Western Cape Government
Environmental Affairs and Development Planning

Reference: E1/4/1

Ms Phumla Nyamza
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Dear Ms Nyamza

WESTERN CAPE GOVERNMENT COMMENTS ON THE NATIONAL SPATIAL PLANNING AND LAND USE MANAGEMENT BILL, 2012 (SPLUMB)

The draft Spatial Planning and Land Use Management Bill, 2012 ("the Bill") was approved by Cabinet for introduction to Parliament. On 29 July 2012 a Notice was published in the press inviting submissions by no later than 10 August 2012.

The attached memorandum contains the detailed comments of the Western Cape Government (WCG) on the Bill, for consideration by the Portfolio Committee on Rural Development and Land Reform.

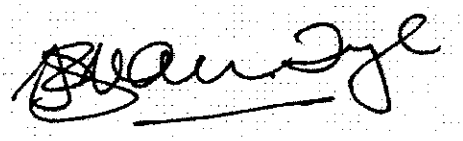
As provided for in the Notice in the press, we request that, in addition to this written submission, the WCG also be afforded an opportunity to address the Portfolio Committee on the key issues raised in this submission.

Your confirmation in this regard will be appreciated. Please correspond with my Office Manager, Ms Annelize de Villiers, to advise of further arrangements in this regard:

- E-mail Annelize.devilliers@westerncape.gov.za
- Telephone 021 – 483 8315
- Fax 021 – 483 3016

We look forward to your further advice in this regard.

Kind regards



PIET VAN ZYL
HEAD OF DEPARTMENT
DEPARTMENT OF ENVIRONMENTAL AFFAIRS AND DEVELOPMENT PLANNING
DATE: 10 August 2012

Western Cape Government
Environmental Affairs and Development Planning

Head of Department
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Ref: E1/4/1

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Dear Ms Nyamza

WESTERN CAPE GOVERNMENT COMMENTS ON THE NATIONAL SPATIAL PLANNING AND LAND USE MANAGEMENT BILL, 2012

1. INTRODUCTION AND BACKGROUND

1.1 The draft Spatial Planning and Land Use Management Bill, 2012 ("the Bill") was approved by Cabinet for introduction to Parliament. On 29 July 2012 a Notice published in the press inviting submissions by no later than 10 August 2012. This memorandum contains the detailed comments of the Western Cape Government ("WCG") on the Bill, for consideration by the Portfolio Committee on Rural Development and Land Reform.

1.2 The current version of the Bill differs in some respects from the May-2011 version ("the 2011-Bill") that was previously published for comment. In our comments we have attempted to compare the 2011-Bill with the Bill to ascertain whether the previous WCG comments on the 2011-Bill were adequately addressed.

1.3 In addition to the comparison with the 2011-Bill, we compare the Bill also with the current version of the draft Western Cape Land Use Planning Bill (LUPA). We include proposals to facilitate alignment between the two Bills and also include other comments for consideration by the Department of Rural Development and Land Reform. It is submitted that the parallel legislative processes surrounding LUPA

and the Bill provide an opportunity to align the proposed planning legislation and to clarify the interface of concurrent land use planning functions in order to ensure a coordinated and efficient land use planning system.

1.4 Whilst it is acknowledged that the process of drafting the SLUMB adhered to legal minimum criteria for public participation, the WCG is of the opinion that not enough consultation was afforded and as a result various issues remain unresolved, as this memorandum highlights in detail.

1.5 In addition to this submission we therefore request that the WCG be afforded an opportunity to address the Portfolio Committee to discuss the issues raised in the submission.

2. GENERAL COMMENT

2.1 The WCG recently engaged with the National Planning Commission (NPC) and presented our comments on the draft National Development Plan (NDP). The WCG is generally in agreement with the policy direction and approach adopted by the NPC. We strongly suggest that in the process of formulating a new enabling framework for spatial planning and land use management in South Africa, your Department and the Bill should take its cue from the goals and principles of the NDP and ensure that a unified and effective new planning system is established in the country.

2.2 The Bill should provide clearer guidance on how the different sectoral approvals for land development should be approached and be dealt with. The jurisdiction and role of the national government in the process of land use applications should be more clearly defined. The Bill does not provide sufficient guidance on the distinction between provincial and local government functions in respect of land use management. Clause 21(g) of the Bill is inadequate in terms of its reference/guidance to inform forward planning related to planned location of future economic and employment opportunities in pursuit of identified priority sectors[1].

2.3 The roles and responsibilities of preparing the NSDF between the Department of Rural Development and Land Reform and the National Planning Commission must be stated clearly in the Bill. There are also other national sector departments that have a key role to play in this regard. Sector departments such as Economic Development, the Department of Trade and Industry, the Department of Environmental Affairs, The Department of Public Enterprises, the Department of Mineral Resources and the Department of Energy, the Department of Agriculture, the Department of Human Settlements, the Department of Water Affairs and the Department of Cooperative Government are some of the key departments that are vital in this process.

[1] Comment by the Provincial Department of Economic Development dated May 2012.

2.4 The Bill should constitute 'framework legislation' and should therefore provide a framework for and guidance on:

2.4.1 Transformational and inclusionary norms, standards and policy directives to govern all planning and development related decision-making, showing strong alignment with, for example, the NDP;

2.4.2 Alignment with other relevant legislation at national level, for instance the Local Government: Municipal Systems Act, 2000 (Act 32 of 2000), ("the Systems Act"), as referred to in more detail below, to ensure that there are no conflicting or contradictory provisions which will lead to costly litigation and extended legal battles. It is also necessary for the Bill to be specific about transitional measures to be put in place to facilitate a differentiated approach, and to also provide for corrective measures to ensure implementation in the manner and within the timeframes envisaged in the Act, once the Bill is enacted;

2.4.3 Structures, systems and institutions to be put in place to give effect to the transformation to a uniform new approach to govern spatial planning, land use management and development in South Africa to achieve relevant international and national outcomes so desperately needed by our communities in the country;

2.4.4 Transitional arrangements taking full account of the need for a differentiated approach that acknowledges differing capacities and resource constraints that exists between the different types of municipalities firstly, but secondly, between lower capacity municipalities vs. higher capacity municipalities. Although this matter is addressed, to an extent in clause 11, clear indication has to be given in the framework on how to deal with Category C Municipalities, and then, what criteria will be used to exercise, for instance, the discretion that is allowed in terms of clause 22(2);

2.5.5 It is of paramount importance to provide clear guidance on the balance between what constitutes municipal planning and what the powers and functions of not only provincial authorities are, but also on what national government's interests are in exercising national powers that impact on land use, also at the provincial and municipal levels;

2.5.6 Minimum standards to promote greater consistency and uniformity in application procedures and decision-making structures. It is again of paramount importance that the Bill is tested against its Constitutional alignment to avoid litigation and/or later legal challenges that are not only costly, but also unnecessary; and

2.5.7 Lastly, the Bill is not progressive enough to create an enabling environment to ensure speedy, but sustainable planning and development related decision making. In this regard, no provision is made in the Bill for transversal resolution of matters within the context of inter-governmental relations.

2.6 It is proposed that clause 7 of chapter 2 of the Bill should take a cue from the principles of the Development Facilitation Act, 1995 (Act 67 of 1995). The intent and spirit of those principles remain sound and applicable to land use management and spatial planning in South Africa. Slight amendments and sophistication may go

a long way to make this clause more meaningful and have greater impact. Clause 7 of the Bill does not take into account some of the latest issues and factors affecting agricultural development in South Africa and globally. The narrow perspective set out in this clause may derail the alternative utilization of agricultural land in South Africa. The NDP contains the latest dynamics in this regard.

3. INFRINGEMENT OF FUNCTIONAL AREAS OF PROVINCIAL AND MUNICIPAL LEGISLATIVE COMPETENCE

3.1 The most troubling aspect of the 2011-Bill was the infringement of functional areas of provincial and municipal legislative competence. The 2011-Bill provided that the MEC may not introduce norms and standards inconsistent to those provided for by the Bill. This provision has been deleted. The deletion of this provision does not in our view prevent a province from providing provincial norms and standards in provincial legislation that are consistent with national norms in accordance with the criteria set out in clause 44(2) of the Constitution of the Republic of South Africa, 1996.

3.2 The 2011-Bill and the current Bill provides in detail for the content of municipal spatial development frameworks. The previous comments relating to the over-regulation of and micro-management of municipal executive authority has not been addressed and the comments in paragraph 8.10.6 of our previous comments are still relevant, namely that the Constitutional Court (in the First certification judgment) has indicated that the term "regulate" refers to "broad managing or controlling" provisions. The aim of such regulation should be to foster the autonomy of local government. Some of the provisions in the Bill overstep this limitation and may in our view impede and compromise the exercise by municipalities of their Constitutional functions. In our view the limitation is overstepped by for instance requiring that partnerships should be specified in the implementation process, the inclusion of budgets and resources for implementation and institutional arrangements. National legislation may not micro-manage municipal planning. The national legislation should provide an enabling framework for provincial and municipal planning functions that can be dealt with more appropriately on municipal and provincial levels.

3.3 The Bill further also prescribes in clause 15(6)(b) that comments on provincial spatial development frameworks must be submitted within 60 days of publication. It is suggested that the national legislation should prescribe minimum standards and should not micro-manage provincial planning matters. The Bill should set a minimum period for publication and should not prescribe a mandatory fixed time period.

4. DEFINITION OF MUNICIPAL PLANNING

4.1 The definition of municipal planning is still the same as provided for in the 2011-Bill. The Bill provides for municipal planning to include the approval of a municipal spatial development framework. The definition also includes the control and regulation of the use of land within the municipal area where the nature, scale and intensity of the land use does not affect the provincial planning mandate of the

provincial government or the national interest. The previous comments which suggested that the national legislation should provide for an integrated municipal and provincial spatial development framework have not been incorporated in the Bill. The Bill retains provisions providing for separate spatial development frameworks for the three spheres of government.

4.2 The exclusion of municipal control over land use in the municipal area that affects the national or provincial interest may be found to be inconsistent with the Constitution. The Bill should allow for an overlap of functions and for each sphere of government to exercise executive authority in respect of its respective functions in an overlapping area. Refer to the more detailed comments in this regard as set out in paragraph 16.

4.3 Clause 21(3) is an addition in the Bill and provides for a Premier to take steps to support the revision of spatial development frameworks to ensure consistency where a provincial spatial development framework is inconsistent with a municipal spatial development framework. It is submitted that this provision leaves scope for provincial legislation to provide for measures and procedures to ensure alignment between spatial development frameworks. Refer however to our comments hereunder on conflict resolution in relation to spatial development frameworks at the different spheres of government.

5. DEFINITION OF PROVINCIAL PLANNING

5.1 Clause 40(1)(b) of the 2011-Bill expressly recognised provincial development management functions in relation to development applications that are of such a nature and scale that it affects the provincial interest.

5.2 The Bill no longer expressly recognises provincial development management functions. One can argue that the Bill also does not prohibit such functions. Clause 10 of the Bill recognises that provincial legislation may deal with provincial matters and matters not specifically mentioned in the Bill. Clause 22 also recognises authorities mandated to make land development decisions in terms of other legislation dealing with land development. Clause 5(1)(c) further limits the regulation and control of land use by a municipality to land use that does not affect the provincial planning mandate. (Refer to the further comments in paragraph 16).

5.3 It will however provide clarity and certainty with regard to the definition of provincial land use planning competencies, if the Bill expressly recognises provincial functions in respect of development management applications that affect the provincial interest, similar to the provisions in clause 52 of the Bill that regulates development applications affecting national interests. (Refer to our comments hereunder on the difficulties with clause 52).

6. REGIONAL SPATIAL DEVELOPMENT FRAMEWORK

6.1 The Bill defines a region as an area with distinctive features 'which may or may not correspond to the administrative boundary of a province or provinces or a municipality or municipalities'. It may be declared if a municipality fails to timeously

adopt or review its municipal spatial development framework (MSDF) or if necessary to give effect to 'national land use policies or priorities'. Importantly, the Bill's concept of a region could fall squarely within the boundaries of a province if it is based on 'national land use policies or priorities'.

6.2 The current version of LUPA defines a region as an 'area, consisting of the areas, or parts thereof, of more than one municipality' (clause 1). It provides that the MEC responsible for planning may declare a region and adopt a Regional Spatial Development Framework (RSDF) for it. Importantly, the current version of LUPA contemplates that a region always crosses a (local or district) municipal boundary.

6.3 This means that the Bill and LUPA both establish 'regions' and subsequent regional spatial development frameworks but with different purposes in mind. LUPA's RSDF is aimed at ensuring that provincial interests are addressed in a SDF covering an area that encompasses more than one municipality but doesn't cross a provincial boundary. The Bill's RSDF is aimed at ensuring that national interests are safeguarded. It is also aimed at addressing municipal failures to adopt or timeously review MSDFs (see below). There are a number of concerns that should be raised in connection with the above scheme.

6.4 It is proposed that the Minister may only declare a geographical area as a region IN consultation with the Premier. In clause 18(4) (b) the Minister must give notice and invite the public for written representations in respect of the determination of an RSDF. Although provision is made for the provinces to be consulted on the declaration of a region, no provision is made for the provinces to be consulted on the content of a RSDF. Furthermore, the activities mentioned in clauses 18(3)(a) to (b) should rather be part of provincial and municipal planning and not be dealt with by the national government.

6.5 **Risk of proliferation and confusion.** There is the general risk of a proliferation of plans and confusion in the planning sector surrounding the term 'region'. If both LUPA and the Bill would be passed with their current definitions of regions, two different concepts of a region would have to exist side by side. It is suggested that the terminology be adapted to clearly distinguish between the two concepts.

6.7 **Criteria for declaring a region.** In terms of clause 18, a region can be declared by the Minister when necessary to give effect to 'national land use policies or priorities'. It is not disputed that national government has the constitutional competence to declare and plan for regions and also that a nationally declared region may even fall within the boundaries of a province. However, it is suggested that the reference to 'national land use policies or priorities' is too broadly formulated. It requires a more narrow definition, particularly in the event of a region being declared within a province.

6.8 Provinces have the constitutional authority to declare and plan for regions within their jurisdiction as part of their competence on 'regional planning and development' (Schedule 4B). Therefore, the framework for a national declaration of a region inside a province would have to pass muster in terms of the criteria set out in clause 146 of the Constitution. The criteria in clause 146 are considerably narrower than what appears in clause 18(3) of the Bill. This could be interpreted to

mean that clause 18(3) seeks to go beyond what a court would consider to be a permitted national override over provincial legislation on Schedule 4B.

6.9 **Objective of a region.** This objective of declaring a region to deal with municipal failures surrounding the adoption of MSDFs is inconsistent with the definition of a region in clause 1 of the Bill, which suggests that a region will be declared as such, based on 'distinctive economic, social or natural features'. Clause 18, on the other hand, suggests that a region will be declared as such, not on the basis of distinctive economic, social or natural features but on the basis of the performance of the municipalities in it.

6.10 **When does a municipality fail to adopt or review its MSDF?** LUPA insists that municipalities review their MSDFs at least once every 10 years. The Bill, on the other hand, insists on a review every five years. The consequence of this, in light of the above framework surrounding the declaration of regions, is that there may be confusion as to when a municipality has failed to timeously adopt or review its MSDF. A strict legal interpretation will solve this. The municipality will have to adhere to the strictest law of the two and after five years, it will fall foul of the Bill and possibly trigger the declaration of a region. However, it is submitted that the parallel legislative processes surrounding LUPA and the Bill provide an opportunity to align the legislation on this issue in order to avoid the need for the above, somewhat constructed, interpretation. Our submission is that 10-yearly reviews would be a more practical arrangement, mindful of the typical time and cost implications of an MSDF review process.

7. LAND USE SCHEME

7.1 The Bill's definition of a land use scheme refers to Chapter 5 of the Bill. A number of difficulties with regard to the alignment between LUPA and the Bill arise upon a close examination of the provisions surrounding the land use scheme.

7.2 **Land use scheme / zoning scheme.** LUPA is premised on a distinction between 'permitted use' and (actual) 'use', whereby 'zoning' indicates the permitted use and actual use is no more than a practical physical reality. Consequently, a rezoning refers to a change in the 'permitted use'. The term 'land use scheme' therefore does not align well with the generally accepted planning practice in the planning profession and in land use management in South Africa. It is furthermore suggested that it does not align well with sections 8(1)(a) and (b) of the Municipal Property Rates Act, 2004 (Act 6 of 2004) which also distinguishes between 'permitted use' and 'use' as mechanisms for differentiating between properties for the purposes of municipal property rating. If the concept of a land use scheme is retained, it is suggested that more effort is made to ensure that the definition of a 'land use scheme' in clause 1 and the terminology in Chapter 5 are adapted to ensure that it is clear that the concept of a 'land use scheme' includes a 'zoning scheme'.

7.3 **Amendment of a land use scheme.** Following from the above, the concept of the 'amendment of a land use scheme' in clause 28 of the Bill would, in the terminology of LUPA and the established practice in the Western Cape, be referred

to as a 'rezoning'. This difference between LUPA and the Bill actually goes beyond a mere difference in terminology. The phrase 'amend its land use scheme *by rezoning*' in clause 28 of the Bill does not address the possible confusion of the two terms but rather aggravates it. For the reasons referred to below, it is contended that the Bill does not adequately address the changing nature of the 'land use/zoning scheme' that results from the Constitution inserting it into the municipal realm.

7.4 The authority to adopt zoning/land use schemes has traditionally been reserved for provincial governments who may or may not have authorised municipalities to do so. The transformation of the old concept of a 'land use/zoning scheme', adopted by the provincial executive into a new concept of a 'land use/zoning scheme' adopted by a municipality as proposed by the Bill has a number of important consequences. One of those consequences is that the nature of 'scheme regulations' (referred to in clause 25 of the Bill) becomes critically important. The instrument of the 'scheme regulations' contains law of general application. In municipal terms, law of general application may only be expressed in a by-law. It is not clear whether clause 28(1), when it refers to the 'amendment of a land use scheme', refers to a rezoning or to the amendment of a municipal by-law containing what is now called scheme regulations. This confusion touches on the fundamental nature of municipal law making surrounding municipal planning and should be addressed.

7.5 **Amendment of a land use scheme in terms of clause 26(5).** Clause 26(5) of the Bill restricts the authority of a municipality to amend its land use scheme on the basis of a number of criteria. There are two concerns with this provision. Firstly, the quality of the provision would be enhanced if it clarified what is meant by 'amendment of the land use scheme'. The amendment could relate to the scheme regulations, the zoning map or to the register. Secondly, it would be appropriate to clarify whether clause 26(5) refers to the amendment at the initiative of an applicant or on the municipality's own initiative.

7.6 If it refers to the amendment of the zoning map on the municipality's own initiative, would a conflict arise with the WCG suggested approach of allowing municipalities to rezone on their own initiative for 'public purposes', subject to public participation. The further limitations of clause 26(5) would contradict the policy intention that the provincial government seeks to express in LUPA and, it is submitted, are not of sufficient gravity that they require a national override over provincial lawmaking on 'municipal planning'.

7.7 **Districts assisting in preparing land use schemes.** Clause 24(4) of the Bill provides that local municipalities in a district may by agreement request the district municipality to prepare a land use scheme covering the municipal areas of the constituent local municipalities in that district. It is suggested to clarify the mechanism envisaged by the phrase "by agreement request" as it may not be clear where that agreement is located. Is it an agreement between each local municipality and the district, between a local municipality and a district or an agreement among all or some of the local municipalities? In addition, if the intention of this provision is to permit district municipalities to assist local municipalities in the preparation (not adoption) of land use schemes, it may be

appropriate to revisit the reference to a (single) 'land use scheme covering the municipal areas of the constituent local municipalities within that district municipality'. It is submitted that the objective of this provision is best expressed by a mechanism where a local municipality may request its district municipality for assistance in the preparation of a land use scheme for the area of that local municipality.

7.8 **Review cycle.** The Bill insists on a five yearly review of land use schemes. Again, it is suggested to replace the general reference to a land use scheme with a more nuanced reference as the land use scheme comprises of regulations, a map and a register. A 'review' of the map or the register would not serve any purpose and the review of the regulations would amount to a review of a municipal by-law.

7.9 The current version of LUPA compels municipalities to review their zoning scheme by-laws every 10 years. The same argument as made with regard to the other review cycle issues, applies. Strictly speaking, there is no legal conflict. However, the provincial policy decision to strive towards stable zoning scheme by-laws by providing for a compulsory 10 yearly review is undercut by a national insistence on a five-yearly review. The question is whether the compulsory review period for land use/zoning scheme is an issue that warrants a national override of provincial legislation in terms of clause 146 of the Constitution. Municipalities may also not have the capacity and resources to do more frequent 5-yearly reviews. (Refer to the earlier comments on the review cycle for SDFs which are also applicable here)

8. MONITORING OF MUNICIPALITIES

8.1 The 2011-Bill disregarded the provinces' role to monitor municipalities. The Bill now provides for the monitoring of compliance with the Bill and provincial legislation, in the preparation, approval, review and implementation of municipal spatial development frameworks and the land use management system, as part of provincial planning (clause 5(2)(b)). The Bill also provides for the Premier to provide measures to resolve inconsistencies between the provincial and municipal spatial development frameworks. Clause 27(3) also provides for a municipality to submit its land use scheme to a Premier for the monitoring of performance as prescribed or in terms of provincial legislation. It is submitted that the Bill recognises the role of provinces in this regard. This provision should however not restrict provinces from providing more detailed measures regarding provincial planning and the monitoring of municipalities in provincial legislation. It is suggested that the Bill should recognize provincial monitoring of the preparation of a land use scheme even before it is approved.

8.2 Furthermore, in a number of places, the Bill provides for a monitoring role of the national Minister. For example, clause 9(1)(b) of the Bill provides that the Minister must monitor progress made by municipalities with the adoption and amendment of land use schemes.

8.3 Firstly, it is difficult to conceptualize 'progress made with the amendment of land use schemes' if the amendment of a land use scheme includes (at least in part) the

amendment of permitted uses on application. It is suggested that the reference should be to adoption and review, rather than amendment.

8.4 Secondly, as mentioned above, the Bill also recognises and regulates the monitoring role of the provincial government. There is no constitutional objection against the existence of concurrent monitoring roles of both national and provincial governments. It is not possible or desirable to establish a watertight division of monitoring roles between the two spheres of government. However, it is suggested that the Bill could do more to clarify the interface between the two monitoring roles. For example, while the Bill envisages provincial governments to regulate the review of land use schemes (item (c) Sch 1), it *compels* the Minister to monitor the progress made by municipalities on that issue. In other words, even if a provincial government establishes an adequate system for monitoring municipal progress surrounding the adoption and review of land use/zoning schemes, the Minister will be forced by the Act to do the same.

8.5 It is recommended that the scheme for national monitoring of municipalities should follow the configuration used in clause 139 of the Constitution and in the Systems Act. This scheme is based on the principle that the national government, where possible, supervises municipalities through provincial governments and that it leapfrogs the provincial governments only in the event that a provincial government fails to adequately monitor local government.

8.6 For example, clause 9(1)(b) could allude to a general reliance on information gathered by the relevant provinces.

9. CONFLICT RESOLUTION SURROUNDING MSDFS AND LAND USE/ZONING SCHEMES

9.1 The Bill provides for both national and provincial roles with regard to the resolution of conflicts. Clause 9(3) of the Bill provides that the Minister may determine procedures to resolve and prevent conflicts between and within spheres. Clause 10(3) provides that the Premier may facilitate the coordination and alignment of land use management systems of municipalities with the programmes of national and provincial organs of state. Item (2a) of Schedule 1 provides that provincial legislation may provide for dispute resolution measures relating to any matter prescribed in the Bill.

9.2 Should the Minister, in exercising his or her authority with regard to this conflict resolution not defer to mechanisms that have been provided in terms of provincial law? For example, the current version of LUPA provides for conflict resolution between district and local SDFs. Should the Bill not permit that mechanism to be used and provide for conflict resolution only in the absence of provincially regulated mechanisms?

9.3 A similar concern arises with regard to the conflict resolution mechanisms in LUPA for inconsistencies between MSDFs and PSDFs. LUPA relies on the conflict resolution mechanism provided for in section 33 of the Systems Act and adds the advice of a provincial Land Use Planning Board to the Systems Act procedure. It is not clear whether the Bill will recognise this as the primary dispute resolution mechanism in

the Western Cape or whether the Province should look forward to the Minister regulating additional or different mechanisms.

9.4 In connection with conflicts between municipal land use/zoning schemes and provincial interests, LUPA also provides for a conflict resolution mechanism. This is based on an instruction on the municipality to share its draft zoning scheme with the provincial government before adoption and allow for provincial comments and possibly the advice of the Provincial Land Use Planning Board before adoption.

9.5 This is now contradicted by the Bill in that the Minister may determine dispute resolution procedures and more specifically by clause 27(3) of the Bill which provides that the municipality must submit the zoning scheme to the Premier *after approval*.

9.6 It is suggested that the Minister be compelled or at least encouraged to defer to dispute resolution procedures that may exist in terms of provincial law and only prescribe them if there is a vacuum or a manifestly inadequate provincial system. It is also suggested that the intergovernmental consultation as envisaged in clause 27(3) of the Bill be left to provincial legislation to regulate.

9.7 It is not sure how a land use scheme can be consistent with AND give effect to a MSDF. These clauses make a SDF and a zoning scheme one document.

10 DELEGATION TO THE MECs

10.1 The Bill generally expects the Premier to exercise the executive authority of the provincial government. The current version of LUPA places much of the executive authority surrounding planning matters with the MEC responsible for development planning. In principle, there is no contradiction as the Premier may delegate his or her authority to a member of the executive council.

10.2 However, clause 56 would benefit from an improvement in this respect. It is recommended that clause 56 of the Bill recognises the authority of the Premier to delegate matters, not only to officials, but also to members of the provincial executive council.

10.3 **Identification of matters of provincial interests.** In clause 10(4), the Bill envisages the Premier to identify matters of provincial interest. The position taken by the Western Cape in LUPA is that the definition of provincial interest should be dealt with in legislation and should not be delegated to the provincial executive. In this respect, it would be appropriate for the Bill not to force provincial governments to regard the identification of matters of provincial interest as an executive matter.

10.4 **Remedial measures.** Clause 10(1)(c) of the Bill empowers provincial governments to provide, in provincial law, for 'remedial measures' to address municipal failures. It may be appropriate for the Bill to further define what is meant with 'remedial measures' and how these measures compare with the appropriate measures provided for in clause 139 of the Constitution.

10.5 This is important for the development of LUPA in the Western Cape. The current version of LUPA does not provide for any authority on the part of the provincial government to executively intervene in the municipal performance of municipal planning functions. This is based on the argument that executive interference in municipalities is regulated by clause 139 of the Constitution.

11. NATIONAL SPATIAL DEVELOPMENT FRAMEWORK

11.1 The content of the NSDF will have profound implications for provincial governments and municipalities and they will become the most important stakeholders in realising the NSDF. It is suggested that the procedure for preparation and adoption of the NSDF, currently provided for in the Bill, does not adequately reflect this reality.

11.2 The clearest indication of intergovernmental consultation can be found in clause 13(1), where the Bill provides that the Minister will compile and publish the NSDF 'after consultation with other organs of state'. There are implicit references to intergovernmental consultation in clauses 13(3) and (4) but it is difficult to see provincial governments and municipalities as anything other than members of the public who may comment on the published draft. It is suggested that a more explicit role for provincial governments and municipalities during the compilation of the NSDF would be appropriate.

11.3 With the development of the NSDF it is required of the Minister to give notice and invite written representations. This method of consultation does not "include transparent processes" as required in terms of Clause 7(e)(iv). It is proposed that a committee be established where relevant experience can be filtered into the process.

12. PROVINCIAL SPATIAL DEVELOPMENT FRAMEWORK

12.1 **PSDF conferring rights.** The current version of LUPA establishes the principle that the PSDF cannot confer rights to use or develop land. The current text of clause 17(3) of the Bill establishes the same principle but does suggest that there are exceptions to that. In other words, there are instances where the PSDF confers rights to use or develop land. While the intention of the latter part of clause 17(3) could have been to refer to the conferral of rights to use or develop land by a municipal land use/zoning scheme, it is recommended that this does not need to be addressed in clause 17(3). It is recommended to delete the latter part of clause 17(3) starting with "except....land use scheme".

12.2 **Review cycle of the PSDF.** LUPA requires the PSDF to be reviewed at least every 10 years. The Bill requires the PSDF to be reviewed every 5 years.

12.3 It can be argued that there is no immediate conflict as the provincial executive will have to adhere to the stricter of the two rules and is therefore able to comply with both. However, it goes without saying that the implementation of a provincial policy decision with regard to 'provincial planning', namely the decision to post the PSDF as a document containing a long term spatial vision of at least 10 years, is

undercut by a national insistence on a five-yearly review. While the long term vision and the five-yearly review are not mutually exclusive, the practical effect of a compulsory five-year review will be that the horizon of the PSDF will coincide with the next elections.

12.4 The rationale behind the 10 year compulsory review of LUPA has been that, if a new incoming provincial government wishes to review the PSDF before the compulsory review is due; there is nothing that prohibits them from doing so. However, the law should not compel an incoming government from revisiting the PSDF. A further argument against a five-yearly review is the fact that a rigorous review will take at least two years. Against the backdrop of a legal compulsion to repeat this every five years, the Bill will propel PSDFs into a permanent status of review and they may thus lose their meaning as the permanent lodestar for planning in the province. No provision is made for transitional measures, should a province not have an approved PSDF within 5 years of the Act being enacted. It is proposed that the period of 5 years be extended to 10 years for various reasons advanced above.

12.5 Clause 15(3) requires a PSDF to be aligned with "the plans and policies and development strategies of municipalities". How does a province align with plans on municipal level?

12.6 Clause 15(1)(d) provides for a PSDF to include "a framework for coordinating MSDFs". It should be noted that there is not a similar provision in the content of a NSDF. It would be very difficult for the PSDF to achieve coordination of MSDFs and any RSDFs as these documents are compiled by different spheres of government and especially where RSDFs cross provincial boundaries. Also refer to par. 11.2 and 11.3.

13. DEPARTURE FROM A MSDF

13.1 Both LUPA and the Bill establish the principle that a MSDF binds the municipality in its decision making. However, the procedures for departure from the MSDF envisaged in the two draft laws differ fundamentally.

13.2 Firstly, LUPA refers to the deviation from the MSDF as an amendment of the MSDF, which can be applied for. The Bill, on the other hand, does not envisage a procedure for the deviation of the MSDF. If this means that the Bill leaves it to provincial governments to further regulate this matter, it is suggested that clause 22(2) would benefit from a reference to the fact that there may be a procedure provided for in provincial law.

13.3 Furthermore, it is suggested that the criteria for departure from an MSDF should be left to provincial governments to regulate. The current version of LUPA codifies the 'conformity principle' which has been practiced for a considerable time in the Western Cape to ensure conformity between planning and development management.

13.4 In short, it provides that a land use application is, or can be made to conform to the applicable plan: a) If the designation on the applicable SDF specifically

provides for the proposed development; b) If the proposed development is not specifically provided for but nevertheless consistent with the relevant designation on the applicable SDF; or c) If the applicable SDF is amended to facilitate the envisaged development.

13.5 The implementation of this scheme in LUPA would benefit greatly from a national law that defers the issue of departures from MSDFs to provincial legislation where there is such legislation.

14. NEED TO AMEND THE MUNICIPAL SYSTEMS ACT

14.1 An issue of even greater concern for the provincial government is the absence of provisions that amend the Systems Act and the Municipal Planning and Performance Management Regulations promulgated in terms of this Act. The Bill is in some respects inconsistent with the Systems Act. It is submitted that a system of 'plan-led' development, the importance of which was recently underscored by the National Planning Commission in its draft NDP, cannot be effectively realised under the regime of the Systems Act. The Systems Act presents the MSDF as a component of the Integrated Development Plan and therefore subjects the amendment of the SDF to the same routine as the amendment of the IDP. This seriously impedes any effort to fashion a system whereby amendment of the MSDF becomes part and parcel of decision making in land use applications. It is currently impossible to position the MSDF as a spatial plan from which a municipality may only deviate in specified circumstances and in terms of a transparent procedure.

14.2 The Local Government: Municipal Planning and Performance Management Regulations, 2001 contain contents of what a MSDF should entail. The current Bill does not make reference to the said regulations. This silence may cause confusion in municipalities and lead to costly legal battles in the future should there be demonstrable contradictions if the Bill is promulgated in its current form. A typical example in this regard is regulation 4(a) of the Regulations, wherein reference is made to the development principles of the Development Facilitation Act that should form part of the MSDF.

14.3 Furthermore the Systems Act compels a municipality to review its MSDF annually, which contradicts the aspiration in SPLUMB (and LUPA) of establishing the MSDF as a document with a long term spatial vision, preferably for 10 years.

14.4 It is suggested that the Bill should address the submerging of the MSDF under the banner of broad municipal strategic planning by amending the relevant provisions of the Systems Act. In the absence of those amendments, the MSDF will never outgrow its status as a policy document of little consequence, a status that it is currently forced to share with the IDP. Chapter 4 of the Bill needs to be rationalized and aligned with the Systems Act, especially parts A to D.

15. MUNICIPAL PLANNING TRIBUNALS

15.1 The Bill instructs municipalities to establish municipal planning tribunals. Municipalities may object from the point of view of interference in a municipality's internal organisation and interference with the executive authority of the municipal

council. For the provincial government, it is a particular point of concern that, should this scheme go ahead, the Premier will be tasked, by clause 37(3) of the Bill, to appoint these tribunals where municipalities fail to do so. Against the backdrop of clause 160 of the Constitution, there are serious doubts whether the provincial government is constitutionally permitted to take the executive decision to populate a municipal structure with individuals of his or her choice and to determine the terms and conditions of their appointment. It is submitted that such provincial executive interference in a municipality is permitted only within the parameters set by section 139 of the Constitution.

15.2 The notion of municipal planning tribunals appears at first glance to be a step in the right direction so as to ensure that a coordinated approach is adopted to deal with certain planning applications. However, the concern with this specific issue relates to the real challenge of capacity constraints which are currently experienced by municipalities across the country. The possibility that the functioning of such municipal planning tribunals may be compromised due to resource challenges is thus a very real possibility. The possible direct implication of this situation is that a legislative provision aimed at reducing procedures and time periods (red tape) may end up having the opposite effect and in fact contribute to further red tape. It must also be noted that the capacity constraints at some municipalities could result in the extremely important functions of the planning tribunal being performed by unqualified personnel or by already overburdened municipal staff. This will furthermore compromise the noble intentions of this provision and could lead to numerous planning disputes and appeals which will only serve to extend the time taken to dispose of applications.

15.3 It is suggested that the names of the Municipal Planning Tribunals be amended to *"Municipal Land Use Planning Tribunals"*.

15.4 Funding for municipal planning tribunals is a concern. This issue is not addressed in the Bill. If all municipalities are required to have municipal tribunals, South Africa would need skilled persons to be available to serve on the tribunals. This is a challenge. Currently Provinces such as Kwa-Zulu Natal are experiencing difficulties in obtaining qualified persons with the appropriate expertise and knowledge to serve on the provincial tribunals. It is noted that some of these members can be shared and that some of them can serve in more than one municipality. This solution results in other challenges in respect of the workload of the members of the tribunals etc. Professional planning skills are acknowledged to be scarce skills in South Africa, which means this capacity is very limited nationwide. The implementation of these provisions relating to the establishment of tribunals may therefore be problematic in the future.

15.5 Mixed responses to the concept of Municipal (Land Use) Planning Tribunals have been received from municipalities in the Western Cape. There is some positive feedback, but also a great deal of skepticism particularly with respect to the cost and possible red tape that might result from these bodies. The WCG is very cautious about procedures that might slow processes down or create extra procedures for developers to comply with. We urge the Department of Rural Development and Land Reform to engage further with the WCG in this regard, as we develop our own review system in LUPA.

15.6 The relationship between the term of office of local government and that of the municipal tribunals requires further thought, especially in cases where the term of the municipal council is not in sync with that of the municipal tribunal.

15.7 Despite the attempt in the Bill to depoliticize the appointment of the municipal tribunals and the operations thereof, this structure remains vulnerable to political manipulation and abuse. If this proposal remains in the Bill, more stringent measures need to be introduced to ensure that there is no political interference with the tribunal in any form.

15.8 It is not clear from the Bill how the tribunals will be held accountable for the decisions they make on land use applications as suggested in clause 40(9). It is critical to clarify this measure because it has implications for a municipality's ability to implement its powers and functions relating to municipal planning.

15.9 The establishment and composition of municipal planning tribunals are problematic in their entirety. There are no minimum qualifications specified, nor are procedures specified which will govern the general conduct of the proposed planning tribunals.

16 DEVELOPMENT APPLICATIONS

16.1 **National/provincial decision making authority.** Clause 5(1)(c) of the Bill makes an exception to the authority of a municipality to control and regulate the use of land. This exception applies 'where the nature, scale and intensity of the land use affect[s] the provincial planning mandate of provincial government or the national interest'(sic).

16.2 Firstly, while clause 5(1)(c) suggests the existence of a category of matters where the provincial government has the authority to *control* land use, this idea is not followed through in the definition of provincial planning in clause 5(2) where the provincial planning authority is limited to the adoption of a PSDF, monitoring municipalities, planning its own powers and regulating. It is suggested that clause 5(2) be expanded by recognising the existence of a category of matters in respect of which the provincial government has the authority to *control* land use.

16.3 Secondly, the manner in which clause 5(1)(c) is worded suggests that municipal authority to control and regulate land use *does not exist* when the abovementioned exception applies. In other words, when control and regulation of land use affects provincial planning or the national interest, *there no longer is municipal authority* to control and regulate. WCG would suggest that this is contrary to what the Constitution provides and does not align with the Constitutional Court's judgment in the matter of *Maccsand (Pty) Ltd v City of Cape Town and Others (CCT 103/11) [2012] ZACC 7 (12 April 2012)*. The gist of that judgment is that the exercise of national competence (with regard to mining) does not displace municipal competence (with regard to 'municipal planning'). The holder of a mining permit also requires a municipal land use approval before being permitted to proceed with the mining activity. It is suggested that the same principle must apply to the convergence of other national competencies and

'municipal planning 'and to the convergence of 'provincial planning' and 'municipal planning'. In other words, the national or provincial authority to control and regulate the use of land exists *alongside*, not instead of, the municipal authority to control and regulate the use of land.

16.4 The ambit of national interest as set out in clause 52 of the Bill has not been amended. Previous comments on this provision have not been addressed. Refer to paragraph 5.5.1 to 5.5.6 of the 2011 WCG comments and the concerns raised there, which are still relevant, namely, that the criteria to determine material impact of the national interest are likely to lead to widespread confusion. The interpretation of these criteria will play itself out not only in the 'intergovernmental arena', but every interested party in a specific land use application may challenge the municipality or the Minister on the interpretation of these criteria. Firstly, the manner in which the Bill uses the concept 'matters within the functional area of the national sphere' is incorrect. National government shares functional areas of responsibility with provincial government in Schedule 4 of the Constitution. Matters such as the environment, agriculture and housing are examples of that. However, national government also has exclusive powers (e.g. control and regulation of mineral extraction). Clause 53(1)(a) and (c) suggests that all development applications that materially impact on, for example, housing, agriculture and the environment must be referred to the Minister. There is no provision for provincial decision-making, even though the Constitution provides that legislative authority with regard to these matters is shared by national and provincial government. Clause 52(2) also establishes national jurisdiction where the outcome of a land use application may be prejudicial to the economic, health or security interests of one or more provinces or the country as a whole or impede the effective performance by one or more municipalities or provinces of the functions in respect of matters within their functional areas of legislative competence. The first of the above criteria may be sensible, as any such impact on more than one province or the country as a whole could indeed justify national jurisdiction. However, the economic, health or security interests of a specific province are first and foremost the responsibility of that province itself. It is not valid that impact on one province only would establish national jurisdiction. This must be changed in the Bill. The second criterion is impermissible. If the approval of a land use application would impair a municipality's ability to perform its functions, the municipality should not approve the application. This is a principle and not a matter of national interest. The same would apply to a provincial government.

16.5 Clause 52(6) is an addition in the Bill and provides for the Minister to publish criteria regarding the type of applications that would be considered to fall within the national interest. This provision is an improvement and may assist in the interpretation and implementation of the intended provision.

16.6 However, WCG is of the view that clause 52 of the Bill is inconsistent with the Constitution in so far as it proposes that land use applications that affect the national interest must be decided solely by the national government. In the *Maccsand*-judgment at par 47-48, the court required co-operation between the different spheres of government in respect of overlapping functions. The land use implications of exclusive national functions will overlap with municipal planning and in certain instances also with provincial land use functions. The court found that

where there is an overlap of functions, the relevant spheres of government should cooperate with each other and each spheres should exercise its authority in relation to its functions. It is submitted that the Bill should be amended to provide for matters of national interest to be decided on a municipal, national level and, if applicable, also on a provincial level. The court stated that it is proper for one sphere of government to take a decision, the implementation of which may not take place until consent is granted by another sphere, within whose area of jurisdiction the decision is to be executed.

16.7 **Maximum decision times.** Clauses 40(9) and 44 envisage that municipalities will be bound by a maximum decision time, determined by the Minister. This appears to be inconsistent with item (w) of Schedule 1 of the Bill, which provides that provincial legislation may determine the maximum decision times.

16.8 In fact, the current version of LUPA provides for a maximum decision time of 130 days. It is suggested that the Bill should defer to the provincial determination of maximum decision times and only regulate them where provincial legislation does not provide any.

16.9 Clause 44(3) also provides for different time periods for different tribunals or different planning applications. In this regard we note that the imposition of a statutory time period which prescribes the turnaround time for approvals is in essence commendable. However, the same issues mentioned with regards to clauses 40 and 44 are applicable in this instance especially since less capacitated and resourced municipalities may struggle to ensure compliance with time periods. Different time periods for different planning tribunals may pose a challenge especially since applicants would wish to have a uniformed standard applicable to most planning tribunals tasked with the consideration of matters[2].

16.10 **Intervening parties.** Clause 45(4) of the Bill provides that an interested party may petition the municipality to intervene in an application or an appeal and, if granted, may participate in such proceedings.

16.11 While the principle to extend public participation in land use applications is critically important, it is suggested that this provision will present municipalities with considerable difficulties.

16.12 Currently, LUPA provides for minimum standards surrounding public participation and expects municipalities to further regulate public participation in their own by-laws. The minimum standard, set in LUPA revolves around providing an opportunity for interested parties to comment on existing applications and the instruction on the applicant to respond to such comments. The provision of an intervention by the interested party in the application has not been envisaged in LUPA and would not be in line with the minimum standard set by it.

[2] Comments by the Provincial Department of Economic Development and Tourism dated May 2012.

16.13 It is feared that it will create further opportunity for delays in a system that is already providing sufficient opportunity for public participation. The decision to either allow or not allow an intervention is also an administrative action that may be reviewed, creating a further opportunity for unnecessary delays. An interested and affected party that intervenes at a very late or advanced stage of the process will certainly add a substantial additional administrative burden on the municipality and will cause additional delays in the process.

16.14 **Development applications affecting the national interest.** Clause 52(1) of the Bill provides for a referral to the Minister when the application materially impacts on an exclusive national function, on strategic national policy objectives or on land use for one of the functional areas of national government.

16.15 Clause 52(2) provides that an application must be referred to the Minister if the outcome may be prejudicial to the economic, health or security interests of one or more provinces or the country as a whole or may impede the effective performance of functions by provinces or municipalities.

16.16 There are a number of concerns with respect to this scheme. Firstly, it is not immediately clear whether clause 52(2) must apply in addition to one of the criteria of clause 52(1) or whether any of the criteria in clause 52(2) on its own may trigger the application of clause 52. Secondly, the provision for the referral of the matter to the Minister for final determination contradicts the ruling set out by the Constitutional Court in the *Maccsands* judgment. As noted above, it is submitted that national competence to take land use decisions may exist but *alongside*, not instead of municipal competence.

16.17 Thirdly, the referral to land use for one of the functional areas of national government is problematic. The functional areas of national government comprise those contained in Schedule 4 and the residual competence of national government. The residual competence of national government is referred to in clause 52(1)(a) so the reference to the functional area of the national sphere of government in clause 52(1)(c) should then refer to the functional areas contained in Schedule 4. However, the functional areas in Schedule 4 are as much a provincial competence as they are a national competence. This renders the trigger referred to in clause 52(1)(c) problematic because this trigger implies that a land use application that relates to, for example, housing or any other Schedule 4A competence, must be referred to the national Minister.

16.18 The impact of this current provision furthermore is that municipalities may be faced with the scenario that a large percentage of land development applications would conform to the criteria of national interest and therefore have to be submitted to the national Minister. The impact of this on the finalisation of such applications could be far-reaching and to the detriment of applicants especially if a cost to business implication (as a result of the extended turnaround time) is taken into consideration. The possible implication of this provision must be re-considered[3].

[3] Comments by the Provincial Department of Economic Development and Tourism dated May 2012.

17 APPEALS

17.1 The 2011-Bill provided for municipal and provincial tribunals. It was proposed that the provincial tribunals would decide municipal appeals, provincial interest matters and matters where municipalities failed to take decisions. The Bill now proposes a revised decision-making scheme. It is now proposed that municipal planning tribunals will take decisions of first instance and internal municipal appeals will be referred to the municipal council. No express provision is made for provincial tribunals or provincial decisions on land use applications of provincial interest. The comment that national legislation may not regulate the detail of provincial planning by the providing for a provincial tribunal, has been addressed by deleting the provisions that provide for such tribunals. It appears as if it is now left open to provinces to regulate the exercise of provincial decision-making on provincial planning in provincial legislation. However, the comments regarding the exclusion of elected representatives from municipal land use planning tribunals and consequently from municipal planning decisions of first instance have not been addressed. Refer to paragraphs 9.1 to 9.3 of the previous comments.

17.2 The Bill provides that provincial legislation may provide appeal and review procedures (item z Schedule 1). However, what it gives with one hand, it removes with the other as clause 54(1)(f) provides that the Minister may make regulations prescribing the procedures concerning the lodging of appeals. While the concurrent power to regulate municipal planning is not constitutionally problematic, it will serve the sector if clarity is provided in this Bill as to where the authority should be exercised. Furthermore, clause 51 of the Bill occupies a large part of the space provided by item z of Schedule 1. If a provincial government would want to regulate a specific appeal procedure in provincial legislation (as it would be empowered to do so under item z of Schedule 1) it would find clause 51 of the Bill on its way because this provision consolidates the internal appeal framework of section 62 of the Systems Act.

17.3 The current version of LUPA provides the unsuccessful applicant and the aggrieved third party with a right to object against a municipal (and provincial) land use decision to a provincial Land Use Planning Board. The Board will issue a recommendation back to the municipality (or the MEC). LUPA also provides that the use of the internal appeal mechanism will bar them from approaching the Land Use Planning Board.

17.4 The manner in which clause 51 seeks to consolidate and extend section 62 appeals requires further consideration. For example, while clause 51(4) aims to overrule the SCA's decision in *City of Cape Town v Reader* 2009 (1) SA 555 (SCA) by extending the right of internal appeal to third parties, clause 51(3) undermines the intention of clause 51(4) by reiterating that the appeal authority's decision may not detract from rights accrued. The question then is how the third party's right to appeal can be meaningful if the right to develop has already accrued to the applicant and cannot be affected? Should the Bill not rather provide that rights in terms of decisions of first instance do not accrue until an appeal has been finalised or until the appeal period has expired?

17.5 It is suggested that the Bill follows through on the principle it establishes in item z of Schedule 1. Perhaps the specific provisions on internal appeals should be replaced with generic standards or principles to be adhered to in provincial legislation. Provincial legislation may then determine a system for review or appeals that is appropriate in that province.

17.6 It is also noted that the Bill prescribes that an internal appeal will vest with either the Executive Mayor, Executive Committee or in the absence of the aforementioned institutions, the council of the municipality. As the internal appeal will be located at one of the above structures, it is important that the impact of the administrative processes (including turnaround times) for the resolution of such internal appeals is noted. The possible impact of the delays occasioned with the resolution of such appeals should be considered. It is proposed that minimum requirements in respect of a streamlined approach (including turnaround times) be considered as far as the adjudication of such appeals is concerned[4].

17.8 The Bill provides for a municipal council to appoint members of the municipal tribunal for a renewable term. A renewable term of office heightens the risk that the office-holder may be vulnerable to political pressures from the council that appointed the member. (*Hugh Glenister v President of the Republic of South Africa and Others 2011 (7) BCLR 651(CC) at par 223*).

18. MINISTER'S REGULATORY POWERS

18.1 Clause 54 contains a list of regulatory powers for the Minister. The difficulty with regard to alignment with LUPA is that much of what clause 54 expects the Minister to regulate is covered by the current draft of LUPA. In addition, it is suggested that a number of these provisions empower the Minister to go beyond what is permitted constitutionally.

18.2 For example, LUPA will address the procedures for the lodging, consideration and decision of applications in the form of minimum standards but clause 54(1)e) of the Bill expects National Ministerial regulations prescribing those procedures.

18.3 The same applies to clause 54(1)(f) on procedures for appeals, clause 54(1)(h) on the determination of application fees and clause 54(1)(j) on the process for public participation in the adoption of land use schemes. LUPA currently provides minimum standards for these matters and expects municipalities to further regulate them in their municipal by-laws.

18.4 While the concurrent authority with the provincial government to regulate these matters is constitutionally unproblematic, it would be far preferable if the Bill would provide clarity as to who has authority in this regard. It is then submitted that the ministerial regulations envisaged in clause 54 of the Bill find application only in provinces that have not regulated these matters in provincial law.

19. CONTENT OF SCHEDULE 1

[4] Comments by the Provincial Department of Economic Development and Tourism dated May 2012.

19.1 In the previous provincial comments objections were raised to the matters listed in Schedule 1 of the Bill. Although the Bill now expressly provides that provincial legislation may deal with the matters listed in Schedule 1, which was omitted in the 2011-Bill, the schedule has not been amended in the Bill. The same objections set out in paragraphs 7.1 to 7.3 of the previous comments relating to the matters listed in the Schedule still apply. The listed matters fall within the ambit of municipal planning. Provincial legislation may provide for minimum standards, supervision and monitoring of the matters listed in the Schedule.

19.2 It is suggested that Schedule 1 of the Act be revisited as there are a number of difficulties with its content.

19.3 Firstly, many of the provincial powers mentioned there are in fact municipal powers. For example, provincial governments have no authority to determine procedures relevant to the approval of the applications, as referred to in item (g) of Schedule 1. Instead, they have the authority to regulate the municipal exercise of the authority to determine those procedures (see ss 155(6)(a) and s 155(7) of the Constitution, read with the heading to Schedule 4B).

19.4 The same applies to issues such as: Item (c): provincial legislation may prescribe provisions for the review of land use schemes; Item (f): provincial legislation may establish procedures for rezoning; Item (i): provincial legislation may provide form and content of applications; Item (m): provincial legislation may provide a uniform form and content of determinations and conditions of approval; and Item (o): provincial legislation may provide procedures for amendment of applications, decision and conditions.

19.5 It is suggested that the matters in Schedule 1 that fall within the realm of 'municipal planning' be rephrased as provincial authority to 'regulate' those matters by way of determining minimum standards.

19.6 In addition, some components of Schedule 1 contradict the text of the Bill. For example, item (c) contradicts clause 54(1)(j), item (w) contradicts clause 40(9) / 44, item (a) contradicts clause 7(d).

20. DEVELOPMENT PRINCIPLES AND NORMS AND STANDARDS

20.1 It is acknowledged that the Bill makes reference to the principle of spatial sustainability in clause 7. The principles of sustainable development: economic development, social inclusion, environmental integrity and good governance, should be balanced in the Bill. It is however noted that the extremely important aspect of promoting economic growth through investment, economic development and employment development is not specifically mentioned. It is our view that in light of both national and provincial objectives which are aimed at this important outcome, the Bill should make provision therefor. In addition a specific reference is made to agricultural land in the Bill- the approach to other economic sectors where land use is a critical component e.g. manufacturing, industrial

development etc, is absent. Similarly, under clause 7(c) (principle of efficiency) statutory recognition should be provided to economic development as an area which directly relates to efficiency.

20.2 We are of the view that the important aspect of economic development must specifically be provided for as one of the elements included in the norms and standards that are to be developed.[5]

21. PROVINCIAL AND MUNICIPAL LEGISLATION

21.1 It was also previously pointed out that the 2011-Bill did not recognise the powers of municipalities to make municipal planning by-laws. Certain provisions of the Bill, such as clause 5, acknowledge municipal regulation of municipal planning. Other clauses such as clause 4(d) refers to land use management in terms of the Bill and provincial legislation only. This comment has to some extent been addressed through clause 32 of the Bill which provides for by-laws aimed at enforcing land use schemes. It is however still not made clear that a land use application may be approved in terms of by-laws.

21.2 The comments set out in paragraph 7.4 of the previous comments are therefore still relevant namely that this approach may be informed by the concern that many municipalities may not be ready to adopt municipal by-laws. However, this concern should prompt national and/or provincial governments to adequately support municipalities by promulgating model by-laws or by adopting default provincial legislation that may be replaced by municipalities as and when they are ready. In other words, what is required is a national framework law that guides provincial governments in establishing their own provincial planning frameworks within the bounds of national standards and with exceptions for land use matters that affect the national interest. For those provinces that prefer to rely on national law, the Bill should include detailed provincial frameworks. Those detailed frameworks would have to include detailed regulations that apply to municipalities which do not have the capacity to adopt their own by-laws.

22. LACK OF INTEGRATION

22.1 The previous comments in respect of clause 30(3) have not been addressed in the Bill. We suggest that sub clause (3) should make express provision that the processes agreed to in terms of an agreement contemplated in sub clause (3) will prevail over any other statutory requirements. The ambiguities pointed out in paragraph 10 of the previous comments have not been removed from the Bill and the in paragraphs 10 of the previous comments still apply.

23. TITLE DEED RESTRICTIONS

23.1 Clause 47 of the Bill proposes a revised provision relating to the removal and amendment of restrictive conditions that addresses many of the concerns raised in

[5] Comments by the Provincial Department of Economic Development and Tourism dated May 2012

respect of the previous provisions as proposed in the Bill. Minimum requirements for the removal of a title deed restriction is provided namely, compliance with section 25 of the Constitution, regard to the rights of those affected and the public interest if any person will be deprived of property as contemplated in section 25 of the Constitution. Further regulations may also prescribe the process for removal or amendment of restrictions.

23.2 An aspect that is still unclear is the reference to contemplated written consent in clause 47(2), as the clause does no refer to any consent that is required.

23.3 Clause 46 of the Bill appears to provide for land use approvals which contravene restrictive title conditions and for the Registrar of Deeds to give effect to such approvals. It is not clear what is intended with this provision. Is it implied that the Registrar of Deeds may amend or remove restrictive title deed conditions through endorsement of a title deed without following fair administrative procedures for the removal of those restrictive title conditions? We suggest that it should be made clear that clause 46 is subject to the procedures and requirements contemplated in clause 47.

23.4 The Bill still provides for the repeal of the whole of the Removal of Restrictions Act, 1967. Certain provisions of that Act were assigned to provinces and must be repealed by the provinces.

23.5 Clause 46(6) of the Bill provides that a reference to the administrator, premier or townships board is deemed to be a reference to a municipality. This provision may not comply with the principles of procedurally fair administrative action and the legal principles applicable to servitudes which require that those persons affected by the proposed removal or amendment of a restriction must receive specific notice thereof. In cases where the municipality is the legal successor-in-title of the relevant authority, it will be sufficient to obtain the consent of the municipality to remove or amend a restrictive condition, but in those cases where the municipality is not the legal successor-in-title to the authority named in the restrictive condition, notice to the municipality may not be sufficient and the consent of the municipality may not constitute valid consent. *(Naidoo and Others NNO v Van Rensburg No And Others 2011 (4) SA 149 (SCA)*. The concerns in paragraphs 11.2 and 11.3 of the previous comments have still not been addressed.

24. INTERVENTION IN LOCAL SPHERE OF GOVERNMENT

24.1 The Bill provides for various instances of intervention by the national or a provincial sphere of government in the local sphere of government for instance, clause 18(3) provides for the national Minister to intervene and to adopt a regional spatial development framework where a municipality fails to adopt, review or amend a spatial development framework, clause 37(3) provides that a premier may appoint tribunal members, if a municipality fails to do so and clause 54(1)(d) provides for the national Minister to prescribe corrective measures if a municipality fails to adopt a land use scheme.

24.2 As indicated in the previous comments these clauses are inconsistent with section 139 of the Constitution. The national sphere of government cannot by legislation

give itself or a province the power to exercise executive municipal powers or the right to administer municipal affairs. These provisions are inconsistent with the Constitution and should be made subject to section 139 of the Constitution.

25. DECISIONS INVOLVING AGRICULTURAL LAND

25.1 The WCG's Department of Agriculture is concerned that the provincial mandate of agriculture is not recognised in the Bill. Previous concerns in this regard have not been addressed in the current Bill.

25.2 With the lack of knowledge regarding the agricultural environment at local government level, there is a concern regarding the criteria that will be used to decide on alternate land use of agricultural land and the impact that this may have on food security in the future.

26. ISSUES OF CO-OPERATIVE GOVERNANCE INVOLVING AGRICULTURE.

26.1 It is imperative that the Bill acknowledges the following in the pursuance of co-operative governance and the reduction of duplication of procedures: a) agricultural principles b) uncomplicated procedures; c) existing agricultural norms and standards d) protection of the land use rights of existing owners and successors in title of agricultural land.

27. TECHNICAL COMMENTS ON SPECIFIC CLAUSES OF THE BILL

Preamble: - The use of the terms spatial **development** planning is inconsistent with previous paragraphs wherein it only refers to spatial planning. Is spatial development planning different?

Definition: "inclusionary housing" – the definition uses the word "provision", but it is the WCG's submission that the term inclusionary housing cannot equate to the provision thereof. It is a principle or a concept and cannot in all cases refer directly to the provision thereof. In addition this definition is in conflict with clause 21(i) where the concept is also widened to other land uses and which appears to be in conflict with the definition. The definition only refers to residential developments.

Definition: "integrated development plan"- means a plan adopted in terms of Chapter 2 of the Systems Act is incorrect. An integrated development plan is adopted in terms of Chapter 5, of the Systems Act. The definition of a spatial development framework needs to be revised and linked to section 35(2) of the Systems Act. It is critical for the Bill to include a definition of "spatial planning" in chapter 1. This omission may address confusion that exists and possible conflict in the future.

Definition: "Land development" – the definition does not refer to rezoning but seems to imply that rezoning would also constitute land development in its

reference to "any deviation from the land use or uses permitted...". In the Western Cape the term rezoning is used not only for a change in land use but also for township establishment. We request that this definition makes provision for the concept of rezoning as well. This very wide definition of land development however brings about a different concern when development is viewed as being an illegal activity. The definition will be used in a court of law to determine whether a development has actually commenced or not in circumstances where the appropriate land use rights have not been secured.

Definition: "zone" –zone is defined in clause 1 as a category of land use which is shown on a zoning map of a land use scheme. Does this definition imply that if land is rezoned by a decision of a municipality and the rezoning is not recorded on a zoning map- that the land is not validly rezoned? It is suggested that the definition should rather refer to a defined category of land use applicable to land in terms of a land use scheme. It is also noted that clause 24(2)(b) refers to *"a map indicating zoning"*. We are of the view that it is the decision of a municipality that allocates zoning and not the zoning map. It is suggested that the provision should provide for *"a map recording/reflecting the zoning of land"*.

Definition: "MEC"-the MEC should be defined as the MEC who has been assigned with the function of planning.

Definition: "owner"- refers to "beneficial owner" – this is unclear. What is a "beneficial owner"?

'Spatial Planning' and 'Land Use Management': Whilst 'Land Use Management' is defined in the Bill, 'Spatial Planning' is not defined at all. Another example which illustrates the vague nature of the wording, is the reference made to 'other kinds of planning'.

"Development": There is no provision in the Bill to define the concept of 'Development', the subject of numerous different interpretations leading to very specific provision being made in some national as well as certain other provinces' planning and development related legislation.

Informal settlement: The Bill does not define what an informal settlement is. This is important given the extent to which the Bill makes proposals on how to deal with informal settlements as part of the land use management system.

Align definitions: There is a general need to align definitions contained in clause 1 of the Bill with other legislation. In this regard it is necessary to revisit a number of definitions in Clause 1 which are inconsistent with definitions provided for under other national legislation. Achieving consistency and alignment should be one of the main objectives in any new legislation.

Clause 4 (Heading: Categories of Spatial Planning): This heading appears to be wrong as it refers to spatial planning which is merely one of the planning categories referred to in the Bill. The clause refers to components of and the IDP itself which clearly are not categories of Spatial Planning. It is suggested that the heading be revisited.

Clause 6(vi): ***"planning tribunal.... May not be impeded or restricted on the ground that the value of land or property is affected by the outcome of the application".*** The Western Cape Government does not agree with this principle. The impact of applications or developments on existing rights and therefore also the value of property certainly should be considered in the evaluation of applications. This principle is one of the key considerations when considering land use applications in terms of LUPA.

Clause 8(2): Norms & Standards –the requirement for standard national symbols is overly onerous and could rather be prescribed provincially.

Clause 9(1)(a) National Support and Monitoring. It is suggested that consideration be given to include the wording "if requested" in paragraph (i).

Clause 10(3)(a) :Does a land use scheme in clause 9(2)(a) include the spatial plans?

Clause 10(3)(b)(ii) – What is meant by "system of a municipality"?

Clause 12(1)(e) provides that spatial development frameworks must guide a *"provincial department"* in taking any decision in terms of the Bill. We suggest that it should read *"guide a provincial government"* as provincial legislation may not necessarily provide for departmental decision-making powers.

Clause 12(1)(j): The reference to "long-terms risks" should be deleted. Long and short-terms risks should be identified and responded to.

Clause 15(1) provides for a premier to compile and determine and publish a provincial spatial development framework. Clause 15(4) provides for the Provincial Executive to adopt and approve a spatial development framework and to also publish it in terms of sub clause (7). The interchangeable use of the words *"compile" "determine", "approve"* and *"adopt"*, makes it unclear which authority is responsible for the approval of a provincial spatial development framework.

Clause 20(2) should read '... in accordance with the provisions of the Municipal Systems Act AND provincial legislation if applicable.'

Clause 21: What are the consequences if a MSDF does not give effect to all the prescriptions listed in this clause? It is also not clear as to what is referred to in Clause 21(j) when reference is made to the terms "coastal access strips". More guidance is needed on Clause 21(p). Is this the national component in an IDP? And it is not clear how an implementation plan as part of the MSDF can include amendments to a Land Use Scheme.

Clause 21(1)(j): This clause should also include a reference to environmental instruments adopted by the relevant environment authority.

Clause 23(2): No framework is included in the Bill for which circumstances must be considered under which a Traditional Council may or may not participate in the development, preparation and adoption or amendment of a land use scheme by a Municipality.

Clause 23(1)(a): "a municipality must, in the preparation of its land use scheme ***provide general policy and other guidance".*** We do not agree that a land use scheme (zoning scheme in Western Cape) should be used to provide policy at all. Policy is the function of SDF's or other similar mechanisms. Land Use Schemes provides for the mechanisms to control the use of land and should make provision for all circumstances envisaged by the municipality and the SDF, but should definitely not promote any policy. Whilst SDF's and other spatial planning documents aim to provide for desired future use of land, land use schemes are controlling the current legal use of land, both in land use categories or zonings as well as the intensity and scale of use. It is acknowledged that in the past policy and schemes were integrated, but in recent years (25 years in the WC), these two planning tools have definitely been divorced as they play two completely different roles in planning. Land use schemes have to do with land use control whilst SDF's are spatial planning tools guiding future use of land.

Clause 24 (2)(c): It is not clear how the incremental introduction of land use management and regulation takes place in informal settlements. It is suspected that the Bill is referring to "land use management provisions that must be made as part of the upgrading of informal settlements".

Clause 24(2)(d) might not be fully in line with the latest human settlements policy of SA.

Clause 24(3) (c): "the variations of conditions of a land use scheme.....". In the Western Cape this concept is referred to as a "departure", but the terminology is not our concern. The concept of a variation or a departure in our understanding is not limited to the instances described in the relevant clause. We request therefore that this concept be developed further to make provision for a wider "variation from the Scheme conditions. We recommend that variation for a temporary use should be included as well as a more comprehensive or total variation from the scheme conditions as stipulated in the WC LUPA. The confusion in this regard is of course linked to the concept of a scheme amendment as contained in clause 28. We differentiate between the amendment of the land use scheme, which in effect will translate to the amendment of Municipal Planning by-laws as described earlier and the processing of a rezoning. These are two completely different concepts and have completely different procedures to process. It is suggested that these two clauses in the Bill be revisited.

Clause 25(1) (Purpose and content of a Land Use Scheme): "to promote (a) economic growth, (b) social inclusion (c) efficient land development.....". It is suggested that these aspects should not be "promoted" by a land use scheme but are more suited in a policy type document such as a SDF. Land use schemes as explained previously have a different role to play and are strict, inflexible law-type mechanisms that control the use of land, currently and are not supposed to

promote any future desired or intended land use. That is the function of spatial planning.

Clause 25(2): "A land use scheme must include: (c) a register of all amendments to a land use scheme". This a very onerous requirement enforced on municipalities. The register traditionally was created to record extraordinary circumstances such as departures and consent use decisions that are not easily recorded on the municipalities zoning map. This is to alert the user of the map and the scheme that special conditions are applicable to a particular portion of land. The requirement in the Bill is a much wider concept referring basically to every rezoning, subdivision and every condition attached to those decisions, effectively the entire file system of the town planning department. We request that the concept be removed from the Bill or changed to a discretionary component of the scheme.

Clause 26(3): The reference to schedule 2 of the Act is restrictive. In practice there are a lot more zoning categories which the Bill should recognise.

Clause 27 (2): Time frames on when the amendments between the two municipalities must be completed will add a lot of teeth to the Bill and ensure that this clause is complied with, sooner rather than later. This clause may be enhanced with specification of the steps that may be taken should the two municipalities fail to reach an agreement.

Clause 32(3): The appointment of an inspector is a good initiative. It would be better if the Bill indicates that such an inspector must be suitably qualified. The absence of this addition may result in weak appointments in municipalities.

Clause 31(1): "written record of all applications and the reasons for decisions". This clause effectively duplicates the requirement of Clause 24(2)(c) and is in fact the entire file system of the planning department in a municipality. Does this provision exclude digital recording?

Clause 41(2): "an application includes an application for.....(d) the amendment a land use scheme....". We contend as discussed at length already that scheme regulations are in fact by-laws and cannot be amended by the tribunal. The Systems Act determines that only the Council can do that.

Clause 43: Conditional approval of application. This principle is currently not known or applicable in the Western Cape. Approval may be subject to conditions but a conditional approval appears to refer to something else, possibly a suspensive condition that must be complied with and if not complied within a specified time the approval lapses. This for the first time makes reference to the fact that rights may lapse and yet no further details in this regard are provided. It is suggested that this entire principle be left for the provinces and municipalities to detail. Not all the provinces have a principle of lapsing rights and those who do should be allowed to determine these time frames. The time frames in the WC are completely different.

Clause 55: it is not clear in which instances the Minister may make exemptions, "In the public interest" is very broad and open to interpretation.

It should be noted that there are many other smaller technical issues which have not been addressed above.

28. CONCLUSION

28.1 All three spheres of government have a role to play in regulating land use management and spatial planning. The allocation and regulation of these functions in a coordinated and uniform manner to ensure the integrity of the land use planning system is critical. National legislation should provide a framework within which provinces may make their own laws which is suitable to the specific municipal and provincial context in terms of planning capacity and as well as economic conditions. It is our view that the framework proposed in the Bill is in some instances inadequate and in other respects over steps the mark and over-regulates or micro-manages municipal and provincial planning.

28.2 This Bill has huge implications for provincial government and municipalities, but despite numerous requests it has not been debated and properly consulted. The Department of Rural Development and Land Reform was therefore urged not to introduce the Bill to Parliament without further consultation and engagement with the various provinces and municipalities in the country (possibly in a two or three day workshop where all these concerns can be discussed) in order to resolve the difficulties with the current Bill. It is important for all spheres to align and co-ordinate their legislative actions in this regard.

28.3 An opportunity was create at the only Mintech meeting which has taken place, but unfortunately the real issues were not discussed and furthermore because of the size of the meeting it was not conducive for debate. The deadline for the Bill to be promulgated has passed and there is no urgency to force this Bill with so many questions, through Parliament. It is proposed that Parliament should refer the Bill back to the Department of Rural Development with the clear instruction that the contents of the Bill be thoroughly work shopped and consulted with all the spheres of government which are affected.

29. In addition to this submission the Department requests that the WCG be afforded an opportunity to address the Portfolio Committee to discuss the issues raised in the submission.

PIET VAN ZYL
HEAD OF DEPARTMENT

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