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Belville, July 18, 2008

Dear Mr. M R Mohlaloga,

**IN RE: SUBMISSION LAND USE MANAGEMENT BILL**

The Local Government Project at the Community Law Centre (University of the Western Cape) has been conducting research on and engaging with local government law since 1998. The Centre hereby thanks the Portfolio Committee on Agriculture and Land Affairs for the opportunity to submit its comments on the proposed Land Use Management Bill. These comments specifically address the constitutional interpretation of municipalities' role with respect to land use management.

**INTRODUCTION**

S 153 of the Constitution charges local government with a developmental mandate "to give priority to the basic needs of the community, and to promote the social and economic development of the community."[1] The 1998 White Paper on Local Government specifies the stimulation of local economic development, provision of services, and creation of spatially integrated cities and towns as key outcomes of this developmental objective.[1]

Land use management is fundamental to local government in achieving these goals. It enables municipalities to facilitate desirable land development for the creation of jobs and the stimulation of local economic growth. It impacts the way in which they deliver services and the budgetary resources needed to provide them by determining where bulk and network services will be located and the efficiency at which they will be provided. It provides the tools through which local governments can preserve the quality and character of the built environment, promote spatially integrated settlements, and conserve the natural environment.

As the sphere closest to the people, the Constitution has identified local government as best situated to determine and drive democratic development. To date, local governments have been provided with the budgetary tools to pursue development and service delivery priorities through the framework for integrated development planning established under the Municipal Systems Act, 32 of 2000. However, the absence of an updated framework for land use management prevents municipalities from effectively translating their visions into spatially integrated, physical development on the ground; a point recognised by both the 1998 White Paper on Local Government as well as the 2001 White Paper on Spatial Planning and Land Use Management. "[F]aced with the challenge of reversing apartheid's spatial legacy and integrating previously divided communities…the only laws available to them for this task are those designed specifically to achieve that which they are charged to undo."[1] The draft land use management bill provides an extremely important first step to addressing this problem.

## CONFUSION OF ROLES AMONG DIFFERENT SPHERES OF GOVERNMENT

There remains considerable confusion regarding the allocation of powers with respect to planning and land use management among different spheres of government. From a constitutional perspective, this confusion is driven by two factors:

(i) overlap between the functions allocated to local and provincial governments under the Constitution; and

(ii) overlap between municipalities' exercise of the "municipal planning" function and national and provincial governments' supervision of this function.

Potential overlap between functions allocated under the Constitution

Schedules 4 and 5 of the Constitution allocate functions to local and provincial governments. Land use management is not specifically identified under any of the functions listed in these schedules. However, a number of the listed functions relate to planning, development, and spatially related competencies such as housing and the environment.

Schedule 4B recognises the importance of planning to local government's developmental mandate by allocating local governments with authority over "municipal planning." The Constitution also allocates authority to provincial governments for the related functions of "provincial planning," "housing," and the "environment" under Schedule 4A, and "regional planning and development," and "urban and rural development" under Schedule 5A. However, the Constitution does not include definitions as to what each of these functions entail. The potential for overlap between these undefined functional areas creates confusion as to the specific allocation of powers among different spheres of government with respect to planning and land use management.

Potential overlap between the exercise of "municipal planning" and the supervision of it

At the same time, local authority over "municipal planning" is not unlimited. S 155(7) of the Constitution provides national and provincial governments with concurrent supervisory powers over the "municipal planning" function. This includes the power to pass framework legislation regulating local government's exercise of "municipal planning." Such legislation is confined to the creation of norms and minimum standards and does not include the ability to determine the details of "municipal planning" activities.

## THE NEED FOR FUNCTIONAL DEFINITIONS

**The Bill should provide definitions for the planning and land use management related functions in Schedules 4 and 5 in order to clarify the confusion regarding the allocation of powers between different spheres of government.**

There are a number of ways in which functional definitions can be provided: through judicial definitions provided in cases determined by the courts; through administrative definitions provided, for example, under guidelines or regulations promulgated by national line ministries or other bodies; or through legislative definitions established in legislation passed by national or provincial legislatures.

To date, the courts have had few opportunities to interpret the meanings of Schedule 4 and 5 functions. Where they have had the opportunity, they have often been reluctant to provide specific definitions and those provided have not always been adequate. The courts are poorly

placed to address functional definitions because they are required to do so within the context of specific cases, and they are removed from policymaking and the inner workings of government. Similarly, the creation of definitions through departmental guidelines and regulations is also less desirable because administrative definitions are not typically subject to broad public discussion and scrutiny, and do not have the force of law.

Parliament is the best placed to provide definitions for the Schedule 4 and 5 functions through national framework legislation. This approach is both consistent with its policymaking role and desirable, since definitions established in this manner would be subject to public discussion and debate, would apply at the national level, would have the force of law, and would be subject to judicial scrutiny.

If definitions are not included in the Bill, the provincial role with respect to planning and land use management will remain undefined and provincial legislation in this area will continue to be enforced on the basis of provincial supervisory powers to regulate the exercise of "municipal planning" under s 155(7) of the Constitution. This will hinder the establishment of a coherent regulatory framework for land use management at the national level. Parliament can avoid this problem by including definitions in the Bill that define the provincial role in planning and land use management under Schedule 4, but do not completely regulate the concurrent space provided to national and provincial governments in supervising the exercise of "municipal planning." Once legislative definitions are in place, where conflicts arise between national and provincial legislation, s 146(2)(b) of the Constitution would enable national legislation to prevail over provincial legislation for the purpose of establishing a national, uniform regulatory framework for land use management.

Defining "Municipal Planning"

The Municipal Systems Act, 32 of 2000 identifies spatial planning as a component of the "municipal planning" function. The White Paper on Spatial Planning and Land Use Management, to which this Bill is designed to give effect, defines spatial planning to include integrated development planning (formerly "forward planning") and land use management (earlier "development control").

While not definitive, work on judicial and administrative definitions may be helpful in providing guidance to Parliament in developing a specific legislative definition for "municipal planning."

*Judicial Definitions*

Although the Constitutional Court has not proclaimed directly on the meaning of "municipal planning," it has established a functional approach for defining Schedule 4 and 5 functions based on:

(i) the territorial principle, and
(ii) the "functional view of what is appropriate to each sphere."[1]

[1] Steytler, N, and Fessha, Y, 2007, "Defining provincial and local government powers and functions" *South African Law Journal* 124: 320; See also Steytler, N, and de Visser, J, *Local Government Law of South Africa*, Issue 1, 5-19.

With respect to local government, the functions must be defined to enable them to deliver on their developmental mandate (ss 152 and 153) to promote social and economic development. Using the Court's approach as guidance suggests that "municipal planning" should:

(i) apply to planning activities falling within the territory of the municipality, and

(ii) include integrated development planning (including spatial "forward planning") and land use management activities, identified by the White Paper as necessary for adequately performing the spatial component of the "municipal planning" function.

*Administrative Definitions*

The Municipal Demarcation Board provided an administrative definition for "municipal planning" in 2003 as part of its work in assessing municipal capacity.

> Municipal planning means – the compilation and implementation of an integrated development plan in terms of Chapter 5 of the Municipal Systems Act, 32 of 2000 and the regulations of this Act. Additionally in relation to the district municipality "municipal planning" means: Integrated development planning for the district as a whole, including a framework for integrated development plans of all municipalities in the area of the district municipality. Additionally in relation to the local municipality "municipal planning" means: Integrated development planning for the local municipality in accordance with the framework for integrated development plans prepared by the district municipality; Development and implementation of a town planning scheme or land use management scheme for the municipality including administration of development applications in terms of special consents and rezonings.[2]

The Municipal Demarcation Board's definition outlines the planning roles for both district and local municipalities, including specific land use management functions to be fulfilled by local municipalities.

*Developing a Legislative Definition*

Parliament might use the Municipal Demarcation Board's definition, along with the principles of the Court's functional approach, as a starting point for developing a legislative definition for "municipal planning" in terms of the Land Use Management Bill. The definition should provide for a coherent allocation of powers between different spheres of government and within two-tiered local government, and encompass the range of activities necessary for local government to discharge its developmental functions fully and effectively. It is recommended that Parliament develop the definition for "municipal planning," as well as the other related provincial competencies, in consultation with national, provincial and local bodies of government.

## CLARIFICATION OF ROLES BETWEEN LOCAL AND DISTRICT MUNICIPALITIES

**The Bill should also clarify the allocation of powers to district and local municipalities within the "municipal planning" function.**

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[2] Municipal Demarcation Board, 2003, *Local Government Powers and Functions – Definitions and Norms and Standards*. 23:95, www.demarcation.org.za.

Currently, the Bill does not differentiate clearly between the respective roles for district and local municipalities in the exercise of land use management. S 48 requires that all municipalities adopt land use schemes, and s 51(1) requires that district and local municipalities align these schemes in accordance with the integrated development planning framework. However, it is unclear how district and local land use schemes should be related. Are district municipalities to pursue their own independent process for developing land use schemes or are their land use schemes to be a compilation of local land use schemes? The idea that districts should maintain their own schemes is out of sync with the Municipal Systems Act, which allocates a coordinating role for districts, and is likely to fuel further contestation between district and local municipalities as they strive to divide municipal functions. The Bill must clarify which powers under the "municipal planning" function should be allocated to district and local municipalities, and provide amendments to the Municipal Systems Act and the Municipal Structures Act, 117 of 1998 where necessary.

The Constitution does not differentiate between the functions allocated to district and local municipalities; all Schedule 4B and 5B functions are included as municipal functions. However, s 84 of the Municipal Structures Act does provide for a division of municipal functions between district and local municipalities. S 84(a) allocates responsibility for integrated development planning for the district, including a framework for local integrated development planning, to district municipalities. The residual powers under the "municipal planning" function are left to local municipalities. It is important to note that the Department of Provincial and Local Government is currently reviewing the role of districts as part of its policy process on the system of provincial and local government, and may be rethinking the division of powers within two-tiered local government.[3]

However, for the time being, the Structures Act does not provide definitions as to what district and local functions within "municipal planning" entail. The 1998 White Paper on Local Government and Chapter 5 of the Municipal Systems Act establish a coordinating role for district municipalities in terms of planning. This is reflected by the fact that there are almost no districts in the country responsible for developing and administering their own land use schemes; where they do maintain this responsibility it is either on a short-term basis until the local municipality can develop the relevant capacity, or for a district management area.[4]

The current role of district municipalities and the definition of "municipal planning" provided above suggests that local municipalities should be responsible for developing and administering land use schemes, while district municipalities should help to coordinate and align the land use schemes of their local municipalities, and mediate any conflicts between them. Otherwise the exercise of district "integrated development planning" would be a direct duplication of local "municipal planning." This arrangement would be both inefficient and call into question the need to differentiate between these functions in the first place.

**JURISDICTION OF PROVINCIAL LAND USE REGULATORS (SS 36 AND 37)**

[3] For more information, see www.thedplg.gov.za/policy/.
[4] For more information, see *2007/2008 Municipal Demarcation Board Capacity Assessment District Summary Report* , www.demarcation.org.za.

**Where not included as part of a provincial competency, ss 36 and 37 provide a blanket power for provinces to interfere with local government's exercise of "municipal planning" and would therefore be unconstitutional.**

S 36 allocates jurisdiction to provincial tribunals for applications that straddle the boundary of a metropolitan or district municipality and affect a provincial interest. 'Provincial interest' is defined under s 37 to include issues impacting on provincial growth and development strategies or similar instruments, and provincial policy objectives. However, without a clear idea of what these strategies and policy objectives comprise and how they relate to the functions allocated to local and provincial governments under the Constitution, it is difficult to determine the jurisdictional powers provided to provincial governments under ss 36 and 37 of the Bill. This is likely to lead to continued confusion regarding the allocation of planning and land-use management between different spheres of government, as well as national and provincial encroachment on the "municipal planning" function. In order to address this problem, it is necessary for the Bill to provide definitions for the relevant functional areas listed in Schedules 4 and 5.

In their current form, ss 36 and 37 pose two specific problems with respect to provincial jurisdiction. First, under s 36(c), inter-municipal applications that affect a 'provincial interest' are to be considered exclusively by provincial tribunals without any role for affected municipalities. Irrespective of the cross-boundary nature of the development, the affected municipalities need to be able to judge the development application against their development and service delivery planning for the portions of the application that falls within their boundary. While s 44(1)(b) does require land use regulators to make decisions that are consistent with municipal spatial development frameworks, this requirement is too broad to adequately provide for local government concerns with respect to municipal planning and land use management. S 41(a), which provides an avenue for municipalities to present their concerns as affected persons, is similarly insufficient to recognise the developmental role allocated to local government under the Constitution. Some specific accommodation needs to be made within the Bill for affected municipalities to participate in the review and approval of such applications. Otherwise, this is likely to lead to weakened accountability for local planning and service delivery.

Second, without a properly defined role for provincial government, the definition of 'provincial interest' under s 37 is extremely vague. A provincial growth and development strategy is a legally undefined policy; it is neither a legislative requirement nor is there a legislatively defined process or format for its development. This stands in contrast to the municipal integrated development plan and its spatial development framework, which has both a legislatively defined process for development and a specifically defined format under the Municipal Systems Act. As a result, anything labeled by the province as a provincial growth and development strategy would provide grounds for a provincial tribunal to decide an inter-municipal application, potentially curtailing local government's exercise of "municipal planning." Reference to a "similar instrument" broadens this provincial power, enabling the province to write up any policy objective and claim that it qualifies to s 37(a)(i). These activities need to be properly recognised as part of a definition for the "regional planning and development" function allocated to provinces under Schedule 5A.

The same issues apply to "provincial policy objectives" in s 37(a)(ii). Again, local government has a well-defined legal framework for arriving at policy objectives through integrated development planning, while provincial government does not. Thus any resolution taken by a provincial cabinet, or perhaps even an MEC, which is branded as a "provincial policy objective" would enable the Province to assert exclusive jurisdiction over an inter-municipal application. The Bill must define what it means in terms of policy objectives and link it to provincial competencies in Schedules 4 and 5. Otherwise the broad definition of 'provincial interest' under s 37 provides a blanket power for provinces to interfere with local government's exercise of "municipal planning." Since s 151(4) of the Constitution prevents national and provincial governments from compromising or impeding municipalities from performing their functions, where provincial policy documents or objectives are not included as part of a provincial competency they would be unconstitutional. Finally, it is unclear what the clause "amongst other things" in s 37(a) refers to and could allow provinces to arbitrarily decide what comprised a 'provincial interest,' independently of the other instruments and policy objectives mentioned above.

In addition to problems related to the definition of 'provincial interest,' the drafting in s 36(c) also needs clarification as it is unclear what happens in the event that an application directly affects "land beyond the boundaries of a metropolitan or district municipality," but does not affect a 'provincial interest.'

### JURISDICTION OF NATIONAL LAND USE REGULATORS (SS 36 AND 37)

**Where not defined as part of the national role in planning and land use management, ss 36 and 37 provide a blanket power for national government to interfere with local government's exercise of "municipal planning" and would therefore be unconstitutional.**

S 36 allocates jurisdiction to the national land use regulator on a similar basis for applications affecting a national interest. 'National interest' is defined under s 37 to include issues impacting on national spatial development perspectives or similar instruments and national policy objectives, land use falling outside the functional areas of Schedules 4 and 5, or where the outcome would affect national economic and other interests or would impede the performance of one or more municipalities or provinces. Without a clear understanding of the role allocated to national government, the definition of 'national interest' presents similar problems of vagueness. Establishing definitions for Schedule 4 and 5 functions will help delineate local and provincial roles, thereby providing a context from which to interpret national jurisdiction.

The specific problems under s 37 with respect to vagueness are the same as for provincial jurisdiction. First, national spatial development perspectives are legally undefined, meaning that anything identified by national government as a spatial development perspective could be used to curtail local government's exercise of the "municipal planning" function through the statutorily defined integrated development planning framework and related land use management activities. The reference to "similar instruments" broadens this power further. Second, the same issue applies to national policy objectives, principles or priorities. Since they are not statutorily defined and there is no established framework for determining them, these could be anything identified by the cabinet as a national policy objective, principle or

priority. Third, without the inclusion of definitions for Schedules 4 and 5, and the types of land uses related to them, it is unclear what types of land use fall outside the functional areas in Schedules 4 and 5. Thus ss 37(b)(i)(cc) and 37(b)(ii)(bb), which refer to these Schedules, have no basis for interpretation.

S 37(b) fails to provide a clear understanding of the circumstances allowing national jurisdiction and leads to a blanket power for national government in deciding land use applications. Moreover, it is difficult to understand why such circumstances – whatever they are interpreted to be – require a national process that bypasses municipalities. As with respect to provincial jurisdiction, the Bill must make specific arrangements for affected municipalities to be involved in the decisionmaking process and for their views to be considered so as to ensure coherent planning and service delivery by the municipality.

In addition, the drafting under s 37(b) also requires further clarification as the definition of 'national interest' based on functional areas presupposes that municipalities can only be frustrated in the exercise of Schedule 4B and 5B powers, when in reality municipalities perform multiple functions outside of Schedules 4B and 5B on the basis of assignment, delegation or agency agreements.

### NATIONAL AND PROVINCIAL SUPERVISORY POWERS OVER MUNICIPAL PLANNING

**Where not defined to be part of a provincial or national competency, s 51(2) oversteps the supervisory powers allocation to national and provincial governments under s 155(7) of the Constitution and is therefore unconstitutional.**

S 51(2) requires land use schemes to give effect to national and provincial spatial development frameworks, provincial growth and development strategies, and similar instruments. If these national and provincial activities are not defined to be part of the functional competencies, this clause oversteps the supervisory powers allocated to national and provincial governments under s 155(7) of the Constitution. This can be addressed by defining the Schedule 4 and 5 competencies and linking the definitions to these activities, or by removing the provision.

Municipalities have the constitutional right to administer and make by-laws on "municipal planning." The adoption of land use schemes is the exercise of that right. National and provincial governments may regulate the exercise of municipal planning under their supervisory powers in s 155(7) of the Constitution through the establishment of frameworks providing for the creation of minimum standards and norms. Any land use schemes that do not comply with those frameworks are invalid under s 156(3) of the Constitution.

Making land use schemes subject to "national spatial development perspectives, strategies for provincial growth and development, provincial frameworks for spatial development and other similar instruments" under s 51(2) poses two problems. First, as pointed out in the previous section on jurisdiction, none of these documents are statutorily defined. As a result, anything branded as such a strategy "or similar instrument" could be used under the Bill to curtail the constitutional power of municipalities over "municipal planning." Again, s 151(4) of the Constitution prevents national or provincial governments from compromising or impeding municipalities from performing their functions. Thus, if these activities are not

included as part of a national or provincial competency, they would be unconstitutional. Second, since these strategies and other instruments constitute policy and not framework legislation that establishes norms and minimum standards, they will not be legally effective under s 156(3) of the Constitution. In other words, supervision on the basis of such instruments is not a constitutional exercise of national and provincial supervisory powers regulating the exercise of "municipal planning" and therefore, land use schemes not complying with those frameworks would not be deemed invalid under s 156(3).

Intervention

**S 73 oversteps the power of intervention provided to national government on the basis of s 139(7) and is therefore unconstitutional.**

S 139 of the Constitution empowers provinces to intervene in local government under certain defined circumstances. Where the province cannot or does not intervene for specific financial problems under ss 139(4) and (5), such as failing to adopt a budget or to meet financial commitments, the national government is required to intervene in its place.

S 73 seeks to empower the Minister for Agriculture and Land Affairs and the Minister for Housing to intervene in local government for issues related to land use and housing if the province fails, or after consultation with provincial government. This oversteps the power of intervention allocated to national government under the Constitution in two ways. First, it suggests that national intervention into municipalities is permissible on issues related to land use planning and housing on the basis of s 139 of the Constitution. However, as stated above, s 139 only allows national intervention into municipalities for specifically defined financial problems and after the province has failed to intervene (s 139(7)). Second, the use of the word "or" in s 73(2) suggests that national intervention by these parties is possible even outside of these circumstances after consultation "with the provincial government and in the public interest." However, national interventions in problems surrounding land use management or housing that bypass the province are not possible in terms of the Constitution.

## TRANSITIONAL PROVISIONS

**S 78(4) oversteps the powers provided to national and provincial governments to support municipalities in exercising the "municipal planning" function on the basis of s 154(1) and is therefore unconstitutional.**

S 154(1) of the Constitution establishes a duty on national and provincial governments to "support and strengthen the capacity of municipalities to manage their own affairs, to exercise their powers and to perform their functions."[5] S 78(4), under the transitional provisions in the Bill, requires municipalities that lack the capacity, expertise or resources to consider or decide applications to refer them to provincial tribunals. The fact that this clause is included under the transitional provisions suggests that it is meant as a short-term measure to support newly-established or otherwise weak local governments that lack the capacity to fulfill their "municipal planning" functions. However, the way in which the clause is drafted

[5] S 154(1) Constitution.

opens up the possibility for its abuse beyond the transitional period. First, the provision does not specify who decides that a municipality lacks the "capacity, expertise, or resources" to review a development application. Second, the failure to include timelines or to specify the period of transition enables application of the provision at any stage. Finally, the inclusion of "must" makes the provision mandatory and therefore fails to provide any method for differentiating between high and low capacity municipalities. These issues can be addressed by making the provision voluntary and replacing the "must" with a "may." In doing so, municipalities would have the option to apply to provinces for help in fulfilling their "municipal planning" functions. Metropolitan municipalities – which are likely to have a high level of capacity – would be unlikely to utilise this measure, while newly established municipalities that have difficulties in conducting "municipal planning" activities may turn to the province for help and support in discharging their functions.

**MISCELLANEOUS**

"The relevant provisions in the Municipal Systems Act" under s 15(1) of the Bill are about to be repealed in terms of the Public Administration Management Bill (Single Public Service Bill) under Schedule 3, item 6.3. This clause should be replaced with relevant references to the new code of conduct established under the Public Administration Management Bill. For example, in terms of the Minister's powers to make regulations regarding the conduct of officials under s 44(1)(a)(vi) of the Bill.

We welcome the opportunity to present the submission orally to the Portfolio committee at the end of July.

Sincerely,

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