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land law specialists

10 August 2012

FOR ATTENTION: MS PHUMLA NYAMZA

The Chairperson
Portfolio Committee: Rural Development & Land Reform
Per telefax 086-504-6848
And pnyamza@parliament.gov.za

Dear Sir/ Madam

SPATIAL PLANNING AND LAND USE MANAGEMENT BILL [W14-2012]

1. The recent press notice inviting comment on the Bill has reference.

Purpose of letter

2. The purpose of this letter is to highlight some of the:

   2.1 fundamental flaws in the basic approach to the drafting of the Bill;

   2.2 problems experienced by the township establishment industry (the "industry") which have not been adequately addressed in the Bill;

   2.3 shortcomings in the text of the Bill; and

   to request the Portfolio Committee to withdraw the Bill and refer it back to the producers thereof with the instruction that they start afresh and prepare a Bill that meet the requirements of our times.

3. Time constraints and practical considerations permit me to make only a few cursory comments and to provide a critical yet incomplete overview of some of the legal constraints and challenges placed upon property development.

4. I also apologize in advance for the length of the document, but do believe that certain points should be ventilated (even if inadequately) to ensure that the level of understanding of at least some of the problems and obstacles standing in the way of socio and economic development is improved.

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Development defined

5. As basic understanding of "development", which lies (or should lie) at the heart of the Bill, is a pre-requisite for comprehending the enormous challenge with which the Legislature is faced.

5.1 Development and its corollary, underdevelopment, as outcomes, are a function of certain political choices and decisions, as well as certain administrative practices, processes, procedures and institutions.[1]

5.2 Defined in this context, development denotes 'social, cultural and economic progress brought about by certain political choices and decisions and realized through certain administrative practices, processes, procedures and institutions.

5.3 Depending on the type of political choices made and decisions taken, and administrative practices, processes, procedures and institutions put in place in pursuit of those choices and decisions, there will be social progress (development) or stagnation (under-development).

5.4 The truth is that these two opposing socio-economic pillars (development and under-development) are a direct function of certain political choices and decisions, as well as certain administrative traditions and institutions, processes and procedures.

5.5 It should be clear from the above that the introduction of a system of spatial planning and municipal land use schemes will in itself be inadequate to bring about the required meaningful change. Improved administrative practices, processes, attitudes and so forth are equally important.

A right to develop

6. Even without it being expressly enshrined in the South African Constitution (the "Constitution"), everyone has a right to develop. The Constitution recognises and protects the right to human dignity, equality, democracy, equity and justice. These are all part of the right to development.

7. This is where the debate about promotion of socio economic development should appropriately begin. Without this fundamental assumption, talk of effective land reform, reduction of poverty and inequality and improved social well-being is superfluous.

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1 Quoted from Department of Rural Development and Land Reform Green Paper on Land Reform, 2011 (G.N. 639 of 16 September 2011).

8. Although property development must be regulated, this has to be done in a manner that acknowledges the vital role that it plays in promoting social and economic development in our country. And herein lays our major problems. Property development is not a mere evolutionary process capable of producing an improved quality of life. If government fails to manage property development properly, it remains a change process *not capable* of producing an improved quality of life. Proper management of property development begins with properly prepared legislation.

Constitutional framework

9. The Constitution as the supreme law of the Republic[2] is the logical point of departure for any exploration of the maze of statutory provisions that apply within the field of land use and development. I will refer (directly or indirectly) to the following constitutional requirements in the argument presented further below.

10. In terms of the Constitution:

    10.1 everyone has the right to have the environment protected for the benefit of future generations, through reasonable legislative and other measures that *inter alia* secure ecological sustainable development and use of natural resources while promoting justifiable economic and social development; [3]

    10.2 everyone has a right to have access to adequate housing and the state is required to take reasonable legislative and other measures within its available resources, to achieve the progressive realisation of this right;[4]

    10.3 everyone has the right to administrative action that is lawful, reasonable and procedurally fair and national legislation must be enacted to give effect to these rights and must provide for the review of administrative action by a court **or**, where appropriate, an independent and impartial tribunal;[5]

    10.4 the state must respect, protect, promote and fulfil the rights in the Bill of Rights;[6]

    10.5 the objects of local government *inter alia* include to provide

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2 Section 1 of the Constitution.
3 Section 24(b)(iii) of the Constitution.
4 Section 26 of the Constitution.
5 Section 33 of the Constitution.
6 Section 7(2) of the Constitution.

accountable government for local communities and to promote social and economic development;[7]

10.6 the public administration is required to be development orientated and to be accountable;[8] and

10.7 national and provincial governments have concurrent legislative competence in respect of municipal planning, but only to the extent set out in section 155(6)(a) and 155(7) of the Constitution.

11. In terms of the Constitution provincial government (*not* national government) must provide for the monitoring and support of local government in the province.[9]

12. Both the national and provincial government have the legislative and executive authority to see to the effective performance by municipalities of their functions in respect of *inter alia* municipal planning, by regulating the exercise by municipalities of their executive authority in respect of *inter alia* municipal planning.[10]

13. The national or a provincial government may not compromise or impede a municipality's ability or right to exercise its powers or perform its functions[11] in respect of *inter alia* municipal planning.

<u>The objects of the Bill</u>

14. The long title of and preamble to the Bill is the key to open the mind of the makers of the Bill and the mischiefs they intend to address. It would appear from the long title and preamble to the Bill that it is primarily concerned with spatial planning at the different spheres of government and land use/ development management within the municipal sphere of government.

15. The narrow focus of the Bill seems to be:

15.1 a system of *spatial planning* (based on development principles, norms and standards);

15.2 municipal *land use management* (employing land use schemes); and

15.3 municipal *land development management* (involving municipal land use planning and municipal planning tribunals)

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7 Section 152(1) of the Constitution.
8 Section 195(1)(c) and (f) of the Constitution.
9 Section 155(6)(a) of the Constitution.
10 Section 155(7) of the Constitution.
11 Section 151(4) of the Constitution.

to promote social and economic *inclusion* and to provide for the sustainable and efficient use of land.[12] It is noteworthy that social and economic inclusion is only a *component* of social and economic development.

16. I submit that the point of departure for the proper description of the objects of the Bill should be section 24 of the Constitution.

16.1 Section 24 has two components. Section 24(a) entrenches the fundamental right to an environment that is not harmful to health or well-being. It is not directly relevant for purposes of my argument.

16.2 Section 24(b) is more in the nature of a directive principle, imposing a constitutional imperative on the state to secure the environmental rights by reasonable legislative and other measures. It specifically identifies the objects of regulation, i.e. to prevent pollution and ecological degradation, promote conservation *and to secure ecologically sustainable development* and use of natural resources *while promoting justifiable economic and social development.*

16.3 Section 24 of the Constitution does not confine itself to protection against conduct harmful to health but seeks also by, *inter alia* promotion of ecologically sustainable development, to ensure an environment beneficial to our "well-being".

16.4 What is immediately apparent from section 24 is the explicit recognition of the obligation to promote justifiable "economic and social development".

(a) Economic and social development is essential to the well-being of human beings.[13]

(b) The Constitutional Court has recognised that socio-economic rights that are set out in the Constitution are indeed vital to the enjoyment of other human rights guaranteed in the Constitution.[14]

(c) *The continued existence of development is essential to the needs of the population, whose needs a development must serve.*[15]

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12 See also section 3 of the Bill.

13 Fuel Retailers Association of Southern Africa v DG: Environmental Management, Mpumalanga and Others 2007 (6) SA 4 (CC) at par 44.

14 Government of the Republic of South Africa and Others v Grootboom and Others 2001(1) SA 46 (CC).

15 Fuel Retailers at par 75.

17. Legislation is the most powerful instrument with which the Legislature can *and should* promote development. A system of spatial, municipal land use planning and land development management are means to an end, not the main object of the Bill. I submit that the primary object of the Bill should be to promote justifiable economic and social development and to secure ecologically sustainable development.

18. Human well-being, environmental integrity and economic efficiency are the three imperatives of sustainable development. The development industry has been smothered and constraint by environmental law, yet **Development Law** has not received noteworthy attention from the Legislature for decades.

    18.1 The necessary balance is clearly lacking on the part of the Legislature if one compares the sheer volume of environmental law passed as opposed to development law which lags far behind. The Bill can make a significant contribution (if properly drafted) to restore the balance.

    18.2 Legislation should place "human well-being" on the same level as "environmental integrity". The Bill, as currently drafted, will not achieve this objective.

    18.3 To achieve sustainability *inter alia* require a conscious government effort (i.e. legislative, executive and judicial) to balance the three imperatives.

19. The Bill should not only have as the main object to promote and secure development as suggested, it should go further and place a *firm and clear obligation* on all three spheres of government to promote and secure such development within their available resources.

Problems experienced by the industry

20. In order to form an opinion of the prospects of success that the Bill will have in bringing about meaningful positive change in the promotion of social and economic development that is justifiable, it is necessary to have at least a very basic understanding of the problems experienced by the development industry. I therefore firstly deal with this topic before turning to briefly discuss the Bill and its prospects of success.

21. Those who are actively involved in property development know that a desperate situation exists in the industry. The private sector's lack of confidence in the township establishment industry is at an all-time low. There have been sustained calls for:

- the simplification and expediting of township establishment by, for instance,

the removal on all levels of government of impeding statutory provisions, measures, procedures and practices and the streamlining thereof;

- methods which may promote the provision of sufficient residential erven and reduce the cost thereof; and

- to remove problems at the procedural level and to create a more favourable climate for township establishment.

22. The core frustrations and blockages relate *inter alia* to the following, all of which I will discuss briefly *seriatim* below:

    - Lack of timely and pro-active development planning;
    - Rigid application of policy;
    - Ineffective public participation system;
    - Ineffective public administration;
    - Unreasonable municipal requirements;
    - Lack of effective accountability mechanisms;
    - Ineffective dispute resolution mechanisms; and
    - Inadequate legal reform.

23. It is noteworthy that these frustrations and blockages have been around for many decades. Attention is invited to the findings and recommendations of *inter alia* the 1970 Niemand Commission, the 1977 Fouché Commission and the 1983 Venter Commission. Many of the legislative measures that were introduced in response to recommendations made by those commissions over time became dysfunctional.[16] It would appear from the contents of the Bill that the Bill was drafted without any or limited knowledge of the mentioned frustrations and blockages and that no serious attempt was made to address same.

24. The property development industry plays a significant role in the South African economy and in the national development strategy. Unless the Legislature effectively comes to the rescue of the industry the future for socio economic development in South Africa looks bleak.

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16 Further particulars will be provided if required.

Lack of timely and pro-active development planning

25. I accept for purposes of this letter that "planning" in relation to land use means the *purposive activity* of working out in advance a *detailed scheme* for land use management and the *accomplishment* of land use objectives. It should be an intervention with an intention to alter the existing course of events. Strategic planning therefore asks questions such as "Where are we? Where do we want to be? How are we going to get there?" A Spatial Development Framework ("SDF") is clearly not a plan, but at best a sub-component of a plan.

26. Spatial development frameworks are of limited value to the township establisher and do not provide the necessary timely planning required at this level. Consequently once the three spheres of government have complied with the requirement of the Bill to prepare spatial development frameworks there will still be decided short-comings in the planning activities in the urban context. What is required is that *development plans* should be drawn up in order to fill this gap.

27. The use of the words "*forward* planning" (e.g. in the preamble to the Bill) is troublesome. Implicit in the word "planning" is that it concerns the future. I suggest that it would be more correct to refer to timely and pro-active planning and request that the term *forward* planning not be used.

28. Sustainable development will not take place without appropriate land use planning. Timely and pro-active land use planning is a pre-requisite for achieving the best results with socio-economic development and environmental management objectives. Such planning may serve to change the way in which local authorities operate, to exercise development control, guide capital investment programs and to evaluate development proposals in terms of desirability. It may also serve to contribute to remaking urban and rural communities in ways that will reverse the negative apartheid heritage, promote integrated land development and balance the competing needs for socio-economic development and environmental protection.

29. From personal observations over many years it is clear that although land use planning is popular in rhetoric and mostly encountered in the literature, government has to date practically achieved very little land use and development planning in South Africa. Only recently the belief in spatial planning gained more importance, starting with the NSDP (which I must point out is more in the nature of a policy document than a plan) and the creation of various spatial planning posts in the Department of Land Reform and Rural Development. Yet in this country national and provincial land use planning exists for the most part in theory only, whilst national and provincial policies and guidelines abound.

30. Local government functions have been expanded to include the eradication of poverty and LED. Each local authority is required to adopt an Integrated Development Plan ("IDP"). The IDP is the institutionalised mechanism for local authorities to achieve these responsibilities and provides them with an enabling tool to negotiate with the population. However, the general trends with the preparation of IDPs seem to be that it is more of a *technical emphasis on producing the IDP document than on ensuring that an effective strategic planning process is engaged in*. I fear that all three spheres of government will approach the compulsory preparation of SDF's as required in terms of the Bill with the same attitude.

31. A major weakness of land use planning undertaken by government (be it in the form of an IDP, a structure plan and so forth) is that it is usually not informed by results of scientific studies, but based on assumptions and academic arguments that often bear very little relationship to practical realities.

    31.1 It explains why government land use planning (to the limited extent that it exists) has had such a limited positive impact on socio-economic development over the years. Why should land use planning undertaken by government not also be subjected to the stringent requirements of for example environmental impact assessments?

    31.2 Currently planning instruments such as the Western Cape Provincial Spatial Development Framework ("PSDF") which started out as a policy document and was subsequently elevated to the status of a so-called section 4(6) structure plan (but in essence remains more policy than plan), carry more weight when deciding applications for township development than the results of scientific studies.

32. IDP's are not, from the perspective of township developers, *development plans*. They are of limited value to the township developer and do not provide the necessary timely planning required at this level.

33. If local authorities are to be pro-active and promote social and economic development they should consult the township establishment industry in the identification of the areas for which local *development plans* have to be drawn up, in deciding on the content of such plans and the determination of development densities.

34. Ideally the necessary environmental, heritage and other studies should be undertaken by the local authority as part of the process of preparing development plans, with the result that individual developers who wish to undertake development within the area to which the local development plan relates will not be required to undertake such studies and go through

time consuming application and public participation processes. Such an approach would *inter alia* make a major contribution to reduce the administrative workload of the authorities concerned.

35. A time-consuming aspect of township establishment is the preparatory liaison that must take place to determine government requirements before a lay-out plan can be drawn up and finalised for submission of the application. Local *development plans* may place the developer in a position to complete this preparatory aspect of a township establishment process more rapidly. It should reflect a program for the provision of services. A development plan will consist of the plan itself, supplemented by a written document and will contain information on land that has full engineering services and can be used immediately for township establishment purposes, etc.

36. Lack of timely pro-active planning by the authorities remains one of the most important reasons for the delays in the property development industry. Due to the lack of timely pro-active development planning by all three spheres of government, the industry is faced with a reactive system of dealing with development applications. The inspiring theories that conceptualised planning as a process of developing a shared vision, a "more collaborative and inclusive approach" to the decision making in a representative democracy and so forth, are clearly meaningless if actual land use planning is not undertaken.

37. There is a great deal of conservatism at government level regarding an increase in the density and it is identified with a lowering of standards and environmental quality that may give rise to urban decay.

    37.1 The authorities encounter considerable opposition from the residents, with great emphasis on the possible effects of the subdivision of residential sites on the existing character of housing standards and heritage resources. The authorities find it difficult to refute these objections and remain objective.

    37.2 If planning was in place (after scientific studies have been conducted) it could provide a basis on which applications for subdivision could be objectively evaluated so that there would be firmer grounds for granting applications in the knowledge that the impact on the existing environment would be limited.

    37.3 The Bill should provide that if approved planning is in place in terms of which the principle of a certain density has been approved, the public participation process could be shortened by only requiring service of notice of individual applications on immediate neighbours and stipulating that objections to those applications may not deal with the

principle of densification but only with the *detail* of how it is to be achieved and so forth.

38. The imperative of sustainable planning translates into notions of striking a balance between the many competing interests in the ecological, economical and social fields in a planned manner, providing a clear pathway or direction in which to move or direct growth or progress. I believe that the contribution that a SDF will be able to make in this regard may be negligible.

39. Due to the lack of planning, the way in which local governments operate within the land use planning and development context have not changed much since 1994 and the potential contribution which planning otherwise could have made to remaking urban and rural communities remain *potential* only.

40. A large number of government institutions are directly or indirectly involved in township establishment. Liaison with these bodies is time-consuming and is a field where time saving procedures could be investigated to good effect. These problems could be removed by the introduction of a more comprehensive system of development planning, which could remove the necessity of comment from other bodies or be kept to a minimum. The question is whether the Bill, as it currently reads, will achieve this?

<u>Rigid application of policy</u>

41. Policy is a development management tool. The adoption of policy guidelines by state organs to assist decision-makers in the exercise of their discretionary powers is regarded by our courts as both legally permissible and eminently sensible.

42. Whilst government policies are an essential component of land use planning, it would be wrong to liken those policies to land use planning. Rather than to undertake land use planning, the authorities seem to concentrate their efforts on the adoption of policies to clarify legislation and to provide guidelines within which the implementation of laws has to take place. Those policies are often open to different interpretations (depending on the agenda of the interpreter) and usually not helpful from a developer's perspective.

43. In practice there is little evidence of policies and legislation geared towards promoting development. The provincial and municipal policies that have to date been adopted rather tend to discourage than promote development.

44. Government policies such as the NSDP and the PSDF do not provide a detailed scheme worked out in advance for land use management or the

accomplishment of land use objectives. Those policies generally lack implementation plans and are not linked to funding arrangements. As a result they are of limited value to the township establishment industry. In the absence of clear measurable policy targets, usually no attempt is made to measure the success of those policies.

45. Pieterse (2006: 289)[17] is convinced, based on his field research in Cape Town, "that policy intentions as expressed in *planning frameworks*, are bound to remain paper-ideas whilst established patterns of organisational (and spatial) practice continues".

46. I submit that pro-active land use planning is required to convert the thinking encountered in government policies into practical measures for achieving policy objectives. To discourage the phenomenon of government policy being adopted without ever progressing into planning I submit that the Bill should make it clear that policy may only be applied if it forms part of approved planning.

47. The difficulty faced by township developers is that notwithstanding the long line of cases which require that policy guidelines not be applied inflexibly or in a manner which excludes decision-making involving the conscientious exercise of the relevant discretion, officials vested with a discretion do not exercise that discretion by making a choice from amongst alternative courses of action, but apply policy instead. It is of little consequence to know that a decision arrived at on this basis (without having regard to the merits) stands to be set aside by a court of law, if you do not have the luxury of funds and time on your side to challenge decisions inappropriately reached.

48. The municipal planning tribunal as contemplated in the Bill may also be empowered to review administrative action, provided it can be described as independent and impartial.[18] It could provide for a much cheaper and quicker option of dispute resolution. The Bill does not give sufficient powers to the municipal planning tribunals to achieve this.

<u>Ineffective public participation system</u>

49. Public participation is an essential ingredient of planning and development. It can, however, become a major hurdle in the way of planning and development if not managed properly. It may become the "defence of privilege".

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17 Pieterse, E. 2006. Building with Ruins and Dreams: Exploring thoughts on realising integrated urban development through crises. <u>Urban Studies</u>, Volume 43(2), pp 285 on 289.

18 See section 33 of the Constitution.

49.1 NGOs and social groups have the ability of disempowering people. They may purport to speak for communities, whilst in reality they are only mandated by a minority within them.

49.2 Populist mobilization of public opinion may distort signals to the elected representatives and may "... *favour networks of articulate, middle-class property owners to the exclusion of the voices of the marginalized*". The public participation process may be open to manipulation by those who follow their own agendas.

49.3 Excessive participationism also holds dangers for the public interest. If government adopts a shallow approach to participatory techniques it may happen that the needs of individuals and individual communities may be brought to the forefront at the expense of the common good, focussing on short-term needs as opposed to long-term sustainability goals.

50. The property development industry can ill afford the lengthy delays occasioned by objections and appeals.

50.1 Members of the public know this. Those who are actively involved in property development will confirm that some members of the public have turned the public participation opportunities being afforded them into a lucrative business. It makes business sense to some applicants to rather pay the objectors for the withdrawal of their objections that lack any merit, than to suffer the losses occasioned by inordinate delays brought about by processing frivolous objections and appeals.

50.2 Corrupt officials also know that developers can ill afford lengthy delays. The only effective manner of addressing the problem will be by introducing effective dispute resolution and accountability mechanisms and cutting down considerably on the time taken to process applications and appeals.

51. The question is how public participation is to be managed in terms of the Bill and whether it will succeed in removing the problems currently being experienced. Frivolous challenges to applications or decisions of the authorities should be appropriately discouraged. An example of an arrangement used in classical times is a *graphe*, which roughly speaking was a lawsuit in Athenian public matters. "If the accuser failed to obtain a fifth of the vote, he was fined and lost the right to bring similar accusations in the future, a practice deemed necessary to prevent frivolous action."[19]

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[19] Elster, John. 1999. Accountability in Athenian Politics. Chapter 8 in A. Przeworski, S. C. Stokes & B. Manin (eds). Democracy, Accountability and Representation, Cambridge University Press; p 253 on 263.

52. Whilst it is important that costs related to the adjudication of objections and disputes should not serve to withhold members of the public from lodging objections or complainants from challenging unacceptable decisions, appropriate arrangements should be put in place to discourage frivolous challenges to applications or decisions of the authorities. I submit that the same "penalty" should be imposed if a party that challenged an application or a decision taken in the exercise of public power abandoned the challenge after starting it (as a blackmailer might do if he succeeded in getting a bribe from his victim).

53. Development is primarily a *people process*, consisting of a number of successive steps or phases. If you require public participation for each step of the way and provide for numerous rights of appeal on the same set of facts, such appeals are dealt with successively by different bodies and not concurrently by one tribunal, extensive delays will occur in obtaining final approval for development of property. The administrative procedures and especially those relating to public participation in the planning process and to dealing with representations and objections, are time-consuming and regularly lead to excessive delays in finalising plans or processing of applications.

54. Citizen participation should be deliberative processes. The mere opportunity or invitation to lodge an objection cannot be equated to participation in the deliberative processes. It is a component only of public participation. Public participation implies at least two ways or mutual communication and more. It is something more than an instrumental process to get a Bill or a plan approved, and should involve the empowerment of people to have control over which and how things are done.

55. The idea of an epistemic community[20] comes into play in this regard. It concerns the idea of empowering the people to challenge fundamentally the conventional mainstream about what is possible and impossible in terms of transformative urban development agendas.

    55.1 The case for the establishment of deliberative forums to imagine and plot alternative approaches to urban development, connects usefully with Pieterse's own argument for a vibrant radical democratic politics in the city.

    55.2 The deliberative forums should serve to give back "a voice" to the people, to act as communicative links between the private and public spheres, to build a strong relationship between the state and civil society by providing debate and diversity and should be aimed at establishing shared reality.

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20 Promoted by Pieterse 2006 – see earlier footnote.

55.3 It should ensure that authority is vested in the people themselves, *the real actors of positive change*. The underlying guiding principle of the deliberative forums process should be as expressed by the slogan "*nothing about us without us*" coined by Cyril Ramaphosa during the constitution-making process.

56. The property development industry depends primarily on sound and positive co-operation between government and the developers. A number of factors cause changed circumstances in the industry on an ongoing basis, amongst which are new legislation that increase development risks and so forth.

56.1 Whilst the development industry is smothered and constrained by opportunities for public participation in respect of all applications that may be made, inadequate statutory provision exists that create opportunity for the industry to deliberate with government regarding development principles, norms and standards, prescribed time periods and so forth.

56.2 I submit that the Bill should require the establishment of deliberative forums by all three spheres of government (chaired by an elected political representative and not by an official) to give back "a voice" to interested and affected parties (including developers), to act as communicative links between the private and public spheres and to strengthen democracy.

Ineffective public administration

57. Government culture, attitudinal problems, a silo nature of approach to and inefficient ways in which the public administration deals with development applications, are amongst the problems experienced by industry members.

58. The property development industry depends primarily on *sound and positive co-operation* between government and developers. There is a serious public relations problem in certain areas of the township establishment industry. Shortcomings in the area of attitudes cannot be afforded.

59. Although attitude relates to the personal approach and conduct of an individual in a particular working situation, the working climate and environment constitute an important input that helps determine this conduct. Our form of government tends to subordinate individual interests to national interests. In this situation there is a far greater tendency at the official level to bureaucratic action. This does give rise to attitudinal problems at various levels, unless deliberate efforts are made continually to temper the system.

60. The position of authority in which the official finds himself is the seat of a

number of the attitudinal problems experienced in township establishment. Whereas the actions of the private sector are based on the profit motive, the motives by which the public official has to be guided are far less concrete.

60.1 The promotion of the general welfare of the community – traditionally the justification for the existence of government institutions – is a generalisation that does not really define the task.

60.2 The over-zealous application of this motive as a guideline by the public official results in an overlapping of the field of operation of the latter with that of the private sector. The result is trespassing on the sphere of responsibility of the private entrepreneur.

61. Extensive new legislation was adopted in post-1994 South Africa. It poses, amongst other things, a development-orientated challenge for particularly local government, which requires changes in the attitudes of officials towards property development. However, the new legislation did not automatically change the mind-sets and attitudes of officials appropriately. A discussion with municipal officials will reveal that they are generally not even aware of the requirement that they should be development orientated.

62. The many government initiatives are constrained by 'deeply embedded cultural assumptions' (governance culture) which provide the implicit norms and values which legitimate (or not) what individual actors do and the way governance processes operate in any context. If transformation of the bureaucracy in terms of changed staff attitudes and mind-sets are not achieved, it will continue to hamper implementation of new legislation. The successful application of the legislation will in the last resort depend on the attitude with which they are approached by all those involved.

63. Coupled with the phenomenon of governance culture is the tendency of officials to focus on their own dimension of interest or competency.

63.1 The silo nature of approach has rightfully been criticised and does pose an obstacle in the way of promoting justifiable social and economic development. For example, at the moment sustainability is everybody's responsibility, but no one's responsibility in particular. This is a major weakness in the struggle for a more sustainable way of life.

63.2 It is noteworthy that in terms of section 36(1)(b) of the Bill it is not required that members of the proposed tribunal should be sufficiently representative to ensure that environmental, social and economic considerations will receive due consideration and that a holistic approach is adopted to the evaluation of applications or complaints.

64. The value systems and underlying processes of urban governance and planning need to be reformed to reflect a sustainability agenda and promote a development orientated public administration. In addition legislation is required for institutional reform, institutional innovation and to ensure that land use applications are evaluated holistically.

65. Lengthy delays in the processing of applications and appeals are the order of the day. The industry cannot afford it. In certain instances no time frames have been prescribed within which competent authorities should reach their decisions.[21] See in this regard section 40(9) of the Bill which requires the tribunal to decide land use applications *without undue delay*. Such a provision is meaningless. As the law currently reads a disgruntled applicant will be able to approach the High Court with an application for judicial review if the tribunal fails to take a decision within 180 days[22] - that is to say if the applicant can afford the high cost of litigation, can afford to wait a few years to obtain a court order and is prepared to make peace with the idea that the High Court will after all the expense and time probably remit the matter to the tribunal concerned for consideration.

66. In instances where time periods have been prescribed[23] the time frames prescribed are usually inappropriately long. I submit that the problem is created by undue influence on the part of officials in the decision as to what is achievable, based on current inefficient procedures, current staff capacity and so forth.

67. The problem with delays has been around for decades. The Venter Commission[24] was *inter alia* concerned about the lack of time scales for completion of the township establishment process that existed at the time. Almost 30 years ago it said the following in par. 2.2.10 of its 2nd Report: "*The extremely long time taken by the township establishment process at present is one of the most critical factors that hamstrings the rapid and effective production of new residential sites. A drastic reduction in the period required to complete establishment is necessary of the industry is to function on a sound basis at all.*"

68. The drastic reduction in the time periods required to obtain all the necessary development approvals as contemplated by the Commission did not

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21 E.g. appeals under section 62 of the Municipal Systems Act.

22 See the relevant provisions of PAJA.

23 E.g. 7 months in terms of the Western Cape Provincial regulations before an applicant may lodge an appeal with the provincial authority if the municipal manager has failed to inform the applicant of the decision. Also see the 180 day period in terms of the 2000 Promotion of Administrative Justice Act ("PAJA") before an application for judicial review may be brought for failure to take a decision.

24 See the 2nd Report of the Venter Parliamentary Commission of Enquiry into township establishment and related matters 1983.

materialise. Instead, the time periods have increased considerably.

69. In the nature of things development applications have potential implications for various organs of state and, as a result, there inputs are required before development applications can be decided. Extremely lengthy delays in obtaining input from other organs of state are the order of the day.

70. The lengthy delays in deciding applications and appeals are irreconcilable with the requirement to promote socio-economic development or the concept of "good government.

71. The process of determining appropriate time frames should include a requirement that proposals in this regard should serve for discussion before deliberative forums. The problems experienced with obtaining inputs from other organs of state could be dealt with by establishing development facilitation units[25] in all three spheres of government that will *inter alia* be responsible for taking appropriate action against departments that do not comply with prescribed time-frames.

Unreasonable municipal requirements

72. In terms of section 40(7)(b) of the Bill the tribunal may, in approving an application, impose *any reasonable conditions, including conditions related to the provision of engineering services and the payment of any development charges*. The critical question from a developer's perspective will be "Who will be the judge in deciding what is reasonable and what not?"

73. It is essential that the Bill imposes specific restrictions on the wide powers given to tribunals in this regard.

73.1 In my experience local authorities increasingly tend to see "development contributions" (as it is known in the Western Cape) as an additional source of income (i.e. over and above property rates, services charges and so forth).

73.2 Development contributions required may potentially be far in excess of costs to be incurred by the local authority in the creation of external bulk infrastructure to serve the township concerned.

73.3 It has been said that the art of taxation is to pluck the feathers without killing the bird. If all three spheres of government are permitted to regard developers as free game and continue to place new financial burdens on them, it does not spell a bright future for the industry.

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25 Referred to in more detail below.

74. Uniform and rational standards for engineering services should apply. The private sector has over the years objected to high standards sometimes required by local authorities when engineer services are installed in new townships.[26]

75. The settling of the question of the basis on which engineering services should be provided by the township establisher and the local authority concerned remains a factor retarding the township establishment process. It relates to the determination of cost liability and lack of uniform standards for engineering services in new townships.

76. In apportioning liability for costs between local authorities and township establishers it is customary to distinguish between *internal* and *external* services. Internal services refer to the engineer services network that is internal to the township concerned but does not include the services situated within the area of such township and that are generally classified as external services and that should be able to serve adjacent areas as well.

77. In terms of the Bill "external engineering service" *means an engineering service situated outside the boundaries of a land area and which is necessary to serve the use and development of the land area*, whilst the Bill defines "internal engineering service" to mean *an engineering service within the boundaries of a land area which is necessary for the use and development of the land area and which is to be owned and operated by the municipality or service provider.*

78. The question that arises is whether, for example, that portion of a feeder-collector road which:

- will serve a regional function, but is situated a new proposed township;
- will not allow for direct access from individual erven situated in that township and therefore is strictly not required for purposes of the township;
- which will be owned and operated by the municipality,

will be an internal or an external engineering service in terms of the definitions found in the Bill. I submit that it should be an external engineering service because the need for that road will not arise from the development of the township concerned. Therefore the developer should not be responsible to make the land available for that purpose without compensation or be responsible to construct the road. Yet in terms of my understanding of the

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26 Will the Blue Book or Red Book apply or is the idea to stipulate different uniform and rational requirements?

definitions provided in the Bill it would appear that such a road will potentially be classified as an *internal* engineering service.

79. Based on the recommendations of the Niemand Commission, the basic principle was adopted in some provinces many years ago that:

- the existing municipal rate-payers should not be expected to carry the burden of services for the new townships;
- the arrangement between the township owner and the municipality should be such that the municipality does not make a profit out of the township owner or the purchaser of his erven either.

In other words the old town should not subsidise the new township, but neither should the developer subsidise the old town / the old derive benefit from the new township.

80. Any formula in respect of the cost of provision of services should insure *equal treatment*. It would appear that this important principle has fallen by the wayside.

Lack of effective accountability mechanisms

81. The Legislator put the public sector at the heart of the challenge to reduce poverty and promote sustainable development for the benefit of all South Africans. The key-role that government has to play in this regard includes the promotion of the public interest within the legal framework, *inter alia* by passing legislation, undertaking planning, performing regulatory functions in respect of land use planning and development and ensuring lawful, reasonable and fair administrative government practices.

82. The keystone of this legal construct is accountability (i.e. being obliged to answer to an authority for one's own acts or omissions and sometimes for the conduct of others). Accountability has an important role to play in curbing the abuse of public power. An effective system of government accountability in the public arena can provide a reasonable assurance that public power will not be abused and, where such abuse would occur, that corrective action and redress are reasonably easy to achieve.

83. On the other hand unanswerable government may lead to unstable conditions endangering the democracy. It is evident from media coverage that the manner in which the public sector uses public power and impacts daily on the quality of life of the people of this country is a matter of increasing concern.

84. The government bodies and their public administrations responsible for giving effect to the laws of South Africa are by law required to be accountable. [27] In order to ensure a reasonable measure of government accountability effective mechanisms are at the very least required to achieve that state of affairs. The mechanisms and processes available to members of the general public to enforce government accountability in respect of its statutory land use planning and management obligations, are ineffective.

85. The introduction of legislation to provide a legal framework within which accountability is to be achieved and to set requirements with which the authorities are required to comply is a necessary pre-condition for government accountability. Current legislation[28] falls short in many important respects.

86. Due to time constraints only a few observations will be made relating to the mechanisms currently available to enforce accountability.

86.1 As pointed out above the *public administration* is required to be accountable. Government officials are not elected by citizens, but are appointed employees. Elections (in themselves ineffective and mediated in many ways) are not an available mechanism to enforce public administration accountability.

86.2 In terms of the applicable legislation government officials are usually indemnified against claims made or legal proceedings instituted against them arising out of any act done or omitted by them in the exercise of their powers or the performance of their duties and functions, if the employee acted *in good faith* and without negligence. Good reason exists for such legislation. However, no prospect of redress exists for the applicant if the official concerned for instance foolishly but in "good faith" exercised his or her discretion.

86.3 There are a number of factors that directly or indirectly restrict the powers of the courts and their ability to assist members of the public in respect of property development matters. Amongst those are judicial restraints, formality of proceedings in our courts, their remoteness and inaccessibility (high costs of litigation), the lengthy delays in obtaining decisions and inappropriate court orders.

(a) The high costs of litigation put this mechanism beyond the reach of the vast majority of South Africans.

(b) There is uncertainty (and therefore risk) associated with how the

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27. See for example section 152(1) and 195(1)of the Constitution referred to earlier.

28. E.g. PAJA, PAIA and the MSA.

court will interpret legislation in a given situation.

(c) The doctrine of separation of powers has resulted in the courts adopting a "hands off" approach when it comes to matters concerning the public administration. As a general rule, the court will normally remit the matter to the executive authority for reconsideration. In other words, after all the risks involved with litigation, the effort, time taken and considerable expense (all of which will not be recovered even in the event of a successful court challenge) one could end up back where you started a few years ago.

86.4. In all instances where statutory obligations are placed on government bodies, effective and affordable mechanisms should be provided for members of the public to enforce prompt compliance.

(a) Provision should be made for informal, relatively cheap and fair procedures for challenging the manner in which public power has been exercised, for prompt and objective hearings, and for supervisory bodies that would not be required to remit matters to the relevant authority for reconsideration.

(b) Such supervisory bodies should be empowered to enquire into the merits of decision, to annul administrative acts, to substitute the decision of the authority under review, to impose coercive fines and take disciplinary action against offending authorities and their officials.

(c) In my experience section 62 of the Municipal Systems Act falls far short of the mark and requires considerable improvement. The manner in which section 51(1) of the Bill is worded, is confusing.[29]

(d) An interested person for purposes of section 51(4)(c) of the Bill should not only be a person with a pecuniary or proprietary interest, but should have lodged an objection against the relevant application. If the person has not even taken the trouble to lodge an objection, it should amount to an administrative act which is unreasonable and procedurally unfair to allow such a person to frustrate due process by coming in through the back door.

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29 Is the intention with "*notwithstanding* the provisions of section 62" to say that, even though a tribunal will not be acting under delegated authority and therefore the provisions of section 62 of the MSA will strictly speaking not find application in relation to decisions taken by the tribunal, that decisions of the tribunal may be appealed against using the section 62 procedure?

87. The accountability requirement has largely been rendered vain and ineffectual as a result of the lack of effective mechanisms and measures to obtain accountability. The current methods available to restrain the authorities from abusing their powers are also ineffective. The same goes for the corrective mechanisms available to citizens to obtain redirection or redress when state performance is deemed unacceptable. The situation calls for an urgent intervention to improve accountability of all three spheres of government within the specified context.

88. I submit that each sphere of government should have a tribunal that may hear and decide charges brought against officials.

88.1 Everyone should be entitled to bring a charge of say "*misconduct in office*" before a special official of such a tribunal, who could render a formal provisional condemnation if the special official considers it well founded.[30]

88.2 The tribunal and its officials should be empowered to investigate, on own initiative or on receipt of a complaint, specified matters (i.e. comparable with but going beyond the powers of public protectors). Such matters may *inter alia* include any alleged maladministration in connection with government affairs, abuse or unjustifiable exercise of power or unfair, capricious or other improper conduct, undue delay by a person performing a public function or any act or omission by a person employed in government, which results in unlawful or improper prejudice to any other person.

88.3 The special official should proceed inquisitorially to ascertain the relevant facts.[31] The complainant must submit acceptable proof that the administrator or authority concerned received written notice of the complaint but failed to remove the cause of the complaint within say thirty days from date of notification.

88.4 If a provisional condemnation was granted, the authority (or official) against which it was granted should be afforded the opportunity to correct its action within a specified but limited time period (the principle of "self-rectification"). If the authority concerned failed to respond within the stipulated time period, the condemnation will

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30 A similar procedure was available in the Athenian model (Elster, 1999: 268). It could serve as a preparatory examination or what is known as a "rule *nisi*" (a provisional order with a return date). In other words, it will not be a final condemnation, but the result of which has to be confirmed by the return date or which could be passed on to the entity's tribunal for consideration.

31 I.e. a similar approach to that prescribed in section 26(3) of the Small Claims Court Act, No. 61 of 1984.

automatically become final.

88.5 If the special official is not prepared to grant a provisional condemnation, the aggrieved person must be able to challenge the officials refusal by way of internal appeal and subject to payment of an appeal fee, which will be refundable if successful on appeal.

88.6 If the special official is not prepared to grant a provisional condemnation as the evidence produced is regarded as inconclusive or if the authority challenges the provisional condemnation, the special official should allow the aggrieved party and the authority concerned the opportunity to file supplementary papers and to have the matter considered by the tribunal.

89. It should be cheap to enforce accountability. The high costs associated with litigation coupled with the ineffectiveness of the judicial remedies and the practice of judicial restraint have to date ensured that many an abuse of public power has gone unchallenged. If the situation was to be turned around and more effective and efficient instruments were put in place to challenge decisions of the authorities/ officials, the government machinery might grind to a halt if the system was not properly constructed and managed.

Ineffective dispute resolution mechanisms

90. Currently the various appeals that may be lodged in terms of the different pieces of legislation finding application within the field of land use planning and development do not receive concurrent consideration, but are dealt with successively. The result is that a single objector can - on the same set of facts - have more than one right of appeal and can delay finalization of applications for years on end.

91. Section 51(1) of the Bill provides for a right of appeal only against decisions taken by the tribunal. The implication is that decisions taken by officials under section 35(2) of the Bill will continue to be appealable under section 62 of the MSA. As alluded to earlier the section 62 MSA appeal mechanism is ineffective and requires substantial improvement.

92. Legislative innovation is called for to replace the current successive rights of appeal on the same set of facts to several different appeal authorities. In the event of appeals to different appeal bodies relating to the same application for development approval, all the appeal bodies (bar one) should lose their decision-making powers and should become commenting bodies only, comparable with the section 38(8) procedure of the National Heritage Resources Act.

93. If the Legislature required decisions relating to land use planning and development to be taken by one body representing all the various interests[32] it could have expedited finalisation of applications and would have contributed to a more holistic approach to consideration of such applications. This in turn would have positively contributed to the progressive realisation of the fundamental right to have access to adequate housing and so forth.

Inadequate legal reform

94. Laws, policies and planning all function as development management tools. There is no shortage of legislation for this purpose, but the current legislation falls short in many important respects.

    94.1 The manner in which the legislation has been written (and the lack of integration of legislation) makes it nigh impossible for local government to effectively promote social and economic development within land use context.

    94.2 The dense and complex legislative environment in which land use planning and development have to take gives rise to protracted administrative procedures that are accompanied by high consultants' fees.

    94.3 Social and economic realities dictate the need for adjustments to the statutory basis and in particular to the procedural framework within which property development has to take place.

95. What I perceive to be some of the major shortcomings in our laws include the following:

    95.1 **Lack of development law:** The sad truth is that laws and policies and their interpretation hamstring growth and development in our country. Laws may promote or restrict development, depending on its aims and objectives as well as the manner in which legal rules are implemented. We have an unfortunate history of laws that still restrict and prevent development. We do not have laws that effectively promote development.

    95.2 **Flawed approach to drafting of legislation.** Many problems experienced in the development industry starts with the manner in which land use legislation is prepared.

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32 The tribunal contemplated in the DFA partially fulfils such a function. However, no such tribunal has been appointed for the Western Cape.

(a) In theory the adoption of legislation should be based on development policy. Development policy should come into existence through a policy-making process. The policy-making process should usually commence when political leaders respond to the needs, problems, ideals and aspirations of the people – which include developers. The problems and main issues should be identified by way of research and a consultation process, in response to which a discussion document should be drafted and published for comment by interested parties.

(b) The question arises whether and to what extent (if any) the political leaders and their consultants involved in the preparation of the Bill have engaged people in the development industry in consultations relating to the needs and problems experienced in their field before formulating a problem statement that would serve as the basis for the Bill. If the problem areas are not properly identified and understood, would one have a reasonable prospect of effectively addressing those problems?

(c) What one encounters in practice is that officials drive the law-making process, usually to address problems which they experience or perceive to exist in land-use context. This is done without going through the process which I have just described. Usually a finished product is placed on the table for public comment. The pivotal continuing role of public participation - and particularly that of developers - cannot be reduced to a mere opportunity or invitation to comment on a finished product. Participation implies at least two-way or mutual communication and more.

95.3 **Lack of effective mechanisms for enforcing compliance.**

(a) Section 5(1)(b) of the 2000 Municipal Systems Act is an example. In terms thereof one is entitled to a *prompt reply* from local authorities to enquiries made.

(b) Section 62 of the MSA requires municipal managers to *promptly* submit appeals in terms of that Act to the internal appeal authority and the latter is required to commence with an appeal within six weeks and decide the appeal within a *reasonable* period.[33]

(c) Section 7(1) of the 1977 National Building Regulations and

[33] See sub-section 62(2) and (5) of the MSA.

Buildings Standards Act is another example. It prescribes time periods for the approval or refusal of building plans.

(d) The legislation prescribes requirements, but without providing citizens with cost and time effective mechanisms to enforce compliance by the authorities. Effective mechanisms must be in place to compel almost immediate compliance with those requirements. Without such mechanisms the authorities are likely to continue ignoring those legal requirements.

95.4 Legislation couched in **permissive terms** and not in peremptory fashion. Section 24K(1) of the 1998 National Environmental Management Act ("NEMA") serves as an example.

(a) The Minister or an MEC *may* consult with any organ of state responsible for administering the legislation relating to any aspect of an activity that also requires environmental authorisation under this Act in order to coordinate the respective requirements of such legislation and to avoid duplication.[34]

(b) Compare the wording of section 24K(1) of NEMA with section 29(1) of the Bill.

(c) The question arises whether the minister or MEC concerned has acted in terms of section 24K(1) of NEMA since its introduction? The answer should serve as a clear indication of what practical effect (if any) section 29(1) of the Bill is likely to have.

95.5 **Lack of a holistic approach and coordination of the legislative endeavours of the three spheres of government**. This is *inter alia* the result of the manner in which the Constitution has been drafted, providing for concurrent and exclusive legislative powers of the three spheres of government in respect of certain functional areas. This has resulted in the statutory duplication of land use controls, public participation processes and internal remedies.

(a) The lack of coordination amongst legislatures has created a legislative environment which is not conducive for the promotion of socio economic development. I submit that with innovative thought and co-operative governance one will be able to overcome this problem.

(b) The establishment of a *development facilitation unit* in each

34 Also see section 24L of NEMA that provides for potential but not compulsory "alignment of environmental authorisations".

sphere of government may assist in overcoming many problems currently experienced by the authorities internally and externally. Such a unit could serve to:

- create awareness in the municipal sphere of the constitutional requirement that the public administration should be development orientated and what the concept involves;
- establish a culture amongst both officials and councillors of being development orientated; and
- receive argument/ inputs on specific problems, investigate same and make policy recommendations to effectively address similar problems in future, etc.

95.6 **Statutory duplication** of land use control. Various government bodies have powers of approval in respect of a single development application. These powers amount essentially to a duplication of control. It is extremely desirable for effective control that final powers of approval should rest with a single institution

96. It would be difficult to over-emphasise the importance for the South African economy of greater stability in the building industry. The lack of stability in the economy dictates that township establishment procedures have to be considerably shortened. In this connection it is particularly important that the approval stage (i.e. the processes through which approval is obtained for a project and development plans) should be separated from the development stage. The development stage is capital-intensive and the township establisher should be put in a position to defer this part of the operations if economic conditions so dictate. I submit that there is no rational basis for the five year validity period of approval as contemplated in section 43(2)(a) of the Bill.

97. The transitional provisions in the Bill are inadequate. It should *inter alia* provide for development applications that were submitted before a municipal SDF was approved but in respect of which a decision has not yet been taken by the date of approval of the SDF, to be dealt with as if the SDF has not been approved. If this is not done, developers will be exposed to considerable risk of having spent a few hundred thousand Rand on scientific studies and so forth, only to be told at the very last moment that due to the provisions of section 22(1) of the Bill the application may no longer be approved.

Regulatory function

98. Section 155(7) of the Constitution enjoins national and provincial governments to see to the effective performance by municipalities of their functions by regulating the exercise by municipalities of their executive authority. The question that arises is what mechanisms the Bill will put into place to achieve this.

99. Chapter 3 of the Bill deals with intergovernmental *support*, but no meaningful attempt is made to *regulate* the exercise by municipalities of their executive authority in respect of municipal planning. As a result the contribution that the Bill will make to the effective performance by municipalities of their functions in respect of municipal planning will in all probability be extremely limited.

Concluding thoughts

100. Socio-economic development is generally regarded as the passport to reduced poverty, reduced inequality and improved social well-being. It holds promise to correct some wrongs of the past. Land use development can potentially make a major contribution to socio-economic development. The state has a key role to play in growing and developing the economy and fighting poverty.

101. The Portfolio Committee should *inter alia* ask itself:

- What corrective steps the Bill propose aimed at the procedural matters that hamper the provision of residential sites (on the one hand) and have a negative effect on production costs (on the other hand)?
- Will the co-ordination of planning (to ensure that development at a local level fits in with the broad regional and national framework) be achieved?
- Will implementation of the Bill make it possible to deal more effectively with township applications?
- Have effective mechanisms been proposed that will help settle disputes between government and the private sector in an objective and impartial manner?
- Will the Bill make it possible for development of a township to take place more easily in phases?
- Does the Bill make specific provision for streamlined procedures?

- What mechanism is proposed to ensure greater effectiveness in the combined action of government and private sector in relation to developments?

- How will the Bill engender government accountability? How is the objective of accountable government to be accomplished?

- Will the Bill create a favourable environment for social and economic development?

- Will the Bill succeed in removing the most important obstacles to the process of township establishment?

102. A total of eighteen years into democracy the struggle to redress the grossly unequal social conditions in our country remains relevant. In view of the fact that the Bill seeks to achieve only a limited number of objects, I submit that it is not sufficiently transformative in nature and no amount of legal "panel beating" will remove the flaws in the Bill.

103. If the idea is to bring about improvements and meaningful change to the system within which developers must operate, it is not theory but a more pragmatic approach is required to convert the vision of a better future for all to a reality. The process begins with properly drafted legislation.

Kind regards.

DU PLESSIS HOFMEYR MALAN INC.

PER:
J P DU PLESSIS