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23 May 2012

THE DEPARTMENT OF RURAL DEVELOPMENT AND LAND REFORM
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Via email to : SOGunronbi@ruraldevelopment.gov.za & lbruiners@ruraldevelopment.gov.za

Sir/Madam,

COMMENTS ON THE DRAFT SPATIAL PLANNING AND LAND USE MANAGEMENT BILL

The Saldanha Bay Municipality's Town Planning officials want to offer the following comments and suggestions:-

A General Comments

1. This Municipality submitted extensive comments per letter dated 15 June 2011 and from the contents of the latest version of the Bill, it appears as if many of these comments/suggestions have not been incorporated. It is trusted that you will seriously reconsider the comments submitted.
2. This municipality only became aware of the commenting period on the 10th of May 2012, after having been alerted to it by the West Coast District Council. It leaves a very short period of time to study the Bill and comment on it. This was despite a very clear email request send on 12/04/2012 enquiring about the participation process.
3. A bill such as this, emanating from national government is supposed to be an overarching bill which should provide **broad planning directions** and pave the way for legislation to be complied by provinces and local government, which in terms of the Constitution they are specifically tasked with or whose competency this is. To this extent it is submitted that this act not fully constitutional.

Restrictive condition – if this means *"any condition"* it can result in legal challenges as it may then also include servitudes *(which may either be public or private)* and the municipality cannot always be the judge in such cases. Legal challenges in this regard may place a huge financial burden on municipalities in this regard in respect of legal costs.

Zone – refer to comments on the name *"land use scheme"*. This also applies to any other place in this bill where there is reference to a land use scheme and it will not be repeated all the time.

Specific Sections

Sec 5 (1) (c) The "nature, scale and intensity" should be clearly defined to avoid any misinterpretation or grey areas.

Sec 5 (2) (b) Provincial monitoring of land use schemes (zoning scheme) is perhaps impractical as it will lead to provincial control and will create an unbelievable amount of administration for which there is no capacity either at provincial or local level. This is very reminiscent of the pre-1994 era. The compliance monitoring parameters and process should be clearly defined to make sure there is no overlap and intrusion on municipal constitutional rights and responsibilities.

Sec 7 (a) (i) If the intent of this section is to primarily refer to historic imbalances based on race segregation it should be clearly noted as such to avoid potential misuse of this principle to justify undesirable developments by developers.

Sec 7 (a) (iii) The mechanism to redress access to land and property by previously disadvantaged communities should be based in the SDF and not the zoning scheme; the zoning scheme cannot be used as a forward planning spatial document; it can only provide for development parameters for suitable land uses to support the spatial planning initiatives.

Sec 7 (vi) – This is a requirement that should really be reconsidered, as certain land use changes will effect property values, there can be no doubt about it. Changes in property values **will have a negative effect on municipal income from rates and taxes.** Such situations should be avoided. It is perhaps also unconstitutional to exclude the argument of land value as an objection in the consideration of land development application. In terms of the Muncipal Finance Management Act, a municipality should seek to maximise its revenue from rates and taxes and should thus avoid situations which could result in a decrease of property values – i.e. decreasing its revenue source.

Sec 7 (e) Acknowledgement should be given to capacity/financial constraints which can have a logical impact on the ability of a local authority to perform good administration.

Sec 8 – dealing with norms and standards – it refers to "Minister must, after public participation" – does this mean by implication that this includes consultation with municipalities or not?

Sec 8 (c) Once again acknowledgement should be given to capacity/financial constraints which can have a logical impact on the ability of a local authority to perform in an efficient and effective manner.

Sec 9 (b)(i) – This is yet another "compliance regulation" of which there are already so many in terms of many other pieces of legislation – it should be noted that reporting on all these

legal permitted usage of the land), whereas zoning has a legal status which specifies for which purpose land may be used or not. To call a zoning scheme in the bill a land use scheme is confusing and **will lead to confusion when dealing with people that use land illegally in terms of its zoning.** There is no reason why the term zoning should be replaced with land use rights.

The public participation referred to in the drafting of a zoning scheme should be more fully and clearly described to leave no uncertainties, unless the prescription of such procedures will be provincial competency in which case it should be clearly set out.

The suggested revision *(as also referred to Section 27(1))* of the zoning scheme every five years is rather unnecessary. Firstly the point of departure should be that a zoning scheme is a land use management tool and the legal basis for property rights and hence the basis for property valuation for rates and taxes purposes. As such **a zoning scheme is not a forward planning** document and as such should not be subjected to prescribed periodical very costly revision. From a land use planning perspective a municipality should review its SDF and not the zoning scheme! This very same argument will count for suggestions elsewhere in the Bill where it is suggested that the zoning scheme should be aligned with the SDF.

The bill also states that a zoning scheme should be aligned according to the SDF. This is not going to work. A municipality cannot just take a way existing land use rights without compensation – this will again lead to potential huge claims – a fruitless expenditure? A zoning scheme gives **development rights**, where as an SDF is a document that provides **development direction**. There is a **fundamental difference**. This base cannot be eroded by SDF proposals. Note that a municipality can also not out of its own accord amend the zoning of land not owned by it, without potentially huge compensation claims – a fruitless expenditure? Also increasing the land use right/zoning of land not owned by the municipality will lead to an increase in rates and taxes on that property for a zoning that the legal owner may not want at a particular stage. This matter should be reconsidered. It will lead to be challenged legally.

Sec 24 (2) (b) – This should be a requirement for the SDF, as the zoning scheme has to give effect to use rights on application in terms of use guidelines proposed in the former document.

Sec 24 (2) (c) – The practical execution of this requirement should be explained; not sure how there can be an incremental application of use rights?

Sec 24 (2) (d) – This should really be more fully described, i.e. size, values, for what minimum size of development etc. Whilst the aim is fair, it should be practically implementable otherwise it is unlikely to happen and will result in compliance issues. To make this a "blanket" requirement **without taking into account place specific aspects** is not recommended as it could have serious repercussions in terms of development viability because of subsiding of development cost for one component. The decision should be left up to the local Council as to when and where it is practically viable to enforce this requirement.

Sec 24 (2) (g) – What and how? See comments made under **Sec 24**

Sec 24 (3) (a) – This is vague and needs to be more fully described.

way of operation, finances and capacity – is flawed. Firstly many local authorities don't have the capacity of town planners and legal practitioners, secondly the **exclusion of elected councillors**, but the inclusion of unspecified outside people **is going to create huge problems.** In all likelihood will the town planner of a local authority become the chair of such a tribunal. This **fundamentally flawed** as he/she can't be judge and jury in the same case? Often such tribunals will be faced by opposition of Senior Council and will not have the capacity or training (or for that matter the job description) to fulfil such a role. Also, what if there are not suitable candidates outside of the municipality with knowledge of spatial planning, especially in smaller towns. Also in smaller towns, if there are any such persons they will most likely have, due to the smaller environment, have **material interests** in many applications due to their own or their clients' business interests in town. Also such outside people with knowledge of spatial planning matters, may have their own political agendas, which may or may not conform to those of the municipal council and would also need to **be remunerated.** This will place an **additional financial burden** on already stretched local budgets. The availability of such persons for meetings may also prove to be challenge.

The imposition and composition of municipal planning tribunals is not practical. It is firstly regarded unconstitutional (it will deprive decision making by locally elected councillors) it will lead to capacity problems, budgetary constraints which could very well result in poor decision making, appeals and even possible corruption. It is also in this regard questionable where it will leave the rights of appeal in terms of the MSA. It is foreseen that a huge number of judicial reviews will follow – this will just not be to be best advantage of orderly development.

In this regard it is suggested that the Bill be amended to **give the municipalities a choice** to have the power of deciding on land use application with the municipality's specific portfolio committee or if they so wish with such a municipal planning tribunal. The anticipated problems with outside persons will however remain.

Sec 37 (1) – There should be an escape clause here whereby it can be done with permission of the municipal council or premier.

Sec 37 (3) – again in this case would there be budgetary constraints and will result in a mandate unfunded for in the 2012/13 financial year and additional burdens in outer years.

Sec 37 (5) – What happens in such a case where it takes too long to have such a committee formed and what will happen to such a committee if no suitable outside candidates can be found, or if they resign and move on – the composition of such a Tribunal will then **not comply** with legislation and can the legality of the decisions then taken by such a Tribunal be legally contested?

Sec 38 (4) (c) – Does this mean that when a rezoning for instance is considered for land on which the Technical Department needs to build a sewerage plant, such a member of that Department may not serve on the Tribunal – really in smaller municipalities this is going to create problems! This section will in effect make section 36 (1) impossible to comply with, as in the evaluation of land use applications, all departments who have a vested interest in land development are involved! Therefore no officials who have any knowledge of land development will be able to serve on the Tribunal.

seeks to introduce measures to improve this with reference to registered town planners. The provisions in of **Sec 45** will then also be in conflict herewith.

Sec 45 (d) – The *intent* behind this is not clear – does this refer to the submission of objections/appeals from interested and affected parties? If so it should not be defined as a land development application seeing as it only relates to such an application; the heading should be changed to include: ...and input thereto...

Sec 45 (4) – This will in numerous cases, especially when it is done after initial public participation, create a back-door entry for objections which will be difficult to deal with – it is also not stated *who will have the competency to grant this status*, again recourse to an aggrieved party? This type of section as with many others in this Bill create many questions that will be left unanswered and this will complicate the implementation of the Bill in its current form – the looser will be the land application and the development process.

Sec 46 (1) – Which period and who will prescribe it and when?

Sec 47 (1) – Does this also include *conditions of approval*?

Sec 47 (2) – What is meant by *"absence of contemplated written consent"* ?

Sec 47 in general – Will publication of such an approval be required? There is also no mention of what the recourse of an aggrieved party will be.

Sec 49 (2) – Can this be the basis for refusal of an application for *leap frogging or not or can in* such a case the developer be made responsible for such external services *(not to be deducted from normal external capital contributions)*

Sec 50 (2) – For this norms and standards need to be provided, which should include for consideration of proximity to coastlines and beaches as recreational areas – such standards should also be carefully considered as too high a standard will kill certain developments, whilst too many open spaces will place undue burdens on budgets of parks departments of municipalities. Who is to determine this in any event, the municipality, the suggested Tribunal, the Province or National Government? The Bill is silent on this.

Sec 50 (3) – This needs very clear and concise regulations otherwise it will be very open to abuse.

Sec 51 (1) – This refers to a general "appeal" procedure even ***"notwithstanding"*** the provisions of Sec 62 of the MSA. This results in the same application being considered 3 times by the same organisation. Firstly the initial decision let's say by the Municipal Planning Tribunal *(actually then operating as the municipal decision making authority)*, then by the Council if appealed in terms of Sec 51 (1) of this Bill and then for a third time in terms of Section 62 of the MSA again by the Municipal Council. This will be a very long drawn out process with lots of opportunity of abuse, and uncertainty. Also in terms of **Sec 51 (2)** no period is prescribed.

Also, are these appeal procedures also applicable to parties aggrieved by an SDF adopted? As local experience up to now has indicated that this can and will easily happen. Such procedures if to be found in an act of this level should be spelled out.

(f) & (g) – This is again not a comprehensive list of application types to be considered and should be extended to include other types of applications such as amendments to structure plans, departures from zoning scheme regulations and consent use applications, approval/amendment of site development plans and amendment of conditions of approval.

(i) – It should be noted that there are very limited possibilities in this regard without deterring from the general quality of an application and land use consideration – also refer back to comments on **Sec 21(i)(ii)**

(y) (vii) – This should also include transfer of sections of land that will be public roads.

(z) – How can the Provincial Government now decide on appeal processes as **Sections 50 and 51** already addresses it to a certain extent?

Schedule 2

Will this list be the full and complete list of possible zoning categories? or will a municipality in their own zoning scheme, be able to have its own zoning categories or additional categories? It is regarded as being **too limited** and will provide for too wide a range of uses to be possibly accommodated therein. **It is submitted that national legislation should be overarching and not include a list of possible zoning as many years of experience with town planning schemes have shown that local circumstances should dictate this – it really deprives a municipality of its municipal planning function.** It will also result in numerous problems when existing zonings and uses which will eventually have to be converted into this limited list of possible zoning categories. This again opens the door for possible compensation claims. **It is also submitted that the inclusion of such a restricted list will make full integration with Spatial Development Frameworks impossible as there will not be sufficient opportunity to provide nearly enough supporting land use parameters for use guidelines aimed at addressing different and varying development scenarios.**

As stated in our initial comments - to prescribe **only 15 land use (zoning) categories** is not going to serve orderly town planning and does not serve **modern land uses and zonings.** This in our view should not find it way in a national bill and should be the domain of municipal planning and to a lesser extent provincial planning. This in our view is exactly the type of issue that this national bill should not concern itself with.

The very same applies for the list of definitions. For what reasons has this been put in place?

It is suggested that, if the law writer wants to keep these zoning categories and definitions in, *(perhaps for the benefit and use by municipalities and areas not covered by workable zoning schemes)* **that an option be created whereby a municipality will have the choice either to adopt these or to compile its own. It should be remembered that municipal planning is in terms of Constitution and municipal function and should not be dictated to by either national or provincial government.**

In conclusion, the national bill should give **overarching planning direction** and not concern itself with **municipal and provincial planning competencies.** It should **not go down to the detail of local decision** making, (if any it should leave it to a mayoral or similar committee). This would however lead to **centralization** and would take decision making away from **locally elected**