SAPOA

THE VOICE OF COMMERCIAL PROPERTY

SPATIAL PLANNING AND LAND USE MANAGEMENT BILL, 2012

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

8 AUGUST 2012

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% of all commercial and industrial property in South Africa, with a combined portfolio in excess of R150 billion.

1.2. SAPOA has enjoyed a constructive and engaging relationship with the relevant sectors of Government, and welcomes the opportunity to make representations on the Spatial Planning and Land Use Management Bill, 2012 ("**SPLUMB**"). 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; SPLUMB 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 SPLUMB right, so that it can serve as an enabler to efficient and orderly development of the property sector.

1.3. In paragraph 2 below, we set out our principal areas of general concern regarding SPLUMB, in particular regarding its consistency with the Constitution of the Republic of South Africa, 1996 ("**Constitution**") and the extent to which SPLUMB as drafted will achieve its stated objectives. Thereafter, in paragraph 3, we set out our more detailed Chapter by Chapter

and clause by clause comments, on the drafting and internal consistency and coherence of SPLUMB.

2. GENERAL CONCERNS ARISING FROM SPLUMB

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

2.1. Provincial government has exclusive legislative power, with regard to "provincial planning" (Part A of Schedule 5 to the Constitution). National government may only make law on "provincial planning" if it is necessary for one of the following reasons, set out in section 44(2) of the Constitution:

2.1.1. to maintain national security;

2.1.2. to maintain economic unity;

2.1.3. to maintain essential national standards;

2.1.4. to establish minimum standards required for the rendering of services; or

2.1.5. to prevent unreasonable action taken by a province which is prejudicial to the interest of another province or to the country as a whole.

2.2. The power of intervention by Parliament, in relation to provincial planning, is thus clearly defined and limited.[1] In addition, although the objectives of intervention are broadly formulated, the word "necessary" considerably limits Parliament's competence to intervene. The Constitutional Court has held that the word "necessary" means that there must be no alternative to achieve the objectives, other than by national intervention. In the so-called *Liquor Bill* case[2] the Constitutional Court held that the provisions of the national Liquor Bill, which prescribed detailed mechanisms to provincial legislatures for the establishment of retail liquor licensing mechanisms, infringed upon the provincial legislatures' exclusive competence to enact legislation on liquor licensing. This was not "necessary" for the maintenance of economic unity. The Court recognised that consistency of approach in the field is important, but held that "importance does not amount to necessity".[3]

2.3. In the preamble to SPLUMB, it is indicated that "it is necessary that ... a uniform, recognisable and comprehensive system of spatial planning and land use management be established throughout the Republic *to maintain economic unity* and equal opportunity and

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[1] *Ex Parte Chairperson of the Constitutional Assembly: in re Certification of the Constitution of the Republic of South Africa (First Certification decision)* 1996 (4) SA 744 (CC) at paragraph 257.
[2] *Ex Parte President of the Republic of South Africa: In re Constitutionality of the Liquor SPLUMB*2000 (1) SA 732 (CC) at paragraph 80.
[3] *Ibid.*

equal access to government services". As set out above, this basis for intervention by Parliament must be justifiable in relation to the high threshold set by the Constitutional Court in respect of the necessity for intervention in terms of section 44(2) of the Constitution.

2.4. Aspects of SPLUMB that regulate **provincial planning** include the following:

2.4.1. Clause 5, which attempts to define the concepts of "municipal planning", "provincial planning" and "national planning". One of the objects of the SPLUMB is to provide a framework for co-operative government and inter-governmental relations amongst the three spheres of government in regard to land use and development in the Republic. It is arguable that a framework of this nature is necessary for maintaining economic unity or essential national standards, given the ambiguity and overlap which exists in relation to each sphere of government's planning competence. However, as discussed more fully hereinabove, the manner in which the SPLUMB defines municipal planning in Clause 5(1), provincial planning in Clause 5(2) and national planning in Clause 5(3), is inadequate, as such definitions to not seek to resolve the ambiguity and confusion in relation to the boundaries between each sphere's area of planning competence. In addition, the manner in which the SPLUMB deals with the provincial planning mandate is superficial and minimal. Accordingly, SPLUMB fails to establish a co-operative government framework in relation to land use and development planning; and as such, it cannot be said to be necessary (in this respect) for purposes of maintaining economic unity or essential national standards;

2.4.2. Clause 12(1), which provides for the mandatory preparation of spatial planning frameworks ("SPFs") by the provinces, and sets framework principles within which these are to be prepared. Clauses 15, 16 and 17 deal with the content, purpose, legal effect and procedure for the preparation, adoption and amendment of provincial SPFs. The preparation of SDFs by the provinces is not specifically regulated in any other legislation (such as in the MSA in the case of municipalities), and it is potentially arguable that the maintenance of essential national standards necessitates a standardised system regulating the content and procedures in respect of the preparation, adoption and amendment of provincial SPFs. Unfortunately Clauses 12, 15, 16 and 17, although requiring alignment between national, provincial and municipal SPFs, do not tackle the difficult issue of how to achieve such alignment; nor do they sufficiently acknowledge the municipalities' constitutional authority as regards municipal planning issues;

2.4.3. in addition, it must be borne in mind that the Constitutional Court in the *Liquor Bill* case held that importance does not amount to necessity, and as such, the desirability (from the national government's point of view) of consistency in this field cannot justify national legislative intrusion into an area of exclusive provincial legislative competence (namely provincial planning). The Court further held that, "the Constitution envisaged that the provincial system of government with its attendant exclusive legislative powers would lead, over time, to differences between provinces' approaches to the matters within their legislative and executive competence." Therefore, since the preparation of provincial SDFs falls squarely within the provincial planning mandate, and the fact that national government would prefer consistency between provinces does not necessarily warrant intervention in terms of section 44(2), it is arguable that Clauses 12, 15, 16 and 17 would not withstand constitutional scrutiny.

2.5. In conclusion, the manner in which the SPLUMB regulates provincial planning arguably falls short of the necessity for intervention test set by the Constitutional Court, in that it fails to establish a framework (particularly in relation to the provinces) for co-operative governance in the area of land use planning and development. In addition, the manner in which it seeks to regulate the provincial planning mandate is flexible, discretionary and superficial; and cannot be said to be *necessary* for purposes of maintaining economic unity or essential national standards. In order for the intervention by Parliament in the area of provincial planning to be justifiable in terms of section 44(2) of the Constitution; the manner in which the SPLUMB seeks to regulate provincial planning will need to be revised in order to more closely reflect its stated purpose and objects set out in the preamble and in Clause 3.

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

2.6. In terms of Section 40 of the Constitution, the South African model of government consists of three spheres: the national, provincial and local spheres of government. 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."[4]

2.7. 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

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

by the national and provincial spheres of government to the extent defined in section 155(6)(a) and (7) of the Constitution.

2.8. Section 155(6)(a) obliges each provincial government to establish municipalities within its province and once established, to provide for their monitoring and support. Furthermore, 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 regulating 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". Thus Parliament is vested with the authority to enact the SPLUMB insofar as it relates to municipal planning (which is listed in Schedule 4), without the limitations imposed in section 44(2) in relation to provincial planning. 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.[5]

2.9. Complications arise in the regulatory context where there is national and also provincial legislation, regulating Schedule 4 matters. In this regard, section 146 of the Constitution regulates conflicts between national and provincial legislation which regulates matters listed in Schedule 4 (such as municipal planning), and sets out a test for determining whether the national or provincial legislation in question prevails. Where SPLUMB and the provincial ordinances or Acts regulating municipal planning co-exist, difficult questions of interpretation will arise if there is any overlap between matters regulated at national level and at provincial level. See further in this regard, paragraph 3.39 below.

2.10. In this regard, the following provisions of the SPLUMB seek to regulate the exercise by municipalities of their executive planning function: Clauses 20 and 21 (which regulate municipal SDFs); Chapter 5 (relating to the preparation of land use schemes), and chapter 6 (relating to land use planning and development). However, municipal planning is also currently regulated by provincial ordinances or Acts, and will continue to be the case unless each of the nine provinces enacts new municipal planning legislation simultaneously with the coming into effect of SPLUMB, which new legislation is perfectly aligned with SPLUMB. In the event of any conflict between SPLUMB and a provincial ordinance or Act in relation to

[5] *Johannesburg Municipality v Gauteng Development Tribunal* 2010 (6) SA 182 (CC).

the regulation of municipal planning matters, the provisions of section 146(2) of the Constitution will need to be invoked in order to resolve the conflict. The application of the broadly framed and nuanced tests set out in section 146(2) may lead to debate and disagreement about which statute prevails in the circumstances, and also to SPLUMB prevailing in certain provinces, and provincial legislation prevailing in others, depending on the outcome of the section 146(2) test. This situation is unsatisfactory and will undoubtedly result in uncertainty and inconsistency in relation to municipal planning in the Republic.

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

2.11. The Constitution confers some planning powers on all spheres of government, by allocating legislative authority for "regional planning and development", "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).

2.12. 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.[6] 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*[7] ("***Lagoon Bay* case**"), the Western Cape High Court held that the *Johannesburg Municipality* case does not mean:

2.12.1. 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

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

[6] Paragraph 57.
[7] (2011) ZAWCHC 327.

2.12.3. 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."[8]

2.13. 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).

2.14. 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 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.

2.15. 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.

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[8] At paragraph 14.

2.16. 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", relative to concepts of provincial and municipal planning, have been discussed. Unfortunately, the SPLUMB fails to even attempt to give content to these terms, and relies instead on the term "national planning" which is not used in the Constitution. It does not appear from Clause 5(3) of SPLUMB, which defines "national planning", that that term purports to cover the concepts of "regional planning and development" and "urban and rural development" as contemplated in the Constitution.

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

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

2.17.2. 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

2.17.3. 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.

2.18. It is essential that the SPLUMB establishes an unambiguous framework, in line within the above-described constitutional principles and jurisprudence, within which each of the national government, provinces and municipalities can exercise their respective planning mandates. In Clause 5 of SPLUMB, the legislature has proposed a description of each of "national planning" (which is not a term that is used in the Constitution), "provincial planning" and "municipal planning". In Clause 5(1)(c), the SPLUMB attempts to delineate the boundaries between municipal planning and provincial planning. The approach taken is purportedly based on the decision in the *Lagoon Bay* case, in that the SPLUMB limits the municipal planning mandate to: "*the control of the use of land within the municipal area where the nature, scale and intensity of the land use does not affect the provincial planning mandate*". However, this Clause is problematic in the following respects:

2.18.1. the principle established in the *Lagoon Bay* case related to the *scale* of the proposed land use; and in particular, the court in that case held that where the *scale* of land use will materially impact on the land use of a larger region than the geographical area of a single municipality, then such land use decision falls

within the provincial planning mandate. Clause 5(1)(c) fails to capture this point, in that it fails to delineate what the indicators of a land use application or decision that encroaches on the provincial planning mandate would be. (As per *Lagoon Bay*, it would be a proposed land use which, by virtue of its nature, scale or intensity, has a material impact on a geographical area wider than that of the municipality, but this kind of test is not reflected in the definition of "provincial planning" (Clause 5(2)). As such, the manner in which Clause 5(1)(c) read with Clause 5(2) attempts to define the limits of municipal planning relative to provincial planning, is potentially unconstitutional, in that it may allow the provinces to encroach on the municipal planning mandate in an arguably arbitrary manner;

2.18.2. in addition, Clause 5(1)(c) limits the concept of municipal planning by reference to the "national interest", which limitation goes wider than the restrictions permitted by section 146(2) of the Constitution;

2.18.3. finally, Clause 5(1)(c) fails to capture the fact that the municipal planning mandate excludes the authority to administer matters relating to land use, which also relate to matters over which the national government and the provinces have executive decision making powers (such as environment, housing, industrial promotion, agriculture, nature conservation, etc).

2.19. It is crucial that the SPLUMB addresses the shortcomings of the Development Facilitation Act 67 of 1995 ("**DFA**"), and creates a framework within which the three spheres of government are effectively able to execute their respective planning mandates; while ensuring that the national and provincial spheres of government do not usurp the municipal planning mandate of the municipal sphere. Clause 5(1)(c) of SPLUMB attempts to define municipal planning and set the boundaries within which the municipalities will exercise this function. However, in our view, it fails to adequately address the complex issue of where the control and regulation of the use of land within a municipal area, becomes a provincial or national function.

2.20. Clause 5(2) defines "provincial planning" for purposes of the SPLUMB. It is important that the definition of "provincial planning" covers, with sufficient precision, the areas where provincial government exercises authority. Accordingly, the definition should include an element which deals with the question of when land use matters go beyond municipal planning. Based on the principles discussed above, an approach may be to include and define key aspects such as "scale" and "impact". However, Clause 5(2) fails to recognise or address the fact that there are elements of land use planning which will fall outside of the municipal planning mandate, and within the provincial planning mandate. This is at odds with the stated object of the SPLUMB, which is to "provide a framework for spatial planning

and land use management in the Republic"; and with Clause 3(e) which provides that one of the objects of the SPLUMB is "to provide [for] co-operative government and intergovernmental relations amongst the national, provincial and local spheres of government". A crucial aspect of co-operative governance in the context of land use planning, is the creation of a framework within which each sphere of government is able to perform its planning functions, without ambiguity and conflict as to each sphere's area of functional competence. The SPLUMB fails to adequately address this issue.

2.21. The definition of "national planning", contained in Clause 5(3) of the SPLUMB, includes, *inter alia*, the compilation of spatial development plans (not defined) and a national SDF, the planning for the execution of its legislative and executive powers insofar as they relate to the development of land and the change of land use, and the making of policies and laws necessary to implement land and the change of land use. As set out above, the national government does not have "national planning" powers *per se*, and any exercise of planning power must take place within its Constitutional competencies related to land use. In the circumstances, consideration must be given to whether the compilation of spatial development plans / SDFs in fact falls within the national planning competence. In addition, the reference to its powers (legislative and executive) in relation to land development, the change of land use, and national planning is broadly stated; and consideration must be given as to whether such powers should be described in a more specific and circumscribed manner, with closer reference to the national government's areas of functional competence.

3. CHAPTER BY CHAPTER ANALYSIS OF PROVISIONS

Chapter 1 – Introductory Provisions

3.1. Clause 1: Definitions

3.1.1. Terms that are used in SPLUMB without being defined, and which are critical for purposes of understanding the scope of the legislation, include the following, all of which would benefit from a clear definition to be included in section 1:

3.1.1.1. "*spatial planning*" (which term appears to incorporate concepts such as land use planning and land use management, but possibly goes wider); and

3.1.1.2. "*land use management*" (the term "land use management system" is defined so it would be a simple matter to define "land use management", which is used throughout SPLUMB).

3.1.2. The term "development application" referred to in the definition of "**applicant**" is fundamental to the Bill, and should be defined.

3.1.3. What does the term "community association" referred to in the definition of **"body"** refer to?

3.1.4. The proviso to the definition of "**environmental legislation**", namely that the definition will include "any other legislation that regulates a specific aspect of the environment" is vague, and may be inconsistently interpreted by the provinces.

3.1.5. The term "**executive authority**", is defined in the Municipal Systems Act 32 of 2000 ("MSA"). For purposes of consistency between the SPLUMB and the MSA, should the definition not be amended along the following lines: "executive authority, in relation to a municipality, has the meaning given to it in the Municipal Systems Act."

3.1.6. In the definition of "**land development**", are all changes in land use achieved in terms of "an applicable Land Use Scheme"? Should the definition not also include, after the words "land use scheme", words to the following effect: "or in terms of any other authorisation, permit or consent issued by a competent authority"?

3.1.7. "**Land use scheme**" is defined with reference to "the documents referred to in Chapter 5". It is not clear, from Chapter 6, which documents are being referred to. This is an important definition in the scheme of the Bill, and should be clearer.

3.1.8. What does the phrase "irrespective of the ownership of such land as open space" mean in the definition of **"open space"?**

3.1.9. Is the definition of "**person"** wide enough? It does not, for instance, refer to unincorporated entities, such as an unincorporated joint venture, a trust or an association; or to a person's successors in title and permitted assignees or transferees.

3.1.10. The term "**region**" is only defined with reference to a regional spatial development framework, and not in its own right. The national government has concurrent jurisdiction with the provinces with regard to "Regional Planning and Development". The definition of "region" is therefore important in relation to the aforesaid functional area.

3.1.11. **"Spatial Development Framework" ("SDF")** is stated to mean "a SDF referred to Chapter 4". SDFs are an integral part of the Bill, and if possible, a clearer definition should be formulated in this definition section.

Chapter 2: Development Principles and Norms and Standards

3.2. Clause 6: Application of Development Principles

3.2.1. Does the term "spatial development planning", used in Clause 6(2), have the same meaning as the term "spatial planning" used in Clause 6(1)(e)? If so, a consistent approach should be followed, and the appropriate term should be defined.

3.2.2. Clause 6(1) refers to "organs of state *and other authorities* responsible for the implementation of legislation regulating the use and development of land". (Our emphasis.) We question whether there are non-organs of state which are vested with such responsibility, and recommend that this language be tightened up so that it is clear which authorities (if any) besides organs of state, are bound by this provision.

3.2.3. "Sustainable use and development of land" in Clause 6(1)(c) is too wide; it implies that the actual users or owners of land are bound by these principles, not because their authorisations or consents make compliance a condition of use, but by virtue of SPLUMB. This goes too far.

3.3. Clause 7: Development Principles

3.3.1. The term "development" is not separately defined. "Land development", which is a defined term, should be used consistently throughout SPLUMB. The common sense meaning of "development" on its own is far wider than as regards land use only, and should be avoided.

3.3.2. Clause 7(a)(vi) is potentially in contravention of section 25(1) of the Constitution, which provides that "no one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property".

3.3.3. Deprivation of property occurs where the state regulates or imposes controls on the use of property (as opposed to the state acquiring the property, as in the case of expropriation). The most common examples of deprivation are land-use planning and development controls, building regulations and environmental conservation laws. These regulatory controls restrict the owner's free use enjoyment, exploitation and disposal of the property and so diminish its value or profitability. Notably, every restriction on property, no matter how small or insubstantial, constitutes deprivation in terms of section 25(1) of the Constitution and is therefore subject to its requirements.

3.3.4. Regulation in the areas of land use planning, development and environmental conservation is regarded as a legitimate and unproblematic exercise of state power, provided that the rules of procedural fairness are adhered to and that the effects of the regulation are not excessive, or disproportionate or unfair.

3.3.5. However, if in a specific case, a decision of a municipal planning tribunal has the effect of depriving an affected land owner of all economic use and benefit of his/her property; or causes a significant diminution in value of the said property, in a manner which is arbitrary (in that it is disproportionate, excessive or unfair); such decision will amount to an unconstitutional deprivation of property in terms of section 25(1) of the Constitution.

3.3.6. Accordingly, Clause 7(a)(vi) which provides that a municipal planning tribunal's exercise of discretion may not be impeded or restricted on the ground that the value of land or property is affected by the outcome of the application, is potentially unconstitutional insofar as it provides that the municipal planning tribunal is not required to consider diminution in land value as a relevant factor when considering applications before it.

3.3.7. It is further noted that there is existing national legislation in place, which specifically and directly rejects the approach taken in Clause 7(a)(vi) of SPLUMB. In this regard section 7(1) of the Building Standards Act 103 of 1997 provides that a municipality may not approve any plan if such plan will "probably or in fact derogate from the value of adjoining or neighbouring properties". This is clearly in conflict with the approach taken in SPLUMB.

3.3.8. The meaning of "prime and unique" agricultural land in Clause 7(b)(ii) should be clarified, or defined.

3.3.9. Clause 7(e)(i) provides that one of the development principles in the SPLUMB is the principle of good administration whereby "all spheres of government ensure an integrated approach to land use and land development that is guided by the spatial planning and land use management systems as embodied in this Act". However, as discussed above, the SPLUMB fails to create adequate systems for co-operative government, through failing to provide clear guidance in relation to the limits of and linkages between each sphere of government's area of functional planning competence. In addition, it must be noted that SPLUMB itself only sets out a framework for spatial planning and land use management systems, and does not "embody" those systems itself. Therefore, this provision gives insufficient guidance as to its actual requirements.

3.3.10. "Government Department" referred to in Clause 7(e)(ii) is not defined. A definition should be included which includes any national, provincial or municipal department.

3.3.11. Clause 7(e)(iv) refers to the creation of procedures for development applications, as an aspect of the principle of good administration. In furtherance of this principle, the SPLUMB should address and make provision for procedures that will apply in instances where development applications which relate to land which falls within the area of jurisdiction of a municipality, in fact fit within the provincial planning competence and therefore should be adjudicated jointly by municipal or provincial government, or should be referred from a municipal authority to the appropriate authority in the provincial sphere.

3.4. Clause 8: Norms and Standards

3.4.1. In terms of Clause 8, the Minister of Rural Development and Land Reform ("**Minister**") is required to "prescribe norms and standards for land use management and land development". As discussed above, the national sphere cannot interfere in provincial planning or municipal planning executive authority; it can only regulate the exercise of a municipality's executive authority to the extent necessary as contemplated in section 44(2) of the Constitution. Consideration should be given whether the national sphere is acting within its planning competence, in prescribing norms and standards relating to (amongst others), national policy on land use management and land development. The subject matter of the envisaged norms and standards is so widely stated that it would be easy for the Minister to stray into the areas of municipal and provincial planning authority and beyond the very limited powers of the national sphere. In addition, the manner and extent to which the norms and standards are to be taken into account in provincial and municipal planning decision-making, is not be explained.

3.4.2. Clause 8(1)(e), which mandates the standardisation and compilation of "all maps and diagrams at an appropriate scale" needs to be clarified. Which maps and diagrams? And, what constitutes an "appropriate scale"?

Chapter 4: Spatial Development Frameworks

3.5. Clause 12: Preparation of spatial development frameworks

3.5.1. In terms of Clause 12(1), the national, provincial, and local spheres of government must each prepare SDFs. Clauses 13 and 14 regulate the preparation and content of national SDFs. The role and function of national

SDFs is unclear, as these appear to overlap with the provincial and municipal planning-related functional areas, as well as with Clause 18 dealing with regional SDFs (to be prepared by national government).

3.5.2. In addition, in light of the provincial and municipal planning areas of competence, it is not clear that the national government has constitutional competence to prepare SDFs dealing with the spatial planning, land development and land use management issues described in Clauses 13 and 14. In our view, the mandate to prepare SDFs should be limited such that only regional, provincial and municipal SDFs are compiled. Even in relation to these, SPLUMB should make it clear that regional and provincial SDFs must not be inconsistent with or cover material that falls within the functional jurisdiction of municipal SDFs; and similarly, regional SDFs must not be inconsistent with or cover material that falls within the function jurisdiction of either provincial or municipal SDFs. This approach is different from the approach taken in Clause 12(2)(a) of SPLUMB, which merely requires co-ordination and alignment between all SDFs, without any indication of which takes priority in the event of a conflict between them.

3.5.3. As mentioned above, Clause 12(2)(a) provides that the SDFs prepared by each sphere of government must be "co-ordinated, aligned and be in harmony with each other". A framework or guidance on how to achieve co-operative governance in this respect should be provided in the SPLUMB, which framework must be designed so that it is consistent with the constitutional allocation of responsibilities as between the national, provincial and local spheres of government.

3.5.4. In regard to Clause 12(5) read with Clauses 20 and 21 (regulating the preparation and content of municipal SDFs), it is important that SPLUMB clearly distinguishes between a municipal SDF, on the one hand, and an integrated development plan ("**IDP**") as contemplated in Chapter 5 of the Local Government: Municipal Systems Act 32 of 2000 ("**Systems Act**"). In Clause 20(2) it is stated that an SDF must be prepared as a part of an IDP – but there is considerable overlap between the requirements for an SDF in SPLUMB, and the requirements for an IDP in the Systems Act. In our view, it is unnecessarily onerous and confusing for municipalities to have to create both an IDP under the Systems Act, and an SDF (to form part of the IDP) under SPLUMB. If there are deficiencies in the Systems Act regarding the contents of or process for compilation of the IDP, these should be rectified through amendments to the Systems Act, and not through imposition of another layer of planning

obligations. If national policy requires that the entire system of IDPs be abandoned in favour of SDFs which are aligned with provincial, regional and even national plans, then Chapter 5 of the Systems Act should be repealed and replaced with the SDF concept as provided for in SPLUMB. Either way, to have both in play is onerous, confusing, wasteful of scarce resources and arguably pointless.

3.6. Clause 13: National spatial development framework

3.6.1. In Clause 13(1), it is suggested the following words be inserted after the word "other" in the first line: "spheres of government,".

3.7. Clause 14: Content of national spatial development framework

3.7.1. The meaning of Clause 14(f) is unclear, since the terms "environmental management instrument" and "environmental management authority" are not defined terms.

3.8. Clause 15: Provincial spatial development framework

3.8.1. Clause 15(2) states that a provincial SDF must be consistent with the national SDF, but does not require that it should be consistent with municipal SDFs. This leaves open the difficult issue of how to regulate the spill-over from municipal planning into provincial planning (i.e. the circumstances in which a particular decision or application has provincial or regional impact rather than only local impact), and ignores the limitations on the extent to which provinces can "interfere" in municipal planning matters.

3.8.2. Clause 15(3) provides, *inter alia*, that provincial SDFs must "co-ordinate, integrate and align ... the plans, policies and development strategies of municipalities". But it gives no guidance on how this is to be done, or what exactly it means. It is difficult to foresee how provinces can play this role without interfering in the municipalities' executive authority in respect of municipal planning.

3.9. Clause 16: Content of provincial spatial development frameworks

3.9.1. The term "sectoral plans" used in Clause 16(1)(c) should be defined or explained. It is not clear in this Clause whether every provincial department is expected to have a "sectoral plan" or whether it is only provincial departments responsible for planning-related matters.

3.9.2. Clause 16(1)(e) provides that a provincial spatial development framework must "co-ordinate municipal spatial development frameworks with the provincial spatial development framework". The meaning of "co-ordinate" in this context should be clearer, since, in order not to usurp the municipal planning function, it is important that the alignment of provincial and municipal SDFs is a collaborative process, and that the municipality's executive authority in this regard is not undermined. As a possible alternative to the current wording, the following words could be inserted at the start of the sentence (i.e. before the word "co-ordinate"): "provide a framework for..."; and the word "co-ordinate" should be changed to "co-ordinating".

3.9.3. Clause 17: Legal effect of provincial spatial development framework

3.9.4. The reference to the term "development plans" in Clause 17(2) should be to "land development plans" (as a defined term).

3.10. Clause 18: Regional spatial development framework

3.10.1. Clause 18(3) effectively permits the Minister to "take over" the responsibility of preparing an SDF at municipal level, in the event of a failure by a municipality to prepare an SDF for its jurisdiction, by declaring that municipal area as a "region" and preparing an SDF for that area as if it were **a regional SDF. In our view, this provision amounts to the usurpati**on of municipal executive authority. The declaration of a municipal area as a region is to prefer form over substance – in fact what is being done through Clause 18(3) is to allocate what should be municipal authority, to the national sphere of government. This provision is thus unlikely to withstand constitutional scrutiny.

3.11. Clause 19: Content of regional spatial development framework

3.11.1. Clause 19(b) provides that a regional spatial development framework must give effect to national and provincial policies, plans and priorities. Insofar as it is possible so as not to undermine the municipal executive authority for municipal planning, such frameworks should also give effect to municipal policies, plans and priorities in the region.

3.12. Clauses 20, 21 and 22: municipal spatial development frameworks

3.12.1. Please see our comments at paragraph 3.5.4 above, regarding the overlap between these provisions and relevant provisions of the Systems Act. In addition, we note that although Clause 22(3) acknowledges that where there are inconsistencies between municipal and provincial SDFs, co-operative

governance requires that these be aligned in a non-conflictual manner, it is not clear from this provision what "the necessary steps" are that should be taken by the Premier, in order to ensure alignment.

Chapter 5: Land use management

3.13. Clause 24: Land use scheme

3.13.1. The meaning of Clause 24(2)(b) is unclear, since the terms "environmental management instrument" and "environmental management authority" are not defined terms.

3.13.2. Clause 24(4) allows local municipalities within a district municipality to request the district municipality to prepare a land use scheme applicable to the municipal areas of the constituent local municipalities within that district municipality. Section 84 of the Local Government: Municipal Structures Act 117 of 1998, provides that district municipalities are responsible only for integrated development planning for the district municipality as a whole (including the adoption of IDPs). This Clause 24(4) of SPLUMB ought to be revised to take into account relevant provisions, including procedures for authorisation of a district municipality for particular functions, under the Municipal Structures Act.

3.14. Clause 26: Legal effect of land use scheme

3.14.1. The reference to "development rights" in Clause 26(1)(c) should be to "*land* development rights".

3.14.2. The reference to "development goals" in Clause 26(5)(c) should be to "*land* development goals".

3.14.3. Clause 26(6), which contemplates that there will be "existing schemes not repealed or replaced by the new land use scheme" is at odds with Clause 26(1)(b), which provides that a new land use scheme "replaces all existing schemes".

3.15. Clause 28: Amendment of land use scheme and rezoning

3.15.1. The reference to "development goals" in Clause 28(1) should be to "*land* development goals."

3.15.2. The reference to "affected parties" in Clause 28(2) should be to "*interested* and affected parties."

3.16. Clause 29: Consultation with other land development authorities

3.16.1. Clause 29(1) is extremely broadly stated, and onerous for municipalities especially those with limited resources and expertise in national legislation. It places an onus on municipal officials to identify "organs of state responsible for administering legislation relating to any aspect of an activity that also requires approval in terms of [SPLUMB]", to contact those organs of state, to consult with them, to ensure the co-ordination of activities with them and to ensure that effect is given to the respective requirements of such legislation and there is no duplication. This is ambitious and overly broad, in our view, and likely unworkable in practice.

3.16.2. It is not clear what the precise purpose or meaning of Clause 29(3) is, as regards that which the municipal planning tribunal can take account of.

3.17. Clause 32: Enforcement of land use scheme

3.17.1. In terms of Clause 32(5)(a), an inspector is permitted to "at any reasonable times without previous notice enter any land for the purpose of ascertaining an issue required to ensure compliance with this Act." Further, in terms of Clause 32(5)(g), an inspector may "seize any such book, record or other document or any such article, substance, plant or machinery which in his or her opinion may serve as evidence at the trial of any person charged with an offence under this Act or the common law".

3.17.2. In our view, these "search and seizure" clauses are too widely cast, and fall foul of the constitutional right to privacy contained in section 14 of the Constitution. In order for a search and seizure to be constitutionally valid, the law authorizing the search and seizure must (i) properly define the power to search and seize; (ii) provide for prior authorization by an independent authority[9]; and, (iii) must require the independent authority to be provided with evidence on oath that there are reasonable grounds for conducting the search.[10] In terms of the Criminal Procedure Act 51 of 1977, a peace officer or a police official is only entitled to search a premises or seize property without a warrant in circumstances where they can show, on reasonable grounds, that a warrant would on application be issued, but that the delay that may be caused by applying for a warrant would defeat the object of the entry or inspection.

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[9] *Park-Ross v Director, Office for Serious Economic Offences 1995 (2) BCLR 198, 218-9 (C).*
[10] *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors 2000 (10) BCLR 1079 (CC).*

Similarly, in order to pass constitutional muster, the powers of the inspector to search or seize any property must be circumscribed in the manner set out above. In particular, the circumstances in which property can be searched or seized without a warrant, if any, must be narrowly construed, as in most cases, a search without a warrant will usually result in a constitutional violation.[11] The approach adopted in the Criminal Procedure Act may be used as a guideline in this regard.

3.17.3. In terms of Clause 32(5)(b), an inspector may "question any person who is or was on or in such land, either alone or in the presence of any other person, on any matter to which this Act relates." In this regard, section 35 of the Constitution (which deals with the rights of arrested, detained and accused persons), provides that any answer that incriminates such person may not be used against him or her in any subsequent criminal proceedings. The prohibition does not however appear to preclude the use of such evidence in subsequent civil proceedings. The Constitutional Court for instance held in *Bernstein v Bester* NO 1996 (4) BCLR 449 (CC), that evidence obtained under compulsion may be used in subsequent civil proceedings against a person. This case demonstrates that this provision will likely pass constitutional muster, provided it prohibits the use of such evidence in subsequent criminal proceedings. In our view, the Clause should be amended accordingly.

3.17.4. Clause 32(5)(c) provides that the inspector has the right to "require from any person who has control over or custody of a book, record or other document *on or in those land....*" to produce such items. The clause should be revised to rectify the italicized wording. In addition, the clause is too widely framed, and should specify (with reference to the inspector's role of ensuring compliance with the SPLUMB) in what circumstances the inspector will be entitled to require any such books, records or other documents.

Chapter 6: Land Development Management

3.18. Section 33: Municipal land use planning

3.18.1. The section provides that "Except as provided in this Act, all land development applications must be submitted to a municipality as the authority of first instance". However, where land development applications fall outside of the ambit of "municipal planning" as discussed herein above, such applications should be dealt with at a provincial or national level, as the case may be. In this

[11] *S v Motloutsi 1996 (1) SA 584 (C)*

regard, section 5(1)(c) of the SPLUMB attempts to delineate the boundaries between the municipal and provincial planning powers, through defining "municipal planning" as follows:

> "*...the control and regulation of the use of land within the municipal area where the nature, scale and intensity of the land use does not affect the provincial planning mandate of provincial government or the national interest*".

3.18.2. This clause (albeit inadequately) recognises that there will be instances where planning decisions will fall within the provincial mandate; however the SPLUMB fails altogether to deal with the procedures that should follow in such circumstances – leaving that to provincial legislation. Both the Constitution and the courts to some extent have delineated circumstances where the provincial planning mandate will prevail over the municipal planning mandate. In accordance with its objects, is essential that either the SPLUMB (if uniformity is required across the Republic) or provincial legislation (if not) addresses the procedural implications of, and creates a framework for scenarios where land use applications fall within the definition of provincial planning. For instance, some procedural issues which need to be addressed in this regard are as follows:

3.18.2.1. does the provincial government in such instances have full and exclusive decision making powers, and the municipalities none? or

3.18.2.2. do they both exercise their own authority with respect to the same subject matter? or

3.18.2.3. does the provincial government deal only with issues of provincial concern; and as such, its approval is then additional to the municipal approval.

3.19. Clause 34: Municipal co-operation

3.19.1. Clause 34(2) provides that a district municipality may, with agreement of the relevant local municipalities, deal with development applications and land use applications within the district municipal area. However, in terms of section 84 of the Local Government: Municipal Structures Act 117 of 1998, district municipalities are only responsible for integrated development planning for the district as a whole (unless authorised under section 85 of the Local Government: Municipal Structures Act to perform municipal planning functions on account of capacity problems in a municipality). Determining land

development and land use applications would not, without such authorisation, fall within the ambit of this power, which is essentially limited to forward planning. Therefore this provision in the SPLUMB should refer to section 85 of the Local Government: Municipal Structures Act, in order to ensure alignment and proper authorisation thereunder before a district municipal planning tribunal can be established.

3.20. Clause 35: Establishment of Municipal Planning Tribunals

3.20.1. Although the terms "land use" and "land development" are defined in section 1 of SPLUMB, neither "land use application" nor "land development application" is defined. Both of those terms are used in Clause 35(1) as if they were self-explanatory, but in some legislation the parameters of such applications should be specified or those terms defined.

3.20.2. Clause 35(1) provides for the establishment of municipal planning tribunals. Consideration should be given as to whether the administration, maintenance and costs of such tribunals will not be unnecessarily excessive; and as such, whether a more expedient approach would be for the municipal council to rather be the primary decision making body, with the municipal planning tribunals established to decide appeals. This is especially the case is rural areas where there is not a vast amount of land development activity. Operational costs of such tribunals will mount up even if they are rarely used.

3.20.3. Clause 35(2) provides that "certain land use and development applications may be considered by an official in the employ of the municipality." Clarification is required as to the types or categories of land use applications which can be heard by such officials, and also whether their decision is final and binding on the municipality, whether there is an internal appeal and any other parameters of the delegatee's authority. In addition, reference should be made to Clause 56 in terms of which such delegation must take place.

3.21. Clause 36: Composition of municipal planning tribunal

3.21.1. Clauses 36(1)(a) and (b) should specify the minimum number of appointees in respect of each category.

3.22. Clause 37: Term of office of members of municipal planning tribunals

3.22.1. Clause 40(5) requires an MPT to keep "*a record of all its proceedings*". The nature and extent of the record should be specified in the SPLUMB or dealt with

in the provincial legislation. It is not clear whether the record must be transcribed as in a court of law, or can consist of informal notes or minutes.

3.22.2. Clause 40(7)(e) provides that an MPT can "give directions relevant to its functions to any person in the service of a municipality or municipal entity". It is not clear precisely what the parameters of this entitlement are: what kind of directions; whether such directions are binding on the persons directed; what kind of directions can be given in respect of a municipal entity (which is a separate juristic person), etc. This provision should be clarified.

3.23. Clause 42: Deciding an application

3.23.1. Clause 42(1)(vi) refers to factors "that may be prescribed". Normally there is a definition in legislation for "prescribed", which is stated to mean "prescribed by regulations". This definition should thus be added. Any such regulations would have to respect the constitutional allocation of executive responsibility for municipal planning decisions, to municipalities.

3.24. Clause 43: Conditional approval of application

3.24.1. Clause 43(1)(b) refers to conditions for approval of applications, that may be "prescribed". It is difficult to imagine what kind of conditions could be prescribed, that would not be constitutionally vulnerable on the basis that the authority to impose conditions lies within the realm of responsibility of municipalities and not the national government.

3.24.2. Clause 43(2) regulates the time-period within which conditions must be complied with, failing which the approval lapses. We question the basis of the decision to set the limit at five years, no matter the circumstances. There may well be circumstances in which the five year limit is inappropriate and overly restrictive.

3.25. Clause 44: Timeframes for applications

3.25.1. The meaning of Clause 44(3)(a) is not clear. It appears that the word "different" should be inserted after the word "to" and before the word "Municipal Planning Tribunal".

3.26. Clause 45: Parties to land development applications

3.26.1. In Clause 45(1)(c) it is not clear who "such person" in the second line refers to. Is it the organ of state concerned, or could it be any other owner as well? This should be clarified.

3.26.2. Clause 45(1)(d) is difficult to understand. It implies that any "interested person who may reasonably be expected to be affected by the outcome of the land development application proceedings", may submit a land development application. This Clause should be clarified.

3.26.3. For purposes of clarity and readability, it is suggested that the first part of Clause 45(6) be amended to read as follows:

> "*Where a condition of title, a condition of establishment of a township or an existing scheme provides for a land use purpose which requires the consent or approval of the administrator,…*"

3.27. Clause 46: Notification to Surveyor-General and Registrar of Deeds

3.27.1. The following words should be inserted after the word "land" and before the word "not" in Clause 46(1): "has been made, which is..".

3.28. Clause 47: Restrictive conditions

3.28.1. The most important national statute providing for the removal or amendment of restrictive conditions is the Removal of Restrictions Act 84 of 1967 ("the Removal of Restrictions Act"). All of the provinces apply the Removal of Restrictions Act to remove or amend restrictive conditions, except Gauteng, which has promulgated its own legislation, namely the Gauteng Removal of Restrictions Act 3 of 1996. The SPLUMB repeals the Removal of Restrictions Act in its entirety, and deals with restrictive conditions in Clause 47.

3.28.2. However, the provisions of Clause 47, which are intended to regulate the removal, amendment or suspension of restrictive conditions, are wholly inadequate for this purpose, both in substance and procedurally, in the absence of the Removal of Restrictions Act or detailed provisions in provincial legislation.

3.28.3. Clauses 47(1) and 47(2)(c) provide that a restrictive condition must be removed in the "prescribed manner". It is assumed that this is a reference to the manner to be prescribed in regulations to be made by the Minister. However, in the event that there is provincial legislation dealing with the removal of restrictive conditions, such as in Gauteng, difficult questions of interpretation will arise as to whether SPLUMB or the provincial legislation prevails in the circumstances.

3.28.4. Consideration should be given as to whether the Removal of Restrictions Act should be repealed simultaneously with the enactment of SPLUMB, or at all.

3.28.5. Notwithstanding the fact that a decision of the MPT is made "in good faith" as contemplated in terms of Clause 47(3); such decision must also be constitutionally valid and in accordance with the SPLUMB, and other applicable legislation in order to avoid liability for damages.

3.29. Clause 48: Investigations authorised by Municipal Planning Tribunal

3.29.1. The words "duly authorised" should be inserted between the words "its" and "designate" in Clause 48(1). Also, it is not entirely clear what the process for appointment of such a designate is, and what the parameters of his or her authority would be. Clause 48(1) refers to investigations whereas Clause 48(2) refers to inspections, so presumably the designate referred to in Clause 48(1) is not the same person as the designated official referred to in Clause 48(2). From a constitutional law perspective, these provisions confer potentially wide powers on the MPT's designate, without specifying the manner in which those powers must be exercised or the limits thereof. These provisions are thus constitutionally vulnerable; alternatively will be interpreted narrowly and may, as a result, be "toothless".

3.30. Clause 50: Land for parks, open space and other uses

3.30.1. The word "land" should be inserted before the word "development" in Clause 50(1).

3.30.2. The word "required" should be inserted before the word "provision" in Clause 50(1).

3.30.3. Clause 50(1) renders the approval of residential applications subject to the provision of land for parks or open spaces. Since the SPLUMB is framework legislation, should a clause of this specific and detailed nature not be dealt with in the regulations or in provincial legislation? In addition, it is noted that based on factors such as location and density, there may well be residential developments, where the provision of parks or open spaces is not required.

3.31. Clause 51: Internal Appeals

3.31.1. In terms of Clause 51(5), an interested person must be a person having a *pecuniary* or a proprietary interest in the decision of the MPT or an appeal in respect of such decision. However, as discussed above, Clause 7(a)(vi) provides that in considering an application before it, an MPT may not be

impeded or restricted in the exercise of its discretion on the ground that the value of land or property is affected by the outcome of the application. The SPLUMB is accordingly anomalous insofar as it recognises on one hand that the value of property is a requisite ground for being an interested person in an application or appeal; but provides on the other hand that an MPT is not required to regard the impact on land value as a relevant factor in considering applications or appeals before it.

3.32. Clause 52: Development application affecting national interest

3.32.1. Clause 52(1)(a) seems to refer to those 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 by national government, despite the affected land areas falling within the jurisdiction of a particular municipality (such as environment, housing and agriculture). However, the Clause is widely framed, in the sense that the national government assumes all decision-making powers in such instances, without reference to the extent to which the application impacts upon any matter within the exclusive competence of local government. A more nuanced approach should be considered, which allows a municipality, where possible, to retain executive authority over those aspects of the application which fall within its exclusive planning competence, and do not impact on matters of national planning competence.

3.32.2. It appears that Clause 52(1)(c) refers to the functional areas of exclusive national planning competence, which include “regional planning and development” and “urban and rural development”. As discussed above, an attempt should be made to provide guidance as to the meaning of these functional areas, relativeto both provincial planning and municipal planning.

3.32.3. Clause 52(3) allows the national government to intervene in cases where an application affects “the national interest”. This term is not defined in the SPLUMB, nor used in the Constitution. In the absence of a clear definition or explanation as to its meaning, it appears to allow the national government to intervene in municipal planning in circumstances which go wider than the constitutionally permitted grounds for national intervention in areas of municipal planning competence, as set out above.

3.32.4. Clause 52 deals with the procedures to follow in instances where land use applications fall outside of the municipal planning mandate, and within the national planning functional area. However, as discussed above, the SPLUMB fails to indicate in what instances such development applications will be

considered to fall within the provincial planning competence; and to deal with the concomitant procedures. An analogous clause to this Clause 52 is required in respect of the provinces.

Chapter 7: General provisions

3.33. Clause 53: Commencement of registration of ownership

3.33.1. The word "not" should be inserted after the word "may" in the second line of Clause 53. In addition, should this Clause refer to registration of any "property transfer" or "rights in property", rather than merely to "registration of any property"?

3.34. Clause 54: Regulations

3.34.1. Chapters V and VI of the Development Facilitation Act 67 of 1995 ("**DFA**") have been declared constitutionally invalid; as such any regulations pertaining to these Chapters cannot continue to apply. Accordingly, Clause 54(3) will need to be amended insofar as it requires such regulations to remain in force.

3.35. Clause 55: Exemptions

3.35.1. Clause 55(1) provides that exemptions from the provisions of the SPLUMB may be granted if it is "in the public interest" to do so. The term "public interest" is not defined, and is a wide and open ended concept. As such, the application of "the public interest" as the basis for granting exemptions from the SPLUMB may cause uncertainty and inconsistency in the application of the SPLUMB, which is contrary to both its objects and purpose.

3.36. **Clause 56: Delegation**

3.36.1. It is suggested that at the end of Clause 56, the words following words should be inserted: "the responsibility for the final decision shall remain with the delegator".

3.37. Clause 57: Non-impediment of function

3.37.1. It is suggested hereinabove, that in terms of section 25 of the Constitution, the manner in which a decision impacts on the value of property, may in certain cases direct the exercise of a power or the performance of a function in terms of the SPLUMB. Therefore, this Clause may be too widely stated.

3.38. Clause 58: Offences and penalties

3.38.1. The reference to "section 25(1) or (2)" in Clause 58(1)(a) appears to be incorrect.

3.39. Clause 60: Transitional provisions

3.39.1. The transitional provisions in the SPLUMB are potentially problematic, in the event that any of the nine provinces fails to enact new provincial planning legislation simultaneously with the coming into effect of SPLUMB. The reason for this is that land use planning (including spatial planning and land use management), other than as regulated by the DFA and other national statutes which will be repealed in their entirety by the SPLUMB, is currently regulated in terms of the various provincial town planning ordinances ("**the Ordinances**"). The SPLUMB does not abolish the Ordinances, but directs, in Clause (d) of Schedule 1, that the repeal, re-enactment or amendment of these ordinances must be addressed in provincial legislation. The Ordinances self-evidently pre-date SPLUMB and will not be completely aligned with it, which raises the thorny issue of which legislation would prevail in the event of a conflict between them.

3.39.2. Sections 146 and 147 of the Constitution regulate conflicts between national and provincial legislation. The constitutional impact of those provisions, as regards conflicting national and provincial legislation, is different depending on whether the provincial legislation in question falls within a functional area listed in Schedule 4, or a functional area listed in Schedule 5. Thus, in relation to any conflict between a provision of SPLUMB and a conflicting provision of an Ordinance, it will be necessary first to decide whether the provisions relate to a Schedule 4 matter (such as regional planning and development, urban and rural development, or municipal planning), or a Schedule 5 matter (such as provincial planning). Thereafter, in respect of Schedule 5 matters, it must be ascertained whether the particular provision of SPLUMB is national legislation as contemplated in section 44(2) of the Constitution, and in respect of Schedule 4 matters, it must be ascertained whether the particular provision of SPLUMB bears the characteristics provided for in section 146(2) of the Constitution. Only then is it possible to ascertain which provision prevails. There will undoubtedly be uncertainty regarding these issues and therefore regarding which provision – SPLUMB or the Ordinance – prevails. This is an unsatisfactory situation for the Republic to be faced with, and will materially adversely affect property development in the Republic as a whole.

3.39.3. A critical issue appears to be uneven capability on the part of the Provinces to adopt revised provincial legislation; together with a short period of time within which to do so. In light of the interpretational difficulties in relation to which

planning legislation will prevail when the SPLUMB comes into force, it is essential that the SPLUMB provides transitional provisions and guidance in respect of areas of conflict between the SPLUMB and the Ordinances; and adopts measures to assist the provinces in the interim (such as, for example, the provision of default provincial legislation which can be used until provincial legislation has been adopted).

3.39.4. In the *Johannesburg Municipality* case, the Constitutional Court declared Chapters V and VI of the Development Facilitation Act 67 of 1995 ("DFA") constitutionally invalid. Clauses 60(3)(a) and (b) of the SPLUMB provide that notwithstanding the repeal of the DFA, municipalities are required to continue to perform in terms of section 38(1)(c) and (d) of the DFA. Sections 38(1)(c) and (d) fall within Chapter V of the DFA. It should be made clear in this provision that municipalities continue to exercise functions in terms of these provisions only insofar as required to give effect to pre-existing decisions made under the DFA, or decisions that are made pursuant to any transitional provisions.

3.40. Schedule 1: Matters to be addressed in provincial legislation

3.40.1. The word "prepared" should be inserted after the word "schemes" in the first line of Clause (c). In addition, it is important that the extent of any such reviews do not result in the provinces usurping the municipalities planning powers.

3.40.2. The words "and the Constitution" should be inserted after the word "Act" in Clause (d)(i), in light of the fact that many of the provisions in the ordinances are unconstitutional.

3.40.3. In terms of Clause (k) the provinces are required to determine circumstances under which municipalities are obliged to deal with development applications. It is, however, also necessary for the provinces to address the corollary of this situation, namely the circumstances where municipalities are obliged to refer applications to the provinces.

3.40.4. Is the reference to "a planning tribunal" in Clause (s) to a Municipal Planning Tribunal, as defined? There is no provision made for Provincial Planning Tribunals in the SPLUMB, and the term "planning tribunal" is not defined.

4. We hope that our comments will be regarded and we hereby request an invitation to parliament for the public hearing relating to the Bill.

Yours faithfully

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