cogta
Department:
Co-operative Governance and Traditional Affairs
PROVINCE OF KWAZULU-NATAL

Enquiries: Mr G. L. Roos
Imibuzo:
Navrae:
My Reference:
Inkomba Yami: (LS)2/17/3/LG/21/2011
My Verwysing:
E-mail: gert.roos@kzncogta.gov.za
Date:
Usuku: 25 May 2012
Datum:

Mr S. Ogunronbi
The Executive Manager: Spatial Planning and Information
Department of Rural Development and Land Reform
Private Bag X833
PRETORIA
0001
SOGunronbi@ruraldevelopment.gov.za

Dear Mr. Ogunronbi,

COMMENT ON THE SPATIAL PLANNING AND LAND USE MANAGEMENT BILL, 2012

The invitation to comment on the Spatial Planning and Land Use Management Bill ("the Bill") published in Government Notice No. 357 of 2012 refers.

The KwaZulu-Natal Department of Co-operative Governance and Traditional Affairs ("KZNCOGTA") continues to support the notion of a national planning law but is concerned about the alignment of the Bill with other laws, including the KwaZulu-Natal Planning and Development Act, 2008 (Act No. 6 of 2008) ("the KwaZulu-Natal Act"), the constitutional validity, practicality, efficiency and affordability of a tribunal as an approval authority of the first instance and internal appeals as proposed by the Bill.

KwaZulu-Natal has implemented a new planning system in on 1 May 2010 which KZNCOGTA believes is the Constitutionally sound, save for the appeal tribunal which is receiving attention, and consistent with the development principles contemplated in clause 7 of the Bill, national norms and standards, existing national legislation and national policies.

The KwaZulu-Natal planning system is incompatible with some of the provisions of the Bill because its approval authorities, appeal authority and application procedures are different. In KwaZulu-Natal all applications for development are considered by municipalities, whereas under the Bill applications for development are considered by municipalities or tribunals depending on the type of application. In KwaZulu-Natal there is only one procedure that must be followed for all applications for development because there is only one approval authority, whereas under the Bill different procedures must be followed for different types of applications for development because there is more than one approval authority. KwaZulu-Natal wants to establish independent municipal appeal tribunals whereas the Bill provides for internal appeals to a municipality's executive committee or executive mayor.

KZNCOGTA invited all municipalities, planners, land surveyors and lawyers who practice planning law to a workshop to discuss the alignment of the Bill with provincial legislation. The workshop which was held on 17 April 2012 was also attended by a representative from the Department of Rural Development and Land Reform. The workshop resolved that, ideally, the Bill and the KwaZulu-Natal Act should be aligned. The meeting also resolved that KZNCOGTA will submit detailed comment on the Bill in response to the invitation for public comment, together with proposals on how the Bill can be improved. The detailed comment on the Bill and proposals on how the Bill can be approved are attached at Schedule 1.

KZNCOGTA also called a meeting with all other provinces to identify matters of common concern and to ensure that its proposals will not compromise any other province. The meeting was held on 18 May 2012 and attended by representatives from the Free State, Gauteng, KwaZulu-Natal, Mpumalanga, North-West and the Western Cape. A representative from the Department of Rural Development and Land Reform was also in attendance. The Eastern Cape representative tendered his apologies but was consulted telephonically.

Both the workshop and the meeting were conducted in the spirit of co-operative government, mutual trust and good faith as required by the Constitution.

Clause 2 of the Bill can be rephrased to align the Bill and the KwaZulu-Natal Act. The new wording will leave both the Bill and the KwaZulu-Natal Act intact. Only a few sections of the Act need to be excluded from applying in KwaZulu-Natal. One of those sections is clause 26(4) of the Bill. Clause 26(4) of the Bill should be deleted because a tribunal should not be allowed to grant an applicant the right to use land for a purpose that is not permitted in a zone. The zoning of the land should be changed instead, or the scheme should be amended to record the departure from the land uses that are ordinarily permitted in that zone in respect of that land. Departures are usually listed in a schedule

to a scheme. Another section that KwaZulu-Natal wants to be excluded from is clause 26(5) of the Bill. The criteria for amendments to a scheme by a municipality in terms of clause 26(5) are too restrictive and will prevent a municipality from making some essential amendments to its scheme. If the Bill is changed to provide that amendments to a scheme by a municipality are not limited to amendments that are in the public interest (which is narrowly interpreted in South African law), the interests of a disadvantaged community (which excludes other communities), or the vision and development goals of the municipality (which does not cover all small developments and minor improvements to the wording of a scheme), clause 26(5) can apply to KwaZulu-Natal.

The proposed new wording for clause 2 of the Bill consolidates all the clauses of the Bill that deal with the application of the Bill (currently clause 2 (application of Act), clause 10(2) (structures established in terms of provincial legislation and procedures contained in provincial legislation) and clause 55 (exemptions)). The new wording is loosely based on section 240 of the Planning Act 2008 (United Kingdom) that regulates the application of the Planning Act 2008 in the United Kingdom, England, Scotland, and Wales.

The proposed new wording for clause 2 of the Bill protects national interest because the Minister can by notice in the *Gazette* oust provincial legislation that is constitutionally invalid or irreconcilable with the development principles contemplated in section 7 of the Bill, any national norms and standards, including the norms and standards contemplated in section 8 of the Bill, national framework legislation or national policy.

The proposed new wording for clause 2 of the Bill is as following:

"**Application of Act**

2. (1) Subject to the provisions of this section, this Act applies to the entire area of the Republic and is legislation enacted in terms of section 155(7) of the Constitution insofar as it regulates municipal planning and section 44(2) insofar as it regulates provincial planning.

(2) The following provisions of this Act do not extend to KwaZulu-Natal –

(a) Chapter 5, section 26(3), (4) and (5);

(b) Chapter 6, sections 34 to 51; and

(c) Chapter 7, section 58.

(3) The Minister may, by notice in the *Gazette* determine that the provisions of the Act contemplated in subsection (2) are nevertheless applicable to a province in place of provincial legislation, if the provisions of provincial legislation are irreconcilable with –

(a) the Constitution;

(b) the development principles contemplated in section 7;

(c) any national norms and standards, including the norms and standards contemplated in section 8;

(d) national framework legislation; or

(e) national policy.

(4) Before the Minister makes a determination contemplated in subsection (3), the Minister must serve a notice on the Premier –

(a) informing the Premier that provincial legislation is irreconcilable with a document listed in subsection (3)(a) to (e);

(c) identifying –

(i) the document and provision thereof that the provincial legislation is irreconcilable with;

(ii) the provision of provincial legislation that is irreconcilable with the provision of the document;

(c) specifying a date by which the provincial legislation must be amended in order to remove the conflict; and

(d) warning the Premier that the Minister may determine that the provisions of the Act that are excluded from applying in the province in terms of subsection (2), may nevertheless be made applicable to the province in place of provincial legislation, if the conflict is not removed.

(5) The Minister may, in the public interest, on request from a province or municipality, by notice in the *Gazette* exempt from any provisions of this Act land or an area specified in the notice.

(6) The Minister may substitute alternative provisions to a piece of land or an area that has been exempted from the Act.

(7) The Minister may withdraw an exemption granted in terms of subsection (5).

(8) An exemption or withdrawal contemplated in subsections (6) or (7) may be made subject to any conditions, including directives relevant to the performance of a function by an organ of state or competent authority within a specified time limit as the Minister, after consultation with the organ of state or competent authority, considers appropriate."

For ease of reference the remaining comments on the Bill are contained in a separate schedule. The Schedule consists of two parts: Part 1 and Part 2.

Part 1 of the Schedule is entitled “General Comment” and deals with the foundations of the Bill that the National Council of Provinces should reconsider.

Part 2 of the Schedule is entitled “Detail Comments (in the order of the Bill)” and deals with the technical aspects of the Bill that the Department of Rural Development and Land Reform should reconsider. The comments in Part 2 are not less important than the comments in Part 1 of the Schedule. There are many contradictions in the Bill that need to be resolved and errors that need to be eliminated. The detailed comments follow the same order as the provisions of the Bill, the comments are grouped under the same headings as the headings in the Bill and the lines are numbered for ease of reference.

Regards,

GL ROOS

LEGAL SERVICES
DATE: 25 May 2012

cogta
Department:
Co-operative Governance and Traditional Affairs
PROVINCE OF KWAZULU-NATAL

SCHEDULE

25 May 2012

COMMENT ON THE SPATIAL PLANNING AND LAND USE MANAGEMENT BILL, 2012, PUBLISHED IN THE GOVERNMENT GAZETTE ON 26 APRIL 2012

1. **DEFINITIONS**

In this document —

"**authorised official**" means an official authorised by the municipality to consider applications for development;

"**Bill**" means the Spatial Planning and Land use Management Bill;

"**KZNCOGTA**" means the KwaZulu-Natal Department of Co-operative Governance and Traditional Affairs;

"**Constitutional Court judgment**" means the decision of the Constitutional Court in the Constitutional Court in *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others* 2010 (6) 182 (CC);

"**DFA**" means the Development Facilitation Act, 1995 (Act No. 67 of 1995);

"**KwaZulu-Natal Act**" means the KwaZulu-Natal Planning and Development Act, 2008 (Act No. 6 of 2008);

"**KwaZulu-Natal Ordinance**" means the Natal Town Planning Ordinance, 1949 (Ordinance No. 27 of 1949);

"**Less Formal Township Establishment Act**" means the Less Formal Township Establishment Act, 1991 (Act No. 113 of 1991);

"**Minister**" means the Minister of Rural Development and Land Reform.

"**Systems Act**" means the Local Government: Municipal Systems Act, 2000 (Act No. 32 of 2000);

"**Systems Act Regulations**" means the Local Government: Municipal Planning and Performance Management Regulations, (Government Notice No. R796 of 2001).;

"**tribunal**" means a municipal planning tribunal.

PART 1: GENERAL COMMENTS

2. **LACK OF INTER GOVERNMENTAL CO-OPERATION AND PARTICIPATION IN THE DRAFTING OF THE BILL**

The invitation to comment on the Bill is the fifth formal invitation to comment on the Bill.

The previous four formal opportunities to comment on the Bill were as following:

(a) May 2001: Invitation by the Department of Rural Development and Land Reform to comment on the Bill after the formal presentation of the Bill to the provinces earlier that same month;
(b) July 2001: Invitation to comment on the Bill published in the *Gazette*;
(c) August 2008: Invitation by the National Council of Provinces to comment on the Bill; and
(d) June 2011: Invitation to comment on the Bill published in the *Gazette*.

KZNCOGTA commented on the Bill in writing on all four previous occasions. KZNCOGTA acknowledged the need for new national planning legislation on all four previous occasions and expressed its desire to participate in the drafting of new national planning legislation.

KZNCOGTA made substantial comments on the versions of the Bill that were advertised for public comment. KZNCOGTA's original comments consisted of 62 pages in point format. This submission is 39 pages. KZNCOGTA's comments were poorly captured in the Spatial Planning and Land Use Management Bill – Consultation Report, dated February 2012. Only five comments made by KZNCOGTA are recorded in the report in the form of five broad statements: the Bill is incomplete, the Bill promotes fragmentation, the Bill does not address public participation

adequately, the Bill does not sufficiently clarify the respective roles of municipalities and tribunals and the appeal process is exclusionary.

The revised Bill did addresses some of KZNCOGTA's concerns: the Bill now provides for public participation, the criteria for decision making have been vastly improved and there is more clarity on the relationship between municipalities and tribunals, to name only a few significant improvements. The judgement of the Constitutional Court Judgement also helped, the right of provinces to consider an application when a tribunal failed to consider it, the right of a district municipality to intervene in an application for development, the right of a province to intervene in an application for development and the right to appeal to a provincial appeal tribunal have all been removed.

The Department of Rural Development and Land Reform must be commended for its efforts. However, further improvements are required before the Bill can be enacted.

Section 41(1)(h) of the Constitution requires all spheres of government to co-operate with one another in mutual trust and good faith by assisting and supporting each other and by co-ordinating their actions and legislation with one another. "municipal planning" is a concurrent legislative competency. All the provinces have provincial planning legislation. In KwaZulu-Natal planning is regulated by the KwaZulu-Natal Act. The Bill impacts directly on provincial planning legislation, including the KwaZulu-Natal Act. Repeated offers by KZNCOGTA to assist with the drafting of the Bill were declined. Similar offers of assistance by the Western Cape Department of Environmental Affairs and Development Planning were also declined.

The provinces and local government should have been involved in the drafting of the Bill. Mere consultation was not sufficient. Persons with extensive experience of dealing with applications for development would have expedited rather than delayed the drafting process. In reality, few provinces and municipalities have the capacity to make persons available to work on the Bill on a regular basis, and most of them would have relied on a small number of experienced persons from other provinces and municipalities in whom they have confidence.

3. **THE BILL PROMOTES FRAGMENTATION OF PLANNING LEGISLATION**

Planning legislation was fragmented in South Africa under the apartheid regime. The Bill fragments planning legislation even further. The fragmentation of planning legislation will frustrate the implementation of national policies and developments by companies and institutions that operate nationwide.

The Bill was drafted as if no other planning legislation existed in South Africa. The Bill ignores existing national and provincial municipal planning legislation.

The Bill empowers municipalities to adopt municipal spatial development frameworks and stipulates the contents of municipal spatial development frameworks. The Systems Act and the Systems Act Regulations also empower municipalities to adopt municipal spatial development frameworks and stipulate the contents of municipal spatial development frameworks. The Bill does not repeal the overlapping provisions of the Systems Act or the Systems Act Regulations. The Bill, the Systems Act and the Systems Act Regulations will have to be read together to determine the contents of a municipal spatial development framework. Earlier drafts of the Bill copied the contents of municipal development frameworks as stipulated in the Systems Act and the Systems Act Regulations verbatim but the wording of later drafts of the Bill has been modified in response to comments on the Bill, especially comments by the National Economic Development and Labour Council ("Nedlac"). The items that are stipulated in the Bill that are also stipulated in the Systems Act and the Systems Act Regulations are therefore now worded differently. There are also items that the Bill stipulates that are not also stipulated by the Systems Act and Systems Act Regulations. Ideally, only one national law should regulate integrated municipal planning. It can be the Bill, the Systems Act and the Systems Act Regulations, or dedicated integrated development planning legislation.

Municipal spatial develop frameworks should only be regulated by one national Act. Municipal spatial development frameworks should be regulated either by the Systems Act (including its regulations), by the Spatial Planning and Land Use Management Act or dedicated legislation that regulates national, provincial, regional and municipal integrated development planning. The Physical Planning Act, 1967 (Act No. 88 of 1967) was an example of reasonably successful integrated development planning law that regulated integrated development planning of all spheres of government. Its successor, the Physical Planning Act, 1991 (Act No. 125 of 1991) was never implemented.

The Bill only regulates one component of a municipality's integrated development plan ie. the municipal spatial framework. Only the Systems Act regulates the other components of integrated development plans ie. the municipality's vision, priorities, strategies, and projects. The Bill introduces national, provincial, and regional development frameworks but does not deal with any other components of integrated national, provincial or regional planning.

The Bill only repeals constitutionally invalid national planning legislation that is administered by the Department of Rural Development and Land Reform. Development can also be approved in terms of the Less Formal Township Establishment Act which is administered by the Department of Human Settlements and the provincial administrations. The Less Formal Township Establishment Act is the successor in law of section 6A of the Prevention of Illegal Squatter Act, 1951 (Act No. 52 of 1951). Provincial administrations instead of municipalities approve development in terms of the Less Formal Township Establishment Act. There can be little doubt that the Less Formal Township Establishment Act is constitutionally invalid, yet developments are still approved in terms thereof. Developments are approved in terms of the Less Formal Township Establishment Act mainly because it waives registration fees and the form that is used to register land is less onerous to complete than other forms for the registration of land. Section 9 of the Less Formal Township Establishment Act which regulates the registration of land is not constitutionally invalid and can be incorporated in the Bill. The Less Formal Township Establishment Act can then be repealed. If the Less Formal Township Establishment Act is not repealed by the Bill there may be an increase in applications in terms of the Less Formal Township Establishment Act, if municipalities fail to implement the Act. The Less Formal Township Establishment Act will provide an escape route for developers, one that is constitutionally invalid.

The Bill ignores provincial planning legislation. Despite the fact that "municipal planning" is a concurrent legislative competency in terms of the Constitution, no mention is made in the Bill of any existing provincial planning law. The Bill assumes that all existing provincial laws will be repealed and that provinces will adopt new planning laws to address the matters that were not addressed in Bill due to a lack of time.

The Bill cannot operate in the absence of regulations and anticipates provincial legislation to deal with the matters that will not be addressed in it or its regulations. Provinces will typically pass both provincial Acts and provincial regulations to deal with the matters that are not addressed in the national Act or its regulations. For example, according item (g) of Schedule 1 of the Bill, provincial legislation may determine the procedure for the approval of an application for development. The

Bill has already partly determined the procedure for the approval of an application for development. The regulations to the Bill will no doubt add more detail to the procedure for the approval of an application for development. Provincial legislation will therefore effectively only determine the procedure for the approval of an application for development to the extent that it has not been already been determined by the national Act or its regulations. In order to make an application for development a developer will have reconcile the national Act and its regulations with a provincial Act and its regulations. This level of fragmentation of planning law is unprecedented in South Africa. Even under the apartheid regime, a developer was never required to reconcile the provisions of four planning laws in order to make a simple application for development like the subdivision of a property into two properties. In practice, a developer will struggle to work out the application process because the steps will be contained in different laws and they will not be in chronological order.

National government and companies and institutions that operate nationwide will have the arduous task of having to familiarise themselves with 19 planning laws that will operate in multiples of four (or three in the case of KwaZulu-Natal): 2X national laws (national Act and regulations) + 8 provinces (excluding KwaZulu-Natal) X 2 provincial laws (provincial Act and regulations) + 1X provincial law in KwaZulu-Natal (no regulations) = 19 planning laws.

The Bill purports to devolve the power to regulate municipal planning to the provincial legislatures in Schedule 1. The power of provincial legislatures to regulate municipal planning is derived directly from the Constitution (section 104(1)(b)(i)). Provincial legislatures have original powers to regulate municipal planning.

Section 146(2)(b) of the Constitution limits national legislation that seeks to establish national uniformity by regulating a matter that falls within the concurrent legislative powers of national and provincial government to the establishment of national norms and standards, frameworks and national policies. The Bill goes beyond the establishment of national norms and standards, frameworks and national policies. There are many provisions of the Bill that cannot be regarded as framework legislation, like clause 32 that provides that if an inspector seizes a plant it must issue a receipt to the owner of the plant. The Bill should concern itself only with national matters: national principles, national norms and standards, national integrated development planning, cross-border integrated regional planning, regional integrated development planning in the national interest, and development that affect national interest. The Department of Rural Development and Land Affairs

should have considered a model provincial law to accompany the Act instead of drafting detailed national planning legislation.

The Bill should clarify the relationship between it and provincial planning legislation. The applicability of the Act in a province should not be decided through litigation. See in this regard the proposed new wording for clause 2 of the Bill in the covering letter.

The Bill empowers municipalities to prescribe the procedures that must be followed when applying for a municipality's consent in terms of a scheme or for the variation of conditions of land use. This will cause further fragmentation of planning processes. If a development also requires a municipality's consent in terms of a scheme, an applicant will also have to be familiar with that procedure, in addition to the procedures contained in the Act, the regulations, a provincial Act and provincial regulations. Historically, provincial legislation has regulated the procedures for consents in terms of schemes and variations of conditions of land use.

4. THE BILL DIMINISHES THE ROLE OF MUNICIPAL COUNCILLORS

Decisions by local government in terms of the Bill are made by three distinct entities: the municipality, the tribunal and an authorised official. The authorised official is optional.

The three entities have the following powers –

(a) only a municipality can change its spatial development framework;

(b) a municipal tribunal or an official authorised by the municipality to consider applications cannot change a municipalities spatial development framework but they do have the power to override a municipality's spatial development framework;

(c) only a municipal tribunal or an official authorised by the municipality to consider applications can approve the establishment of a township, the subdivision of land, the consolidation of land and the removal, amendment or suspension of a restrictive condition of title; and

(d) a municipality, a municipal tribunal or an authorised official can consider applications to amend a land use scheme.

The Bill further limits the involvement of municipal councillors –

(a) by only empowering a municipality's executive committee or an executive mayor to make decisions in terms of the Bill (the Bill ignores national legislation that establishes municipal structures, including municipal planning committees);

(b) by only empowering a municipality's executive committee or executive mayor to hear appeals, adopt a scheme or amend a scheme.

Municipal councillors will effectively have no involvement under the Bill in the approval of major developments like low income housing developments, gated estates, shopping centres, office blocks, industrial developments and airports.

A municipal council is not protected by its spatial development framework or its land scheme against unwanted decisions because a tribunal or an authorised person can override them. A municipal council cannot appeal against the decision of the tribunal or the authorised person because the decision of the tribunal or authorised person is regarded as the municipality's decision. A municipality cannot appeal against its own decision.

Under the KwaZulu-Natal Act, all final decisions on developments are taken by municipalities. Municipalities can delegate their powers under the KwaZulu-Natal Act, if they wish to do so. Most municipalities in KwaZulu-Natal have delegated final decisions on developments to their executive committees.

5. THE TRIBUNAL SYSTEM IS IMPRACTICAL, INEFFICIENT AND UNAFFORDABLE

A single development may require the approval of all three different municipal entities: the municipality, the tribunal and the authorised person. It will be confusing for developers to have to apply to three different entities for planning approval.

Many major developments will require the approval of both a municipality and a tribunal because neither a municipality nor a tribunal can approve all components of a development.

A municipality can amend its scheme, but the amendment will inevitably have to be followed up with an application to the tribunal or an authorised official for township establishment, the subdivision of land, the consolidation of land or the removal, amendment or suspension of a restrictive condition. Effectively, the approval process will have to be repeated.

A tribunal can approve the subdivision of land to create a new property and it can determine the zoning of that property, but it cannot grant consent for any land uses that are only permitted with the municipality's consent within that zone. Effectively, the approval process will have to be repeated.

A municipality can adopt or amend a scheme but the provision of infrastructure is effectively left to the tribunal or authorised person. A municipality may zone a property for a purpose that cannot be supported by existing infrastructure and that is not cost effective to service. According to the service cost model of the eThekwini Municipality, the cost of servicing a property can increase fourteen fold, depending on its location relative to existing infrastructure.

The running costs of a tribunal can be prohibitive for a municipality because it requires the services of persons who are not in the full-time service of a municipality. The average cost to the KwaZulu-Natal Department of Co-operative Governance and Traditional Affairs for a single application to the KwaZulu-Natal Development Tribunal in terms of the DFA is R50 000. The cost can be justified for major applications, but the vast majority of applications for development are relatively minor and do not require the services of a team of experienced professionals.

A tribunal system can unduly delay development. The KwaZulu-Natal Development Tribunal is still considering applications that were lodged in terms of the DFA before 9 September 2010 (the date after which no more DFA applications could be lodged in KwaZulu-Natal). The KwaZulu-Natal Planning and Development Commission has a backlog of about 400 applications which it needs to consider. The applications were lodged in terms of the KwaZulu-Natal Ordinance before its repeal on 1 May 2010. It will take several years for the KwaZulu-Natal Planning and Development Commission to dispose of the applications.

Municipalities must establish tribunals to consider applications for development in terms of the Bill. Municipalities can jointly establish tribunals. A tribunal must consist of at least 5 members and 3 tribunal members constitute a quorum of the tribunal. A tribunal must consist of both officials and persons from the private sector. Councillors may not serve on the tribunal.

It is questionable whether all municipalities have enough officials with knowledge of planning to serve on the tribunal, even if municipalities establish tribunals jointly. It is also questionable whether all municipalities have sufficient access to persons from the private sector to serve on the tribunals and the funding to pay them for their time and expenses. The DFA Tribunal in KwaZulu-Natal has more than 40 members. Despite the large number of members, many applications for development are delayed because of the lack of availability of tribunal members. Hearings are postponed because there are not enough tribunal members to constitute a quorum (especially if a matter could not be heard in one day and the same tribunal members have to reconvene to continue to hear the matter).

Any person with knowledge and experience of planning can serve on a tribunal. Effectively, anyone can serve on the tribunal because most people have some knowledge and experience of planning.

The authorised official should not be a separate entity. Tribunals should be able to delegate certain decision making powers to a single member of the tribunal. See sections 61 and 62 of the Planning Act 2008 (United Kingdom) for a similar mechanism.

In KwaZulu-Natal applications for development must be considered by municipalities. Every application for development must first be evaluated by a person employed by the municipality who is registered as professional planner or a technical planner in terms of section 13(4) of the Planning Profession Act, 2002 (Act No. 36 of 2002). The evaluation of the application for development must be documented in report than must be considered by the municipality when it considers the application for development.

6. A MUNICIPALITY'S EXECUTIVE COMMITTEE OR EXECUTIVE COMMITTEE IS NOT AN IMPARTIAL APPEALS BODY

A municipality's executive committee or its executive mayor can hear an appeal against a decision of a tribunal in terms of the Bill.

The impartiality of a municipality's executive committee or its executive mayor is questionable.

A municipality has the right to appeal against a decision of the tribunal, if a development is located in the municipality. If a development involves municipal land the municipality will be the applicant, the original decision maker (the tribunal’s decision is regarded as the municipality’s decision), the appellant and the appeal authority.

In KwaZulu-Natal appeals are usually lodge in respect of major developments. Municipal councils will usually have prior knowledge of such developments. Developers lobby councillors to support their developments and officials consult the municipal council when considering an application for development (usually the ward councillor and executive committee). It is not possible for officials in KwaZulu-Natal to approve a major development and commit a municipality's financial resources towards engineering services for a development without first consulting the municipal council.

When a municipality's executive committee or its executive mayor considers an appeal, it may have to rely on the technical advice of the very same officials who have served on the tribunal.

In KwaZulu-Natal appeals are heard by an independent tribunal of persons with qualifications in professions, like planning, engineering, environmental management, land surveying and law who are registered with the governing bodies their respective professions. The KwaZulu-Natal Planning and Development Appeal Tribunal is a provincially appointed and administered statutory body. The KwaZulu-Natal Planning and Development Appeal Tribunal will soon be dissolved and replaced by municipally appointed appeal tribunals with a similar composition in response to the Constitutional Court judgement.

7. UNNECESSARY NARROW RIGHT OF APPEAL

The Bill provides no right of appeal against a decision by a municipality to adopt a scheme or to amend a scheme. Ironically, most appeals in the past have been against scheme amendments or consents granted by municipalities in terms of a scheme.

The Bill provides a right of appeal against a decision by a tribunal, but only if the appellant can demonstrate a financial or proprietary interest in an application. Effectively, a municipality's executive committee or its executive mayor must adjudicate if the impact of the refusal or approval of an application for development on a person's finances or other belongings can be justified. A person cannot appeal against a decision on planning grounds, for example, the adverse effect of a development on cultural heritage, traffic, engineering services, community facilities, the environment, agricultural resources etc.

The narrow grounds of appeal will encourage unnecessary litigation. It is relatively easy to establish objectively if a person commented on an application. It is much more difficult to establish if a person's finances or belongings will be affected by a decision.

Even if a person does have a financial or proprietary interest in an application, it is not clear how a person obtains a right of appeal because the Bill does not require tribunals to consult the public. Ironically, the Bill requires a municipality to consult the public on a rezoning, but affords no person a right of appeal.

It would appear that effectively only an applicant and the Minister have rights of appeal. The Bill empowers the Minister to decide an application himself. He is therefore unlikely to use his right of appeal.

There was an unfortunate period in South-Africa's history when the common law *actio popularis* which allowed a person to act in the interest of a group was considered to be abolished. It empowered the government of the day to implement apartheid planning without interference by the judiciary.

A decision on a development by a municipality or a tribunal is an administrative action. The Constitution reintroduced the right of any person to challenge an administrative decision (section 33 read with section 38 of the Constitution). Note that "everyone" has the right to administrative action that is lawful, reasonable and procedurally fair, not only people whose finances or belongings have been affected. Other laws like the National Environmental Management Act, 1998 (Act No. 107 of 1998) followed suite.

KwaZulu-Natal has a long tradition of planning and development appeals (appeals have been heard by the KwaZulu-Natal Planning and Development Commission, KwaZulu-Natal Appeals Board, KwaZulu-Natal Development Appeal Tribunal or the MEC for Co-operative Governance and Traditional Affairs, depending on the legislation). The KwaZulu-Natal Act continues the tradition. All appeals are now heard by the same appeal body, currently the KwaZulu-Natal Planning and Development Appeal Tribunal which will soon to be replaced by district and metropolitan appeal tribunals.

An appeal should be a wide appeal without restricted grounds of appeal. It is acknowledged that appeals by competing developers and persons who do not want their amenity disturbed account for a large percentage of all appeals. It is also acknowledged that appeals can delay development. However, appeals also lead to better decision making which more than makes up for the disadvantages. A competing shopping centre developer may not succeed in preventing the erection of a new shopping centre, but chances are that the traffic arrangements etc. for the new shopping centre will be much improved after the competitor pointed out the deficiencies.

8. UNINTENDED CONSEQUENCES

Some of the unintended consequences of the Bill have already been pointed out: the Bill fragments planning legislation, it modifies the wording of items that it has in common with the Systems Act and the Systems Act Regulations, the tribunal system will probably slow down development approval, it may force applicants in the short term to resort to the remaining old order constitutionally invalid legislation, a municipality will appeal to itself against its own decision, and appeals are limited to the impact of a decision of the tribunal on an appellant's finances or belongings.

There are many other unintended consequences.

Both district and local municipalities must adopt schemes. Both district and local municipalities can amend schemes (presumably their own). Both district and local municipalities can hear appeals against a tribunal's decision (will appellants be given a choice?).

The Bill provides for the alignment of a decision by a municipality on the adoption or amendment of a scheme with that of other organs of state. The Bill does not provide for a similar alignment of decisions of the tribunal with decisions of other organs of state. Ironically, it is decisions of the tribunal that really require alignment with the decisions of other organs of state. Only a tribunal can approve the subdivision of land which requires alignment with the Subdivision of Agricultural land act, 1970 (Act 70 of 1970). Only a tribunal can approve township establishment which require alignment with decisions of other organs of state like the South African National Road Agency Limited and provincial transport departments. The zoning or rezoning of land is not regarded as activities that may have a detrimental impact on the environment. Construction and transformation (ie. physical development) are regarded as activities that may have a detrimental impact on the environment.

If a development involves municipal land, the officials serving on the tribunal will have to recuse themselves leaving only the private sector members which will not constitute a quorum in most municipalities.

9. MATTERS THAT THE BILL SHOULD ADDRESS BUT FAILS TO ADDRESS

The Bill does not rationalise national planning legislation. It repeals some national planning laws but there are other laws administered by the Department of Rural Development and Land Reform

like the Upgrading of Land Tenure Rights Act, 1991 (Act No. 112 of 1991) and the Provision of Land and Assistance Act, 1993 (Act No. 126 of 1993) that also have constitutionally invalid planning provisions that have not been rationalised. The Less Formal Township Establishment Act is another example of a constitutionally invalid planning law that should have been repealed by the Bill. The Less Formal Township Establishment Act is partly administered by the Department of Human Settlements and partly administered by the provincial administrations.

The Bill does not cater for low income development. It should waive registration fees and provide for a simple registration process along similar lines as section 9 of the Less Formal Settlement Act.

The Bill should delete redundant conditions of title by operation of law. The KwaZulu-Natal Act provides for the deletion of redundant conditions of title by operation of law that fall within the competence of the KwaZulu-Natal Legislature.

The Bill should provide for joint municipal decision making. Provincial legislation cannot provide for joint municipal decision making.

The Bill should provide for independent appeal tribunals to review decisions on developments. Decisions on developments are administrative actions. Section 33(1) of the Constitution, 1996 guarantees the right to administrative action that is lawful, reasonable and procedurally fair. Section 33(3) of the Constitution, 1996 states that National legislation must be enacted to give effect to the right of administrative justice and provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal.

The Bill should empower municipalities to jointly establish appeal tribunals.

The Act will not achieve its policy objectives if it fails to facilitate actual development.

10. FAILURE TO LEARN FROM PROVINCIAL AND FOREIGN LAWS THAT REGULATE PLANNING

It would appear that the Bill was drafted without a comparative law study. All countries in the world have to plan development and most of them have planning laws for that purpose (planning is regulated by decree instead of legislation in countries like the Kingdom of Saudi Arabia). There are great examples of foreign planning laws to learn from. There were three generations of planning laws in the last century in Europe, Australia and New Zealand, one after the First World War, one after the Second World War and one during the late nineties. Reference is made to the Planning

Act 2008 (United Kingdom) elsewhere in this document. The Planning Act 2008 (United Kingdom) is the fourth modern generation of planning legislation in the United Kingdom. The Planning Act 2008 (United Kingdom) is a simple but sophisticated planning law. Its predecessors were tested relentlessly in court. It is therefore also a very robust law. The Planning and Development Act 2000 (Ireland) is the best example of an integrated planning law. It regulates planning, housing, heritage, the environment, coastal management and transport. Western Australia has recently updated the Planning and Development Act 2005. The Planning and Development Act 2005 rationalised a number of planning laws. The Land Use Planning and Approvals Act 1993 of Tasmania is an unusual planning law with innovations not found in other jurisdictions. Germany's Federal Building Code 1998 regulates both planning and building plan approval. Queensland's Sustainable Planning Act 2009 integrates planning and environmental management. It is the second generation of planning legislation in Queensland with that integrates planning and environmental management (it repealed the Integrated Planning Act 1997). The provinces of the KwaZulu-Natal, Northern Cape and Western Cape (not in operation) have adopted new planning legislation and the planning legislation of Gauteng is in an advanced stage.

PART 2: DETAIL COMMENTS (IN THE ORDER OF THE BILL)

11. **NAME OF THE BILL**

(A) *Comment:*

The name of the Bill does not reflect the legislative competency of Parliament as determined by the Constitution, 1996.

The Constitution, 1996 does not refer to "spatial planning" or "land use management".

The Constitution, 1996 refers to "regional planning and development", "urban and rural development", "provincial planning" and "municipal planning".

Before the Constitutional judgment drafters used terminology that favoured the constitutional validity of their legislation. The national Bill was known as the "National land Use Management Bill" because "land" is an exclusive national legislative competency. Most provincial bills were known as "Planning and Development" bills because the provincial legislature may legislate on "regional planning and development", "urban and rural development", "provincial planning" and "municipal planning".

Since the Constitutional Court judgment there is no longer a need to favour or avoid particular terminology.

(A) *Recommendation:*

The name of the Bill should be aligned with terminology used by the Constitution, 1996, particularly since it can be argued that its scope is much more than just spatial planning and land use management. "Planning and Development" is therefore preferred to "Spatial Planning and Land Use Management". "Planning and Development" also has the advantage that the title of many foreign laws dealing with the same subject matter also refers to "planning and development". We are not aware of any foreign law that refers to "spatial planning" or "land use management" in its title.

Since the KwaZulu-Natal Department supports the concept of a national framework Act that is accompanied by comprehensive national regulations an appropriate name for the Act would be

the "South-African Planning and Development Act" or the "National Planning and Development Act". "South-African" is aligned with international conventions on the naming of Acts which refer to a geographical area, rather than to a tier or sphere of government. "National" is arguable more in line with South African convention for the naming of Acts.

12. **DEFINITIONS AND TERMINOLOGY**

(A) *Comment:*

(1) There is only one occurrence of "existing planning legislation" in the Bill. It is in the definition of "incremental upgrading of informal areas". The definition of "incremental upgrading of informal areas" can be improved to eliminate the need to define "existing planning legislation".

(2) The legal implications of "day" when the last day falls on a Saturday, Sunday or public holiday must be determined. In terms of the Interpretation Act, 1957 (Act No. 33 of 1957) the last day can be on a Saturday. Contrary to popular belief, if the last day is a Sunday or a public holiday, the last day becomes the day <u>before</u> the Sunday or public holiday <u>not</u> the day thereafter.

(3) There is only one occurrence of "incremental upgrading of informal areas" in the Bill which is in clause 7(a)(v). There are two other instances in which a similar term is used: clause 21(k) in which the term "incremental upgrading approaches" is used and item (a)(viii) of Schedule 1 in which the term "incremental upgrading of an informal settlement or slums" is used.

(4) The definition of "land" should be reconsidered. It only refers to a cadastral unit. This can be limiting, especially within the context of schemes for rural areas and traditional communities. "land" should also include to "an identified area". An agricultural holding is a farm or an erf (outside a township).

(5) The concepts "land development" and "land use" are sometimes used interchangeably in the Bill. According to the definition of "land development" it includes a change of land use, township establishment, subdivision of land and consolidation of land. The same items constitute a change of land use according to clause 41. There are some items that are only associated with "land development" or "land use", for example only "land development" includes the erection of

buildings whilst only "land use" includes the removal, amendment and suspension of restrictive conditions. Another example, no reference is made to "land development" in the definition of "land use management system". Was it the intention to exclude "land development"? The two terms are confusing.

(6) The definition of "land development" creates the impression that approval is required in terms of the Bill for the erection of buildings and structures. Approval should not be required in terms of the Bill for the erection of buildings and structures. Approval should be required in terms of the Bill for the use of the land for the erection of buildings and structures. The erection of buildings and structure on land should require building plan which is regulated by the National Building Regulations and Building Standards Act, 1977 (Act No. 103 of 1977).

(7) "land use" should be redefined. There is not always an approval for land use from an organ of state. For example, in former KwaZulu there were no restrictions on the use of land before 1994. Developments that existed before then will not have a formal approval. Likewise, there will not be formal approvals for developments that existed before the 1930s when the first planning and development laws were introduced in South Africa.

(8) The definition of municipality must be reconsidered. All municipalities must adopt spatial development frameworks but surely it is not intended that both district municipalities and local municipalities have to adopt land use management schemes.

(9) Care should be taken when importing a definition directly from another enactment through reference. The definition of "organ of state" in the constitution, 1996, excludes the judiciary.

(10) Care should be taken with the definition of "public place". Public places are deliberately called other terms like "public open space" on layout plans to avoid the need to have them shown on a survey diagram or a general plan, thereby circumventing the rules applicable to public places.

(11) The terms “planning”, “development” and “land use management” are used inconsistently in the Bill:

(a) The Bill is known as the “Spatial Planning and Land Use Management Bill (no reference to “development”);

(b) The collective name for the system that is introduced by the Bill is known as the “Spatial Planning System” (no reference to “land use management” or “development”);

(c) The principles are known as “Development Principles” (no reference to “planning” or “land use management”);

(d) The principles apply to organs of state responsible for the "use and development" of land (no reference to “planning” or “land use management”);

(e) The principles apply to "spatial planning, land use management and land development"

(f)“spatial” is an adjective that qualifies “planning” and “land” is an adjective that qualifies “development”)

(g) The norms and standards are referred to as “compulsory norms and standards for land use management and land development” (no reference to “planning”, “land” is an adjective that qualifies “development”);

(h) Intergovernmental support is restricted to “land use management” (no reference to “planning” or “development”);

(i) National, provincial and municipal government must prepare “spatial development frameworks” (no reference to “planning” or “land use”, “spatial” is an adjective that qualifies “development”);

(j) Municipalities must prepare “land use schemes” (no reference to “planning” or “development”);

(k) Municipalities must consult other “land development” authorities when they prepare a land use management scheme (no reference to “planning” or “land use management”, “land” is an adjective that qualifies “development”);

(l) Provinces and municipalities must establish “planning tribunals” (no reference to “land use management” or “development”);

(m) Planning tribunals must decide applications for “land development” (no reference to “planning” or “land use management”, “land” is an adjective that qualifies “development”);

(n) The heading of the clause that empowers the Minister to intervene is “development application” as oppose to “land development application”;

(o) The Chapter on the provision of services also refers to “development application” as oppose to “land development applications”; and

(p) The general provisions sometimes refer to “development applications” and other times to “land development applications”.

(12) The term township register" is defined but not used in the Bill.

(A) *Recommendation:*

Delete the definitions for terms that are not used in the Act.

Avoid the need to refer to "competent authority". See the proposed definition of "land use". A competent authority will always be an organ of state. In clause 5 that relates to the application of the principles "competent authority" can be replaced by "an organ of state". In clause 54 the reference to "competent authority" can simply be deleted (and "any organ of state" can be replaced with "an organ of state" and "such" with "the" (plain language)).

The definition of "day" should be amended to provide that if the last day is a Saturday, a Sunday or a public holiday, the last day should be the day thereafter.

Remove the need to define "incremental upgrading of informal areas" by amending clause 6(a)(v) to read as following —

> "(v) land development procedures must include provisions to encourage access to secure land tenure and the progressive introduction of administration, management, and engineering services in areas that are settled in an informal manner, including areas under traditional leadership".

Land use should be defined as following: "**land use**" means the purpose for which land may lawfully be used.

A "land use management system" should also cater for "land development".

The definition of "land use scheme" should refer to clause 23 of the Bill.

See comment on "municipal council" and "municipality".

See comment on "organ of state".

The determining factor for a "public place" should not be whether or not it is registered on a survey diagram or a general plan. It creates an easy way of avoiding the rules that apply to public places.

Township must be defined as "township" as defined in terms of section 102 of the Deeds Registries Act, 1937 (Act No. 47 of 1937) or any other law administered by the Registrar of Deeds, 1937.

Rationalise the use of the terms “planning”, “development” and “land use management”. See also the comments on the name of the Bill.

13. **THE SPATIAL PLANNING SYSTEM**

(A) *Comment:*

Under clause 3(c) reference is made to the action whereas under clause 3(d) reference is made to the processes.

(B) *Recommendation:*

Swop clauses 3(a) and 3(b) around to follow the same order as the order in which the matters appear in the Bill (principles first, spatial development frameworks second).

Refer to the actions or the processes under both clauses 3(c) and 3(d). For example, clause 3(c) could read “the process for the adoption and amendment of land use management schemes”.

See also the comments on the use of the phrase “spatial planning” instead of the terminology used in the Constitution (ie. planning and development).

14. **SCHEMES**

(A) *Comment:*

A municipality must adopt a single new scheme for its whole area in terms of the Bill. The eThekwini Municipality in KwaZulu-Natal administer a number of schemes with unique provisions to address local conditions and would like to continue to do so. If the eThekwini Municipality is forced to only have one scheme it will have to introduce a multitude of zones etc to cater for regional differences in land use mix, density etc (for example, all the different residential zones in the municipality will have to be captured in the same scheme which will

result that instead of the normal 3-4 residential zones per scheme the consolidated scheme may have to provide for up to 90 residential zones).

The Bill should also empower private persons and organs of state (other than the municipality) to apply for the adoption of a scheme. There is sometimes a need for a private person to apply for the adoption of a new scheme, like a big development in an area where there is no scheme in which it can be incorporated.

The Bill should define what constitutes an amendment to a scheme. Different actions constitute scheme amendments under old order planning laws.

The criteria for the adoption of a scheme are that a scheme must promote economic growth, social inclusion, efficient land use development and minimal impact on public health, the environment and natural resources. If a municipality supports a development, it will be inclined to reason that it is promoting economic growth and social inclusion and, if a municipality wants to refuse a development, it will be inclined to reason that it is promoting minimal impact on the environment and natural resources.

The criteria for an amendment of a scheme are that the amendment must advance the development goals of the municipality and objectives of the municipal spatial development framework. Although the criteria are so broad that almost any scheme amendment can be justified, a municipality may also be unable to make some scheme amendments, especially minor amendments.

The Bill attempts to zone all land that has not been zoned in the past by operation of law. All land outside the area of a scheme will instantaneously be zoned without any restrictions, other than the land use. A similar approach was followed in the former Cape and Free State Provinces. At the time, there were not many lawful non-agricultural developments outside the area of schemes in those provinces, so the approach was successful. Today there are many lawful non-agricultural developments outside the area of schemes. Developments are also increasingly multi-purpose by nature. In the KwaZulu-Natal midlands it is common to have an active farm, a crafts shop, a crafts factory, a bed and breakfast establishment, and a number of self-catering chalets on the same property. In which zone will the property be classified? Will it be classified in accordance with the dominant land use of the property? If so, how is the dominant land use determined? Is it the land use that accounts for most of the area of the property or is it the land use that generates the most income? Assuming that the land owner

successfully argues that the dominant land use is residential: If the land owner originally applied for 50 self-catering chalets, but were only allowed 5 self-catering chalets, will the owner now be able to build the balance of the chalets without the need for further development approval? What is the status of the original development approval? Is land that may only be used for the purposes listed in Schedule 2 of the Bill by necessary implication zoned for that purposes? If it is zoned by implication, subject to which development controls (number of units, footprint, parking requirements etc)?

Clause 26(4) empowers a tribunal to permit the use of a property for a purpose that is not permitted by the scheme.

Zoning is the only form of scheme control supported by the Bill.

The Bill differentiates between the following —

(a) the adoption of a scheme;

(b) an amendment to a scheme;

(c) a rezoning;

(d) a written consent of a municipality in terms of a scheme, and

(e) a variation of conditions of land use.

The terms “amendment” of a scheme and “rezoning” are used interchangeably in clause 28 of the Bill. It would appear that a municipality cannot change its scheme clauses. Was that the intention? A tribunal can also amend a scheme but it is not limited to rezoning. Was it the intention that only a tribunal can change the scheme clauses adopted by a municipality? What happens if a municipality wants to introduce a new zone? Does it have to apply to the tribunal for approval?

The procedures that must be followed to obtain the consent of a municipality in terms of a scheme or for the variation of conditions of land use are not regulated by national or provincial legislation but by schemes which promotes fragmentation of planning legislation.

The Bill differentiates between a zone and a special zone. The only reference to a special zone in the Bill is the optional requirement that “a land use scheme may include provisions relating to specific requirements relating to any special zones identified to address the development priorities of the municipality”. The intention of this provision is unclear. It does not appear to refer to a conventional special zone. Maybe the same goal can be achieved with ordinary zones and what is really required is a management overlay and accompanied action plan or another

planning instrument like transferable development rights or social contributions. The drafters of the Bill continually muddle up strategic planning and spatial planning. They appear to have a good understanding of what is required, but a poor understanding of the tools that are required to achieve their objectives.

The alignment provisions of the Bill appear to only apply to schemes. Was this the intention?

The Bill does not provide for a joint application process. Three different applications to three different authorities in three different spheres of government are still required. Public consultation is not required for applications in terms of the Subdivision of Agricultural Land Act, 1970 (Act No. 70 of 1970). Public consultation may be required for applications in terms of the Act and environmental management legislation. The public consultation processes remain separate and duplicated.

It may not be possible to make a joint decision. Under the Subdivision of Agricultural Land Act, 1970 (Act No. 70 of 1970), a municipality may not consult the public on an extension of a scheme to include agricultural land, unless the Minister of Agriculture, Forestry and Fisheries has first agreed to the extension. A municipality cannot make a decision on an extension of a scheme before it has consulted the public. A joint decision is therefore not possible.

There are rights of appeal to four different appeal authorities in terms of the Bill, the Subdivision of Agricultural Land Act, 1970 (Act No. 70 of 1970), and environmental management legislation:

(a) in terms of the Bill there are no rights of appeal against a decision of a municipality, to adopt a scheme, to amend a scheme, to rezone land or two grant consent in terms of a scheme;

(b) in terms of the Bill there is a very limited right of appeal against a decision of a municipal planning tribunal to approve services, to subdivide land, to consolidate land or to remove restrictive conditions of title;

(c) in terms of the Subdivision of Agricultural Land Act, 1970 (Act No. 70 of 1970) there is a right of appeal to the Minister of Agriculture, Forestry and Fisheries; and

(d) in terms of the national Environmental Management Act, 1998 (Act No. 107 of 1998) there are rights of appeal to the Member of the Executive Council responsible for the environment and the Minister of Water and Environmental Affairs.

How will appeals be dealt with?

Can all four appeal authorities consider an appeal against the joint decision and reconsider the whole application?

(B) Recommendation:

The Bill should allow a municipality to adopt a set of schemes that covers its whole area.

The Bill should also empower private persons and organs of state (other than the municipality) to apply for the adoption of a scheme.

The Bill should not prescribe a particular form of scheme control, like zoning. It creates the opportunity to employ a variety of other methods of controlling development, including normative planning, performance planning, area based plans and management overlays.

If the drafters of the Bill insist that zoning should be the only method of development control, the definitions of "zone" and "rezone" should be improved. The following definitions are proposed (if absolutely necessary) —

"**rezone**" means to change the zoning of a property or an area to another zoning that exits in the scheme; and

"**zone**" means a group of land uses that are permitted on a property or within a specified area in terms of a scheme, and may also include land uses that are permitted with a municipality's consent, lands uses that are not permitted, building restrictions like height, coverage and spaces around buildings, parking requirements and other development controls."

In KwaZulu-Natal a zoning map and scheme provisions are two components of the same instrument. Any change to the zoning map, including the zoning of an area that was not previously zoned, and any change to the provisions of a scheme are regarded as amendments to the scheme.

In KwaZulu-Natal land is not zoned by operation of law. Under the KwaZulu-Natal Act, municipalities have five years to extent their schemes to their whole area. In the process municipalities will accommodate lawful developments outside schemes that were approved by provincial government. The conditions of approval of each lawful development will have to be accommodated in the scheme. Lawful developments and their associated conditions of

approval in KwaZulu-Natal are varied, it is not possible to introduce zones by operation of law that will cater for all developments.

New developments are incorporated into a scheme whenever possible. If there is not a scheme to incorporate a new development into a municipality has two options —

(a) if it is a major development, the municipality can adopt a scheme for the development; or

(b) if it is a minor development, the municipality can be approve the development as a development situated outside the area of a scheme and incorporate it into a scheme at a later stage.

The Bill should not empower a tribunal to permit the use of a property for a purpose that is not permitted by the scheme. If a property is suitable for a use that is different from the purposes for with it is zoned, the scheme must either be amended to also permit that use within that zone, or it must be amended to rezone the property to a zone in which that use is permitted.

The Bill should not require a municipality to include the procedures for the granting of consent in terms of a scheme or for the variation of conditions of approval subject to which it amended its scheme or granted its consent in terms of its scheme. At the very least the Bill should empower provinces to regulate these matters in provincial legislation should they wish to do so. In reality, there is limited scope for truly different procedures. For instance, regulation 18 of the Regulations on Fair Administrative Procedures, 2002 (Government Notice R.1022 of 2002) requires that notice must be given in a local newspaper if an application affects the rights of the public in an area and that the public must be given 30 days to comment on an application. The KwaZulu-Natal Act employs a single universal application process for all applications which makes it easy to combine different types of applications into a single application. The KwaZulu-Natal Act identifies applications that are not regarded as applications that affect the rights of the public in an area, like applications for the consolidation of land, and applications where the public has already effectively been consulted, like applications for the subdivision of land inside the area of a scheme. A shortened application procedure can therefore be followed in these instances. Developers in KwaZulu-Natal appear to be satisfied with this universal process. See our comments under "Public Consultation" for more information on how the KwaZulu-Natal Act addresses public consultation.

A special zone should not be regarded in the Bill as different from any other zone. The only difference between a conventional special zone and other zones is that there tend to be only

one occurrence of a particular special zone in a scheme. Clause 24(3)(b) should read as following: “(b) specific measures to address the development priorities of the municipality;”

The alignment of authorisations provisions of the Bill should also apply to decisions of the tribunal.

15. **LAND DEVELOPMENT**

See also the general comments.

(A) *Comment:*

A competent authority should be obliged to consider matters that are relevant to development, like an applicant's motivation, comments by the public, the record of decision and comments of other organs of state, the impact of a development on surrounding land uses and development rights (context). Phrases like "the public interest", and "facts and circumstances" are too vague and provide no real guidance.

Clause 45 is a step in the right direction but its scope is too wide.

Sadly, there is no dedicated chapter for engineering services anymore. Engineering services is another matter that the Department of Rural Development and Land Reform was unable to resolve within the time available and has opted to require the provincial legislation to resolve.

The Gauteng Planning and Development Bill uses the same definitions for “engineering service”, “internal engineering service” and “external engineering service” as that of the Bill but provides a definition for “land area” which makes it easier to understand what “internal” and “external” engineering services are.

Clause 68 of the Gauteng Planning and Development Bill is similar to clause 49 of the Bill but is much better worded. The Gauteng Planning and Development Regulations will further clarify internal and external engineering services.

The Gauteng Planning and Development Bill provides that a municipality may require a developer to provide internal services with a greater capacity than what is required to serve the

development at the service provider's expense, if an area has been identified as a growth area and the additional capacity is required for future development.

Will organs of state that undertake development also have to make development contributions?

(B) *Recommendation:*

There are conditions of title that are redundant and that can be removed by operation of law thereby circumventing the cost and time associated with an application. For example, the condition found in deeds of grant that the property to which the deed of grant relates may not be transferred without the prior consent of the Minister.

Clause 45 will work well for most other conditions of title that need to be removed in the interest of development. However, empowering a municipality to grant consent in place of any controlling authority is taking it too far. The South African Road Agency Limited, the Department of Agriculture, Forestry and Fisheries, the Department of Public Works, the provincial departments responsible for transport and the provincial departments of public works all impose conditions of title and a municipality cannot substitute them (the organs of state). There are provisions in the laws of the respective organs of state to remove the conditions imposed by them.

The Bill should copy some of the good provisions of the Gauteng Planning and Development Bill. There is one reservation, development contributions should be calculated at the cost of engineering services when it is likely to be constructed, not at present day cost. The United Kingdom's Planning Act, 2008 also has excellent provisions for engineering services (called "infrastructure").

16. **APPEALS**

See the general comments.

17. **DEVELOPMENT APPLICATION AFFECTING NATIONAL INTEREST**

(A) *Comment:*

The improvements to the clause are welcomed.

Applications in that are in national interest can be lodged with either the Minister or the tribunal. There should only be one point of entry for applications and it should be the municipality. There is no need for the Minister to take over the approval of a development if a municipality has the resources to deal with the application and is supporting the application. Two recent examples in KwaZulu-Natal of developments that would in future be regarded as developments in national interest are the King Shaka International Airport and the new border post between Kwazulu-Natal and Swaziland. The eThekwini Municipality approved the zoning of the King Shaka International Airport and the uPongolo Municipality approved the new border post, including offices and staff housing. There would have been no need for the Minister to take over the development approval process in either case. The Minister could simply have monitored the development process.

A land development application for the purposes of clause 52 should be defined. The term can be interpreted restrictively to only mean applications to the tribunal. Applications in terms of other planning laws may also affect the national interest.

The use of land can also be changed without an application. For example, a municipality can amend its scheme.

National engineering services should be listed as developments in national interest.

(B) *Recommendation:*

All applications must be submitted to the municipalities (tribunal etc). The procedure in clause 52(4) can then apply (the municipality must inform the Minister, the Minister may be joined as a part or direct that the application must be referred to him etc.).

A land development application for the purposes of clause 52 should be defined.

An action by a competent authority that has the same effect as the approval of an application should be regarded as an application.

List national engineering services as developments in national interest.

There is a small grammatical error in clause 52(2) that should be corrected: The phrase "may be prejudicial to" should be moved to the beginning of paragraph (a) because it does not link up with paragraph (b): "...be prejudicial to.. may impede...).

18. **REGISTRATION OF OWNERSHIP**

Not all conditions of approval relate have to be complied with before a property may be registered. Conditions of approval can also relate to the erection of buildings, the occupation of buildings, maintenance etc. Clause 53 should be rewored to qualify that a property may not be registered before a municipality has complied with the conditions of approval that must be complied with before a property may be registered.

The Bill should rationalise the registration of ownership in the deeds offices by repealing redundant provisions like the remaining provisions of the Regulations for the Administration and Control of Townships in Black Areas, (R293 of 1962) and the sections of the KwaZulu Land Affairs Act, 1992 (KwaZulu Act No. 11 of 1992) that were not assigned.

Provision should be made for the waiving of fees and compliance with less stringent registration requirements for the upgrading of settlements by the Department of Human Settlements. Less stringent requirements include, permission to register a property, even though the underlying cadastral has not been consolidated, and waiving the need for both partner's written consent in cases where couples are married in community of property.

19. **DELEGATIONS**

It should not be possible to delegate the power to appoint a tribunal to an official.

Under the KwaZulu-Natal Act, it is also not possible for a municipality to delegate the power to adopt a new scheme.

20. **NON-IMPENDIMENT OF FUNCTION (IRRELEVANT CONSIDERATIONS)**

The term can be substituted with “irrelevant consideration”. The term is consistent with the terminology of section 6(2)(e)(iii) of the Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000) and it is plain language.

The clause should be moved to the criteria for decision making for municipalities and the planning tribunal.

21. **OFFENCES AND PENALTIES**

(A) *Comment:*

The enforcement provisions are inadequate.

(B) *Recommendation:*

The Act should have a dedicated enforcement chapter.

Offences and penalties cannot be created in subordinate legislation and must be addressed in the enabling Act or in original legislation.

See the KwaZulu-Natal Act for a comprehensive Chapter on enforcement.

The enforcement chapter of the KwaZulu-Natal Act is based on the enforcement measures of the National Environmental Management Act, 1998 (Act No. 107 of 1998).

The KwaZulu-Natal Act also introduced new innovations, including the following —

(a) clarifying that the rating of a property in accordance with its actual use does not constitute approval for the use if it is an unlawful use;

(b) persons are warned through a site notice that a development is unlawful to protect innocent persons who may otherwise be guilty of an offence under the Act, like builders;

(c) provision is made for urgent enforcement in the form of a type of interdict (urgent prevention order);

(d) professionals can be criminally liable under certain circumstances: a registered planner for certifying that due process was followed, when it was not, a land surveyor, if plans are submitted without approval by a competent authority, a building control officer for approving building plans contrary to a scheme or development approval, aconveyancer, if a condition is deleted from a deed without approval by a competent authority (see the latest proposed amendments to the KwaZulu-Natal Act);

(e) government officials are criminally liable if they authorise illegal development because it is not possible to hold the government departments that they represent criminally liable; and

(f) provision is made for the regularising of illegal development in cases where the development is desirable, subject to payment of a penalty.

22. **REPEALS**

(A) *Comment:*

The Bill does not rationalise all national planning laws.

(B) *Recommendation:*

The Bill should rationalise all national planning laws.

Laws that should also be repealed or partly repealed include:

(a) the regulations of the Regulations for the Administration and Control of Townships in Black Areas, (Proclamation No. R. 293 of 1962) that were not assigned to the provinces;

(b) the sections of the Physical Planning Act, 1967 (Act No. 88 of 1967) that were not assigned to the provinces;

(c) sections of the Upgrading of Land Tenure Rights Act, 1991 (Act No. 112 of 1991);

(d) the Less Formal Township Establishment Act, 1991 (Act No. 113 of 1991);

(e) sections of the KwaZulu Land Affairs Act, 1992 (KwaZulu Act No. 11 of 1992) that were not assigned to KwaZulu-Natal;

(f) sections of the provision of Land and Assistance Act, 1993 (Act No. 126 of 1993).

Provision should also be made for development approval where the land claims court confirms an agreement to resettle people on vacant land in terms of the Extension of Security of Tenure Act, 1997 (Act No. 62 of 1997). The Act is increasingly abused to avoid the need for development approval and public consultation.

23. **TRANSITIONAL ARRANGEMENTS**

(A) *Comment:*

The transitional arrangements are inadequate.

For example, a designated officer must issue a certificate that an applicant has complied with the conditions of approval for an application in terms of the DFA. A development may be a phased development and an applicant may only comply with a condition of approval in 15 years. Who will issue the certificate of compliance?

(B) *Recommendation:*

The transitional arrangements need to be improved.

24. **COMMENCEMENT**

(A) *Comment:*

Why must the President specify commencement dates for different provisions of the Act?

What will the status of the Act be on the day that it is published?

The KwaZulu-Natal Department of Co-operative Government and Traditional Affairs' interpretation of the commencement clause is that the Act will come into operation on the day that it is published in the *Gazette*. It is unlikely that the provincial planning tribunals would be established, the municipal planning tribunals would be established, the training materials would have been prepared, officials, councillors and tribunal members would have to be trained on how to apply the Act and office arrangements would be in place, before the Act is published in the *Gazette*.

(B) *Recommendation:*

The Act should come into operation on a date determined by the Minister.

Section 13(3) of the Interpretation Act, 1957 (Act No. 33 of 1957) will be applicable if the Act will commence on a date determined by the Minister. The section provides as following —

"13(3) If any Act provides that that Act shall come into operation on a date fixed by the President or the Premier of a province by proclamation in the Gazette, it shall be deemed that different dates may be so fixed in respect of different provisions of that Act."