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CITY OF JOHANNESBURG'S COMMENTS ON THE DRAFT SPATIAL LAND USE MANAGEMENT BILL, 2011

1. INTRODUCTION

A draft Bill was published in the Government Gazette of 6 May 2011 and it prescribed that written comments and consultative inputs be provided by no later than 6 June 2011.

The City of Johannesburg Metropolitan Municipality's comments on the Bill follow hereunder.

This Bill has been long overdue bearing in mind the White Paper on Spatial Planning and Land Use Management was published in July 2001. The City also commented on previous drafts, specifically the last draft in 2008, and it is pleasing to see that this latest draft is a much-improved document and it is more pleasing to see that some of our previous comments have been included in this draft. The City also appreciates the consultative process that was followed up to this stage in trying to come up with an Act that is workable and it is to be expected that this consultative process will continue up until the Regulations have been finalised and to the stage when the Bill is ready to be enacted.

This Bill is obviously as a result of the Constitutional Court's judgement in the City of Johannesburg v The Gauteng Development Tribunal and Others which judgment was handed down on 18 June 2010. This judgement gave definition to what is meant by "Municipal Planning" on the one hand, as a local government

definitions be brought in line with such guidelines again as it has been working well over all of these years and there is no reason for these disciplines to be redefined. Reference to refuse removal is a positive aspect and should be retained.

"Inclusionary housing" is defined, however, there is no further reference to it in the Bill it self. It is nice to see that it has been mentioned but content should be given to it in the Bill's provisions. For example, provision in the Bill should be made for a municipality to adopt a policy on this aspect with mechanisms for regulated or compulsory implementation. It is also suggested that it not be limited to "inclusionary housing" only but that it refers rather to "inclusionary development", otherwise it is limited to housing only.

An "integrated development plan" is adopted in terms of Chapter 5 of the Local Government: Municipal Systems Act, 32 of 2000, and not Chapter 2.

The definition of "land development" should also make provision for township establishment.

The Bill should make it clear and reference throughout the Bill to "erf", "land" and "site" should be consistent so that there is no confusion.

It is suggested that the definition of "municipality" also include a municipal committee, or a committee of Council.

It is not clear what is meant by the definition of "open space" or the reason for including it in the first place, especially the reference to or the limitation of it to land set aside or to be set aside for the use by a community as a recreation area.

The introduction of a "provisional general plan" is something new and it is not clear when and under what circumstances would one get such a provisional

clarified when one should establish a township and I suggest that guidance be obtained from the Welma Boerderye-case where the court made reference to a single use v that of multiple uses on a piece of land. The sole discretion to decide this issue should be given to the municipalities.

Consideration should be given to whether "zone" should not be "use zone".

2.2 Subsection (2) and Section 2 of the Bill make reference to provincial legislation and provincial planning and it provides under schedule 1 what Provincial legislation must address.

Is this not contrary to the White Paper on Spatial Planning and Land Use Management, 2001, the forerunner to this Bill? The white paper proposed one set of procedures in one piece of legislation for the whole of the country thereby eliminating the current situation where different procedures apply in different provinces. Will this not again be the case if every Province now also enacts their own Planning Acts over and above this National Act?

The white paper clearly stated that this Bill will clear up the extraordinary legislative mess inherited from the apartheid era and that it will rationalize the existing plethora of planning laws into one national system that will be applicable in each Province in order to achieve the national objective of wise land use.

Furthermore, section 146 of the Constitution states clearly that National legislation that applies uniformly with regard to the country as a whole prevails over Provincial legislation <u>if any of the following conditions</u> is met: (own emphasis)

(a) (a) The national legislation deals with a matter that cannot be regulated effectively by legislation enacted by the respective provinces individually.

legislation in respect of matters within the functional areas listed in Schedule 5 to the Constitution. Section 2 of the Bill clearly states that this Bill is enacted in terms of not only section 155(7) but also section 44(2) of the Constitution. Which again means that this Bill will always prevail over any Provincial legislation as per section 147(2) of the Constitution.

Now if this national legislation, once enacted, is always going to prevail over Provincial Legislation, then why do we need Provincial legislation? It is accepted that "prevail" does not mean that the Provinces may not also enact their own legislation, however, in Gauteng there is already a proposed provincial act dealing with the same issues and which is already in conflict with the Bill.

Will municipalities be able to choose not to follow the Provincial legislation, or will they be obliged to use Provincial legislation as long as it is not in conflict with this National Act, once enacted?

2.3 With reference to sections 3 and 4 in the Bill, the role and competency of National Government and Provincial Government needs substantial clarification in relation to the role and responsibility of municipalities. The fact that each will produce a Spatial Development Framework is confusing. National Department should be entitled to demand the inclusion of spatial aspects resulting from matters within their domain or functional area, as per schedule 4 and 5 of the Constitution, after a process of consultation, and in a similarly should Provinces.

It is proposed that only municipalities produce Spatial Development Frameworks with a legal obligation to include all such claims or interests from Provincial as well as National level. What is important is that all levels must consult with each other before stating claims or interests, but that only the municipality be authorized to produce a Spatial Development Framework. This will remove the confusion of different levels of plans, each with it's own legal status, the complication to synchronize times frames of producing and reviewing such plans and to keep track of all amendments during a planning cycle, and lastly to avoid

The attempt to make provision for compulsory norms and standards is applauded, but it is problematic, especially with reference to what it will include. An obligation to produce such norms and standards is bestowed upon the Minister and is based on detail such as a report on an analysis of existing land use patterns. This is a very naïve attempt and it is proposed that the Bill makes provision for the Minister to produce norms and standards as and when. The Minister may then promulgate such norms and standards after proper research has been undertaken by academic institutions and after proper consultation.

2.5 Chapter 3 deals with National and Provincial Support and Monitoring. It is not clear from the Bill how this support will provided and whether a specific municipality may, for example, apply or request such support and assistance when needed. How will the monitoring be done as set out under section 9(b)?

Section 10 talks about Provincial interest. Such interests must be clearly spelt out otherwise it would not be clear on what those will be and one may well find ourselves in the same DFA scenario where some Provincial Government may impede the right of a municipality to do municipal planning, for example in the Western Cape Province where the Provincial Government approves the municipalities' SDF's and schemes. This should not be allowed.

Again, it is not clear how the support and assistance be provided or how the monitoring will take place as set out under section 10(1) – (4).

2.6 The entire Chapter 4 needs to be re-looked at. As previously stated, it is unclear why there should be SDF's on so many levels. It is accepted that on National, Provincial and on local level each sphere of government has its own duties as far as development is concerned. But with reference to National and Provincial it does not relate to the adoption of a spatial development framework. Only municipalities, in line with the Constitutional Court's judgement referred to earlier and in line with a municipality's executive authority to do municipal planning, should develop and adopt a spatial development framework.

2.7 Section 22(2)(b) in Chapter 5 needs to be amended as it was meant to refer to specific "environmental management legislation" as defined in NEMA and not specific "environmental management Act".

The incentives referred to under (e) should rather be included under the SDF or as approved by the Council of that municipality.

It is also difficult to include land use and development provisions in the land use scheme to promote the effective implementation of national and provincial policies if you don't know what those policies entail (see section 22(2)(f)).

Section 24(1)(d) is going to create problems and it is unclear why this section was included. It will be difficult to enforce and to administer. How is it determined, for example, where the applicant only exercised a percentage of his rights granted. Does it then still extinguish? Maybe it should be made relevant to certain developmental rights only such as subdivisions, consolidations and secondary consent use rights.

Section 24(2) is contrary to trite case law. The provision of a land use scheme cannot nullify a condition of title, which is deemed to be contrary to the scheme. See **Camps Bay Ratepayers Association v Minister of Planning, Western Cape**[4]. It is also for this reason that conditions may be removed, amended or suspended in terms of a law of general application such as the Removal of Restrictions Act, 1967, and the Gauteng Removal of Restrictions Act, 1996.

It is also suggested that a link be drawn between a municipality's SDF and the land use scheme.

Section 27 needs to be expanded upon or it needs further elucidation. Currently a municipality is entitled to do much more than mere rezoning property which is owned by it, such as establishing a Council township.

[4] 2001 (4) SA (CPD).

Issues such a record of proceedings and providing reasons for decisions are also superfluous as same is regulated in terms of the Promotion of Administrative Justice Act, 2000.

It is uncertain what section 36 seeks to achieve. The grounds of appeal were copied from section 146(2)(c) of the Constitution. It seems only where there is a national or provincial interest at stake will someone be able to appeal to a Provincial Tribunal.

The rest, in other words, if your ground(s) of appeal does not fall within the ambit of section 36(1)(a) – (f), will have to use section 62 of the Systems Act (which has very limited application) or make application to court for review.

It is also debatable whether, in the light of the Constitutional Court's judgement referred to earlier, whether a Provincial Tribunal can at all hear an appeal emanating from a municipality. Will they not be doing "municipal planning" which is local government matter over which a municipality has executive authority? For example, where will a Provincial Tribunal get the authority from to depart from a municipal SDF? It would be unconstitutional.

The Bill needs to be very clear what powers and functions these Provincial Tribunals may possess, bearing specifically in mind the Provincial legislation which will follow and which will give effect to this section as stated in section 38(2). Section 40 does not give the required clarity and it is worded very wide. It gives the MEC and the Premier of the Provinces very wide powers. This needs to be curtailed so that that the two spheres of government knows what constitutes "municipal planning" and what constitutes "provincial planning".

It is also not clear under section 43 what such National interest might be. It makes it difficult for a municipality to decide whether to forward an application to the Minister or not if those interests are not declared upfront. It is especially very concerning that such discretion is also given to an applicant in section 43(3).

being treated as essential in a similar way as bulk and link services for instance. This results that in same instances the social facilities never materialize to the disadvantage of the overall community.

Section 49 makes provision for the Minister to lay down guidelines for the calculation and recovery of development charges and all Provincial guidelines and Municipal tariffs must be consistent therewith. It is going to be difficult to get the timing right when this Bill is enacted. These guidelines will have to be in place at the time this Bill is enacted otherwise applications will be lodged in terms of this Act and in the absence of these guidelines and the duty to bring the municipal tariffs in line therewith, how will these charges be calculated and recovered? The work done by National Treasury has been noted and is welcomed.

2.10 Section 51(1) and (2) seems to contradict one another. The point has been made earlier that section 147(2) of the Constitution states that National legislation under this section will prevail over Provincial legislation. It also means that the old order Ordinances remain in force until repealed by Provincial legislation which means they remain in force and may be used as long as they are not in conflict with this Act.

Section 52 makes provision for the Minister to make Regulations and it is noted from the content of the Bill that a vast majority of detail will have to be addressed in the Regulations which is not in the Bill itself, for example, application procedures, appeal procedures, what applications may be lodged under this Act, etc.

It always makes it difficult to comment on the Bill as a whole when the Regulations are not available which should be read in conjunction with the Bill. It is assumed that the City will also be put in a position to comment on any proposed Regulations as well which will give great content to the provisions in the Bill.

It is also noted that as per Schedule 1 to this Bill, that it is anticipated that great detail should also be provided for in Provincial legislation which detail is not necessarily in the Bill.

It is as if the Bill, once enacted, will not be bale to function on its own and that the detail will actually be in the Provincial legislation, as the matters to be addressed in Provincial legislation as per Schedule 1 covers all the basis.

There are matters listed under Schedule 1, which should ideally also have been in the Bill. Many of the issues raised above, as concerns against the Bill, are now listed as issues to be addressed in the Provincial legislation. It then begs the question, if the legislature was already aware of the issues, because many of them are listed under Schedule 1, why was it not addressed in detail under this Bill?

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