *ability of future generations* to meet their own needs." [1]

4.2.4. The World Bank suggested that:

[1] Report of the Brundtland Commission 1987 *Our Common Future*: 8

> "(t)he widely accepted definition of sustainability in economics derives from 'maintenance of capital', or keeping capital intact. Historically the idea of keeping capital intact for the determination of income predates Adam Smith's 'The Wealth of Nations'".[2]
>
> …
>
> "Of the three forms of capital - human-made capital, human capital and natural capital - environmental sustainability refers to natural capital. ...Sustainability means maintaining environmental assets, or at least not depleting them. Prevailing models of unsustainable development treat consumption or liquidation of natural capital as income. (At its lowest level) sustainability is maintaining total capital intact. Thus oil may be depleted as long as the receipts are invested in sustainable activities elsewhere. The sustainable receipts, which are only part of the total receipts, are income."[3]

4.2.5. In the National Environmental Management Act 107 of 1998 (NEMA) sustainable development means:

> **"**the integration of social, economic and environmental factors into *planning, implementation and decision-making* so as to ensure that development serves present and future generations" (Emphasis added)

4.2.6. Without economic assessment, including all the costs for the life cycle of the costs, the environmental and social disadvantages, a decision about land use and development cannot be made. This includes weighing the alternatives and cumulative impacts to the project.

4.2.7. The Constitutional Court in *Fuel Retailers*[28] considered these social, economic and environmental factors which were defined in NEMA. Ngcobo J (as he then was) stated:

> "Here NEMA specifically enjoins the environmental authorities to *consider, assess and evaluate the social and economic impact* of the proposed filling station*, including its cumulative effect on the environment* as well as its impact on

[2] Goodland R Daly H Kellenberg J *Definition of Environmental* Sustainability and *Burden Sharing in Transition to Environmental Sustainability.* The World Bank, Washington DC 20433 USA.
[3] Goodland R Daly H Kellenberg J supra.
[28] *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province and Others* (CCT67/06) [2007] ZACC 13; 2007 (10) BCLR 1059 (CC); ; 2007 (6) SA 4 (CC).

> existing filling stations and thereafter to make a decision that is appropriate in the light of such assessment.[29]
> . . .
>
> Our Constitution does not sanction a state of normative anarchy which may arise where potentially conflicting principles are juxtaposed. *It requires those who enforce and implement the Constitution to find a balance between potentially conflicting principles. It is founded on the notion of proportionality which enables this balance to be achieved.* Yet in other situations, it offers a principle that will facilitate the achievement of the balance. *The principle that enables the environmental authorities to balance developmental needs and environmental concerns is the principle of sustainable development.*[30]
> . . .
>
> Conversely, if some damage to the environment were to be established, the economic sustainability of a proposed economic enterprise could be highly relevant as a countervailing factor in favour of a finding that on balance the development is sustainable. *Thus, an enterprise that promised long-term employment and major social upliftment at relatively small cost to the environment, with damage reduced to the minimum, could well be compatible with NEMA.* On the other hand to allow a *fly-by-night undertaking either to spoil a pristine environment, or to use up scarce resources, or to introduce undue health hazards, will probably be in conflict with NEMA.*[31]" (Emphasis added.)

4.2.8. Section 7 of the Bill outlines development principles which are to be applied in spatial planning, land use management and land development. Section 7(b) identifies principles which are relevant to **spatial sustainability**, however this section fails to incorporate any of the principles outlined above.

4.2.9. The failure of this section to include a substantive section on the balancing factors which influence the principle of sustainable development will result in the decision making process falling short of both section 24 of the Constitution, as well as the principle of sustainable development as stated in NEMA.

4.2.10. It is submitted that a section should be included under section 7(b) which sets out the sustainability factors that must be considered in terms of each application.

4.2.11. It is critical that the development principles include the necessary substantive elements which should be considered. Other sections of the Bill are informed by

[29] Ibid at para 90.
[30] Ibid at para 92-3
[31] Ibid at para 117.

these development principles – such as section 14(a), 19(a) and section 21(a) when considering the content of a national, provincial and municipal spatial development framework. They are therefore essential to the decision making process, and must include the constitutionally necessary factors.

4.2.12. Section 22 of the Bill gives the Municipal Planning Tribunal or any other mandated authority to power to depart from the provisions of a municipal spatial development framework if the departure can be justified or the SDF can be proven to be illogical.

4.2.12.1. It is submitted that this decision must be based on a sustainability assessment considering all the factors which we have mentioned above. This sustainability and impact test must be built into all decision making.

4.3. **The recognition and promotion of customary forms of tenure**

The status of customary law tenure systems in Africa

4.3.1. The renowned scholar of customary law and related systems of tenure, the late Prof Okoth-Ogendo of Kenya, once recounted how, as the colonial era drew to a close in the 1950's and 60's, British legal scholars organised a series of conferences to discuss the 'future' of customary law in Africa and the need to 'construct a framework for the development of legal systems in the emerging states'. These initiatives assumed that the 'indigenous' legal systems of African countries and peoples of which they were well aware, were inadequate and inferior compared to the English common law.

4.3.2. These scholars must have felt vindicated when, upon independence most African countries adopted the colonial legal framework wholesale – especially, as Okoth-Ogendo points out, in view of the development framework's "general ambivalence as regards the applicability of indigenous law". Indigenous law and customary legal systems were

regarded as inferior, were never extended to areas covered by colonial laws and, when applied, it was done only to the extent that it was not repugnant to Western justice and morality or inconsistent with any written law.

4.3.3. It is trite that the post-colonial era sadly continued the relegation of customary law to a separate and unequal system of law that rarely found its way into the formal, 'Western' courts.

4.3.4. Whereas many African countries adopted constitutions towards the end of the twentieth century which in many cases recognise customary law as an equal source of law to be applied by the courts 'where appropriate', the application of customary law in the formal courts remains almost exclusively limited to issues of personal law, and rights claimed by individuals.

4.3.5. The South African courts are a notable and significant exception.

4.3.6. The seminal case with regards to customary forms of tenure was that of the *Richtersveld*[32] community which reached the Constitutional Court in 2003. In recognising the aboriginal title of the Richtersveld community, the Court held that

> "the real character of the title that the Richtersveld Community possessed in the subject land was a right of communal ownership under indigenous law. The content of that right included the right to exclusive occupation and use of the subject land by members of the Community. The Community had the right to use its land for grazing and hunting and to exploit its natural resources, above and beneath the surface. It follows therefore that prior to annexation the Richtersveld Community had a right of ownership in the subject land under indigenous law."

4.3.7. This judgement confirmed the constitutional recognition and protection of customary law as found in sections 39(3) and 211 of the Constitution.

[32] Above n 2.

4.3.8. We submit that any policy document that purports to address development and land questions in South Africa should have as a central concern the recognition of customary law as a source of law equal to statutory and common law as a source of tenure rights in South Africa.

Communal tenure, customary law and culture

4.3.9. In *Richtersveld*, the Constitutional Court based itself on a finding by the Supreme Court of Appeal according to which the mainstay of the community's culture was its customary land tenure laws and rules.[33]

4.3.10. Our courts have therefore recognised an inextricable link between communal tenure, customary law and culture.

4.3.11. Amongst the development indicators identified in the Green Paper on Land Reform released by the Department on Rural Development and Land Reform last year, is cultural progress.

4.3.12. Inexplicably, however, despite this recognition of the restoration of land and tenure rights as a function of cultural progress, the both the draft and final versions of the green paper then proceeded to exclude the most important aspect of land tenure – communal tenure – from the ambit of the document. The SPLUMB can be criticised on the same score.

4.3.13. As customary communities across the continent remain largely unable to assert their tenure rights within the formal courts precisely because the mainstream legal system struggles to accommodate the customary legal concepts foreign to common law, any development framework that pretends that the separation between the status of the customary/communal tenure and the common law property system will only entrench the undermining of the former.

[33] "The primary rule was that the land belonged to the Richtersveld community as a whole and that all its people were entitled to the reasonable occupation and use of all land held in common by them and its resources" quoted in paragraph 7 of the draft green paper on land reform dated 6 September 2010. .

The legacy of Apartheid and the neglect of the former homelands

4.3.14. The question of communal tenure is inextricably linked to the legacy of the homelands which not only created clusters of Africans with no citizenship rights, but denied people any rights to resources thereby facilitating extreme poverty and inequality. The deep structural entrenchment of such inequality will inevitably remain a challenge for decades to come. The SPLUMB purports to address these very questions.

4.3.15. There can be little doubt that the crisis of a lack of common citizenship status and the associated civil and political rights during apartheid were felt most acutely in the former homelands. The focus on creating a shared citizenship must therefore start with these former 'subjects'. These are precisely the people largely residing on communal land. We submit that the exclusion of the people on communal land from the discussion on their development and equality can only perpetuate the current state of affairs.

4.4. **Administrative Justice**

4.4.1. Section 33(1) of the Constitution states that:

> "Everyone has the right to administrative action that is *lawful, reasonable and procedurally fair*."

4.4.2. The decisions made with regard to applications for land use change and land development made by Municipal Planning Tribunal will amount to administrative action, and therefore the constitutional principles of *lawfulness, reasonableness and procedural fairness* must be at the heart of the process which sets up the structures.

4.4.3. Unfortunately, the Bill does not incorporate these principles in the preamble of the Act, and therefore this failure results in a lack of integration of these principles to permeate throughout all sections of the Act.

4.4.4. Promotion of Administrative Justice Act, 2000 (PAJA) is mentioned in both section 8(1)[34] and section 52 (1)[35] of the Bill. Both these sections deal with the conduct of the Minister. It is submitted that the conduct of the Municipal Planning Tribunals is the conduct which is central to this application process, and the Bill should make it clear that the entire process is subject to administrative justice principles.

4.4.5. Section 12(1)(o) of the Bill states that:

> "(1) The national and provincial spheres of government and each municipality must prepare spatial development frameworks that –
> . . .
> (o) *consider and where necessary incorporate* the outcomes of substantial public engagement including direct participation in the process through public meetings, public exhibitions, public debates and discourses in the media . .."

4.4.6. It is submitted that there should be no qualification on the consideration of public participation. This should always be considered, and the failure to do so would amount to an infringement on the administrative justice principles outlined above.

4.4.7. The Bill gives the Minister and the Premier wide powers in terms of developing spatial development frameworks, but does not include the necessity of public involvement or consultation. This happens in for example section 15(1),[36] section 18(1)[37] and section 18(3)[38] of the Bill.

4.4.8. Section 51 of the Bill states that any person whose rights are affected by the decision of the Municipal Planning Tribunal can appeal the decision to the

[34] "The Minister must, after public consultation, prescribe norms and standards for land use management and land development that are consistent with the Act, the Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000) and the Intergovernmental Relations Framework Act."
[35] Subject to the Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000), a land development application must be referred to the Minister where such an application materially impacts on . . ."
[36] "The Premier of each province must compile, determine and publish a provincial spatial development framework for the province."
[37] "The Minister, after consultation with the Premier and municipal council responsible for a geographic area, may by notice in the Gazette publish a regional spatial development framework to guide spatial planning, land development and land use management in any region of the Republic."
[38] "The Minister, after consultation with the Premier and Municipal Council responsible for a geographic area, may declare any geographic area of the Republic to be a region for the purpose of this section."

municipal manager, who will then submit the appeal to the executive authority of the municipality who will function as the appeal authority.

4.4.9. The appeal authority must consider the appeal and can either (1) conform (2) vary or (3) revoke the decision of the Municipal Planning Tribunal. However, the Bill then goes on to state that despite these powers, whatever option the appeal authority decides, this *cannot detract from the rights which have accrued in terms of the original decision.*

4.4.10. It is submitted that this constitutes a violation of the person who appeals the decision's right to administrative justice. The right to appeal the decision is one which, it is submitted, should be included in the Bill, However, this right is of no value if the decision which was originally made cannot substantively overturned. The rights which accrued with respect to the original decision must, we submit, follow the outcome of the appeal decision. If this is not so, the appeal process becomes a farce, and is merely an attempt at lip service being paid to administrative justice principles.

4.5. **Special considerations: Mining**

4.5.1. Historically, mining has had a huge impact on communities and their social and natural environments in South Africa. It is therefore essential that special care be taken when considering the application of land use change in the context of mining and an extra normative hurdle be built in to the Bill to ensure that special intelligence is given to decisions about whether land use can be altered for mining use. This is especially so due to the cumulative impacts that the mining industry has had on the resources of the country and further, that the Constitutional Court has declared it a mandatory consideration in the *Fuel Retailers*[39] case. Ngcobo J, as he then was, stated:

> "To sum up therefore NEMA makes it abundantly clear that the obligation of the environmental authorities includes the consideration of socio-economic factors as

[39] Note 34 above.

an integral part of its environmental responsibility. It follows therefore that the parties correctly accepted that the Department was obliged to consider the impact of the proposed filling station on socio-economic conditions. It is within this context that the nature and scope of the obligation to consider socio-economic factors, in particular, whether it includes the obligation to assess the cumulative impact of the proposed filling station and existing ones, and the impact of the proposed filling station on existing ones. But first what are the relevant provisions of NEMA?[40]

NEMA principles "apply . . . to the actions of all organs of state that may significantly affect the environment".[78] They provide not only the general framework within which environmental management and implementation decisions must be formulated,[79] but they also provide guidelines that should guide state organs in the exercise of their functions that may affect the environment…

Apart from this, the proliferation of filling stations in close proximity to one another may increase the pre-existing risk of adverse impact on the environment. The risk that comes to mind is the contamination of underground water, soil, visual intrusion and light. An additional filling station may significantly increase this risk and increase environmental stress. Mindful of this possibility, NEMA requires that the cumulative impact of a proposed development, together with the existing developments on the environment, socio-economic conditions and cultural heritage must be assessed.87 The cumulative effect of the proposed development must naturally be assessed in the light of existing developments. A consideration of socio-economic conditions therefore includes the consideration of the impact of the proposed development not only in combination with the existing developments, but also its impact on existing ones.[41]

Third, NEMA requires the consideration, assessment and evaluation of the social, economic and environmental impact of proposed activities. This requires the assessment of the socio-economic benefits and disadvantages of proposed activities. This clearly enjoins the environmental authorities to consider and assess the impact of a proposed activity on existing socio-economic conditions which must of necessity include existing developments…

Finally NEMA requires "a risk averse and cautious approach" to be applied by decision-makers. This approach entails taking into account the limitation on present knowledge about the consequences of an environmental decision. This precautionary approach is especially important in the light of section 24(7)(b) of NEMA which requires the cumulative impact of a development on the environmental and socio-economic conditions to be investigated and addressed…

[40] Id at para 62.
[41] Id at para 72.

> [99] In these circumstances one would have expected that the environmental authorities and Water Affairs and Forestry would conduct a thorough investigation into the possible impact of the installation of petrol tanks in the vicinity of the borehole, in particular, in the light of the existence of other filling stations in the vicinity. The environmental authorities did not consider the cumulative effect of the proliferation of filling stations on the aquifer.[42]
>
> [100] The other matter relates to the attitude of the environmental authorities to the objection of the applicant to the construction of the proposed filling station……Whatever, the merits of the criticism may be, a matter on which it is not necessary to express an opinion, an environmental authority whose duty it is to protect the environment should welcome every opportunity to consider and assess issues that may adversely affect the environment." (Footnotes omitted.)

4.5.2. The factors outlined above by the Constitutional Court are considerations which must be taken into account when applications are made for mining purposes, and it is submitted that these factors should be specified in the Bill.

4.5.3. Further, in the application process, special considerations must be made as to whether a specific resource and ecological component are cumulatively affected by the proposed mining operation. Factors that should be considered should include:

4.5.3.1. whether the proposed operation is one of several projects or activities in the same geographic area;

4.5.3.2. whether other projects or activities in the area have similar impacts on the specific resource and ecological components;

4.5.3.3. whether these impacts have been historically significant for this resources and ecological components; and

4.5.3.4. whether other investigations in the area have identified a cumulative impact concern,

4.5.4. To avoid extending data and analytical requirements beyond those relevant for decision-making, the selection of geographical boundaries and time period should,

[42] Id at para 99.

whenever possible, be based on the natural boundaries of the resource concerned and the period of time that the proposed project's impacts will persist.[43]

4.5.5. Section 7(b)(ii) states that special consideration must be given to the protection of prime and unique agricultural land when the principles of spatial sustainability

4.5.6. Section 12(1)(n) of the Bill states that

> "(1) The national and provincial spheres of government and each municipality must prepare spatial development frameworks that-(n) give effect to national legislation and policies on sustainable utilisation and protection of agricultural resources"

4.5.7. It is submitted that Section 12(1)(n) should include that cognisance should be taken of the significant impact of mining on natural resources and therefore extra measures should be put in place.

5. SPECIFIC PROVISIONS

5.1. Section 22: Status of spatial development frameworks

5.1.1. Section 22(3) states that when a provincial SDF is inconsistent with a municipal SDF the Premier must take charge in ensuring the revision of the SDF's to ensure consistency.

5.1.2. In effect, this provision gives the province the power and authority to ensure that there is consistency without consultation with the municipality. This may not be compliant with the Constitutional Court judgment in DFA judgment.

5.2. Section 45: Parties to land development applications

[43] In particular, rural communities on communal land must be assisted to participate meaning fully in decision making processes concerning mining that will impact on their land and identity. They should be assisted to employ their own impact assessors.

5.2.1. Section 45(1)(d) of the Bill states that a land development application may be submitted by "an **interested person** who may reasonably be expected to be affected by the outcome of the land development application proceedings."

5.2.2. The sections which follow state that the Municipal Planning Tribunal or appeal authority has the discretion to determine who an interested person is after the interested person discharges the burden of establishing why they have an interest.

5.2.3. It is submitted that the section widens the scope of possible applicants who can apply for land development, dramatically. Despite the fact that the interested person has to discharge an onus in order to establish why he/she qualifies as an interested person, the discretion which the Municipality is given in terms of the Bill is not limited, and has no qualification.

5.2.4. It is therefore difficult to determine from the provision, as it currently stands, what factors the Municipality will use to determine whether an interested party has proven a sufficient interest in the matter or not.

5.2.5. It is submitted that this interested person category be removed and that land owners, customary law rights holders and the State should be the only parties able to make land development applications.

6. CONCLUSION

6.1. We urge you to withdraw the Bill from the legislative process for the following reasons:

6.1.1. The failure of the Bill to incorporate sufficient development principles relevant to the principle of sustainability;

6.1.2. The failure of the Bill to ensure the constitutional principle of administrative justice is respected and adhered to through-out the land use change and land development process;

6.1.3. The failure of the Bill to recognise the historical impact mining has had on communities in South Africa, which creates a need for the Bill to make

special consideration when applications for land use change and land development are made in the context of mining;

6.1.4. While the Bill recognises, in its Preamble, that the informal and traditional land use development process remain poorly integrated into formal systems of spatial planning and land use management, it is then silent on the status of customary tenure and the rights of customary communities to consent as provide for in the Interim Protection of Informal Land Rights Act. As such, it may only perpetuate the inequality it purports to undo.

6.1.5. The failure of the Bill to recognise the tension of opposing development paradigms and community participation in this regard as provide for in regional and international law.

6.2. We therefore propose the adoption of the following course:

6.2.1. The offending aspects of the DFA be repealed, and the workable parts of the DFA given continued application;

6.2.2. An appropriate bill be prepared with participation of relevant departments and stakeholders by a newly constituted Development and Planning Commission established by the minister under the DFA which will be required to ensure an informed participative legislative process;

6.2.3. The support of the Constitutional Court be sought for this plan of action.