

MUNICIPAL PLANNING IN TERMS OF SPLUMA

FORMULATION OF MUNICIPAL BY-LAWS

Susan Mosdell

Dimensions of land use planning law



Dimensions of land use planning law.....the need to balance considerations



Historical Context

- ❖ Restrictive covenants (in the private law realm) existed historically.
- ❖ Statutory controls on land use developed slowly, over time, with increasing population size and urbanisation.
- ❖ Planning pertaining to the use and allocation of land reflective of political ideology – in the South African context that means apartheid ideology has substantially influenced planning.
- ❖ Township planning developed first in the broader sense, then evolved into zoning at micro-scale.
- ❖ An underpinning thread of macro-scale planning remained in the IDP requirements contained in the Local Government: Municipal Systems Act of 2000, with its requirement for spatial development frameworks at local level.
- ❖ The Bill of Rights had far reaching impacts on land use planning law, in particular the environmental right, the equality right, the property right, the access to information right and the right to fair administrative process, as well as the locus standi provisions.

➤ With increasing urbanisation, modern cities are faced with mounting pressures which make land use planning more and more important, and more and more contentious....

-population numbers

-housing needs

-transport issues

-economic development & employment creation

-education & health facilities

-conservation issues

-coastal management issues

-climate change issues



Legislative Context

INTERFACE OF SPLUMA WITH OTHER LEGISLATION

Although SPLUMA is the principal legislative instrument with regard to spatial and land use planning, it should not be read in isolation. It interfaces with other legislation, such as-

*The Deeds Registries Act, 1937 * The National Building Regulation and Building Standards Act, 1977 * The Subdivision of Agricultural Land Act, 1970 *The Land Survey Act, 1995 *The Urban Transport Act, 1977 *The Housing Act, 1997 *The National Heritage Resources Act, 1999 * The National Water Act, 1998 * The National Environmental Management Act, 1998 and its various subsidiary Acts (Integrated Coastal Management Act/Protected Areas Act/Biodiversity Act/Air Quality Act/Waste Act)*The Mineral and Petroleum Resources Act, 1995



Legislative Context

INTERFACE OF SPLUMA WITH OTHER LEGISLATION CONTINUED

IMPORTANT TO REMEMBER that in terms of Constitutional Court jurisprudence, none of these Acts overrides municipal planning powers (Maccsand, Constitutional Court 2012) – nevertheless there needs to be alignment between municipal planning legislation and other legislation (Constitution Section 156(3) : By-laws conflicting with provincial and national legislation are invalid).



SUGGESTED OUTLINE FOR BY-LAW (based on City of Cape Town Municipal Planning By-law)

Chapter 1: Definitions

Chapter 2: Application of by-law/conflict of laws

Chapter 3: Spatial Planning

Part 1: Introductory provisions

Part 2: Municipal SDF

Part 3: District and local SDF's

Part 4: General provisions re spatial planning

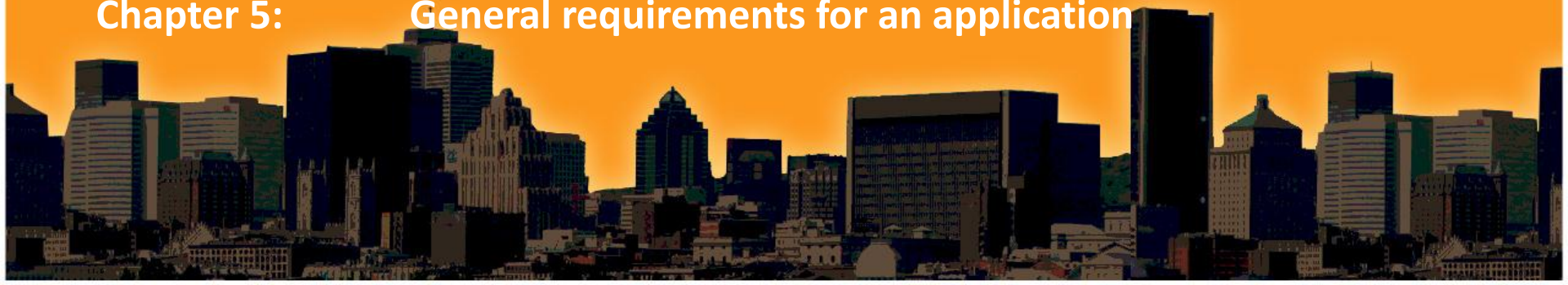
Chapter 4: Development Management

Part 1: Zoning scheme

Part 2: Use right and non-conforming use

Part 3: General lapsing provision

Chapter 5: General requirements for an application



SUGGESTED OUTLINE FOR BY-LAW (based on City of Cape Town Municipal Planning By-law) continued

- Chapter 6: Special provisions for applications**
- Part 1: Rezoning, departure & consent use**
 - Part 2: Restrictive conditions**
 - Part 3: Consolidation**
 - Part 4: Subdivision**
 - Part 5: Owners' association**
 - Part 6: Engineering services**
 - Part 7: Exemptions**
 - Part 8: Emergency and urgent housing**
- Chapter 7: General procedures for all applications**
- Part 1: Making an application**
 - Part 2: Notice and comment**
 - Part 3: Process and criteria for decision**
 - Part 4: Decision**

SUGGESTED OUTLINE FOR BY-LAW (based on City of Cape Town Municipal Planning By-law) continued

Part 5: Extension of validity of approval

Part 6: Appeal

Part 7: Prescribed requirements and notification

Part 8: Integrated decisions

Chapter 8: Decision makers

Chapter 9: Enforcement

Part 1: Introductory provisions

Part 2: Complaint

Part 3: Civil enforcement

Part 4: Criminal enforcement

Part 5: Investigative and enforcement powers of officials

Chapter 10: Naming and numbering of streets

Chapter 11: Transfer certificate

Chapter 12: General administrative provisions

What's new in Spluma?

- A clear distinction is drawn between municipal, provincial and national planning, and the monitoring and oversight role of provincial government is made explicitly clear (Section 5(2)(b)). (Constitutionality?)
- Development principles are laid out in Section 6, which apply to spatial planning, land use, development decisions, and evaluation of impacts.

Five fundamental development principles

- 1 SPATIAL JUSTICE – redress of imbalances, inclusion of previously excluded areas, redress in access to land by previously disadvantaged persons, security of tenure, upgrading of informal areas, decision making is not to be based on protection of land values

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Five fundamental development principles

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What's new..... Fundamental development principles continued....

- 2 SPATIAL SUSTAINABILITY - land development within fiscal, institutional and administrative means, protection of prime agricultural land, consistency with environmental management laws, stimulating land markets, limiting of urban sprawl **(creating sustainable urban design)**
- 3 EFFICIENCY – using existing resources, minimising negative financial, social, economic and environmental impacts, streamlining and processing within time frames **(saving time and resources)**
- 4 SPATIAL RESILIENCE - flexibility in plans, policies and systems to ensure sustainable livelihoods in communities most vulnerable to economic and environmental shocks **(preparing for adverse circumstances)**
- 5 GOOD ADMINISTRATION – integration across spheres of government, inputs from all sectors in developing SDF's, clarity, transparency, empowerment of the public **(sound administrative principles)**

Relevance of principles for for by-law drafting

- The transformative imperative should be evident in the SDF. Consider whether this is so, and amend if necessary. Consider what mechanisms are needed to give practical effect to the transformative imperatives of the SDF. This may involve creating overlay zones or rethinking previously applicable permissible uses. For example, where densification is considered desirable, it may be necessary to allow second dwellings on residential properties.
- Ensure that the by-law creates mechanisms for implementing the principles of urban design enunciated in the SDF. This will typically involve creating overlay zones with specific rules.
- Create mechanisms for streamlining process.
- Create resilience mechanisms. (e g special measures for flood-prone areas)
- Create sound administration mechanisms.

What's new..... National norms and standards/support and monitoring of provinces and municipalities

Section 8 requires that national norms and standards be developed reflecting national policy, promoting social inclusion, spatial equity and desirable settlement patterns, maximising efficiency, analysing existing spatial trends and proposing alternatives, identifying strategic under-utilised land, standardising symbology and differentiating between areas, needs and types of land use where appropriate.

Sections 9, 10 and 11 create an extensive and detailed support and monitoring system filtering down from national, through provincial to local government. (Constitutionality?)

What's new?..... Detailed stipulations regarding spatial development frameworks / role of executive authorities of municipalities in land use management

For each sphere of government detailed processes and content requirements are set out for spatial development frameworks (Sections 12 to 21). It is stated that SDF's don't confer any rights (Section 17). Of significance is that **land development decisions contrary to municipal SDF's are now forbidden and unlawful, unless a deviation is warranted by site-specific circumstances** (Section 22).

With regard to land use management it is now prescribed (Section 23) that **the executive authority of a municipality must give policy guidance with regard to the municipality's land use scheme.** Furthermore **the executive authority must oversee implementation of the scheme by the officials of the municipality.** (Thus executive mayors and executive councils need to become familiar with spatial and land use planning issues.)



Relevance of Sections 12 to 22 for by-law drafting

- Since the status of municipal SDF's is enhanced, it is important to ensure that the by-law and land use scheme are fully aligned to the SDF (eg in an area earmarked for growth in the SDF, there should not be restrictive measures curtailing growth)
- Consider whether the by-law can establish circumstances under which a deviation from the SDF is warranted? In terms of Section 22 site specific circumstances warrant a deviation. Could these be delineated in a by-law?

What's new?..... Land use schemes (zoning schemes) – mandatory and optional components

In terms of Section 24 the following are mandatory components of land use schemes:-

- They must cover all areas of the municipality.
- They must comply with environmental law.
- They must incrementally introduce land use management into rural/traditional leadership areas and into informal areas.
- They must include provision for affordable housing.
- They must contain incentives for development priorities.
- They must facilitate implementation of national and provincial policy.
- They must give effect to the SDF and IDP.

The following components are optional:-

- A requirement for no development without the consent of the municipality.
- Special zones for development priorities.
- Provision for variable conditions.



Land Use Schemes in by-laws

- Many towns and cities have old land use schemes which don't include all areas in their jurisdiction. This must be remedied. There is a period of five years from 1 July 2015 to undertake this (ie by 30 June 2020).
- A by-law should contain criteria for establishing zonings where there previously were none. This may require establishing a process of recognising existing uses deemed lawful on 1 July 2015, bearing in mind that Section 26(3) requires that unzoned land must be zoned for use for one of the purposes listed in Schedule 2. However there is a catch-all at the end of this schedule: *'any other purpose as may be prescribed'*.
- The principles of Section 25 of SPLUMA must guide the development of land use schemes, ie it must promote economic growth, social inclusion, efficient land development and minimal impact on health, the environment and natural resources.

What's new?..... Rezoning

Section 28 sets out the bases upon which property may be rezoned:

- To achieve development goals and objectives of the SDF; and
- To accomplish the objectives of the spatial development framework.

Note – In terms of Section 28(4) only full council may approve changes relating to the use and development of land in a zone, ie changes to the permitted and concessionary uses.

Note – This section allows municipalities to apply to rezone land to accomplish their goals and objectives (subject to process).
(Possible conflict with property right?)



What's new?..... alignment of authorities

Section 30 provides for possible alignment of authorities, and for the issuance of an integrated authority where authorisation for the same activity is required under different laws. (This would allow for an environmental authorisation and land use approval to be granted in a single authority. It should also enable simultaneous application for the two types of approval.)

For by-law drafting purposes – mechanisms should be established to give effect to this. Intergovernmental consultation may be required. The process will take time to develop.



What's new? New municipal decision making structures

Municipal land use decisions are now to be taken by a **municipal planning tribunal** (Section 35), although the power to delegate decision-making to specific officials still exists. Municipal councils need to determine what functions should be delegated to officials via the MSA system of delegations.

Tribunals consist of officials and external advisors, and **no councillors**.

Tribunals have the power to decide the following applications (subject to Section 42 and Section 43 which regulate imposition of conditions):

- (a) township establishment;
- (b) the subdivision of land;
- (c) the consolidation of different pieces of land;
- (d) the amendment of a land use or town planning scheme, except any change affecting the scheme regulations in terms of section 25(2)(a); or
- (e) the removal, amendment or suspension of a restrictive condition.

Provision in by-laws for Municipal Planning Tribunals

- Recruitment and appointment of members of tribunal – process: nominations/evaluation panel? Criteria for appointment?
- Code of conduct
- Legal protection for tribunal members – indemnity?
- Functional and process issues – quorum, voting, hearing of submissions in writing and orally, record keeping, secretarial support, proper recordal and provision of reasons for decisions

What's new – new locus standi provisions

New locus standi provisions apply – in terms of Section 45(1) the following parties can approach a municipal planning tribunal:

- (a) an owner, including the State, of the land concerned (this includes a 'beneficial owner');
- (b) a person acting as the duly authorised agent of the owner;
- (c) a person to whom the land concerned has been made available for development in writing by an organ of state or such person's duly authorised agent; or
- (d) a service provider responsible for the provision of infrastructure, utilities or other related services.

In addition, an interested party may apply to intervene in proceedings as intervenor (Section 45(2)).

Previous legislation allowed only an owner to make applications. For by-law purposes it is necessary to formulate processes/forms to accommodate all the new categories of applicant.

What's new?A new power for local government – removal of title deed restrictions

The power to remove restrictive conditions of title is now in the hands of municipalities, subject to Section 25 of the Constitution (Section 47). The planning tribunal has no obligation to pay compensation to any person arising out of a decision to remove.

For purposes of by-law drafting, there are many complexities. Title deed conditions must be analysed and their nature and purpose determined. (A conveyancer's certificate will generally be needed.) Servitudes must be categorised as praedial or personal. Interested and affected parties may be wide-ranging. Impact upon existing rights and legitimate expectations must be considered. Full public participation is essential. PAJA principles apply.

What's new? Engineering services

In terms of Section 49, municipalities are obliged to provide external engineering services, whilst developers are obliged to provide internal services. There is no mention of development contributions, although there is provision for developers to provide external services in lieu of DC's, which implies that municipalities are allowed to charge DC's.

Suggestions for by-law to prevent uncertainties and preclude disputes with developers:

- Provide for a scenario where the municipality would ordinarily be responsible, ie for external and bulk services but cannot provide these due to budgetary constraints or budget prioritisation issues – allow for imposition of a condition of approval that developer must pay
- Elaborate on what constitutes internal and external services.
- Establish the principle that where a development creates a need for upgrading or expansion of services he or she may be required to pay for the added capacity. Confer authority on the decision-maker accordingly.

What's new? Parks and open spaces

It is now mandatory for development applications to provide parks and open spaces, either on or off site, in residential developments (Section 50).

For purposes of by-law drafting, create latitude to adopt policy guidelines going forward with regard to the extent of land required for parks and open spaces. Also allow for a discretion to allow offsetting by providing parks and open spaces outside of the property, in the municipality's discretion. Also allow for a monetary amount in lieu of land.

What's new?..... New appeal processes

Any person whose rights are affected may appeal within 21 days to the appeal authority, who is the executive authority of the municipality (the executive mayor or executive committee)(Section 51). Parties with locus standi to appeal include the following:

- (a)* an applicant;
- (b)* the municipality where the land affected by the application is located;
- (c)* an interested person who may reasonably be expected to be affected by the outcome of the land development application proceedings.

The by-law should contain details of the mechanisms for appeal. An appeal advisory panel will generally be needed to assist the executive authority. Consider who should serve on this panel.

What's new..... New enforcement provisions: Section 32

- Provision for interdict, mandamus and demolition order (all obtained from a court) (The first two already existed in common law)
- Provision for designation of municipal official as inspector with regard to the land use scheme
- Powers of entry are broad, except for private dwellings which require a warrant
- Powers of seizure of material which may serve as evidence (subject to right of user to make a copy and requirement for a receipt)
- Provision for issuance of compliance notice

Enforcement provisions for by-laws

- Include a provision to the effect that the municipality may take enforcement measures in combination, in sequence or as alternatives.
- Include provisions for the receipt of complaints – obligation to act, and turnaround times.
- Include detail that must appear in compliance notices.
- Consider whether pre-notices apply and whether the decision to issue a compliance notice is appealable.
- Include provision for withdrawal of approvals if conditions not complied with.
- Provide for administrative penalties? (Akin to Section 24G of NEMA)
- Include provision for shortened service in the event of urgent matters.
- Expand on criminal provisions of SPLUMA. NB: Include criminalisation of non-compliance with decisions taken in terms of the by-law. (SPLUMA only criminalises non-compliance with the land use scheme.)
- Include provision for personal liability on the part of individuals representing corporations and partnerships.
- Include mechanisms for issuance of warrants by magistrates.

Discussion and evaluation

