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Dear Mr Ogunronbi

COMMENTS ON THE REVISED SPATIAL PLANNING AND LAND USE MANAGEMENT BILL, GENERAL NOTICE 357 OF 2012

The general notice 357 of 2012 calling for comments on the revised version of the Spatial Planning and Land Use Management Bill has reference.

SALGA welcomes the opportunity to make further representations on the Bill and would like to highlight key issues that still need to be addressed in the Bill. As part of our mandate, SALGA initiated a consultation process with municipalities and other stakeholders as far back as March 2011 and has since then been involved in a series of consultative engagements on the Bill with the local government sector. The key issues that SALGA is raising in response to the revised version of the Bill (which must NOT be construed as substituting comments that were submitted by individual municipalities) are therefore matters that were identified by municipalities (and reiterated at a workshop with municipalities co-hosted by SALGA and the South African Cities Network on 16 April 2012) as requiring attention before the Bill can be passed.

The issues listed below must be read together with SALGA's previous submission on the first version of the Bill as well as the attached detailed submission from some municipalities.

1. CONSULTATION PROCESS

Given the importance and impact of this Bill on municipal planning, there should have been meaningful and parallel engagements with the local government sector in order to ensure that issues that were raised by the sector are adequately dealt with. The failure by the Department of Rural Development and Land Reform to engage with the local government sector on the key concerns that were raised in response to both versions of the Bill , makes it difficult to understand the rationale for some of the provisions in the Bill. Given that this Bill provides a framework for dealing with the legacy of apartheid development planning and will also provide a framework for the regulation of municipal planning, it is SALGA's view that the local government sector was not

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adequately consulted and no feedback was provided on why the key concerns raised were not addressed in the revised Bill.

2. LEGISLATIVE CONTEXT

2.1 Constitutional issues

The Constitutional Court ruling on the constitutional invalidity of chapters 5 and 6 of the DFA confirmed that municipal planning is an area of exclusive competence for the local government sphere. The proposed roles and functions of each sphere of government as outlined in the Bill should therefore give effect to the constitutional court ruling and find resonance throughout the Bill. The Spatial Planning and Land Use Management Bill has constitutional shortcomings in that:

- The Bill does not adequately recognize the power of municipalities to legislate on municipal planning matters. When viewed within the context of sections 41(g), 43(c) and 151(2) of the constitution, municipalities are the primary sources of legislative and executive authority in relation to local government matters set out in part B of schedule 4 and 5 and this must find resonance throughout the Bill.

- Schedule 1 of the Bill sets out a number of issues that must be dealt with in provincial legislation and in so doing purports to empower provinces to deal with municipal planning matters.

- The Bill goes beyond the power of regulating municipal planning (see schedule 1 clauses, (c), (f), (g), (i),(j), (k), (l), (m), (n), (o), (p), (q) and (r-z).

- Many of the powers of the Minister to make regulations are too broad and encroach on municipal planning functions (see clauses (e-k of the Bill). The above listed clauses therefore impede the municipality's ability or right to exercise its powers or functions as contemplated in the constitution and confirmed in the DFA constitutional court ruling.

- The attempt to outline what constitutes national and provincial interests does not go far enough to clarify the powers and functions of each sphere of government. The provisions of section 155(7) of the constitution give the power to municipalities to legislate on municipal planning matters. The powers that are purportedly being given to the provincial sphere by virtue of schedule 1 are therefore in conflict with the intention of section 155(7) of the constitution

2.2 Repeal of legislation

No additional legislation is being repealed except the Removal of Restrictions Act, the Development Facilitation and the Physical Planning Act. It is not clear as to what process is being followed to repeal other laws that were assigned to Provinces such as LEFTEA, Act 70 of 1970 the BCDA regulations. There is therefore a need to identify all the legislation that is currently used to regulate development planning at both provincial and national level, and clearly indicate what legislation will be repealed by what laws. The red tape that is caused by the requirements to obtain authorization in terms of other laws need to be reduced by introducing guidelines on how development applications should be dealt with should the relevant competent authorities in terms of the other legislation fail to issue their authorization within the stipulated time frames.

3 Interrelationship between different Spatial Development Frameworks

The proliferation of SDFs generated by various spheres of government is likely to create confusion when it comes to assessment of development applications and implementation of spatial policies. SDFs formulated by other spheres of government may potentially interfere with the municipal planning function. The MSA adequately covers the procedural and substantive issues in relation to SDFs and there is no reason provided for amplifying or purportedly reinforcing such provisions through provincial legislation. It is not clear how the Bill will ensure alignment of the Spatial Development Frameworks by the national, provincial and local governments. The introduction of Regional Spatial Development Frameworks should not facilitate the creation of another layer of planning bureaucracy without clearly articulating how this level of planning will be administered. The Bill is silent on the role of District municipalities in spatial planning.

4. LUMs DEVELOPMENT

4.1. Land Use Schemes and existing property rights

The Bill attempts to achieve an alignment between spatial planning and land use schemes (zoning/town planning schemes), which is commendable. However, not enough attention is given to the question of how to deal with existing real rights. The transitional arrangements (from old rights to new rights) that are proposed in the Bill may lead to claims for compensation against the local authorities. It is suggested that the rights remain in place for a period longer than 5 years.

4.2 Review of land use schemes

Whilst it is important to align land use schemes to SDFs, the review of land use schemes every 5 years may be too onerous and impractical. A period longer than 5 years may be necessary given the time and resource constraints associated with the review of land use schemes.

4.3 The Planning tribunal's exercise of power when considering an application may not be impeded or restricted on the ground that the value of the land or property is affected by the outcome of the application

Section 7 (1)(b) (ii) of the National Building Regulations and Building Standards Act no 103 of 1977 does not permit a building plan to be approved if the municipality is of the opinion that the building will derogate from the value of surrounding properties. It is possible that notwithstanding the intentions of the Bill, Section 7 of NBR in fact brings the issue of derogation of property values to the core of consideration of building plan approvals that may be needed post land use approvals. It is not clear whether the Bill purports to differentiate between the use of land and the erection of a building and if so what the implications of the potential conflict that may be created by the different criteria for consideration of land use applications and building plan applications.

4.4 Engineering Services

The reference to "fair and reasonable costs" in section 40(3) and 40(4) is likely to create unnecessary complications when a determination has to be made as to what constitutes fair and reasonable costs. No guidance is given with regard to how one

will arrive at the fair and reasonable costs. It is not clear as to whether this section of the SPLUMB is purporting to amend the relevant provisions of the MFMA.

The definition of internal engineering services does not cover private roads and no provision is made for possible contribution to provincial engineering services where developments have an impact on say provincial roads. Municipalities must be able to impose conditions involving all services in private developments.

It is unclear as to why clause 40(4) uses the term "development charge" as this will not include a situation where the developer is required to provide services with a capacity more than what is directly required by his or her development. No norms or standards are also provided for the calculation of such development contributions

5. LUMS IMPLEMENTATION

5.1 Municipal Planning Tribunals and their composition

There are already adequate provisions in terms of the Municipal Systems Act 32 of 2000 and Municipal structures Act 117 of 1998 that cater for decision making bodies that are flexible enough to deal with the different situations that apply to municipalities across the country. It is not necessary to prescribe decision making bodies contrary to section 160 (1)(a) of the constitution. The prescription on who may serve on the Municipal planning tribunal is very problematic especially the mandatory requirement of having a member from the private sector serving on such tribunals. The experience with the DFA has shown that this is a bad practice. There are financial implications for payment for the unwanted services of the private sector professionals. The involvement of the private sector professionals will in the eyes of communities compromise planning decisions. Municipalities must be left to exercise their own discretion on the composition and powers of their own decision making bodies. In terms of section 160 (1)(a), of the constitution, a municipal Council is empowered to make decisions concerning the exercise of all its powers (including municipal planning) and the performance of all the functions of a municipality. The prescription on how a municipality must set up a planning tribunals may be both in conflict with section 160 (1)(a) of the constitution and section 79 of the Municipal Systems Act 32 of 2000 (MSA).

It is therefore SALGA's view that the Bill goes beyond what should be contained in framework legislation by being prescriptive in a manner that erodes the powers of municipalities as provided for in terms of section 160 of the constitution and in terms of the Municipal Systems Act 32 of 2000 and Municipal structures Act 117 of 1998.

5.2. Appeals tribunals

Whilst SALGA welcomes the amendment that removed the Provincial Appeals tribunal and the introduction of an internal municipal appeal structure modeled along the lines of Section 62 of the MSA, there are however questions on the effectiveness of such an appeal body given the caveat that is provided with regards to the effect of its decisions on "rights that have already accrued". On the plain reading of the proposed appeal body, it appears as if it would be biased towards applicants only with very little recourse for objectors.

The rationale in excluding councilors from the planning tribunals and yet including them in the appeals tribunal needs explanation. Instead of being prescriptive on who can serve on the Appeals Tribunal, it is SALGA's view that municipalities must be left to set up their own appeals tribunals, provided no private sector or provincial professionals sit on such tribunals. In order to ensure that municipal planning is dealt

with by the municipal sphere of government, an inter-municipal appeals tribunal comprising of officials from different municipalities may be a viable option, especially in cases where the there are capacity challenges and the workload does not justify the setting up of an appeals tribunal in each municipality.

5.3 Development Principles, norms and standards.

There is concern on the number of opportunities available for each sphere of government to set norms, principles and standards, which all find expression in the implementation of development at the local government sphere. These norms and standards are sometimes extremely difficult to apply on a site specific development application and can potentially be the basis for protracted arguments between objectors and applicants, when assessing the desirability of a development application.

5.4. Definition of National and Provincial interests

The triggers of a development application to constitute national and provincial interests need to be clarified. Without such triggers being clarified, it will be left to the applicant or the municipality to make such a determination and follow the necessary process. Such a situation is undesirable and may be open to abuse as unscrupulous applicants can use this loophole to manipulate development applications in order to avoid appeals. Furthermore, the lack of clarity on the triggers for provincial and national interests may create an opportunity for other spheres of government to interfere in municipal planning matters.

6. IMPLEMENTATION OF THE NEW ACT

6.1. Intergovernmental support and municipal capacity

There are no innovative ways to deal with the capacity challenges being faced by some municipalities. The problem of capacity and piecemeal 'support" provided to municipalities by both national and provincial spheres of government is likely to continue. It is therefore important for the Department to conduct municipal capacity assessment and immediately kick start a process that will ensure that the necessary capacity is developed to implement the provisions of the Bill.

6.2 Intergovernmental Relations in decision making

There is a need for clarity on Section 49(5) of the Bill that provides for the Minister to either join as a party to an application of national interest or make the decision himself. The provisions of this Section may potentially create unnecessary conflict and it is suggested that where national and provincial interests (however defined) are involved, these other spheres of government only join as a party to the application and not get involved in making the decision. The fact that a development application may impact on national and provincial interests does not on its own take away the municipality's power to decide on the development application as part of municipal planning. The Bill should therefore make it clear that notwithstanding the fact that the Minister may make a decision on a development application that has an impact on national or provincial interests, the municipality is still required to make a decision on the same application on matters of municipal planning.

6.3. Transitional arrangements

SALGA is very concerned that there appears to be no arrangements that have been put in place in order to deal with development applications that were submitted in terms of the DFA and will not be finalized by 18 June 2012. Furthermore, there is also a concern on what legislation will be used by municipalities that were relying on the DFA to manage land development applications, post 18 June 2012, since it is clear that the new legislation will not be in place by 18 June 2012. In anticipation of the promulgation of the new legislation it is strongly suggested that the Bill incorporates a clause that allows development applications that were submitted/approved in terms of the DFA on or before 17 June 2012, to be deemed to have been submitted in terms of the SPLUMA and thus could be finalized in terms of the SPLUMA. Given that Chapters 5 and 6 of the DFA were ruled to be unconstitutional, we do not understand the legally basis on which the Bill can purportedly extend the functioning of development tribunals that were established in terms of the section of the DFA that were ruled to be unconstitutional. Whilst SALGA is aware that there is an application to the Constitutional Court for the extension of the validity of chapter 5 and 6 of the DFA, there is a need to ensure that the Department of Rural Development and Land Reform's response to the Constitutional Court application does not create a situation where there may be legislative vacuum or prejudice to applicants whose applications will not be finalized by 18 June 2012.

7. CONCLUSION

Whilst SALGA supports the initiative to urgently develop coherent and progressive development planning legislation, the urgency to formulate new legislation must not be done at the expense of meaningful engagement with the local government sector. SALGA would therefore want to request for an opportunity to further engage on the key issues that were previously raised by municipalities during the consultation phase on the first and second drafts of the Bill and resolve as many issues as possible before the Bill is finalized.

I trust that you find the above responses in order.

Yours sincerely

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