

Submission on the Spatial Planning and Land Use Management Bill, 2011 (6 June 2011)

1 Introduction

The Socio-Economic Rights Institute of South Africa (SERI) is a non-profit organisation offering professional, dedicated and expert NGO socio-economic rights assistance to individuals, communities and social movements in South Africa. SERI conducts applied research, engages with government, advocates for policy and legal reform, facilitates civil society coordination and mobilisation, provides free legal advice, litigates in the public interest and conducts popular education and training. Our thematic areas are housing and evictions; access to basic services (water, sanitation, electricity); and migrant rights & livelihoods.

One of our core areas of research, advocacy and litigation is around the improvement of living conditions of shackdwellers in informal settlements throughout South Africa, and those living in so-called 'bad buildings' in the inner city of Johannesburg. We welcome the review and rationalisation of planning legislation in South Africa, particularly as it relates to bottom-up integrated development planning (i.e. the development of IDPs) and the upgrading of informal settlements in line with the national Upgrading of Informal Settlements Programme (UISP).

2 General observations

2.1 Extension of public comment process

SERI appreciates that since the White Paper on Spatial Planning and Land Use Management was published in 2001, numerous attempts have been made over the last 10 years to pass national legislation on spatial planning and land use management in South Africa. However, there are a number of problems with the short period available for public consultation on the revised Spatial Planning and Land Use Management Bill ('SPLUMB'), given the importance of the Bill for addressing spatial inequality and ensuring access to land, housing and other socio-economic rights for all living in South Africa (as outlined in the Preamble to the Bill). The problems that have hampered the Bill in the past have not disappeared, and a far more proactive and inclusive approach needs to be adopted, driven by high-level stakeholder engagement.

SERI requests further opportunity for a wide range of stakeholders, including municipalities, town planners and town planning firms, Environmental Impact Assessment practitioners (EAPs), community-based organisations and social movements, to give input into the process if they have not done so in this round. Following this initial round of submissions, the draft Bill should be published again for comment.

SERI urges the Department of Rural Development and Land Reform (DRDLR) to consider approaching the Constitutional Court to request an extension on the timeframes included in the judgment handed down in June 2010 by the Court.¹ The Bill should not be rushed in order to comply with these timeframes if they are unreasonable, given the magnitude of the task and the importance of the legislation for the country.

2.2 National institutional responsibility for spatial planning and land use management

The Department of Rural Development and Land Reform (DRDLR) is not the most appropriate institutional home for SPLUMB and the functions contained therein. The focus of this Department is on rural development and rural land issues, and it is not well-placed to take on the far more broad and complex issues of spatial planning and land use management in South Africa more generally, particularly in cities. A more appropriate home for SPLUMB and its functions might be within the Department of Cooperative Governance and Traditional Affairs (CoGTA), which is responsible for overseeing municipal integrated planning. However, the role of the National Planning Commission needs to be addressed more comprehensively.

This question of the most appropriate institutional home needs to be addressed as a matter of urgency, as it will affect which Minister is responsible for overseeing implementation in terms of the SPLUMB. The definition of "Minister" in Chapter 1 would need to be changed. The rationale behind the DRDLR as the responsible department and Minister for spatial planning and land use management needs to be provided, as well as a sober analysis of its ability to take on this function given its existing challenges in dealing with rural land reform.

2.3 Apartheid-era provincial legislation still in effect

The SPLUMB does not repeal provincial apartheid era planning legislation and the current process of developing overarching national legislation within tight timeframes does not address the very real problem that highly problematic subsidiary legislation has not been replaced. With the repeal of the Development Facilitation Act 67 of 1995 ('DFA'), there will be very few options available to municipalities, and they will have to use the old Provincial Ordinances. Provinces will be under immense pressure to develop new provincial legislation; however their capacity to do this is questionable. National government needs to develop compatible provincial legislation that can be adapted and adopted by provinces as they see fit. Timeframes need to be instituted for this process.

2.4 Professional skills capacity under question

The Bill is extremely important in terms of the critical role of spatial planning and land use management in redressing apartheid spatial inequality and creating sustainable and viable cities and towns that work for everyone in South Africa. However, as is the case with most of the progressive legislation and policy in South Africa, the problem lies in the implementation and the failure of intergovernmental cooperation. These two aspects will need to be addressed if national legislation is going to change anything in practice. It is common knowledge that there is a shortage of professional planners in the country, particularly in rural

¹ *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others* [2010] ZACC 11 (22 September 2009).

areas and small towns, and that town planners are often conservative in their approach to planning.² This gap in professional skills will need to be addressed as a matter of urgency, as the Bill envisages a drastically increased need for professional planners at all levels. The absence of capacity in certain municipalities will potentially require more relaxed approaches to various aspects of land use development and management. The limited ability of district and local municipalities to undertake comprehensive Spatial Planning Frameworks needs to be acknowledged, and support provided where applicable.

3 Specific comments on the SPLUMB

Chapter 1: Introductory Provision

Definitions of “incremental upgrading area” and “incremental upgrading of informal areas”

These definitions should reflect the fact that incremental upgrading can happen where there is existing occupation and informal development (e.g. informal settlements) but can also refer to land proactively unlocked in order to relocate households living in existing settlements (e.g. in a voluntary process undertaken in order to de-densify the existing settlement) or simply to provide more opportunities for previously excluded people to consolidate themselves in well-located areas with access to services and tenure.

Section 4(1) and 4(2)

The differentiation between municipal and provincial spatial planning is unclear. This needs to be made more explicit in the Bill.

Chapter 2: Development Principles, Compulsory Norms and Standards

Section 8

It appears that the kind of information gleaned from the compiling of the compulsory norms and standards (particularly in relation to land use patterns) is extremely important to the nature of the Bill, and should potentially be conducted prior to the finalisation of the Bill.

Chapter 3: Intergovernmental support

Section 9

It is questionable that the Minister of Rural Development and Land Reform is the most appropriate person for undertaking the support and monitoring function in terms of SPLUMB. CoGTA may well be better placed.

² One of the findings from SERI's recent case study and research on informal settlement upgrading and land use management was the need for “greater buy-in and involvement of professionals on a pro bono basis in relation to informal settlement upgrading i.e. planners, architects, engineers, EAPs etc. See SERI, “Towards a Synthesis of the Political, Social and Technical in Informal Settlement Upgrading in South Africa: A Case Study of Slovo Park Informal Settlement, Johannesburg” Working Paper No.1 (April 2011) 65: http://seri-sa.org/images/stories/slovo_park_working_paper_draft_15may11.pdf

Chapter 4: Spatial Development Frameworks

Section 11(7)

As mentioned above, the role of the Minister in terms of spatial planning is much more in line with the existing powers and functions of CoGTA, rather than the DRDLR.

Section 19

SERI is aware of existing problems with the integrated development planning process, and the fact that in reality it is exclusionary and inaccessible to poor and marginalised people and is dominated by party political agendas. If the Municipal Spatial Development Frameworks are to be a *real* representation of bottom-up consultation and planning, there needs to be a concerted effort to ensure these spaces are not 'captured' by other agendas.

Section 20

Municipalities are large areas, and there needs to be a focus on engagement in spatial planning and development at a more localised level, particularly in metropolitan municipalities. The Bill needs to consider the importance of genuine community participation in the processes of local spatial planning, and put in place mechanisms to ensure this happens at the most localised level possible.

Chapter 5: Land Use Management

Section 22

The national legislation needs to provide more guidance on what potential "suitable categories of land use zoning and regulations" are envisioned. This is a potential space to address the realities of land use in South Africa, and envisage how livelihoods can be promoted through proactive land use zoning interventions e.g. multi-purpose/use land use zoning. Schedule 2 outlines land use purposes, but it is unclear how this related to zoning. Further, this list excludes any kind of mixed use purpose.

National legislation needs to provide a progressive framework for provinces and municipalities to work with, and this means being bold with the kinds of interventions that could be adopted to redress spatial inequality and promote sustainable livelihoods and settlements. See comments made to Section 8 above.

Section 22(2)(c)

The inclusion of "provisions that permit the incremental introduction of land use management and regulation in informal settlements, slums and areas not previously subject to land use scheme" is welcome; however, SERI agrees with recent statements made by Erasmus J in a judgment in the Cape High Court that read: "the word slum if used in the United Nations Millennium Development Goals. It is placed in inverted commas as I do not deem it appropriate to refer to a human beings abode in those terms" (para 9, footnote).³

SERI would like to see the word "slum" removed from the Bill altogether.

³ Judgment by Judge Nathan Erasmus in *Beja and Others vs City of Cape Town and Others* (April 29 2011); <http://www.politicsweb.co.za/politicsweb/view/politicsweb/en/page71656?oid=233509&sn=Detail&pid=71616>

The drafters of the Bill need to be aware of the fact that while Section VII of the DFA made provision for a special tenure approach (including initial ownership) to allow for a more rapid and incremental township establishment approach, this section was never used in practice. There needs to be a more proactive, instructive approach by national legislation towards the kind of instruments available to provinces and municipalities to redress spatial inequality and to meet the basic needs of previously disadvantaged groups in South Africa.

A recommendation in SERI's recent research on informal settlement upgrading and land use management is that "there needs to be much greater focus on incremental development, particularly *in situ* upgrading in terms of the UISP i.e. where access to services and security of tenure are provided before the construction of houses."⁴ Municipalities and provinces have adopted a non-integrated, 'one size fits all' approach to housing development in the past, which has resulted in limited low-density residential settlements being built on the periphery of towns and cities, without access to social and economic amenities. The focus on building top-structures has meant that millions of households continue to wait in the so-called 'housing waiting queue' without tenure security or access to basic services. It would perhaps be appropriate for the Bill to explicitly reference the Upgrading of Informal Settlements Programme (UISP) as included in the National Housing Code, 2009, and the links with the land use scheme in relation to informal settlement upgrading. Referencing relevant Human Settlements and Environmental Affairs legislation and policy should be encouraged in the Bill.

Section 22(3)(b)

The Bill refers to "special zones identified to address the development priorities of the municipality". This concept is vague and needs to be more clearly defined, as it is potentially an extremely important instrument. This important provision will be ignored or abused if guidelines/examples are not provided in the national legislation in some way.

Section 23(1)(a)

"Economic growth" should not be the first item listed in this section, as it presents a false hierarchy. The Preamble of the SPLUMB clearly emphasises the desire to redress spatial inequality and to "respect, protect, promote and fulfil the social, economic and environmental rights of everyone and strive to meet the basic needs of previously disadvantaged communities." While economic growth is important, it should not be the first item listed in section 23(1) e.g. possible entries include "Social and economic inclusion" or "Most effective use of land to promote social and economic inclusion" or the "Most valuable use of land, not economic value but social value". See comment on section 55 below.

Sections 28 and 29

One of the most important overlaps will be with provisions in the National Environmental Management Act 107 of 1998 (NEMA), particularly around Environmental Impact Assessments (EIAs) and authorisations in terms of the Environmental Impact Assessment (EIA) Regulations. The linking of SPLUMB to NEMA should be made more explicit, rather than relying on vague references to ad hoc agreements. In recent research conducted by SERI, one of the findings was that the "rationalisation and simplification of the land planning and regulation processes are critical – particularly around township establishment and EIA

⁴ SERI (note 1 above) 63

processes – and they should be made explicitly pro-poor and catered to the upgrading of informal settlements.”⁵

Chapter 6: Land Development Management

Section 33

Municipal and Provincial Planning Tribunals will have a fair amount of power, and there needs to be more guidance on who sits on the tribunal, what skills are required etc.

Section 40(1)(b)

What is “provincial interest”? This needs to be defined.

Section 41

Who monitors those sitting on planning tribunals, and ensures that there is no conflict of interest? There needs to be a thorough screening process undertaken by a neutral, external body.

Section 55

This is an important clause, as it acknowledges the very real practice of land development being impeded because of its presumption of the negative effect on property values in the immediate vicinity i.e. Not in My Backyard Syndrome (NIMBYism). It may be useful to have this clause expanded on, and referenced elsewhere in the Bill. The fact that municipalities are under pressure to expand their rates and taxes base, and that this value created from well-located land is often a determinant of what gets approved for development i.e. townhouse complexes, malls etc., needs to be acknowledged and mitigated against

The social value or function of land is extremely important, and the Bill would do well to acknowledge its importance, perhaps in Chapter 2.

Contact details

6th Floor, Aspern House
54 De Korte Street
Braamfontein 2001
Johannesburg

Reception: 011 356 5860

Fax: 011 339 5950

Email: Kate Tissington: kate@seri-sa.org

Website: <http://www.seri-sa.org>

⁵ SERI (note 1 above) 64.