

A response to the SPLUMB

6 June 2011

SUMMARY

This document represents a response by the South African Cities Network (SACN) to the Draft Spatial Planning and Land Use Management Bill, published on 6 May 2011. The SACN is currently involved in a comprehensive study into the practice of spatial planning and land use management across the nine provinces in South Africa. The publishing of this Bill has come at an opportune moment, as it allows the organisation to usefully engage with this process, on the back of a useful and growing database of knowledge. This document has been compiled from the results of this ongoing study, the considered opinion of experts commissioned by the SACN to consider the Bill, as well as inputs from a workshop held by the SACN on 1 June 2011 which had representatives from most of its members. It does not provide a comprehensive review on the SPLUMB. Instead, it touches on a number of broad important themes that are critical going forward. In summation, the SACN's position is that:

1. The SPLUMB is a step in the right direction

- Towards the process of legislating for an appropriate and long overdue spatial planning and land use management law, this is progress.

However, there are a number of critical areas that need to be dealt with by the Bill for it to be workable in its current form:

2. Transitional arrangements need improvement

- The Bill places a heavy responsibility on provinces and to an extent municipalities, to legislate for spatial planning and land use law within a very short notice.
- While this is in keeping with its role as framework legislation, it will leave a grave legal vacuum as provinces get about doing this. This will create uncertainty around land use planning at municipal level.
- The SPLUMB must provide transitional measures and provide guidance in areas where these laws fall away, while provincial legislation comes on-stream.

3. More work needs to be done on integrating sectoral approvals

- SPLUMB has set out an approach of voluntary integration of approvals, rather than providing clear guidance as to how to resolve the overarching question of multiple approvals for land development. This is a pragmatic approach, but many would say a lost opportunity for the SPLUMB as a national law.
- The SPLUMB should therefore cease this window of opportunity to provide for greater and more robust guidance on how different sectoral approvals for land development should be dealt with.

4. More work needs to be done on integrating appeal procedures

- The law and practice in terms of appeals for land use planning is currently very fluid and uncertain.
- The SPLUMB should, as framework national legislation, set out much more clearly and decisively what the law around appeals should be. Currently, it does not do this.

5. National jurisdiction on land use applications needs greater certainty

6. Greater certainty is needed around guiding principles for decision making

- As it stands, the SPLUMB opens up multiple decision making criteria, which has the potential of increasing uncertainty and unpredictability around decision making.

7. The SPLUMB should provide greater guidance on how provinces and municipalities shall deal with the diversity of land use management needs

- Greater guidance is needed on how land use management legislation to be enacted at provincial level should deal with the enormous diversity of needs across various contexts.

8. The SPLUMB should provide greater guidance on the future of the Ordinances.

- This includes on how they will be used, and how the transition from them will be managed at provincial level. This is because there is great potential for legal conflict once the SPLUMB comes into being.

9. In terms of timelines and processes as a way forward:

- A process of remedying these issues should commence immediately, in a forum where all spheres of government are represented
- A parallel process of creating regulations is needed to deal with many of the transitional issues raised, as the SPLUMB is tailored appropriately
- A longer term process of assisting in drafting provincial and municipal laws should commence now, given the considerable responsibilities that will accrue to them after the SPLUMB.

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1. INTRODUCTION

This paper sets out the SACN's response to the draft SPLUMB that was released for public comment in May 2011. It does not purport to cover each and every concern that the SACN's member cities have with the draft bill, as these will be covered in the cities' own submissions. Rather this document summarizes a number of overarching concerns with the legislative framework introduced by the SPLUMB, which the SACN thinks need addressing.

The paper is divided into eight sections:

1. The first section deals with the **constitutional starting points**, particularly those flowing from the Constitutional Court's 2010 *City of Johannesburg* judgement.
2. The second looks at the implications of the SPLUMB being **framework legislation, rather than a comprehensive law reform**.
3. Thirdly, the implications of the **repeal of national legislation** are considered, as are those of the non-repeal of some other legislation.
4. The fourth section examines the way in which the SPLUMB addresses the question of **integrating approvals**.
5. In the fifth section there is an analysis of the question of **appeals**, within the broader context of national and provincial intervention powers.
6. Sixthly, the paper looks at the approach taken to providing **criteria for land use decision-making**.
7. In the seventh section, the implications of the SPLUMB for different **geographic areas** are considered. And, finally, the paper concludes with a consideration of **the constitutionality of the Ordinances**.

From the onset, it is important to indicate that the SACN welcomes the current draft of the SPLUMB. It is a marked improvement on the 2008 draft bill and is a step in the right direction. The SACN provides the response set out below in the spirit of identifying the crucial areas of improvement that need to be done on the draft bill as well as further legislative drafting to ensure that the entire legal framework for spatial planning and land use management is effective and appropriate. It must be emphasized nevertheless that changes are needed of the SPLUMB in its current form and further development of the law needs to be supported if the effectiveness of the planning and urban management system in South Africa is to be retained and enhanced. In this respect, the SACN is open and willing to provide its resources wherever and whenever it can to ensure a positive outcome to this process.

2. CONSTITUTIONAL STARTING POINTS

All three spheres of government have been allocated land use planning powers by the Constitution. The Spatial Land Use Management Bill aims to provide a

framework for the division of authority between the three spheres of government.

a. National/provincial

National and provincial governments have concurrent powers and functions in Schedule 4. This means that both may make and implement laws on functional areas, relevant to land use planning, listed in Schedule 4. If they both legislate on the same topic and there is a conflict between the national law and the provincial law, the Constitution provides for a mechanism to resolve the conflict (s 146). This means that if a provincial government adopts (or maintains) a law that contradicts the Spatial Land Use Management Act, the criteria of section 146 of the Constitution determine which law prevails.

Provincial government has exclusive power with regard to “provincial planning”. National government may only make laws on “provincial planning” if it is necessary for one of the reasons set out in section 44(2) of the Constitution.

b. Local

There are two types of overlap that result from the manner in which the Constitution distributes powers, relevant to land use planning, among the three spheres of local government.

First, “municipal planning” is not exclusive to local government. Both national and provincial governments may regulate “municipal planning”. However, this national and provincial power is limited to framework legislation and may not usurp a municipality’s executive and administrative authority with regard to “municipal planning”. This means that the SPLUMB may not remove a municipality’s executive authority with regard to “municipal planning” in the name of trying to regulate “municipal planning”.

Second, there are many other national (and provincial) powers (in Schedules 4A and 5A) that are relevant to land use planning. National (and/or provincial) governments have full authority with regard to these matters. Where there is overlap with “municipal planning”, the general principle is that national government may not compromise or impede a municipality in the exercise of its functions (including “municipal planning”). For example, when national government makes legislation that aims to protect the environment or agricultural production, this legislation may not unduly compromise a municipality in the performance of its functions. The Constitutional Court’s approach here is less clear.

In summary the SPLUMB must strike a careful balance between maintaining the autonomy of municipalities in controlling and regulating land use, while doing justice to the national government’s interest in providing a framework for

municipal planning and the national government's interest in exercising national powers that impact on land use. In addition, all of this must be done in a manner that also respects the provincial authority to adopt province-specific legislation to regulate a provincial planning framework.

c. Duty to coordinate and cooperate

The Constitution instructs all organs of state to “coordinate legislation with one another”. In the development of national legislation, the national government must therefore make every effort to coordinate the legislation with provincial governments and with municipalities. It is thus imperative that consultation with local government in general, and the SACN in particular, on the proposals contained in the SPLUMB must be comprehensive and meaningful.

d. Case law

The abovementioned scheme has been confirmed in judgments by the Constitutional Court. In 2010, in *City of Johannesburg v Gauteng Development Tribunal*, the Constitutional Court dismissed the argument that “municipal planning” refers to forward planning only and does not include any development management authority for local government. “Municipal planning”, the Court held, “has assumed a particular, well-established meaning which includes the zoning of land and the establishment of townships. In that context, the term is commonly used to define the control and regulation of the use of land”.

The Court also held that none of the provincial powers of “regional planning and development” “provincial planning” and “urban and rural development” (see Schedules 4A and 5A) gave provincial governments the right to authorise land rezoning and establish townships similar to that of municipalities. The Court acknowledged that there is no watertight division between the functional areas but insisted that the provincial powers should not be interpreted so wide that they also include municipal powers. For example, the Court stated, “provincial roads” does not include “municipal roads”. In the same vein, “provincial planning” and “regional planning and development” do not include “municipal planning”.

However, in an earlier case in 2008, *Wary Holdings v Stalwo*, the Court accepted ‘executive oversight’ by national government in the context of agricultural subdivisions that require national approval. The Court did not find that it encroached on “municipal planning”.

In summary, the Constitution allocates land use planning and development management authority to all three spheres of government. The Constitutional Court has made it clear that the “control and regulation of land use” is a constitutionally protected competency of local government. SPLUMB may provide a framework for the exercise of that power by municipalities but may

not usurp the executive authority of municipalities to control and regulate land use. The Constitutional Court did accept that, in certain cases, national and or provincial governments may exercise executive powers with regard to land use planning. This would come into play when national/provincial powers such as agriculture, environment and the regulation of extractive industries so dictate.

An important question is whether SPLUMB adequately recognises that municipalities are constitutionally empowered to adopt municipal by-laws with regard to “municipal planning”? The Bill appears to be predicated on the assumption that municipalities will receive, consider and approve land use applications in terms of the Act and in terms of provincial legislation. This may be informed by the concern that many municipalities may not be ready to adopt municipal by-laws. However, it can be argued that this concern should prompt provincial governments to adequately support those municipalities by promulgating model by-laws or by adopting default provincial legislation that may be replaced by municipalities as and when they’re ready.

3. FRAMEWORK LEGISLATION VS COMPREHENSIVE LAW REFORM

The draft SPLUMB is framework legislation in the sense that it does not purport to regulate every aspect of land use management or spatial planning. Instead it provides a legislative framework within which provincial (and local) government must enact legislation.

It is however somewhat uneven in this respect in that the draft bill treats spatial planning and land use management differently. On the one hand it covers the spatial planning function quite comprehensively whereas on the other it requires the bulk of the actual legislative change relating to land use management to be carried out by provincial and local governments.

The scenario that the draft bill envisages is that each Province will enact its own legislation dealing primarily with land use management but also spatial planning and this provincial law will take on the task of rationalising the range of laws applicable in that province (with the exception of the legislation listed for repeal in the draft bill). Each provincial government will have to review its applicable legislation not only for compliance with the draft bill but also to ensure that the legislation reflects the definition of ‘municipal planning’ given by the Constitutional Court in *City of Johannesburg and others v Gauteng Development Tribunal* (2010). It is thus difficult to evaluate the full impact of the draft bill as it effectively only represents a partial view of the overall legal framework that will apply in a particular province. The full picture will only emerge when the new provincial legislation is enacted. In the meantime, i.e. after the enactment of the SPLUMB but before the enactment of new provincial legislation, there will be a

period of heightened uncertainty as municipalities in particular as well as all other stakeholders in the planning system grapple with the conflicts between the new national and old provincial legislation. That many parts of those provincial laws are themselves unconstitutional will only aggravate the situation.

An example from the Free State is useful. In that province no municipalities are authorised to approve township establishment or rezoning applications. Only the province may do that in terms of the old OFS Ordinance. During the interregnum while the Free State provincial government draws up new legislation to replace the Ordinance and which is both consistent with the SPLUMB and the Constitution, not only will all township establishment and rezoning applications have to be decided municipally but also by newly established tribunals. In the absence of massive support it is inconceivable to imagine the municipalities of the Free State being ready or able to implement the new approach envisaged in the SPLUMB.

Framework legislation *per se* is not inappropriate. However, the current scheme in terms of which a framework law will require immediate changes to procedures that are currently regulated in detail while simultaneously putting provincial governments under a severe burden of having to develop new provincial legislation at high speed is potentially cause a massive disruption to the planning system and the land development industry. The difficulties experienced by all the provinces – to varying degrees – in drafting, enacting and implementing new such legislation over the past fifteen years does not suggest that they will be able to respond to the demands of the SPLUMB.

4. REPEAL OF NATIONAL LEGISLATION

The SPLUMB aims to repeal three statutes: the Development Facilitation Act, the Removal of Restrictions Act and the Physical Planning Act(s). It also does not repeal a number of laws that it could be expected to repeal. These include the Less Formal Township Establishment Act and the various apartheid-era regulations promulgated in terms of the Blacks (Community Development) and Blacks (Administration) Acts that deal with township establishment and land use management in former African areas. Each of these is dealt with separately below.

a. Development Facilitation Act

The Constitutional Court only declared chapters five and six of the DFA to be unconstitutional. Of the rest of the Act the only chapter that has currency today is chapter one that provides General Principles for Land Development and Conflict Resolution. The SPLUMB's alternative to the DFA's Chapter One Principles is section 6, which sets out Development Principles applicable to the

Spatial Planning System. The SPLUMB principles are considerably briefer than those in the DFA.

The chief significance of the repeal of the DFA will be felt in the provinces where the Development Tribunal has *de facto* become the primary – and often only – procedural route available to an applicant wishing to obtain approval for a land development project. These provinces include Limpopo, Mpumalanga and North West. In provinces such as Gauteng and KwaZulu-Natal there will certainly be greater pressure on the municipal route for processing applications as the option of using the DFA falls away. Currently the administrative load of processing and deciding applications is distributed between the municipalities and the Development Tribunals; now the municipalities will have to handle them all. But it is in the provinces where the DFA has predominated, especially in areas in which the provincial Ordinances do not apply, that the impact will be most severe. In these provinces there will effectively be a vacuum for applicants wishing to have their applications approved, and this includes public sector driven projects such as subsidy housing projects. The weakness of local government structures in these provinces exacerbates this situation further. Obviously the SPLUMB is not able to reverse the unconstitutionality of chapters five and six of the DFA but it is regrettable that it provides no alternative mechanism, especially in the provinces that need this most.

b. Removal of Restrictions Act

The Removal of Restrictions Act ('RoRA') was introduced in 1967 to provide a more efficient and streamlined way of removing title deed conditions than that permitted under the Common Law, which entailed approaching the courts for an order. The Act was also assigned to Provinces in 1994. Gauteng has enacted its own Removal of Restrictions Act and the new Kwazulu-Natal Planning & Development Act provides an integrated procedure for the removal of restrictions in that legislation, which repeals significant sections of the RoRA.

The effect of the summary repeal of the RoRA by the SPLUMB thus is that the removal of title deed conditions will be possible, but will be considerably more onerous than is currently the case, at least until all the provinces have enacted provisions that deal with the issue. It is vitally important that the SPLUMB deal comprehensively with the implications of repealing the RoRA, rather than leaving it to Provinces to resolve.

c. Physical Planning Act

The Physical Planning Act ('PPA') is clearly an anachronism that needs to be fully repealed. However, there are elements of the Act, particularly the provisions of the 1967 Act that were saved by the 1991 Act, which continue to be used to regulate land use in parts of the country. For instance, Guide Plans drawn up

under the Act continue to have a legal effect and where a land use is contemplated in an area covered by one of these Plans a certificate of consistency is required from the relevant provincial authorities. The Free State and North West are two good examples of where the PPA continues to play a significant role in LUM.

There can be little dispute that the PPA is outdated and should be consigned to history. It is however not advisable simply to repeal the enabling provisions without evaluating whether or not the absence of these provisions will have negative consequences, especially in areas under land development pressure but which do not fall within a Town Planning or Zoning Scheme. The case of the Vaal River Structure Plan illustrates the potential environmental damage that could flow from the PPA being summarily repealed. The SPLUMB must provide transitional measures to manage land use in areas affected by the PPA until such time as the relevant municipal authorities have been able to extend their land use management instruments (i.e. Schemes) to those areas.

d. Regulations in terms of the Blacks (Community Development) and Blacks (Administration) Acts¹

These regulations are **not** identified for repeal in the SPLUMB. As with the remaining provisions of the PPA these regulations are certainly ripe for repeal. Most (if not all) of them have been assigned to the provinces. Theoretically thus the responsibility for revising and/or replacing them lies (and will lie) with the provinces. In practice however few of the provinces are in a position in terms of capacity and human resources to carry out this exercise. Moreover, most of the regulations are inherently unconstitutional, especially now in the light of the 2010 DFA judgment of the Constitutional Court. It is thus a grave omission that the SPLUMB provides no practical guidance to provinces faced with the task of modernizing this set of regulations. It would have been preferable for the SPLUMB to repeal them **and** to provide a clear guidance as to what should be enacted to replace them in practice.

e. Less Formal Township Establishment Act

This Act ('LeFTEA') provides a fast-track route for township establishment, particularly in the context of low-income housing provision. It relies on two main devices to achieve the desired fast-tracking. Firstly, it excludes the application of a number of land use management laws from the area to be declared a 'less formal township' and secondly it gives the provincial government the power to make the final decision. This law thus suffers from

¹ These include: Proclamations R293 of 1962, R188 of 1969; Proclamation R1897 of 1986 ('Regulations relating to township establishment and land use'); GNR1886 of 1990 ('Township Development Regulations for Towns'); and GN R1888 ('Land Use and Planning Regulations').

precisely the same constitutional weakness as the DFA. Municipalities (and provinces) that hope that the gap left by the DFA insofar as fast-tracking low-income housing is concerned will be filled by LeFTEA will thus be disappointed. Given its constitutional flaws it would be appropriate for a law such as the SPLUMB to not only repeal LeFTEA, thereby clearing up any uncertainty as to its continuing applicability, and provide an alternative mechanism for expedited development. This is particularly important in the provinces that have come to depend heavily on the DFA for this.

5. INTEGRATING APPROVALS

Clauses 28 and 29 of the SPLUMB set out an approach to voluntary integration of approvals (for instance land use and environmental approvals), rather than providing clear guidance as to how to resolve the overarching question of multiple approvals for many land development projects. Clause 28 provides a framework for the integration of approvals. Clause 28(1) empowers the municipality or the MEC to consult with other organs of state and enter into agreements with other organs of state to avoid duplication. The Bill provides that the relevant planning tribunal may consider an authorisation in terms of that agreement as adequate for meeting the requirements of SPLUMB. Clause 29 provides for the possibility of two or more organs of state issuing integrated authorisations.

The question is whether this provides a sufficiently robust framework for the reduction of red tape and multiple approval process that overlap. The Bill places the responsibility for the integration of approvals in the hands of the executive at national, provincial and municipal level. Integration of processes is permissible through the adoption of MOUs. The issuance of integrated authorisations is also permissible, provided that all legislative requirements are met. Cooperation must therefore still be actively procured before the integration becomes a reality and developments are expedited. It may be worth considering whether the suggested legislative regime for integration of approvals would actually undergo a significant change with these provisions.

At the same time, the stalemate surrounding the intersection of use rights in terms of the Mineral and Petroleum Resources Act and land use legislation persists. The recent judgments in *Macsands* and *Swartland v Louw* clearly indicate that an approval in terms of the MPRDA does not bind the competent authority in terms of land use planning legislation.

At the same time, the Constitutional Court has made it clear in *Fuel Retailers Association of Southern Africa v Director-General Environmental Management, Department of Agriculture, Conservation And Environment, Mpumalanga*

*Province*² that environmental authorities may not always simply rely on prior municipal town planning decisions when authorising a listed activity in terms of NEMA. When the Mpumalanga provincial government authorised the building of a fuel station they were supposed to consider the socio-economic impact of the activity and should not have relied on the prior rezoning by the local authority to have fully covered that aspect in the land use decision. The Court indicated that NEMA's instruction to consider socio-economic impact is wider than the instruction in the Ordinance to consider need and desirability.

This points towards the need for a more properly considered national legal framework that contains more guidance than merely suggesting that integration of approvals is permissible.

6. APPEALS / PROVINCIAL & NATIONAL INTERVENTION

a. Appeals

The proliferation and fragmentation of appeals against land use decision is a serious cause for concern as it may unnecessarily slow down decision making.

The provisions of SPLUMB put forward the bare bones of an appeal system whereby provinces are afforded limited appeal authority. Whether or not these proposals will address the abovementioned problem is briefly discussed below.

i. Internal appeals

Section 62 of the Municipal Systems Act plays a critical role in the broader debate about the proliferation of appeals. Section 62 of the Systems Act provides for internal appeals against decisions taken in terms of authority delegated to an official or municipal structure/office-bearer by the Municipal Council. The applicability of internal appeals is determined by a number of parameters.

First, section 7 of Promotion of Administrative Justice Act forbids the institution of judicial review proceedings before internal remedies have been exhausted. This means that, if the law provides for a mechanism for aggrieved parties to have a land use decision revisited, this must be followed before the courts may be approached. A critical question is thus whether section 62 of the Municipal Systems Act provides for a remedy recognised by PAJA and that therefore objectors must first use section 62 before going to court.

Second, in the context of land use specifically, the courts have limited the section 62 'internal' right to appeal to unsuccessful applicants.³ A third party in a land use decision may not rely on the internal appeal and must find recourse elsewhere. Further caselaw has continued to constrain the applicability of

²2007 JDR 0445 (CC).

³*Reader and Another v Ikin and Another* 2008 (2) SA 582 (C).

section 62 of the Systems Act. In *Loghdey v City Cape Town*,⁴ the Western Cape High Court remarked that it is “nothing more than a codification of the limited circumstances in which a decision-maker can, at common law, withdraw or alter its own decision without infringing the doctrine of *functus officio* (which determines that once a decision has been made the decision-maker cannot revisit it)”.

Third, section 62 states that the possibility for internal appeal “does not detract from appeal procedures provided elsewhere”. It thus seems to say that, if other appeal mechanisms are available, they set aside the applicability of section 62. Most land use ordinances currently provide for appeal mechanisms whereby the MEC, responsible for planning is the appeal authority. That arrangement, as discussed below, is almost certainly unconstitutional.

The intersection between dedicated appeal frameworks and section 62 internal appeals has never been properly addressed in any statute. While section 62 appears to defer to other appeal mechanisms, the phenomenon of doubling-up of appeal mechanisms still persists. In *Loghdey*, the High Court remarked that section 62

“is ineptly drafted and has given rise to great difficulty and confusion. Some may regret the limiting interpretation given to the provision by the courts. Certainly the wider, albeit somewhat linguistically strained, interpretation previously given to it in practice by many municipalities was in conformance with the trend notable in certain other jurisdictions to enhance the quality of administrative justice by extending the availability of administrative appeals, thereby reducing the extent to which resort needs to be had by adversely affected parties to judicial review, which in many cases is not a satisfactory alternative to a merits appeal. Be that as it may, the import of the provision has now been authoritatively declared and therefore, unless and until s 62 of the Systems Act is amended or substituted, it falls to be construed and applied accordingly”.⁵

The question is whether SPLUMB adequately deals with the confusion that persists with regard to the applicability of section 62 appeals. It appears to assume that section 62 appeals will continue to be available to unsuccessful applicants but doesn’t authoritatively deal with the intersection. Clause 36 provides for a limited appeal from a Municipal Planning Tribunal to a Provincial Planning Tribunal without clarifying the intersection with section 62 of the Municipal Systems Act. For example, it is not clear whether the unsuccessful

⁴*Loghdey v City of Cape Town and Others, Advance Parking Solutions CC and Another v City of Cape Town and Others* (100/09) [2010] ZAWCHC 25 (20 January 2010)

⁵At para 34.

applicant needs to first use section 62 before approaching the Provincial Planning Tribunal in terms of clause 36(2).

b. Appeals to the province

It is not clear whether the appeal mechanism provided for in clause 36 will consolidate and clarify the current state of fragmentation in appeals against land use decisions.

First, it contradicts provincial frameworks such as the appeals provided for in the KwaZulu-Natal Planning and Development Act.

Second, it allows only for appeals that deal with the issues listed in Clause 36(2). It is not clear how the 'remaining' issues are to be dealt with. The options are many. Section 62 may allow the unsuccessful applicant to first try an internal appeal. Provincial legislation may provide for appeal frameworks that do not deal with the 36(2) instances. In the absence of those, the courts may be approached for a judicial review of a decision.

The criteria under 36(2), in terms of which provincial appeal jurisdiction is opened up deserve a closer examination. Clause 36(2) refers to national security, economic unity, the common market, economic activity across provincial boundaries, equal opportunity or access to government services or protection of the environment. When the decision affects any of those matters, provincial appeal jurisdiction is opened up.

While the attempt to limit provincial appeal jurisdiction may be sensible, given the anxiety surrounding provincial interference in "municipal planning", the manner in which the Bill does so is problematic. First, most of the criteria point towards national jurisdiction rather than provincial jurisdiction. Second, the criteria are insufficiently defined and do not adequately reflect the provincial interest. If environment is listed why are other provincial concerns (such as agriculture) not?

In sum, the uncertainty with regard to applicability of appeal mechanisms may just persist or perhaps even be aggravated with the proposals as set out in SPLUMB.

What is required is the provision of a firm principle on the applicability of section 62 of the Systems Act in the configuration of national and/or provincial appeal mechanisms. Second, should the Bill proceed with the provision of a provincial appeal mechanism, the limitation of the provincial jurisdiction would need to be revisited. Thirdly, it would be useful to examine the proposals in the current version of the draft Gauteng Planning & Development Bill for municipal-level appeal structures.

c. National jurisdiction with regard to land use applications

Clause 43(1) expects municipalities to refer land applications to the national Minister if it materially impacts on –

- matters within the functional area of the national sphere in terms of the Constitution;
- national policy objectives, principles or priorities; or
- land use for a purpose which falls within the functional area of the national sphere of government.

These criteria are likely to lead to widespread confusion. From the onset, it is worth noting that the interpretation of these criteria will play itself out not only in the ‘intergovernmental arena’. Each and every interested party in a specific land use application may challenge the municipality or the Minister on the interpretation of these criteria.⁶

First, the concept ‘matters within the functional area of the national sphere’ is not clear. National government shares functional responsibility with provincial government with respect to Schedule 4 matters (e.g. environment, agriculture, housing etc.) but national government also has exclusive powers (e.g. control and regulation of mineral extraction). If clause 43(1)(a) and (c) includes Schedule 4 matters this would crowd out provincial authority.

Second, the impact on national policy objectives, principles or priorities is an extremely wide concept as virtually every land use application may be interpreted to somehow have an impact on national policy. Moreover, because of the fluid and informal nature of the instruments “objectives”, “principles” and “priorities”, they may prove to be moving targets. It would open the door for national government to ‘work its way into municipal planning’ by adopting informal policy objectives (that do not have to be approved by Parliament, including the NCOP) which refer to municipal planning issues.

Clause 43(2) also establishes national jurisdiction where the outcome of a land use application may be –

- prejudicial to the economic, health or security interests of one or more provinces or the country as a whole;
- impede the effective performance by one or more municipalities or provinces of the functions in respect of matters within their functional areas of legislative competence

The first criterion may be sensible as such impact on more than one province or the country as a whole would indeed justify national jurisdiction. However, the economic, health or security interests of a specific province are first the responsibility of that province itself. It is not clear why the impact on one province would immediately establish national jurisdiction.

⁶See e.g. clause 43(3): “Where an applicant believes that his or her application is likely to affect the national interest he or she must submit a copy of that application to the Minister.”

The second criterion is not clear. If the approval of a land use application would impair a municipality's ability to perform its functions, the municipality should not approve the application. This is not automatically a matter of national interest. The same would apply to a provincial government. It would appear that the inclusion of the single municipality/province ("one or...") in clause 43(2) disrupts the focus on national interest which this provision aims to define.

7. CRITERIA FOR LAND-USE DECISION-MAKING

The SPLUMB reinforces the normative approach to planning decision-making pioneered by the DFA. This is distinct from the approach adopted by the Provincial Ordinances that generally have one or two broad criteria for decision-making. Thus, under the old Cape Province's LUPO, section 36 provides that:

"(1) Any application under Chapter II or III shall be refused solely on the basis of a lack of desirability of the contemplated utilization of land concerned including the guideline proposals included in a relevant structure plan in so far as it relates to desirability, or on the basis of its effect on existing rights concerned (except any alleged right to protection against trade competition).

(2) Where an application under Chapter II or III is not refused by virtue of the matters referred to in subsection (1) of this section regard shall be had, in considering relevant particulars, to only the safety and welfare of the members of the community concerned, the preservation of the natural and developed environment concerned or the effect of the application on existing rights concerned (with the exception of any alleged right to protection against trade competition)."

Under LUPO thus the predominant criteria for decision-making are 'desirability' and 'effect on existing rights', with subsidiary criteria of community safety and welfare, environmental preservation and, again, the effect on existing rights.

Under the old Transvaal Ordinance the Township Establishment Regulations prescribed that the applicant in a township establishment process must motivate in terms of 'the need for and desirability of' the township (Regulation 18(1)(b)(i)). The old Orange Free State Ordinance has a similar requirement.

Land Use Management decisions, under the SPLUMB, have to be taken in accordance with the following:

1. The General Principles in Chapter 2 'shall guide ... the consideration by a competent authority of any application that impacts or may impact upon the use and development of land' (clause 5). The Minister may, in terms of clause 7, prescribe further General Principles in time.
2. The Compulsory Norms and Standards in clause 8 are 'for land use management and land development'. These have yet to be formulated or prescribed.

Municipal Spatial Development Frameworks are binding on any 'planning tribunal or other authority required or mandated to make a land development decision' and clause 21 stipulates the limited cases in which this will not be the case: where 'site specific circumstances justify a departure from [it]; and where it would lead to an 'illogical or unintended result'.

The SPLUMB thus introduces a more complex process of land use decision-making. This alone is not necessarily a concern as land use management is inherently a complex activity. However, in a context where there is limited professional capacity – in both the public and private sectors – and where the legislative environment for land use decision-making is already complex, with an ever increasing range of national and provincial laws prescribed criteria in terms of which land use decisions must be taken by municipal authorities it is worrying that the SPLUMB does not narrow down these criteria but rather seems to open up an apparently unlimited range of options, with which municipal decision-making will have to conform.

8. GEOGRAPHIC SCOPE OF THE LEGISLATION

Because of the history of planning legislation in South Africa there are concerns with the impact of the SPLUMB on different types of area. Municipalities have to manage a wide range of laws and regulations applicable to the different types of area, some flowing from apartheid categories and others from more recent developments. Thus, for example, African townships continue to be regulated by township establishment and land use management regulations that are different from those applicable in the formerly white, coloured and Indian group areas. Areas under customary leadership (and almost all having previously fallen under one of a range of different 'bantustan' or 'homeland' administrations' not only have their own legislation but also African Customary Law that applies to land allocation and use. In addition, large parts of many towns and cities are now inhabited by people who have acquired and developed the land outside of the applicable legal frameworks. These informal settlements are growing in number. Moreover many of them are located precariously, in areas prone to flooding and fire, and are dominated by structures that are unsafe and unsanitary. There are thus pressing land use management issues that have to be addressed in these areas, yet no laws available to do that.

It appears from the SPLUMB that the responsibility for developing land use management legislation that responds to the needs of these areas will lie with Provinces. The SPLUMB provides little in the way of practical guidance or support as they go about this challenging task. Few provinces to date have demonstrated any capacity for confronting such a challenge. In practice the work will have to be done by municipalities, continuing to operate under inappropriate and highly outdated legislation.

In the case of the law dealing with land use management in former African townships as well as former bantustan or homeland areas it is unfortunate that the SPLUMB does not maximize the power of national legislation to decisively repeal the outdated legislation (R293, *Regulations for the Administration and Control of Townships in Black Areas*, for example, dates back to 1962). There are considerable risks involved in repealing and/or revising this regulatory framework, including that of inadvertently weakening people's land tenure (and thus property rights) while doing so. It is thus inappropriate to leave municipalities to tackle this regulatory reform alone.

In relation to informal settlements the SPLUMB, while providing some 'space' to develop approaches, fails to provide clear guidance to municipalities as to how they should develop and manage these areas in terms of the new law. Important, innovative practice in the regulation of informal settlements is emerging from some municipalities, such as the City of Johannesburg. Yet the SPLUMB only very broadly draws on that experience, and does not provide a clear approach.

9. CONSTITUTIONALITY OF ORDINANCES

Currently, spatial planning and land use management is done in terms of a myriad of pieces of national and provincial legislation. The various provincial town planning Ordinances play a critical role in this wide spectrum of land use legislation and still form the backbone of land use management in large parts of the country.

The Bill, correctly, does not abolish any town planning ordinances. Only provinces may repeal these laws. At the same time, it is clear that, in many respects, the ordinances cannot co-exist with the content of the Bill, if approved.

As the town planning ordinances hail from the old order, they are often not aligned with the new constitutional dispensation, including an enhanced role for municipalities in municipal planning. The allocation, in these ordinances, of very broadly defined land use management authority, including, for example, the authority for provincial executives to dispense with appeals, is unlikely to stand up to constitutional scrutiny. These ordinances have, perhaps miraculously, escaped serious constitutional scrutiny for quite some time. However, it appears

that their expiry date is fast approaching. Already, there are instances where the constitutionality of decisions taken in terms of town planning ordinances is being challenged. Furthermore, a number of legal opinions, procured by cities and provincial governments, indicate that 'a storm is brewing' with respect to the constitutionality of the town planning ordinances. Municipalities, as the implementers of town planning legislation, will be most negatively affected by this as their land use management role will be undermined by litigation and delays resulting from unconstitutional national and provincial legislative schemes. Municipalities may have been reluctant to adopt their own planning by-laws in the absence of up-to-date national or provincial frameworks. However, at some point municipal by-laws may be adopted that contradict ordinances in which case further confusion and litigation is likely to follow.

The continuation of these ordinances should therefore be limited to the absolute minimum of provisions that are needed to fill a critical vacuum.

In light of this, it is disappointing that the Bill does not include the repeal of these laws as a matter to be addressed in provincial legislation.

The underlying problem may be the uneven capability and interest on the part of provinces to adopt fresh provincial land use planning and management legislation. However, the appropriate manner for the SPLUMB to deal with this problem is the provision of default provincial legislation, i.e. national rules that apply until provincial legislation has been adopted.

10. CONCLUSION

From the analysis above it is clear that the SPLUMB, while making some significant advances, as yet fails to provide the legislative intervention that local government actually requires. In particular it fails to provide a plausible and workable legislative scenario that covers the host of issues that will arrive with the repeal of laws such as the DFA, the Physical Planning Acts and the Removal of Restrictions Act. Moreover it does little to address the complex legislative legacy of apartheid by leaving all the key regulatory instruments used for apartheid land use management in place. Clearly the SPLUMB alone cannot repeal many of the offensive and outdated laws. Those laws fall within the provincial sphere's legislative competence. However, the impact of a law such as the SPLUMB that is drawn up in isolation from provincial initiatives and capacity and which does not address the practical implications of its enactment in mid-2012 may well be more damaging than useful.

A systematic and coordinated programme of legislative reform, one that meaningfully includes each sphere of government and which respects that all three spheres have distinct and important legislative and executive powers and functions in relation to land use management is needed. Considering that the

core of land use management is now 'municipal planning' it is inconceivable that new land use management legislation can be drawn up without the full and active participation of local government.

11.RECOMMENDATIONS

The SACN thus makes the following recommendations:

1. A process must commence immediately, in which all three spheres are properly represented and which has access to high-level professional advice, to drive urgent task of revising and improving the current draft SPLUMB.
2. In tandem with the process of revising and improving the SPLUMB there must be a concerted effort to prepare a set of regulations that will enable a constitutionally sound procedure for fast-tracking high priority land development projects. These regulations should draw on the experience of implementing similar provisions in both the DFA and LeFTEA. It is not impossible to have these regulations ready in time for promulgation at the point of enacting the SPLUMB, if not before.
3. A further process of around two-years duration must be commenced immediately, also driven by a multi-sphere institutional arrangement, to prepare draft model provincial laws for municipal and provincial planning, as well as model by laws for municipal planning. Clearly this process would not preclude any province or municipality from proceeding with its own efforts in this regard but it would yield outputs that will be essential for the spatial planning and land use management system to operate effectively.