SAPOA

THE VOICE OF COMMERCIAL PROPERTY

GAUTENG PLANNING AND DEVELOPMENT BILL, 2012

COMMENTS BY THE SOUTH AFRICAN PROPERTY OWNERS' ASSOCIATION ("SAPOA")

28TH MARCH 2013

1. INTRODUCTION

1.1. SAPOA is the representative body and official voice of the commercial and industrial property industry in South Africa. SAPOA was established in 1966 by the leading and large property investment organisations, to bring together all role players in the commercial property field and to create a powerful platform for property investors. Today our members control about 90% (ninety percent) of all commercial and industrial property in South Africa, with a combined portfolio in excess of R150 billion (one hundred and fifty billion Rand).

1.2. SAPOA has enjoyed a constructive and engaging relationship with the relevant sectors of Government, and has made representations on the Spatial Planning and Land Use Management Bill, 2012 ("**SPLUMB**"). SPLUMB has not progressed any further through the legislative process. The Gauteng Planning and Development Bill (the **"Bill"**) being proposed provincial legislation is a more satisfactory and appropriate way of dealing with land use planning. As is well known and openly acknowledged in Government, the impact of regulation on the private sector's ability to do business is a critical factor in the health and prosperity of every sector of business activity; the Bill is therefore of enormous importance to SAPOA members, and will play a key role in the extent to which commercial and industrial property ownership can contribute to economic development and job creation in South Africa in the future. The agility, simplicity and clarity of regulatory procedures is also critically important in facilitating access to the property market to emerging businesses in that sector; an onerous, opaque or unduly complex regulatory environment hampers transformation and increases costs. We therefore believe that it is worthwhile for Parliament to apply the necessary resources to getting the Bill right, so that it can serve as an enabler to the efficient and orderly development of the property sector.

1.3. In paragraph 2, we set out our more detailed clause by clause comments, on the drafting and internal consistency and coherence of the Bill. Further in paragraph 3 below, we set out our principal areas of general concern regarding the Bill, in particular regarding its

consistency with the Constitution of the Republic of South Africa, 1996 ("**Constitution**") and the extent to which the Bill as drafted will achieve its stated objectives.

1.4. As a general comment, the Bill should be of benefit to the property industry provided adequate regulations are passed and the municipalities continue to implement their existing development frameworks and do not start afresh with the process. No regulations have yet been proposed for the Bill and many items in the Bill are left open for items to be prescribed by regulation. Those regulations will provide the detail to the operation of the Bill.

1.5. The Bill will replace a number of pieces of legislation, in particular the whole of the Town Planning and Townships Ordinance 15 of 1986 which regulated town planning within the old Transvaal. Members of SAPOA will be used to having operated within the framework of that ordinance and it is regretted that new terms and definitions are used in the Bill.

2. DETAILED CLAUSE BY CLAUSE COMMENTS

The paragraph numbers below will refer to the paragraph numbers clause in the Bill:

(ad) The meaning of the words "or a land use scheme" in the definition of "***application***" is unclear (i.e. are land use schemes applications in terms of the Act, or are applications in terms of land use scheme "***application(s)***" as defined?). This should also be clarified in the definition of **"*approval*"**.

(ah) In the definition of **"*building regulations*"**, the words "the building regulations in the National Building Regulations and Standards Act, 103 of 1997" are clumsy and wording to the following effect should be used "promulgated in terms of the National Building Regulations and Standards Act, 103 of 1997."

(at): The definition of *"environmental legislation"* should include any other legislation relating to the environment;

(aw): The word *"system"* should read *"law"*;

(ba): The definition of *"interested parties"* should have reference to an interested and effected party so that the interested party must necessarily be affected to have *locus standi* in future proceedings and not simply be somebody who has made representation;

(bc): The definition of *"land"* should not include the words *"improvement or building on the land"*. "Building" is separately defined and for example under (bx) reference is made to *"part of land"* which will not necessarily mean part of a building. *"Land"* should simply have its ordinary meaning and a possible definition is *"any land depicted on a diagram approved by the surveyor general"*. Further note under

(bd) that reference is made to a land area which does not include buildings;

(bp): Regulations will set out the form of the notice but there are different notices to different persons for different matters that may require different forms;

(br): The definition of *"open space"* should include an area for use by the public;

There is a typographical error (a comma and a full stop) at the end of the definition of **"*open space*."**

(bv): The definition of "parastatal body" is broad and not easy to apply, to the extent that it excludes bodies which are **"*organs of state*."** The definition of organ of state, contained in section 239 of the Constitution provides, inter alia, that "*organ of state means any functionary or institution exercising a public power or performing a public function in terms of any legislation*." A parastatal body is defined in the Bill as *"an organisation, other than an organ of state, established by law to perform a function or provide a service on behalf of national, provincial or municipal government*." A body contemplated in the definition of "parastatal body" (namely, a body established by law to perform a function on behalf of government), would appear to fall squarely within the constitutional definition of "organ of state". In this respect of the definition is ambiguous and should be clarified.

(bw): A *"park"* is normally created in terms of the conditions of establishment and the designation is not on the general plan;

(cf): It is possible for a *"public place"* to be owned by a private individual that, for example, has bequeathed that land for use by the public. This would be a *"public place"*;

(ch): The *"Registrar of Deeds"* is appointed in terms of the Deeds Registries Act;

(ci): The definition *"refuse site"* could also include privately owned refuse sites;

(cr): A *"settlement"* may become a township so the definition should read which is *"not yet"* a township;

(cx): By limiting this definition to require that the land is indicated on a general plan as a township is limiting as the prohibition of an illegal township as it can never be argued as it is not a township in terms of the Act unless is it depicted on a plan. A preferable definition would be that defined in the Town Planning and Townships Ordinance 15 of 1986.

(cz): The definition *"township register"* would be better defined as *"the register of a township opened in terms of the Deeds Registries Act"*;

(db): The word *"or"* should read *"for";*

3 (2): The word *"suitable"* should be included in sub paragraph (a) so that the aim is to facilitate sustainable land development;

7: The adoption of a long term development plan for a period of 20 (twenty) years is an extremely long period of time as a development plan should be continually reviewed. The adoption of the plan should not limit the constant review of the long term development plan;

8: Similarly the provincial integrated development plan which is more medium term must be annually reviewed and, if necessary, amended where appropriate. This should not be done only every 5 (five) years;

12(3) and 12(4) The Bill presents provincial spatial development frameworks (**"SDF"**) as guidelines and not as binding documents. This entails that in the event of inconsistency between a provincial and a municipal SDF, the municipal SDF prevails (in guiding and informing decisions of the municipality). This may give rise to uncertainty and inconsistency in the manner in which municipalities determine applications, and it would be preferable if the two spheres of government were instead under an obligation to ensure that their SDFs are aligned, or at least not inconsistent.[1]

There is a typographical error at the end of clause 12(4) (a double full stop).

The Bill fails to prescribe the time limits within which provincial and municipal SDFs should be adopted, and also fails to deal with transitional arrangements, before the respective SDFs are adopted. This is an unsatisfactory situation, unless there are concrete consequences in the event of non-adoption of SDFs.

Chapter 3: It should be made clear what the position is relating to the existing municipal spatial development frameworks that have been developed within the cities. There would seem to be little point in creating new spatial development frameworks which have already been created as a component of the integrated development plans in terms of the Municipal Systems Act 2000. The whole of

[1] See clause 14(1) of the Bill, in terms of which municipalities are required to "take into consideration the content of the provincial spatial development framework" in preparing municipal SDFs (but are not bound thereby, or required to achieve alignment).

"Chapter 3" should acknowledge this principle.

14(5) The Bill makes it clear that a municipal SDF does not limit the discretion of a municipality in determining an application or appeal. The municipal SDFs are merely guidelines. This may afford municipalities too wide a discretion – with the potential for arbitrariness and inconsistency in decision making,[2] and unpredictability in the way in which land is developed in the Province.

Chapter 4: Again the concept of integrating the existing town planning schemes into land use schemes under the Bill should be recognised. Reference should be made to this for example in 16 (1) and specifically in 19 (1) so that all existing schemes prevail. The concept of retaining the existing schemes is mentioned in 20 (8);

15 Clause 15(1) provides that the purpose of a land use scheme is to determine and regulate the use and development of land in the municipal area to which it relates. As stated in paragraph 3.11 above, the Bill fails to regulate the use and development of land where developments span the jurisdictional area of more than one municipality, and/or encroach upon the provincial planning mandate.

There is a typographical error at the end of clause 15(1)(g) (a misplaced semi-colon).

16 In terms of clause 16(1), municipalities are given five years from the coming into operation of the Bill to adopt a single land use scheme for the whole area of its jurisdiction. It is assumed that until such time as land use schemes are adopted, "existing land use schemes" shall continue to apply and regulate the use and development of land. However, this has not been specifically stated in the Bill and in our view the transitional arrangements in this regard are inadequate.

There is a typographical error at the end of clause 16(6) (a double full stop).

19 (5): This clause may give rise to a situation where if an owner wishes to alter or extend a building, it may not be able to do so relying on the land use scheme in existence at the time the building was constructed. A new land use scheme could simply be implemented which restricts the development. This will have an affect on investor confidence;

20: In terms of clause 20(1), municipalities are required to review the provisions of their land use schemes every 5 years. It is questionable whether the

[2] The Western Cape Land Use Planning Bill requires development to be in accordance with SDFs, and where a decision cannot be reconciled with a provincial or municipal SDF, it cannot be approved without an amendment to that SDF.

municipalities may practically comply with this limitation, and arguably a longer period should be considered.

The continual review of the land use scheme and the ability of the municipal council to amend the scheme will create great uncertainty for the property industry. The scheme should remain unless amended by way of application from land owners. Any change by the municipal council must only be done if it is in the interest of the general public and harmonious development of the area.

Given that a land use scheme has the force of law [18(3)(a)], the municipality should not be entitled to review the land use schemes from time to time as it will create great uncertainty for future investors. Also see section 21(1)(b) and 21(9);

21: Once a scheme has been approved, it should remain constant. The powers in 21(9) are extremely wide allowing the municipality to amend the schemes. It is only if the alteration or further amendment would "materially" underline the effective rights of an owner that it shall not be made. The term *"material"* is vague and the owner will have to contest the amendment. There should be a provision for payment of compensation if the amendment of a land use scheme by a municipality causes the person who has an interest in land to suffer any diminution in value as a result of the amendment to these schemes;

21 (16): This clause says that the municipality shall alter, correct or further amend an existing scheme at the request of the owner of the land concerned. This would appear to be in conflict with the requirement that there be a formal application to amend the scheme;

22: As with the existing schemes, there are the necessary structures and procedures for the management of land use presently in place by the municipality. The existing structures and procedures should remain until varied by the municipality;

23: The establishment of the municipal appeal tribunal within the province is relatively democratic but as names are put forward by the municipalities, there will always be a political influence;

23(15): The previous members of the appeal tribunal should remain in office until the 5 (five) year rotation has taken place. This will avoid appeal tribunals not being in existence due to inefficiencies of not appointing a new tribunal that would affect the ongoing process of the tribunal;

26(1)(a): The power of an appeal tribunal to impose conditions is too wide. The appeal should simply uphold or dismiss an appeal. As presently worded, the appeal is in

fact a new hearing.

In terms of clause 26(1)(a), the appeal tribunal may "may make any decision which could have been made by a municipality." This begs the question, in relation to those decisions which should be made by the Province? While there is currently a lacuna in the Bill in this respect, the powers of the appeal tribunal will need to be revised to cover Provincial decisions, and consideration given as to whether a provincial appeal tribunal should be constituted in respect of decisions of the Province.

26(2) The meaning of the word "register" is unclear.

29(1): The concept of a decision of the majority of municipalities is extremely vague. It is not clear how the mechanisms for such a majority to be achieved will be established;

30 In terms of clause 30(3)(b), the provisions of Chapter 6 of the Bill shall not apply where the land use concerned is directly related to the functions for which the organ of state or parastatal body concerned is authorised to undertake on such land. As stated above, the definition of "parastatal body" is ambiguous and requires clarification, particularly in light of a clause such as this – which grants such bodies a temporary exemption from certain provisions of the Bill. Also the reference to "authorised" should be more clearly delineated (i.e. authorised by legislation).

31: It should be noted that the Bill does not include the provisions of Section 67 of the Town Planning and Townships Ordinance restricting the sale of stands in a township once steps have been taken to establish a township. The reason for this was to protect the sale of stands that have not been serviced to innocent buyers. This is a useful mechanism to protect innocent purchasers and should be retained;

31(4): This clause would appear to restrict the zoning of land without establishing a township. This is very restrictive and prevents, for example, agricultural land having an industrial zoning by consent use;

32(1): The regulations will set out the prescribed manner in which the application must be made. One would assume that these will set out the exact detail that must be furnished with the application and should include the consent of all directly affected parties;

33(1): The regulations will prescribe what notice must be given and to whom it must be

given. We assume all neighbours and interested and affected parties will receive notice;

34(1): This provides that an applicant shall forward a copy of a notice of its application to "every municipal department, organ of state, parastatal body and to any service provider prescribed." It will be important that the relevant bodies referred to above (i.e. municipal departments, parastatals, organs of state and service providers) are "prescribed" with sufficient clarity and particularity – since the clause is extremely widely cast and it is unclear to whom, specifically, an applicant should forward such notice. (Also see comments on 30 above);

35(2) The wording of clause 35(2) is unclear in relation to when the 14 days for comment by the applicant start running. We suggest adding wording to the following effect at the end of clause 35(2) – "of receipt of the proposed approval.";

35(3): It is not clear whether this requirement will give rise to a hearing. It should be more specific;

36(3) As with 35(2) above, the wording of clause 36(3) is unclear in relation to when the 14 days for comment by the applicant start running. We suggest adding wording to the following effect after the words "14 days" – "of receipt of the provisional decision";

37(1): The statement of conditions should also include reference to the services to be installed and other requirement that the municipality may impose on the approval of the development application. Alternatively, is it intended that this be dealt with in a separate services agreement? If so, this should be mentioned;

37(6) In clause 37(6), reference is made to the "Minister" in relation to a certificate contemplated in the Agricultural Holdings (Transvaal) Registration Act, 22 of 1919. The term "Minister" is not defined in the Bill, however it is assumed that such reference is to the "Minister" as defined in the Agricultural Holdings (Transvaal) Registration Act, being the "*Minister of Public Works and Land Affairs or any other Minister who may be authorized for the time being to discharge the duties of that Minister."*

38(7): The submission for the correction to the Registrar of Deeds must be in terms of the Deeds Registries Act and similarly to the Surveyor General must be in terms of the Land Survey Act.

38(8): There should be specific provision for the revival of an application that has lapsed

without having to furnish a new application, or at least an expedited process;

38(9): It is not clear what the Registrar of Deeds or Surveyor General are to do upon receiving notification that the approval of a township has lapsed. One would assume they will simply note this against the previous communication sent to them? This requires clarification;

41(1) and (2): It should be noted that properties cannot be consolidated with different owners. Reference in 41(1) should be to *"two or more co-owners of land"*;

44(2): The term *"material"* is subjective and should be deleted. Any change should require notice be given to the interested party;

45(1): The words *"density or intensity"* should simply be replaced with the word *"change"*;

46(2): This should simply include as a purpose *"the change of permitted use of land"*;

48(1): The same comment in 30 and 34(1) relates to the vagueness of *"every ... organ of state, any service provided ..."*;

48(3): There should also be a notification process as set out in clause 33 where a land use application is made. This will allow 48(3) to be implemented. The same applies to clause 50(3) so that people may become interested parties;

50(4): This clause should also apply to an application for consolidation;

51(2): It should be noted that the establishment of a settlement can only incur if it is subsidised or to be subsidised by government. This is a vague definition and the extent of the subsidization is not clear. It may lead to abuse;

53: There is no provision for giving notice in the prescribed form for the establishment of a settlement area and therefore public participation is excluded, and may be unconstitutional if other people's property rights are affected;

53(4): A decision is to be sent to interested parties. An interested party is a person who has made any representations in respect of a draft land use scheme, amendment scheme or any application in terms of the Act. Notice of the decision should rather be given by advertisement to the general public;

53(5): A time period should be given by when the municipality is to issue a decision;

54(1): It is not clear what the Registrar of Deeds is expected to do upon publication of

the settlement. A formal register should be opened in the Deeds Registry;

54(3): It should be clear when the municipality is required to give the written approval of the transfer of land in a settlement area. Such an event would be upon the installation of all services;

55(4): This general plan should be in the same form as the draft already prepared;

55(6): In clause 55(3) there is a restriction on transfer of any part of the property. This clause now permits the registration of *"any erf in a Deeds Registry"*. It is not clear what this means. It should refer to transfer to a third party;

55(8): The approval of the township should be by registration in the Deeds Registry to allow further transfer of stands in the settlement;

56 There is a typographical error at the end of clause 56(2) (double full stop).

58 In terms of clause 58(1), where the approval of the Minister, the Administrator, an MEC, a controlling authority or the townships board, is required in terms of the Less Formal Townships Establishment Act, 113 of 1991, the Black Communities Development Act, 4 of 1984 or the Agricultural Holdings (Transvaal) Registration Act, 22 of 1919, or in terms of any existing scheme – such reference shall be a reference to the municipality. The Less Formal Townships Establishment Act and the Black Communities Development Act are to be repealed by the Bill, however, the Agricultural Holdings (Transvaal) Registration Act is not.

The purpose of the Agricultural Holdings (Transvaal) Registration Act is to "provide for the registration of land in the Transvaal which is divided into agricultural holdings, for regulating the subdivision of such holdings and for other purposes in connection therewith

61 There is a typographical error at the end of clause 61(5) (double full stop).

62: It should be recorded that parties are entitled to legal representation in an appeal;

63(1): It is not clear what the consequence is if an appeal is not heard within the 90 (ninety) day period. There must be a sanction for not doing so;

67: It is not clear why the form of appeal is in respect of only *"a part"* of a decision by a municipality. It should be in respect of "any decision";

68(8): There is a typographical error at the end of clause 68(7) (double full stop).

Clause 68(8) provides that "the installation of external engineering services by the

applicant...shall not be subject to the provisions of the Local Government: Municipal Finance Management Act 56 of 2003. This exemption provision is very widely stated and it is questionable whether it is legally valid for a provincial legislature to "exempt" an activity from the requirements of national legislation. Thus, we consider the constitutionality of this provision to be doubtful.

69: There should be a period by which the development contribution must be determined by the municipality. Failure to give notice should free the developer from that obligation. There should be provision for an owner to appeal the decision for payment of contribution.

71(1)(a): There should be provision for guarantees to be established to secure the payment of the relevant contributions upon a date on which they are payable as in clause 71(3);

71(4): The municipal roads should vest in the municipality from the date of establishment of the township and not the first registration of any erf in a township. One would assume the word *"first registration"* means first transfer of an erf. This should be reworded;

73: As mentioned above a number of items in this clause are prescribed and require effective regulations. In addition, guidelines are to be produced before this legislation can be operative;

83: The transitional arrangements should be amplified so that all existing schemes and everything done under the Town Planning and Townships Ordinance should remain of full force and effect and those town planning schemes and other policies must be deemed to have been adopted by the local authorities as if passed under the Bill.

3. GENERAL CONCERNS ARISING FROM THE BILL

Consistency with the Constitution: Parliament's competence to regulate municipal planning matters

3.1. In terms of Section 40 of the Constitution, the South African model of government consists of three spheres: national, provincial and local. Each sphere is granted the autonomy to exercise its powers and perform its functions within the parameters of its defined competencies. Each sphere of government must respect the status, powers and functions

of government in the other spheres, and "not assume any power or function except those conferred on it in terms of the Constitution."[3]

3.2. In terms of section 156(1) of the Constitution, municipalities are afforded executive authority in respect of the functional areas listed in Part B of Schedule 4 and Part B of Schedule 5. Part B of Schedule 4 includes "Municipal Planning". These listed functions may be regulated by the national and provincial spheres of government to the extent set out in section 155(6)(a) and (7) of the Constitution.

3.3. Section 155(6)(a) obliges each provincial government to establish municipalities within its province and once established, to provide for their monitoring and support. Section 155(7) allocates to the national government, subject to section 44, and to the provincial governments, the legislative and executive authority to "see to the effective performance by municipalities of their functions in respect of matters listed in Schedules 4 and 5, by *regulating* the exercise by municipalities of their executive authority referred to in section 156(1)". The provision in section 44 dealing with Parliament's competence to regulate municipal planning is contained in section 44(1)(a)(ii), which provides that the National Assembly has the power to "pass legislation with regard to any matter, including a matter within a functional area listed in Schedule 4". The national and provincial regulation referred to herein cannot be so extensive as to take away municipal power to apply discretion to decisions that fall within the areas of municipal executive responsibility. The effect of these provisions is that, except to the extent set out above, the executive authority over, and the power to administer matters listed in Part B of Schedules 4 and 5, is vested in municipalities alone.[4]

Consistency with the Constitution: The boundaries between regional planning, provincial planning and municipal planning

3.4. The Constitution confers some planning powers on all spheres of government, by allocating legislative authority for "regional planning and development" and "urban and rural development" concurrently to the national and provincial spheres; legislative and executive authority for "provincial planning" exclusively to the provincial sphere; and executive authority over "municipal planning" exclusively to the municipal sphere. For purposes of working out where each sphere of government's authority starts and ends, it is self-evidently important to be able to delineate the parameters of each of those concepts (regional planning and development; urban and rural development; provincial planning; municipal planning).

[3] Section 41(1) of the Constitution.
[4] *Johannesburg Municipality v Gauteng Development Tribunal* 2010 (6) SA 182 (CC).

3.5. In the case of *Johannesburg Municipality v Gauteng Development Tribunal* 2010 (6) SA 182 (CC) ("***Johannesburg Municipality* case**"), the Constitutional Court dealt with the meaning of "municipal planning", and authoritatively interpreted the concept of "municipal planning", as used in Part B of Schedule 4, to refer to the control and regulation of the use of land, including the zoning of land and the establishment of townships.[5] Similar clarity is beginning to emerge in relation to the meaning of "provincial planning". In the subsequent case of *Lagoon Bay Lifestyle Estate (Pty) Ltd v The Minister of Local Government, Environmental Affairs and Development Planning of the Western Cape and Others*[6] ("***Lagoon Bay* case**"), the Western Cape High Court held that the *Johannesburg Municipality* case does not mean:

3.5.1. that all questions involving the zoning of land and the establishment of townships invariably, regardless of the circumstances, fall exclusively under the rubric of "municipal planning"; or

3.5.2. that all such questions must be determined exclusively by municipalities; or

3.5.3. that provincial government can never have authority, as part of its functions of monitoring and oversight, to decide planning issues, merely because they fall within the category of "municipal planning."[7]

3.6. The Court in the *Lagoon Bay* case accepted that the majority of applications for rezoning must be considered by municipalities pursuant to their functional competence in respect of municipal planning, as the impact of the majority of such planning decisions is limited to the geographic area of the relevant municipality. The Court, however, held that there is a category of planning decisions which, for a variety of reasons, *including the size and scale of the proposed development*, will have an impact beyond the area of a single municipality and will have effects across a wider region. The Court held that these "extra-municipal" issues exceed the bounds of municipal planning and fall within the ambit of "regional planning and development" (as per Part A of Schedule 4 to the Constitution) and/or "provincial planning" (as per Part A of Schedule 5 to the Constitution).

3.7. The national government has the power to make and execute laws on the functional areas listed in Part A of Schedule 4. This includes "regional planning and development" and "urban and rural development." Legislative authority over matters listed in Part B of Schedule 5 (which includes "provincial planning"), vests in the provincial sphere exclusively. The national government is also empowered to regulate the exercise of municipal powers and the administration of municipal affairs, subject to section 44 of the Constitution. The

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[5] Paragraph 57.
[6] (2011) ZAWCHC 327.
[7] At paragraph 14.

national sphere cannot, by legislation, give itself the power to exercise executive municipal or provincial executive powers, or the right to administer municipal or provincial affairs.

3.8. A difficult issue arising in relation to the limitations of national and provincial versus municipal executive responsibility, is in respect of land use decisions that may overlap with matters within the executive authority of the national or provincial spheres, such as housing, agriculture and the environment. These are all functional areas listed in Part A of Schedule 4 to the Constitution, that are relevant to land use planning and that would ordinarily require decision-making in respect of land areas that fall within the area of jurisdiction of a particular municipality. National or provincial government (depending on the allocation of responsibility between them in terms of national legislation) has full authority over these matters, and may legislate, implement and administer in these functional areas without the limitations that apply to provincial involvement in matters set out in Part B of Schedules 4 and 5. It is inevitable that the exercise of those powers by national or provincial government will limit municipalities' power over land use, and it is important for rational distinctions to be drawn between categories of decisions that should be made by national or provincial government, and those that should be made by municipal government.

3.9. As far as we are aware, there is no useful case law in which the concepts of "regional planning and development", and "urban and rural development", have been given meaning by courts, relative to concepts of provincial and municipal planning.

3.10. Based on the Constitutional provisions and jurisprudence discussed above, insofar as the meaning of provincial planning is concerned, the following principles emerge:

3.10.1. the provinces have the power to regulate (including supervision, monitoring and support) the manner in which land use decisions are taken by municipalities;

3.10.2. the Court in the *Lagoon Bay* case established that where a particular planning decision will have an impact beyond the geographical area of a single municipality and will have effects across a larger region, because of, amongst others, size and scale; then such planning decisions rest within the planning jurisdiction of the provinces; and

3.10.3. in those areas related to land use in which the provinces have executive decision making powers, there invariably has to be a degree of municipal compromise.

3.11. In our view, the Bill fails to delineate circumstances in which the Gauteng Provincial Government (the **"Province"**), would be required to decide on development and land use

applications, in accordance with its constitutional mandate.[8] In particular, the Bill fails to make provision for categories of land use applications which may affect an entire, extra-municipal region, and as such require the involvement of the Province.[9]

3.12. Moreover, the Bill fails to deal with the necessity for the intervention of the Province in relation to land use and development applications which impact upon those functional areas listed in Part A of Schedule 4 to the Constitution, that are relevant to land use planning and that fall within the exclusive competence of the Province (such as housing, agriculture, tourism and the environment).[10] For example, clauses 51 to 58 of the Bill regulate the establishment of settlements (being housing which is subsidised or to be subsidised by government). Since the establishment of settlements is likely to materially impact upon an area of exclusive Provincial competence, such as housing, applications of this nature should be submitted to both the municipality and to the Province. At present, the Bill makes no provision for the involvement of the Province in relation to the establishment of settlements. The necessity for the involvement of the Province applies in relation to all applications which are likely to materially impact upon a constitutional function which is exclusively reserved for the Province.

3.13. Thus, the manner in which the Bill regulates the provincial planning function is inadequate, in that it fails to establish a framework for co-operative governance in instances where land use applications fall outside of the municipal planning function (based on, *inter alia*, the size and scale of a development); and in instances where land use applications materially impact upon an exclusive Provincial function.

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[8] Which includes its exclusive competence over provincial planning, and its concurrent competence over regional planning and development and urban and rural development together with national government.

[9] In accordance with the dicta of the Western Cape High Court in the *Lagoon Bay* case. For example, the Western Cape Land Use Planning Bill envisages a specific category of land use applications which will require the approval of both the municipality and the provincial government. This applies to developments that affect an entire region (e.g. a regional mall).

[10] By way of example, the Western Cape Land Use Planning Bill makes specific provision for the intervention of the province in relation to developments that directly affect exclusive provincial functions (such as a development having a material impact on agriculture or tourism).

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28TH MARCH 2013