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Serving our Nation in Land Reform, Development and Geospatial Information

Portfolio Committee on Rural Development and Land Reform
3rd floor
90 Plein Street
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Date 10 August 2012

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Attention : Ms Phumla Nyamza

Re : Comments on the Spatial Planning and Land Use Management Bill [B 14 – 2012]

The South African Geomatics Institute (SAGI) is a voluntary organization of statutory registered persons working in the domain of land surveying, town planning and other surveying specialisations.

SAGI was formed in 2004, however its foundations are built on much older institutions. Over the decades various changes have developed such that today we have one body (SAGI) that represents the interests of all Geomaticians – the modern term for surveyors.

Land Surveyors undertake most of the town planning in the country on behalf of investors / property owners and other clients. Such planning and ultimate realisation and registration of rights flowing from such planning amount to many billions of Rands each year and as such, the Spatial Planning and Land Use Management Bill (SPLUMB) has a direct impact on our members and their clients.

1. General

SPLUMBS is framework legislation which seeks to create a uniform planning system across the country. This has never been achieved in South Africa before and is sorely needed. However it does not address Tenure other than continuing a system whereby formal tenure rights can only be realised if planning is done.

It is a pity however that in drawing up this Bill, it would appear that only state organs and certain planning professionals where involved / consulted directly. SAGI represents most of the Private Practising Professional Land Surveyors in South Africa, and Land Surveyors undertake most of the planning work below the level of SDF / IDP and scheme creation in most provinces.

We therefore find it very strange that one of the main planning players in the market (from a private sector perspective), namely ourselves, where not consulted on this bill. We

provided comment of a very brief nature in 2011, and it's unfortunate that the deadlines for comment have always been very short.

Being framework legislation and intending to make planning easier and uniform across the country it seems that much of the understanding of planning is simply accepted from current legislation / methods without relooking at the purpose of planning and what it should and should not be doing.

2. Costs of Planning

The last few decades have brought growing complexity and frustration for those involved in planning / development. Developers must deal with an expanding array of regulations at every level of government. Unreasonable regulations on development inevitably inflate paperwork required for a project and intensify the complexity of data, analysis, and review procedures for both public and private sector. Ultimately, the delay caused by this regulatory maze produces higher development costs, increased expenses due to risk, uncertainty, overhead, and inflated cost of labour and materials. The proliferation of various consents needed in this process is another indication of increased bureaucracy and red tape.

Tenure and planning are intertwined in a myriad of interrelated issues in South Africa. While in a country such as the UK for example tenure and planning are separate issues. Anybody in the UK can subdivide, lease or otherwise deal with or sell off any portion of their land without the need for any statutory consent whatsoever, but the moment any development takes place its subject to planning and building controls and conditions.

In South Africa, essentially one must undertake all the planning costs upfront to realise development rights. There are pros and cons to both methods (SA and UK) and its clear that the department never gave any thought to any other alternative methods.

We are growing increasingly concerned about the costs of planning to the average land owner. The government is a large player in the provisioning of housing and can afford the planning costs, but for individual owners or emerging entrepreneurs, planning is increasingly becoming unaffordable.

- It is not clear if the department has done any study of how sustainable our current planning system is ?
- Its not clear how our planning system compares with international best practise ?
- Would the envisioned Norms and Standards have provisions to keep to a minimum the application cost but also the cost of preparing the documents needed ?

We have not been consulted on the Bill so we can only express our concern that we may be creating a planning system that is un-affordable to the poor and middle class.

Planning is increasingly adding significant costs onto land ownership thereby acting as a barrier for poorer people to acquire.

3. Planning and Tenure

In trying to understand planning controls on tenure we must look at the rational for imposition of subdivision controls through planning legislation. This rationale is based on the need of Government to regulate in order to promote the health, safety and general welfare of the community / society and is based on three outcomes, namely ;

- to prevent subdivisions which are poorly linked to the broader community,
- to prevent subdivisions with inadequate public facilities and infrastructure,
- reducing financial uncertainty and risk to the investor, buyer and the community.

In addition to this, in South Africa's case, planning was one of the tools to tenure control under the apartheid system. Thus planning can be used as a political and economic tool to further the objectives of the day and South Africa's apartheid past is a prime example of this.

However there are some subtle hidden implications which people are not aware of in that as a result of the above three outcomes, two important factors emerge, namely;

- The hidden increase of cost due to a prolonged approval process, and
- The exclusionary implications of subdivision Controls.

The level of public improvements (road, sewer, water, stormwater) required must be scrutinized to determine whether or not planning is actually designed to erect an economic barrier to keep out the poor and, increasingly, those with a moderate income as well.

However, South Africa has an additional characteristics with regards tenure, which many other countries are not subject too namely;

- People with legally recognised tenure rights but no means to acquire title.

If people currently live with some measure of legal tenure protection, planning does in no way alter their tenure other than to be a cost barrier to obtaining title (an exclusionary tenure practice). We say this because planning only seeks to regulate the use of the land not the tenure of the existing land.

The constitutional court in its judgement relating to the DFA (Case CCT 89/09 [2010] ZACC 11) never defined what municipal planning actually is. Given the different forms of planning ascribed to different spheres of Government the court did stipulate that any interpretation of municipal planning must be taken in a restrictive interpretation and not in a broad interpretation. At the time of the constitution it was never envisioned that Land Use schemes would extend wall to wall. Certainly it was the intention of municipalities to be wall to wall but there is a distinction between municipal jurisdiction and town planning. The constitutional court case over the DFA came about due to a certain development that resulted in a rezoning and the establishment of a township, thus usurping the powers of the municipality. It would seem to us that certainly, any development in which a burden is placed on a municipality in terms of any service provision or a rezoning occurs or a township is being created then this would trigger municipal planning.

The process of a tenure upgrade does not involve any rezoning or service provision and is unlikely to be classed, if ever challenged, as Municipal Planning. The right to services is

not based on land ownership but on the individual. Indeed the constitution compels the legislature to pass measures to realise the upgrading of title thus rendering tenure a national competency, even if not expressly stated so in the constitution. This Bill does not suitably address this issue. In fact it does not suitably address the issue at all.

We face a stark reality in this country in that millions upon millions of people live with tenure rights but cannot convert them into registrable tenure rights. The main blockage is of course the planning system and conventional planning requirements along with legislative problems. The lack of planning or laws does in no way somehow make these fellow South Africans vanish or invisible, they exist and they impact on society. They obtain services of some sorts. One must remember further that we are talking about people who have obtained lawful tenure rights which this Government and our courts recognise.

While SPLUMBS talks of sustainability, efficiency of use, uniform, effective social and economic inclusion and such, this is all to do with land use – where is the land ownership – Tenure.

SPLUMB's addresses the issues in creating new Greenfield developments, but does not address how existing tenure rights can be realised, with planning to follow at some future date. For most South Africans planning is an exclusionary barrier to tenure advancement.

Tenure is not and should not be linked exclusively to land use. Their is no reason why a part of a property cannot have a different use to the remainder in the same manner as one has flood controls or environmental controls or building controls over a property, different zonings can easily exist over a property.

Planning (of all types) has manifested itself in a myriad of laws on the backbone of the Cadastral System. Over the decades further controls have been developed to such an extent that the Cadastral system requires consent for any changes to happen. We accept that in a built up area there are a myriad of issues to consider and implications, however in lesser built up areas there are less considerations to factor in and in rural areas even less, if any at all.

Any form of tenure upgrade or any process to obtain title to existing tenure rights should be exempt from the provisions of this bill, or at most the bill should provided for norms and standards with regards criteria to be applied without the need for an application / approval process.

SPLUMB's in no way addresses the superiority of either tenure or planning, or the differing levels of planning needed or for that matter distinguishing between what should be an application versus commenting or Notification of changes. A good example of this is expropriation.

Expropriation of part of a property is used quite extensively by organs of state, but rarely does it result in the drafting of a subdivision diagram. We know that, for example, the KZN provincial roads department has approximately 25 000 expropriations needing diagrams. This is just one department, in all there are possibly hundreds of thousands of subdivisions across the country that are needed to create a clear planning picture. Expropriation of a part of a property is simply endorsed in the title deed of that property without the need for a sub divisional diagram. In the case of this Bill, why would a department incur costs of planning for a subdivision approval when expropriation (tenure) does not expressly require a sub divisional diagram?

A state organ can expropriate and have the title deeds endorsed to that effect, but yet in order to frame a diagram, would have to undertake an extensive planning exercise – the result of which changes nothing and the outcome of which cannot be “no”. Expropriation does of course not alter the zoning, only the ownership.

This bill does not set out the conditions under which planning is not needed, or for that matter the conditions under which consolidations or sub divisional control is not needed. Instead, it’s all viewed as needing control which has and will create a false planning environment.

By incurring costs, people will find informal methods of dealing with ownership as millions of people currently do. Surveyors are regularly faced with informing property owners of the complexities of planning and legal requirements for subdivisions. The costs of undertaking this is for many property owners a significant percentage of the total worth of their property (sometimes as much as 50 – 100% of the property worth, particularly for low value land) and invariably the land owner is never heard from again. Months or years later one will see the illegal development happen anyway and it has become so widespread that municipalities find it difficult to take action.

If municipalities seriously want to cater for the needs of the community, then municipalities need the full picture of the land ownership – it does not help only having a system in place as defined by the Survey Generals office and Deeds Office – If planning controls cannot deny a person their tenure rights already enshrined in law – then why have planning control in respect to this in the first place ?

This legislation can thus be seen as only applicable to richer people and the greater population will simply ignore this legislation as too costly. Planning costs have significantly increased in recent years as control is handed to municipalities. In KZN for example, under the ordinance an application cost R10. Under the KZN PDA one is now looking at an application cost of R 3000 plus. In both cases this did not include the preparation costs although under the new KZN PDA system this has increased a minimum of 100 – 200 %.

There are examples of consolidations that did not previously require consent under certain circumstances now costing over R 100 000 in terms of preparing the documentation necessary for the application under the KZN PDA.

The department simply has no idea of the private sector costs associated with preparing a planning application. Indeed its Memorandum at the back of the SPLUMB’s bill attests to the fact that it has only considered state costs – no mention at all of private sector costs has been made or undertaken.

Town Planning schemes are legal documents and having changes to the Cadastral System means systems must be in place between Municipalities and the SGO. We have seen a trend in recent years for even such things as consolidations to be controlled when none existed prior (except for the Free State and Gauteng). Consolidations are an item which most certainly does not require an application – they should rather be dealt with by way of the land surveyor informing the municipality of his intention and giving a municipality 30 days to provide comment or valid objections. The bill provides for all consolidations needing an application. Clearly little thought went into this as significant costs can be saved by rather informing a municipality of ones intention to consolidate and if the municipality has an objection then follow an application process, but it certainly does

not make any sense to have all consolidations following an application process.

It is clear from the above that there is absolutely no compelling need to regulate Consolidations. To do so would be completely counter to the aims and objectives of the act. Alternatively these can be easily sidestepped by way of Notarial ties thus undermining whatever the intention of the bill drafters was anyway. Regulating Consolidations therefore serves no public interest, at least not any public interest that would warrant legislation.

Thus,

- Consolidations should not be regulated in its current form.
- The Act must be clear on tenure upgrade rights versus planning. Planning should not be an exclusionary control to tenure.
- The Department must undertake a cost review exercise of the cost of planning on the applicant.
- Not all subdivisions should be subject to municipal consent, the Bill should address this.

4. Development Principles and Norms and Standards

The envisioned Development Principles and Norms and Standards are in effect the regulations to this Bill. Planning by its very nature is a consultative process and a complex one at that. Great powers are being conferred on the Minister in terms of this bill and the development principles and norms and standards will be beyond the oversight of parliament.

The bill should make provision for at least a Development, Norms and Standards Board to be established comprising of representatives from both the state and private sectors as well as competent professionals. Such a board could also identify problems on a regular basis and make recommendations for changes in a timely manner. Such a board must have representation from Lawyers, Land Surveyors and Town Planners.

5. Municipalities

Many municipalities are dysfunctional and many more have never undertaken planning. Not withstanding the constitutional court case, it cannot be that the court envisioned every municipality performing municipal planning until such time as it is competent to do so.

The bill should allow for functions to be gradually transferred to municipalities as and when it has systems and processes in place. Development should not be held to ransom because a municipality does not know what to do.

The recent introduction of the KZN PDA was a prime example of how municipalities can radically influence development. Municipalities in KZN previously did not undertake town planning functions (aside from some exempt municipalities such as eThekwini and a few others), the results of municipalities now undertaking planning matters resulted in the worst development year in KZN since 1935 with regards new subdivisions, new townships and such like.

The passing of this bill and its impacts on development and jobs should not be taken lightly as its impacts can and will be felt far and wide.

An additional problem to contend with is the lack of suitably qualified persons to sit on municipal tribunals. In many towns there is no planner or land surveyor available or anywhere remotely close by. Its not clear how municipalities should constitute municipal tribunals if professionals cannot be obtained to fill such positions.

6. Specific Issues

Section 1

The following Items need definitions;

In Section 7(b)ii “Prime and Unique agricultural land” is used, but yet the Bill does not define what this actually is.

In Section 7(b)vi “urban sprawl” is used, but yet this is not defined. Urban sprawl means different things to different people and should be defined.

In Section 58(1)c “form” and “function” of land should be defined. Since these are criminal offences, they should be defined as to exactly what they mean.

Section 7

Section 7 (c) iii talks of timeframes. This must be specified in national legislation as to what the maximum timeframe should be for an application to be processed. Considering that there are different types of development applications from single subdivisions to full townships, different time periods should be applicable to different applications. This cannot and should not be left to provinces and municipalities to decide. Equally there should be consequences for not keeping to timeframes. In development terms, timeframes are an excellent indicator of a functioning department.

What is often stated as a turnaround time on a departments website or stated in law is very often vastly different from reality. A Law can stipulate a period of 30 days for example in the case of KZN roads department, but in reality one can expect a decision in 1 – 2 years time. Department of Agriculture recently quoted a 30 days decision making process, but in reality one will wait 1 – 2 years or longer for a decision.

Without a maximum stipulated time period, the public cannot really know what a reasonable timeframe is and take action or raise questions.

We would suggest that if an application involves advertising and a public consultative process then 3 months should be more than adequate. If no advertising or public consultative process is needed then one month is more than adequate.

Section 10

Section 10(1)c: “Provincial legislation may provide for “remedial measures in the event of the inability or failure of a municipality to comply with an obligation in terms of this Act ….”

Compliance should not be an optional component of planning. The word “may” should be changed to “must”. It is also unclear how a province can provide remedial measures unless the whole municipality fails, not just a particular department. Failure of a municipal

department can be determined in a matter of months and remedial systems should be fast and efficient.

Section 10(2): “Provincial legislation not inconsistent with the provisions of this Act may provide for structures and procedures different from those provided for in this Act in respect of a province.” What is then the purpose of Section 3 (a)”provide for a uniform, effective and comprehensive system of spatial planning and land use management for the Republic ”

If it’s the intention as stated by the objects of the Act to provide for a “uniform” and “comprehensive system” of planning then Section 10(2) should be deleted. One cannot have different structures and procedures and at the same time have a uniform system of planning.

Section 17

Section 17(3): “The provincial spatial development framework cannot confer on any person the right to use or develop any land except as may be approved in terms of this Act, relevant provincial legislation or a municipal land use scheme.”

It’s clear that National Planning such as the provision of energy, telecommunications, rail, roads, prisons, police stations, administration buildings and such like is subject to the approval of a Municipality. Further, provincial planning such as school locations, provincial roads, health facilities and other provincial responsibilities would also be subject to municipal approval. In effect one has a spatial development framework which in reality is not binding on a municipality other then perhaps being a “guide” to decision making by that municipality.

Section 22

Section 22(3) talks about aligning inconsistent SDF's between Province and Municipalities, but its clear that little can be done in forcing a municipality to change its SDF if the need arose, this puts Provincial and National SDF's in jeopardy of simply being toothless documents that a municipality can in fact legally ignore as its only compelled to follow its own SDF.

Section 24

Section 24(1): “A municipality must, after public consultation, adopt and approve a single land use scheme for its entire area within five years from the commencement of this Act.”

The bill does not make provision for what happens if this is not done. If such a land use scheme is adopted or approved after this five year period, its not clear if it is legally binding since it has not complied with the timeframes and would such a process have to be restarted entirely from scratch again?

Section 26

Section 26(4): “A permitted land use may, despite any other law to the contrary, be changed with the approval of a Municipal Planning Tribunal in terms of this Act.”

This is a rather powerful statement as one is granting permission to a municipal planning

tribunal to overrule other competent authorities – Precisely the reason why the DFA was struck down by the courts.

Was this intended by the department that Municipalities have such far reaching powers.

Section 28(1) : A municipality may amend its land use scheme by rezoning any land considered necessary by the municipality to achieve the development goals and objectives of the municipal spatial development framework. - Further supports the conclusion we draw that any other legislation controlling rezoning can be overruled by a municipality.

Section 32

Section 32 deals with enforcement of land use scheme's – all references to “may” should be replaced by “must”. Transgressions of the scheme are very serious criminal matters as envisioned by the Bill and enforcement should not be subject to the whim of officials, it should be a duty and a burden to enforce and prosecute. Alternatively transgressions should not be a criminal offence.

Section 35

Section 35(2) should have the same conditions placed on officials as applies to Municipal Planning Tribunal Members in terms of Section 38.

Municipal Tribunals don’t allow for the sitting of Joint or Multiple tribunals. Private Developments can and do cross municipal boundaries and even provincial boundaries. Provision needs to be made for such circumstances. This is another reason to have complete uniformity in planning at both provincial as well as municipal levels.

Section 38

Section 38(4)b and c, dictates the types of officials who have a conflict of interest on the Municipal Planning Tribunal. Reading section 40(1) and (2) its apparent that a tribunal must comprise at least 2 municipal officials. This begs the question – in the event of an application by the municipality itself to the tribunal, how can the tribunal hear such matters when it could be reasonably perceived to be biased in hearing the matter with 3 members. In such cases, in order to maintain the integrity of the system, non state members should outweigh state members.

Section 41

Section 41(2)c – Consolidations should be removed. The majority of provinces traditionally never had this as an application and this would best be controlled by the land surveyor asking the municipality if they have any objection to the consolidation. In this manner, costs can be radically reduced to the investor and land owner.

Section 36

Section 36(4) – It is necessary to have provisions to designate multiple chairpersons and deputy chairpersons. Some provinces used the DFA tribunal extensively, and it’s likely that, depending on the delegations to officials, some large municipalities could be swamped by applications and thus have the need to establish multiple tribunals.

Section 41

Section 41 – Circumstances often arise where it is necessary to amend, for various reasons, the wording of the tribunal's decision. Section 41, does not authorise this and indeed the Bill does not make it clear who has the authority to make these changes. Changes could be needed to rectify spelling mistakes, numbering issues, amendments to layout plans due to local geological or environmental issues which where unforeseen and a host of other reasons for changes.

Section 42

Section 42(1)c should include the condition that the tribunal should take into account the exclusionary implications of planning on tenure so as not to create additional costs to land access.

Section 43

Section 43(2)a – Five years is not enough. It could be that phase 1 is complete, but phase 2 has bulk infrastructure issues, for example, through no fault of the developer. This should be made 10 years.

It could also be that general plans have been approved by the Surveyor General for which approval has now lapsed. This can confuse the public as the assumption is created that land is available. Only the land surveyor concerned or the land owner can withdraw an approved Diagram of General plan. Thus one has approved properties (unregistered) in the system for which the municipality cannot withdraw such. Equally, a lapsing of a decision is not the same as voiding a decision, so the municipality cannot withdraw it anyway.

Section 50

Section 50(1): There are many small developments and single subdivision type applications. Why should people who already have subdivision rights in terms of a land use scheme be subjected to a development levy ? For example a site zoned Special Residential 900 and the site is 2000m2 – such a person has rights for which he/she must pay again when they wish to do a subdivision.

Its not clear how development charges can be implemented in terms of this Bill when development charges need the authorisation of the ministry of finance in terms of the Municipal Fiscal Powers and Functions Act. Development charges are not within the realms of municipal planning and is a national finance issue.

How does this bill address the uniformity, effectiveness and sustainability of development charges? What mechanisms exist for this to be calculated in a rational scientific manner free from political interference for the sustainability of the community? In addition for smaller developments its not clear what ones property rates charges are for as rates are precisely for the provision of services, in such cases a double charge would amount to fraud in the case of existing services that simply need a connection.

Section 51

Section 51(3) this does not make sense. Rights can accrue from a decision of the tribunal,

but yet when the decision of an appeal body overturns the tribunals decision, such rights that have accrued are not effected. What happens if the tribunal approved the building of 20 units and contracts have already been issued and construction works started and possibly already completed by the time the appeal is finalised?

This Item should be deleted.

7. **Conclusion**

We have sought to point out some issues in the available time we have to comment on this bill but would implore parliament to consider the matters we have raised, not withstanding the urgency of the legislation, which is unfortunate.

If the legislation has to be delayed by a month or two, it is better to rectify the problems than to continue.

Peter Newmarch
SAGI President. 10 August 2012.