SAPOA

THE VOICE OF COMMERCIAL PROPERTY

www.sapoa.org.za

DRAFT MPUMALANGA PLANNING ACT, DRAFT 13 OF 28 JANUARY 2013

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

16TH MAY 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. SAPOA has also commented on the Gauteng Planning and Development Bill ("**GPAD**") and now comments on the draft Mpumalanga Planning Act (the "**Act**") being proposed provincial legislation which 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 Act is therefore of enormous importance to SAPOA members, and will play a key role in the extent to which commercial and

1.3. 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 Act right, so that it can serve as an enabler to the efficient and orderly development of the property sector.

1.4. In paragraph 2, we set out our more detailed clause by clause comments, on the drafting and internal consistency and coherence of the Act. Further in paragraph 3 below, we set out our principal areas of general concern regarding the Act, in particular regarding its consistency with the Constitution of the Republic of South Africa, 1996 ("**Constitution**") and the extent to which the Act as drafted will achieve its stated objectives.

1.5. As a general comment, the Act 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 Act and many items in the Act are left open for items to be prescribed by regulation. Those regulations will provide the detail to the operation of the Act.

1.6. The Act 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 Act.

2. DETAILED CLAUSE BY CLAUSE COMMENTS

The paragraph numbers below will refer to the paragraph numbers in the Act:

CHAPTER 1 – INTRODUCTORY PROVISIONS

(1) **Definitions**

"**beneficial owner in law**":	It is not clear where this concept is used in the Act and what the difference is between a beneficial owner in law and an owner. The concept of owner would be preferable;
"**existing scheme**":	This definition does not deal with the former Development Facilitation Act "**DFA**" which was not repealed but certain provisions found unconstitutional. Yet, existing schemes established pursuant to the DFA will be in use;
"**incremental upgrading area**":	It is not clear from the definition or from the Act as to what is intended or meant by the term "incremental upgrading". It is also not clear what the intention of this definition is. Perhaps it is to allow for certain areas to be upgraded without immediate compliance with this Act. The GPAD used the concept of *"settlements"* which could be exempted from the development requirements;
"**land**":	The definition should have its ordinary meaning and should perhaps mean any land depicted on a diagram or general plan. This would include roads, open areas and parks etc which may not be an erf, portion, farm or holding;
"**land development**":	This definition is duplicated and the first definition namely *"means any procedure aimed at changing the use of land in terms of chapter 5"* is the preferable definition;

"**land development**":	The second definition is an important definition given the provisions of Sections 5 and 21 dealt with below and land development cannot, for the purpose of this Act, include the erection of buildings or structures as that is not the function of a planning legislation. In addition, Section 21 is a much wider scope than this definition. It should accordingly be revisited;
"**land use management**":	This does not have the same meaning but will have a similar meaning as the context may dictate;
"**municipal council**":	The question marks need to be completed. It is not clear what they intend to replace;
"**owner**":	This definition is too broad. Only a registered owner should be able to make an application for change of land use. This should not be open to beneficial owners in law (it is not clear what the distinction is in this case) and indeed it is not clear how the holder of a registered servitude of land or a lessee of land could be in the position of an owner to make application for a change of land use;
"**prescribe**" or "**prescribed**":	The reference to *"other legal instrument relevant to the performance of any act"* should be removed from the text. It is not clear what is anticipated here;
"**public participation**":	This should have its own meaning and should not be defined. As presently defined the word *"all"* qualifies the members of the community and should be deleted if the definition is to remain. In addition, "**public participation**" is more than being informed but includes the participation element. This definition should be deleted and "**public participation**" should have its own meaning;

(2) **Use of definitions**

It is not good practise to dictate that definitions in this Act must be applied in other documents such as Spatial Development Frameworks and land use schemes.

The definitions should only apply to this Act.

(3) **Application of the Act**

This should be amplified to state that the Act *"applied to the planning, use and development of all land in the Province"*.

(4) **Objects of the Act**

It is not clear what the effect of stating the objects of the Act is. Is it anticipated that everything within the Act must be within the objects of the Act? If so, this should be stated.

CHAPTER 2 – DEVELOPMENT PRINCIPLES, NORMS AND STANDARDS AND SPATIAL DEVELOPMENT FRAMEWORKS

(5) **Legislative framework**

It is not clear why this statement is being made as it is trite law. National legislation will always be applicable to land.

(6) **Provincial development principles and norms and standards**

It is not clear what the intention of this clause is. This clause should set out in more detail that the provincial planning and development must be implemented and that the provincial plans must have the purpose of co-ordinating, integrating and aligning provincial land use with municipal plans and development strategies so that they are at idem. To do this, provincial planning and development is required and simply applying development principles not inconsistent with national legislation. Provinces should have integrated development plans and provincial special development frameworks which must be amended from time to time, and, as mentioned aforesaid, not be in conflict with municipal planning. Chapter 2 requires considerable amplification and reference should be had to the provisions of Chapter 2 of the GPAD.

CHAPTER 3 – CO-OPERATIVE GOVERNANCE

This clause should be amplified as set out above to link the municipal and provincial frameworks and create and integrated approach to planning.

CHAPTER 4 – LAND USE SCHEMES

Reference should be had to Chapter 4 of the GPAD which is much more comprehensive in its form.

(12)(2): The land use scheme should be consistent with the existing development frameworks that have been created under the Local Government – Municipal Systems Act, 32 of 2000, assuming that these were prepared.

(12)(3): The word *"may"* should read *"must"* as it is obligatory to prepare the land use schemes. However the land use schemes are not prepared or administered by a district municipality. This is the function of the local municipalities. The district municipalities may have their own land use schemes relating to its jurisdictions. The district municipalities and local municipalities have different functions.

(12)(11): This statement is trite in that all land within the municipal area will be subject to the enforcement of the land use schemes by the municipalities.

(13)(2)(h): The concept of the progressive introduction of land use management on communal land is not clear. The land use scheme will set out the committed uses of land and the land use applications may be approved on the basis of this principle. As mentioned above, the concept of lesser formalities required for settlements in the GPAD may be a good way to deal with this.

(13)(2)(i): Similarly the concept of incremental upgrading and progressive introduction of land use management will also regulate this issue. More details should however be contained in the Act dealing with this.

(14): The concept of the land use scheme coming into effect when all appeals on the land have been disposed of is not the preferred way of dealing with the matter. If an appeal has been lodged, then the approved land use scheme should not be published in the Provincial Gazette. Otherwise it is not known whether there are in fact appeals and it is common practise that publication in the Provincial Gazette is a date on which the land use scheme will come into effect.

(15)(1): The word *"earlier"* should be included after the word *"or"* in the second line so that the occurrence is every 5 (five) years or earlier upon request of the Premier. It is not clear what the consequence of the municipality not submitting the scheme to the Premier.

(16): It is questionable whether municipalities may practically comply with the limitation of every 5 (five) years and it is not clear what the consequence of not doing so is. The continual review of the land use scheme and the ability of the municipality to review the scheme will create great uncertainty within the property industry. The scheme should remain as is unless amended by way of application from a land owner. Any change by the municipality must only be undertaken if it is in the interest of the general public and harmonious development of the area. Further the rights of land owners must be recognised and a public participation process should be involved in the review.

(17): The effect of this provision is that all existing uses will continue for 15 (fifteen) years. It is not clear what happens after 15 (fifteen) years. As you have 15 (fifteen) approaches, great uncertainty may be created as certain uses may not be in keeping with the new land use scheme and the consequences of a legal use under this act are stringent.

CHAPTER 5 – LAND DEVELOPMENT

(19): The registered planner should act in an independent capacity and not on behalf of the applicant. This should be much like the environmental practitioners under the Environmental Law who make a report to the Authorities. If this is not the case, the registered planner may well owe allegiance to the applicant.

(21): The scope is extremely wide and includes *"any other application to develop land"*. The Act uses the concept of *"develop"* which is extremely wide. The purpose of the Act is for land use planning and accordingly the application should be limited to those activities and accordingly the words *"any other application to develop land"* should be deleted.

(22): As mentioned above, the concept of owner is extremely wide and all the persons included in that concept cannot possibly be permitted to make application for land development. It can only be the owner or the owner's authorised agent that can make the application. Accordingly the definition of "owner" should be amended as set out above.

(24): The applicant should submit the application to the relevant provincial authorities in the area, such as the road authorities, hospital authorities etc, that have an interest in the change of land use planning. This will allow the provincial authorities to give input and to align the municipal planning with provincial planning.

(25): The concept of the amendment not being substantial in (25)(3) is subjective and may give rise to abuse. We would submit that any amendment should require notice to be given to all the participating parties. Provision should also be made for the abandonment of development applications.

(27)(3): It should be noted that the municipal council is to decide on the application. As mentioned above, the definition requires clarification where the question marks are included. Is it intended that this is the full council i.e. must be considered by the full municipal council in chambers?

(27)(4): The term *"municipality"* should read *"municipal council"*.

(27)(5): The term *"endowment"* should be defined.

(27)(6)(a): The decision of the municipal council should be final on the date on which it is given, unless subject to appeal. There should not be further enquiry as to whether the conditions of establishment have been fulfilled. It is a logical approach. Firstly the municipal council grants approval and secondly, once the conditions of establishment have been complied with, the rights should be proclaimed.

(27)(6)(b): The concept of right of appeal lapsing should be amplified to refer to an appeal succeeding. It may be preferable not to refer to the appealing of the council's decision in this way. The decision of the council should be final unless it is formally appealed and then if it is appealed, it will become final once the ruling in respect of the appeal is made.

(28)(1)(e): The municipality should not be entitled to suspend restrictive conditions of title if they are personal in nature. This qualification should be imposed. For example, it should not be able to modify a usufruct.

(29): This is not a good provision and should be deleted. Once a land development application has been approved, then it is final and the land use scheme is amended. Any amendment of that must require a new application. To allow an amendment after approval will cause difficulty. If the clause is to remain, it is not clear what the municipality would consult the surveyor general and the registrar in this regard. This is not a good provision.

(30): It is not clear why this clause is included as this is a matter for the deeds registry to deal with. To suggest that ownership of *"public place in the street shall revest in the township owner"* may not be effective as the township owner may no longer exist, it may have been liquidated or wound up. The public place should remain in the ownership of the municipality. It is not a simple application to cancel a general plan. The ramifications are extremely wide. Accordingly, clause 30 should be deleted.

(31)(2): The period of 5 (five) years is extremely long and it will create uncertainty. This relates to proclamation of the township and the ability of the municipality to charge rates and taxes. The period should be shortened to 1 (one) year so that applications are not made and held in abeyance for a long time.

(32): This clause will create commercial difficulty for developers who, for example, will not be able to sell on the whole development with this caveat. The certificate under Section 28(2) will normally only be given after proclamation of the township and there is a period of 5 (five) years within which that may occur [see (31)(2) above]. The restriction should be limited to transferring an erf in a township and the approval of buildings.

(33): This restriction should not apply to consolidations but only establishing townships and perhaps sub-divisions. There should however be a method of guaranteeing performance to the municipality which will create an exemption for the entering into of these contracts. Whilst it is understood the purpose of this provision, in practise, such provisions are ignored and many *"pre-proclamation sales"* have been entered into in the past. If it is serious that this should be a prohibition, then there should be a sanction other than the contract being of no force and effect.

CHAPTER 6 - APPEALS

(34): The mechanism for establishing the appeals board is clumsy and it is questioned whether it may be effectively implemented.

(37): The powers of the appeal board is extremely wide. The decision should be related to a true appeal and the only matter in question is the previous decision. The board should not have such powers as it then, in effect, creates a new hearing.

(41)(1): To reiterate that the powers of the appeal board are not required, this clause requires the appeal to be determined solely on the merits of the hearing appealed against and limited to the evidence or information which the decision under appeal was given. There is therefore a conflict between this clause and clause (37).

(42): There should be strict time limits within which the appeal must be heard. Reference is made in (45)(1) to the prescribed time period which we assume will be in the regulation.

CHAPTER 7 – ENGINEERING SERVICES AND DEVELOPMENT CONTRIBUTIONS

(50): This clause is peremptory and we would suggest that not all applications will require land for parks and open space or for development contributions in lieu thereof.

(51): This clause should be reconsidered as in many cases roads vest in home owners associations and not the municipality. There is reference to *"municipal streets"* but it is not clear what the distinction is between this and an ordinary street.

CHAPTER 9 – GENERAL PROVISIONS

(64): It is not clear what the intention of this clause is. These are extremely wide powers and the Premier should not have the powers although they relate to temporary exemptions. It should be noted that there is no provision relating to the development of land relating to the municipality and accordingly the municipality will be bound by these provisions. It is recommended that a separate provision be dealt with for the municipality rezoning its land.

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."[1]

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

[1] Section 41(1) of the Constitution.

3.4. 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.[2]

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

3.5. 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).

3.6. 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", to refer to the control and regulation of the use of land, including the zoning of land and the establishment of townships.[3] Similar clarity is beginning to emerge in relation to the meaning of "provincial planning".

[2] *Johannesburg Municipality v Gauteng Development Tribunal* 2010 (6) SA 182 (CC).
[3] Paragraph 57.

3.7. 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*[4] ("***Lagoon Bay* case**"), the Western Cape High Court held that the *Johannesburg Municipality* case does not mean:

3.7.1. 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

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

3.7.3. 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."[5]

3.8. 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).

3.9. 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.

[4] (2011) ZAWCHC 327.
[5] At paragraph 14.

3.10. The 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.

3.11. 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.

3.12. 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.

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

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

3.13.2. 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

3.13.3. 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.

3.14. In our view, the Act fails to delineate circumstances in which the Mpumalanga Provincial Government (the "**Province**"), would be required to decide on development and land use applications, in accordance with its constitutional mandate.[6] In particular, the Act 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.[7]

3.15. Moreover, the Act 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).[8]

3.16. Thus, the manner in which the Act 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.

Yours faithfully

ADVOCATE PORTIA MATSANE
MANAGER: LEGAL SERVICES DEPARTMENT

[6] 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.
[7] 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).

[8] 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).