"APPENDIX 1"

RE: NOTES ON DEVELOPMENT CHARGES AND LEGAL FRAMEWORK TO ACCOMMODATE A MORATORIUM/DISCOUNT OR DEFERMENT OF PAYMENT OF DEVELOPMENT CHARGES

1. **INTRODUCTION AND HISTORY:**

1.1 The concept of development charges, also known as "*external service contributions"*, *"bulk service contributions"*, *"capital contributions"* or "*bulk infrastructure contribution levies"*, is defined as follows in the draft Municipal Fiscal Powers and Functions Amendment Bill (the "*draft Bill"*):

> ***"Means a charge levied by a Municipal Planning Tribunal in terms of Section 40(7)(b) of, and contemplated in Section 49 of, the Spatial Planning and Land Use Management Act, which must –***
>
> ***(a) contribute towards the cost of capital infrastructure assets required to meet increased demand or existing and planned external engineering services; or***
>
> ***with the approval of the Minister, contribute towards capital infrastructure assets required to meet increased demand for other municipal engineering services, not prescribed in terms of the Spatial Planning and Land Use Management Act;"***

1.2 In plain terms, a development charge is a once-off capital charge to recover the actual cost of external infrastructure required to accommodate the additional impact of a new development on engineering services. In theory, the fee is calculated on a pro-rata basis, according to the total costs of the infrastructure and the amount of service that will be provided to the development relative to the actual cost of the capital asset concerned[1]

1.3 From the above, it is clear that DCs only relate to the installation of external services infrastructure and, consequently, the provision of external services. In the Spatial Planning and Land Use Management Act, Act 16 of 2013 ("*SPLUMA"*), an attempt is made to define the concepts of internal and

[1] Development Charges in South Africa: Current Thinking and Areas of Contestation by Nick Graham and Stephen Berris.

external engineering services. The aforesaid definitions, which have been recognised and have been incorporated by reference in the draft Bill, have given rise to fundamental difficulties, due to the fact that the definition omits to deal with link services, i.e. services that are located outside the boundaries of a land area, but designated, exclusively, for the land area concerned, whilst it is not uncommon to find external services, such as bulk water pipelines, main outfall sewers and high order municipal roads, all aimed at servicing substantially more than only the actual land area, within the boundaries of a township.

1.4 The concept of DCs was introduced during the mid-eighties, pursuant to the findings of the Venter Commission and given statutory effect by incorporation in the different Provincial Planning Ordinances that applied at the time, such as the Land Use Planning Ordinances in the Cape and Natal Provinces and the Town Planning and Townships Ordinance, Ordinance 15 of 1986, in the old Transvaal Province. Prior to the incorporation of the concept of payment of DCs in provincial legislation, alternative funding mechanisms, such as payment of "*betterment"* and "*endowments"*, were applied.

1.5 It is important to note that, in general terms, development charges are primarily regarded as a financial tool with a profound spatial impact and not necessarily a mechanism to boost a Municipality's income stream.

1.6 Section 229 of the Constitution, empowers Municipalities to ***"impose rates and property charges and surcharges on fees"*** and ***"if authorised by national legislation, other taxes, levies and duties …"***.

1.7 The aforesaid provisions were echoed in Section 4 of the Local Government Municipal Systems Act, Act 32 of 2000 ("*MSA"*) in as far as it limited the power of Municipalities ***"to recover other taxes, levies and duties …"*** only for as far as it has been authorised by **national legislation**.

1.8 The above Constitutional and legislative provisions had a direct impact on the status of the historic **Provincial** Ordinances that empowered Municipalities to recover DCs and also the question as to whether Municipalities were indeed still empowered to recover DCs, in the absence of the contemplated National legislation.

1.9 During 2002, the MSA was amended by the introduction of Section 75(A), which provided for the introduction of a general power to Municipalities ***"to recover fees, charges and tariffs."***

1.10 Due to the unique nature of a DC (having the characteristics of both a charge and a tax), uncertainty still existed if Section 75(A) of the MSA, in fact constituted national legislation that in fact, empowered Municipalities, to recover DCs by implementation of the procedures contemplated in Chapter 8 of that legislation. The specific national legislation that was envisaged was probably the Municipal Fiscal Powers and Functions Act 12 of 2007, which

empowers municipalities to raise "municipal taxes". This Act does not elaborate on DCs, and will be amended by the Amendment Bill which is discussed below.

1.11 During 2011, the national government published a Draft Policy Framework for Municipal Development Charges in which the main problems, that existed at the time, pertaining to the levying of DC's by municipalities were summarised, but more importantly, government's vision to address the uncertainties that existed, was articulated by reference to the following principles:

"Equity and Fairness

- ***Development charges should be reasonable, balanced and practical so as to be equitable to all stakeholders;***

Predictability

- ***Development charges should be a predictable, legally certain and reliable source of revenue to the Municipality for providing the necessary infrastructure.***

Spatial and Economic Neutrality

- ***Primary role of a system of development charges is to ensure the timely, sustainable financing of required infrastructure that should be determined on identifiable and measurable cost to avoid distortions in the economy and patterns of spatial development.***

Administrative ease and uniformity

- ***The determination, calculation and operation of development charges should be administratively simple and transparent."***

1.12 Upon the coming into operation of SPLUMA during 2015, express powers were conferred upon Municipalities to recover DC's in, *inter alia*, Section 40(7)(b) that authorised a Municipality (a Municipal Planning Tribunal) to, when approving a land development application, impose conditions ***"… including conditions related to the provision of engineering services and the payment of any development charges."*** Section 49(2) of SPLUMA provides that the

municipality is responsible for external engineering services which are defined as services outside the boundary of the land area concerned. This begs the question of link services etc. that are discussed above.

1.13 Section 49(4) of SPLUMA, furthermore provided for a situation whereby a developer may, in agreement with the Municipality, install external engineering services *in lieu* of payment of the applicable development charge.

1.14 In addition to the above, Section 10 of SPLUMA, read with Schedule 1 to the Act, empowered provincial governments to enact provincial legislation, dealing, *inter alia*, with "***the calculation of development charges and any development contributions required to meet the strategic objectives of a Municipality."*** To date, none of the above have been addressed in any specific terms in contemplated provincial legislation. It is my view that, should such legislation be enacted it will be inconsistent with section 229 of the Constitution, referred to earlier. It may also be inconsistent with section 154(4) which provides that national and provincial government may not compromise or impede a municipality's right to exercise its powers and perform its functions. Any provincial legislation will have to be crafted so as only to regulate the manner in which municipal functions are exercised or to provide general standards and requirements, e.g. by providing for procedures that the municipality must follow in performing the function, but not actually calculating the DCs for the municipalities[2].

1.15 As a result of the above and the uncertainty created by the nature of a development charge (i.e. is it a tax, levy, surcharge or a *sui generis* contribution towards capital expenditure?) and the applicable legal framework, a situation has developed in our country, where no uniformity and, consequently, predictability exist, relating to the payment of development charges. To this end, some Municipalities still do not levy development charges at all, whilst, where DC's are indeed levied, there is very little, if any, uniformity as far as the calculation of contributions are concerned and, consequently, huge disparity exists between bulk services levied by different Municipalities. Furthermore, some Municipalities developed *ad hoc* policies, sanctioned by Council Resolutions, determining the applicable tariffs, whilst other Municipalities opted for the mechanism provided in Chapter 8 (Section 75(A)) of the MSA and incorporated development charges as a so-called "*fee"* in the policies and tariffs.

1.16 As a result of the unsatisfactory state of affairs, the draft Bill was published for public comment, earlier this year, the comment period closed at the end of March 2020 and it is anticipated that the Bill will serve before Parliament for adoption during the course of this year.

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[2] See for example the Constitutional Court judgement *in Minister of Local Government … Western Cape v The Habitat Council and others* 2014 (4) (SA) 437 CC

2. **MAIN CHARACTERISTICS OF THE DRAFT MUNICIPAL FISCAL POWERS AND FUNCTIONS AMENDMENT BILL ("*MFPFA*" OR "*BILL*"):**

2.1 In the media statement issued by national treasury, simultaneously with the publication of the Bill for comment, the key reforms that are introduced through the Amendment Bill, are summarised by reference to the following:

2.1.1 That it introduces an ***"unambiguous, fair and consistent basis …"*** for Municipalities to recover DCs.

2.1.2 That the Bill increases uniformity, predictability and gives certainty to developers and the market in general.

2.1.3 The Bill ensures the cost of municipal infrastructure is borne by the ultimate beneficiary to whom the developed product is passed on in ownership.

2.1.4 **The Bill provides for flexibility, subsidisation and exemption of certain categories of landowners and land development.**

2.1.5 Lastly, that infrastructure for poor households will continue to be funded through national grants and assistance and will, accordingly, not have an impact on the poor.

2.2 It is important to note that, contrary to legislation such as the Municipal Property Rates Act, Act 6 of 2004, which allows the intervention of the Minister (national government) under certain prescribed circumstances, the Bill does not provide for direct intervention by national government under any circumstances.

2.3 Until such time as the Bill becomes law, Municipalities will continue to levy development charges on the basis that they currently do, be it as part of DC policies adopted under Section 75A of the MSA, By-Laws, or simply policies adopted by the Council of the Municipality concerned. Having regard to the origin of the aforesaid perceived powers (if it truly exists in law, which is, to say the least, debatable), a Municipality will have a wide discretion as to the levying of DCs and, more specifically, any moratorium or deferment to be imposed. It goes without saying that, whatever arrangement finds application, it will have to be provided in a duly sanctioned policy (contemplated in Section 9(B) of the Bill) and, before the coming into operation of the Bill, at least a Council Resolution that will have to amend an existing Resolution, policy or tariff.

2.4 The Bill, in specific terms, compels a Municipality to adopt a policy, consistent with the Act on the levying of DCs and empowers the Municipality to, in the policy, specify municipal engineering zones and, moreover, may dictate

payment of DCs in tranches and granting of a specific category of landowners or the owners of a specific category of land developments **"*… a reduction in the development charge payable in respect of the land development.*"**

2.5 From the above, it is abundantly clear that, currently and after the coming into operation of the amendment Act, mechanisms do exist in terms of which certain categories of developments and areas can be exempt from payment of DCs or where a reduction on or deferment of payment of DCs, can be engineered.

2.6 Practically speaking and, for as far as the intended moratorium is aimed at "*kick starting"* land development, pursuant to the negative impacts of Covid-19 and the lockdown, this will have to be initiated by national government and, as such, national government will be required to provide a mechanism whereby the negative financial impacts that will no doubt be experienced by Municipalities, can be mitigated. This would be further ameliorated by a restriction on the timeframe for which this emergency stimulation would be available, and qualifying criteria and conditions for categorised developments to which such stimuli measure would apply.

2.7 In the above regard, it must be kept in mind that a mechanism already exists whereby affordable housing developments are exempted from payment of DCs by grants and other funding models introduced and managed by national government. An example is the annual Municipal Infrastructure Grant (MIG) allocated by the Division of Revenue Act for the relevant financial year. The aforesaid grants are normally aimed at providing "*social infrastructure",* whilst Municipalities have, traditionally, been expected to cover the costs of bulk infrastructure for non-poor households and non-residential land uses through own sources of funding, such as capital replacement reserves, loans and development contributions. There appears to be no legal impediment to extending the grant system to Municipalities to also cover losses that Municipalities will suffer and expenditure that Municipalities may incur as a result of a moratorium/deferment being placed on development charges during these times.

3. THE CONSTRUCTION OF EXTERNAL SERVICES, OTHER THAN MUNICIPAL SERVICES, BY A LAND DEVELOPER:

3.1 Land developers are often faced with a situation where external bodies (i.e. bodies and institutions outside of Municipalities) submit negative comments on a development, based on the absence of infrastructure or the impact that development may have on infrastructure owned and managed by such body. For example, it is not uncommon for a provincial roads authority to submit negative comments on a proposed land development, based on the impact that same will have on provincial roads infrastructure, or where SANRAL will submit negative comments, due to the impact that a particular development will have on a National Road.

3.2 The result of the aforegoing is that, in order to enable the development to proceed and to accommodate the concerns of the applicable external body, a developer is forced to, at own cost, upgrade the applicable provincial or national service, in order to accommodate the impacts of the development. The aforesaid takes place in the absence of any statutory mechanism, whereby a developer finds itself under an obligation to pay any form of DCs to provincial or national government for as far as a development may increase the impact on such services.

3.3 This is based on the view or even mindset that new or extended developments place a burden on provincial and municipal infrastructure, such as roads, and that the developer should be made to pay for this. However, this view is not legally tenable.

The exclusive powers given to provinces by Schedule 5 to the Constitution over provincial roads and traffic, and the powers given to Municipalities in Parts B of Schedules 4 and 5, which include "municipal roads", "refuse removal, refuse dumps and solid waste disposal" and "electricity and gas reticulation", for example, are permissive powers, i.e. the provinces/municipalities may spend their funds and resources to exercise the powers. However, the courts have held that this power includes a duty to do so in appropriate circumstances.

The Eastern Cape High Court held in *Agri Eastern Cape and others v MEC of the Department of Roads and Public Works and others* 2017 (3) SA 383 (ECG) that the Province had a duty to provide and maintain provincial roads and that it must use the funds at its disposal in a responsible manner to do so. The Court in that case ordered the Province to adopt a specific maintenance policy. See also *Schwartz v Schwartz* 1984 (4) SA 467 (A) - Corbett JA at 473I-474E.

The same applies to municipalities. In this regard section 3(2) of the MSA provides that "The council of a municipality, within the municipality's financial and administrative capacity, and having regard to practical considerations, **has a duty to**–

…..

(d) strive to ensure that municipal services are provided to the local community in a financially and environmentally sustainable manner;

….

(g) promote and undertake development in the municipality; …"
[Emphasis added]

3.4 The installation or upgrading of a service for and on behalf of provincial and/or national government, more often than not, has a positive impact on municipal services, as it often leads to a situation where the impact, not only of the development concerned, but the general impact on a municipal service, is substantially reduced. Notwithstanding the aforesaid, no statutory mechanism exists, whereby a developer can be compensated for the construction or installation of non-municipal services and/or whereby the cost of such services can be set-off against DCs payable to a Municipality. Comments submitted on the Bill include proposals that the cost of construction of external provincial or national services should, indeed, be allowed to be set-off against municipal DCs, subject thereto that a funding mechanism then be put in place, whereby Municipalities be refunded by the sphere of government for the amount so set-off, less any (quantifiable) benefit that a Municipality may derive directly from the installation of the service concerned.

3.5 Even in the absence of statutory mechanisms to arrange the above, land developers have indeed entered into tripartite agreements with both the municipality and, for example, the Provincial Roads Authority in order to mitigate the huge financial obligations that a situation where charges are duplicated and a developer pays both a DC and upgrade provincial roads. A practical example is where the developer of Steyn City (and other developers who will ultimately benefit from the applicable upgrades) undertook to attend to extensive road upgrades on Provincial Roads and where the municipality agreed to accommodate such developers as far as payment of DC’s for roads are concerned.