

Enforcement of Municipal Planning By-Laws

FIONA OGLE
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INTRODUCTION

- Enforcement SPLUMA
- Enforcement MPBL
- Civil Enforcement
- Criminal Enforcement
- Examples: City of Cape Town



Spatial Planning & Land Use Management Act (SPLUMA) – Enforcement Provisions

SPLUMA – Enforcement Provisions

Section 32 – Enforcement of land use schemes

- S 32(1) -Municipality may pass by-laws aimed at enforcing its land use schemes
- S32(2) deals with court orders a municipality may apply for
- S32(3) - (12) deals with power and functions of an inspector
- **Problems**
- S32(5) – enter any land at any reasonable time without notice...
- S32(8) i: *“An inspection of a private dwelling may only be carried out by an inspector when authorised i.t.o a warrant issued by competent court”*
- No provision for inspection with consent.
- Only requires warrant for inspection of a private dwelling - unconstitutional – need warrant for all inspections without consent
- No power for magistrate to issue warrant
- Cannot use sections 21-26 of Criminal Procedures Act, 1977 - not deal with entry for inspection purposes and only a member of the Police can apply for the warrant

City of Cape Town Municipal Planning By-Law, 2015 (MPBL) – Enforcement Provisions

MPBL – Enforcement

5 Parts

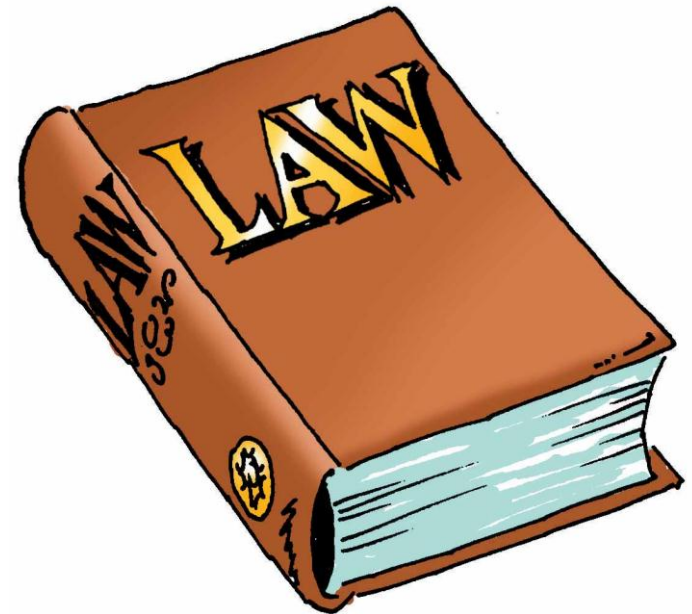
Part 1 – definition of contravention and owner.

Part 2 – the complaint

Part 3 – civil enforcement

Part 4 – criminal enforcement

Part 5 – investigative and enforcement powers of an investigator



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Enforcement – part 1

- Extended definition of “owner”
- For the purposes of enforcement, “owner” also includes -
 - a) the legal representative of an owner or their estate where the registered owner lacks legal capacity due to age, mental health, mental disability, death or insolvency;
 - b) If the owner deceased and if an executive has not been appointed, an heir. If no heir, the person who is entitled to the benefit or the use of the land or building or who enjoys such benefit.
 - c) If the registered owner is a CC which is deregistered – a member of the CC at the time of deregistration.
 - d) If the registered owner is absent from SA or their whereabouts are unknown – a person who, as agent, undertakes the management, maintenance or collection of rentals or other moneys iro the land or building
 - e) If the City is unable to determine the identity of the person otherwise defined as owner – the person who is entitled to the benefit of the use of the land or building or who enjoys such benefit.
- Also contains provisions for the prosecution of corporate bodies

Enforcement – part 1

Choice of enforcement measure

- City may take any one or more enforcement measures contemplated in this Chapter of the MPBL and may take them in any order or combination.
- 2 methods of enforcement: **Civil** and **Criminal**
- Most cases referred for criminal prosecution first. Only if unsuccessful or proceedings very slowly in court, will City consider using civil action
- Exceptional circumstances – utilise civil proceedings without criminal

Enforcement – part 2

Complaint

- **City mainly operates on complaint basis**
- Person who is affected may in writing request the City Manager to investigate an alleged contravention and to act ito the MPBL.
- City must investigate the complaint within the time and in accordance with the procedure set out in guidelines.
- Must inform the complainant of the outcome of the investigation within 30 days of the investigation being completed and the steps to be taken.

CIVIL ENFORCEMENT

Civil enforcement: Overview

- **Compliance notice** – multipurpose – criminal or civil
- **Withdrawal of approval** – failure to comply with conditions of approval – only for temporary departures and consents granted on temporary basis (can appeal)
- **Directive** – provide information, demolish or restore a building, rehabilitate land, act in accordance with MPBL
- **Administrative penalty** – MPT may determine amount. 0 – 100% of value of building work, 0- 100% of value of area that is used unlawfully. Factors for determining amount are set out
- **Rectification** – may make application to rectify but must pay admin penalty before application is considered.
- **Enforcement litigation** – formalises right to apply to High Court for orders.
- **Prohibition on transfer or land unit** – must obtain a certificate for clearance for any property which is flagged on the rates system.

Enforcement – compliance notice

1. Compliance notice

- Notice can be used in different ways for both civil and criminal cases.
- Sets out the unlawful conduct, the time period within which to cease, failure to comply is an offence, requires owner to take certain steps
- Advise of the right to apply for rectification and may set out the measures that the City intends to take.
- May invite owner or person within a specified time to inform the City what steps have been taken to comply.
- **No appeal** against decision to issue or not to issue a compliance notice.



Enforcement – withdrawal of approval

2. Withdrawal of an approval

- Non compliance with an approval for a temporary departure or an approval granted for a limited period of time (consent) – serve a pre-notice inviting the owner or other person to make written representations on the notice and give reasons why the approval should not be withdrawn.
- City must consider representations
- Can decide to withdraw or not
- If decide to withdraw the approval - City must notify the owner or other person **(can appeal)**
- Approval is withdrawn from the effective date of the decision.
- Once withdrawal is effective-
 - Notify owner of withdrawal and instruct owner or other person to cease the activity and to take any other step which the City considers necessary to comply with the MPBL immediately or within a time determined.
 - Update zoning register and map.

Enforcement – directive

3. Directive

- Pre-directive gives owner/ person the opportunity to state why the City should not direct the person to –
 - Submit documentation
 - Demolish a building or rehabilitate the land to what it was before
 - Address any other impact of the contravention.
- After considering representations, the City can issue the directive as set out or one that is less onerous.
- Directive must-
 - Set out the direction
 - Must attach the decision and the reasons for the decision
 - State that a failure to comply with the directive constitutes an offence
 - State that City may prosecute or apply to court for enforcement of directive
- Owner can **appeal**
- Owner or other person must comply with a directive from the effective date.

Enforcement – administrative penalty

Administrative Penalty (New concept)

- Administrative penalty ≠ a fine imposed by the magistrates court.
- Can only be imposed by the MPT - must be a separation between the administration and the person who imposes the penalty.
- A person who has contravened the MPBL and who wishes to rectify the contravention (ie submit an application), may apply for the determination of an administrative penalty if the City has not issued a demolition directive.
- Must submit the application for penalty.
- If they do not submit, the CM may submit an application
- If CM does so, person concerned must be given an opportunity to make written representations.
- Report to the MPT
- MPT must determine amount of the penalty (0% to 100% of value of u/a work or area used)

Enforcement – administrative penalty

Administrative Penalty

- Guidelines set out in by-law
- When determining amount – MPT must consider
 - (a) nature, duration, gravity and extent of the contravention
 - (b) conduct of the person involved in the contravention
 - (c) whether the unlawful conduct stopped and
 - (d) whether the person has previously contravened the MPBL
- Owner or person must be notified of the amount and a right of appeal. Must pay the admin penalty within 30 days.
- City may apply to the High Court for an order confirming the order of the MPT

Enforcement – rectification of a contravention

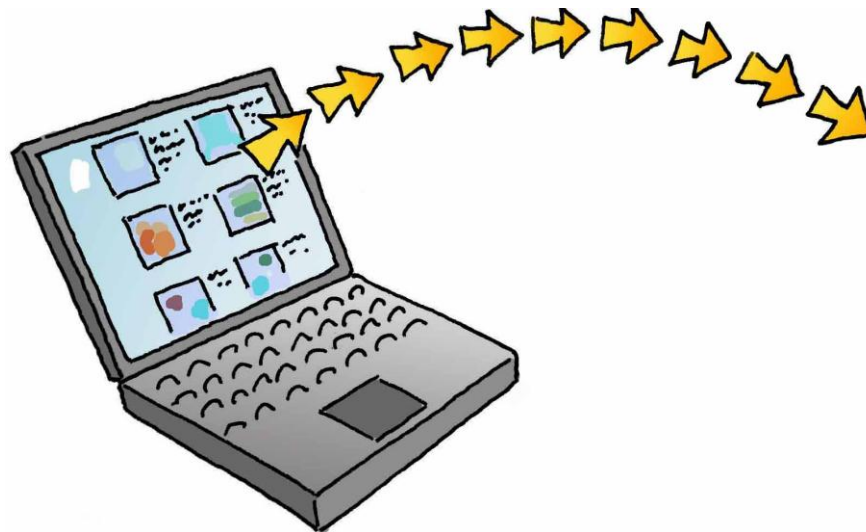
- S 129 of the MPBL - A person who is using land in contravention of the MPBL may apply for the necessary approval.
- Must pay the administrative penalty before the City may consider the land use application (can submit land use application but can't decide).
- In exceptional circumstances, the City, when granting an approval or making a determination, must impose appropriate conditions to ensure payment of any administrative penalty.
- Payment of the administrative penalty does not limit the City's power to institute criminal prosecution.
- 2016/2017 statistics – Administrative penalty reports comprise 40% of all reports to MPT and about 4 % of applications.
- Value- R 4.8 m

Enforcement – Enforcement litigation

- City can apply to the High Court for interdict or demolition notwithstanding the other remedies available.

Urgent interdicts

- Allows the City to serve a notice by telephone, by email or some other form of electronic communication.
- May apply to the High Court on an urgent basis for relief.



CRIMINAL ENFORCEMENT

Enforcement – Criminal

- **MPBL lists offences and penalties**

- Creates offences for both the operator and the owner.
- Upon conviction liable to fine or imprisonment not exceeding 20 years (fine = up to R 800 000.00 or both fine and imprisonment)
- Offence to contravene a decision taken or a condition imposed, the provisions of the DMS, use land in contravention of DMS, fail to comply with a compliance notice or a directive.
- May not alter or destroy land to extent property cannot be used for purpose in DMS
- Threaten, obstruct fail to permit entry
- Continuing offence
- Fail to furnish information or furnish false or
- Misleading information.
- Supplies particulars, information or answers in an application or appeal knowing it to be false or misleading



Enforcement - criminal

Other offences

These offences unique to City of Cape Town – problems that developed over the years:

- common property must be transferred to the HOA on first transfer of an erf arising from subdivision. Offence not to do so.
- HOA – developer must call a meeting of the HOA within 60 days of the transfer of 60% of the land units arising out of the subdivision or within 2 years of the transfer of the 1st land unit. Offence not to do so.
- An applicant must ensure that-
 1. No misrepresentation is made to the City (guilty of offence if not comply)
 2. The City is not misled (guilty of offence if not comply)
 3. All information is accurate,
 4. Applicant does not omit relevant information.

Enforcement - criminal

Other offences

- Objection - no person may request the payment of money or any other form of consideration from the applicant or any person involved in the application in return for not submitting an objection or in return for submitting a notice of no objection or a supportive comment.
- No person may offer a person payment of money or any other form of consideration in return for not submitting an objection or for submitting a notice of no objection or a supportive comment.
- Naming and numbering of streets – a person who alters or amends or displays a street name without the City's permission is guilty of an offence and upon conviction is liable to the penalties contemplated in MPBL

Enforcement – powers and functions of an investigator

- SPLUMA has a number of provisions relating to criminal enforcement
- MPBL repeats these clauses
- **Section 135 (8)** sets out powers of an investigator



Enforcement – powers and functions

- Inspection with consent is not dealt with in SPLUMA. By law provides that the City may with consent inspect land or buildings including private dwellings.
- S32(8) of SPLUMA: *“An inspection of a private dwelling may only be carried out by an inspector when authorised i.t.o a warrant issued by competent court” but does not authorise a competent court to issue the warrant in terms of SPLUMA*
- Warrants required for all cases where consents not given.
- Section 170 of the Constitution provides that Magistrate’s courts may decide on any matter determined by an Act of Parliament.
A By-Law not an Act of Parliament . MPBL cannot contain provisions which authorise a magistrates court to issue a warrant.
- MPBL contains provisions which permit the High Court to issue a warrant. SPLUMA which is an Act of Parliament will need to deal with this aspect in due course.

Enforcement – powers and functions

- S 135 (4) – Investigator may inspect a property without warrant if consent is received from owner, or if the delay in obtaining a warrant may defeat the object of the entry
- If no consent, then an investigator may enter and inspect only on the authority of a **warrant**.
- A judge in chambers may issue a warrant contemplated in subsection (5) on written application by an investigator if it appears from information under oath or affirmation that –
 - there are reasonable grounds for suspecting that a contravention of the MPBL has occurred;
 - an inspection of the place is likely to yield information pertaining to the contravention; and
 - the inspection is reasonably necessary for the purposes of the MPBL

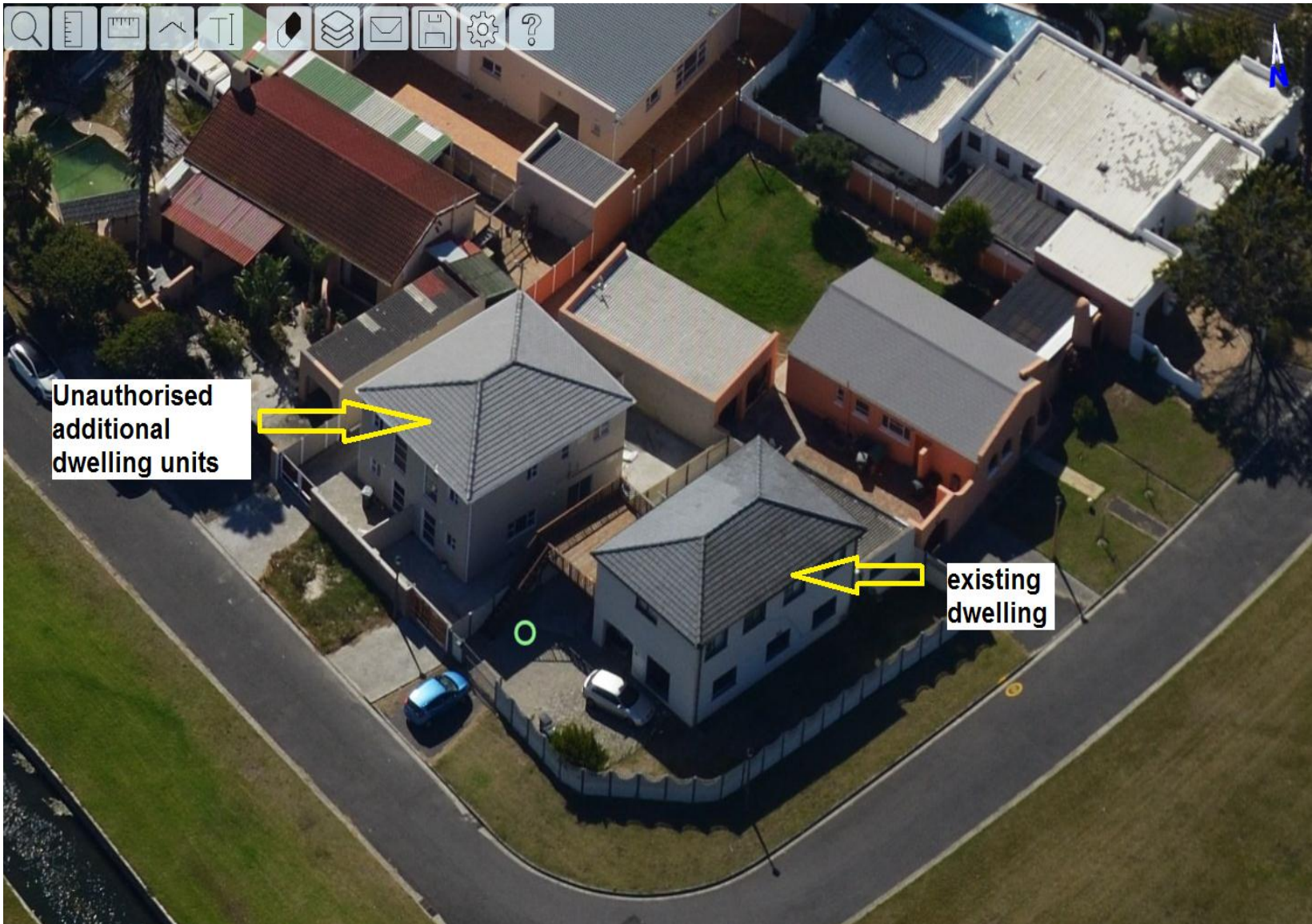
Examples: City of Cape Town

Examples

- The following examples relate to High Court litigation.
- Litigation focusses on obtaining an interdict and often gives the owner an opportunity to rectify.
- Litigation rarely relates only to a land use issue.
- Unauthorised use is often linked to-
unauthorised building work which contravenes the NBR.
- Fire , health and environmental health issues.
- Often require a PIE application which needs to commence prior to the interdict application.

Erf 81375, Elfindale, Cape Town

- Owner obtained City's consent in 2015 to construct second dwelling on 1st floor of main dwelling (zoned single dwelling residential).
- Constructed 2 additional dwellings unlawfully without land use and building plan approval.
- Notices were served to cease the unauthorised building work, but owner ignored notices
- City did not institute criminal action because the owner is a repeat offender.
- In 2016, the City approached the Western Cape High Court
- High Court granted an order in March 2016 interdicting further unauthorised building work. Owner was also interdicted from allowing unauthorised properties to be occupied until the necessary approvals have been obtained



Unauthorised
additional
dwelling units

existing
dwelling

Erf 81375, Elfindale, Cape Town

- Owner then submitted the necessary land use application (subdivision and departures from building line). Was required to apply for an administrative penalty first
- The City's MPT imposed an administrative penalty of R100 000.
- Owner paid the administrative penalty - the City then considered the land use application.
- Owner proceeded to rent out the unauthorised units
- City wanted to proceed with contempt of court proceedings, but owner obtained land use and building plan approval during this time.



Portion 302 of Farm 728, Joostenbergvlakte, Cape Town

- Property is zoned for Agricultural purposes
- City received complaints about unauthorised diesel depot
- City investigated complaint and found that owner constructed three 23000 litre diesel tanks without land use and building plan approval (EIA also required)
- City served notices to cease unauthorised land use – owner ignored notices
- Criminal prosecution was instituted, but was unsuccessful
- City then noticed that many of the structures on the property have been constructed without building plan approval
- Served further notices for additional unauthorised structures, but the owner refused access on property without a warrant
- Owner denied selling the diesel, i.e there is no business use
- City appointed a PI to monitor property – PI's findings formed part of City's papers
- High Court granted an order interdicting owner from carrying out the business and to demolish/remove the diesel tanks. Owner complied with order.
- City currently recovering legal costs from owner



Unauthorised
diesel depot



Erf 22937, Maitland, Cape Town

- City received complaints about dilapidated building (formerly used as a factory) that was occupied unlawfully
- Property occupied by approximately 60 people. Various unauthorised uses, such as motor vehicle repairs, spray painting etc. Illegal activities such as drug use reported by Metro Police
- Several City departments investigated property – found that it contravenes the MPBL, NBR, Fire Safety By-Law, Problem Building By-Law & Environmental Health By-law.
- City did not approach criminal courts – instituted High Court proceedings immediately due to concerns over health and fire risks
- City also had to institute proceedings i.t.o the prevention of Illegal Eviction Act, 1998 (PIE)
- High Court granted order owner compelling owner to evict occupants, demolish all unauthorised building work. Owner may also not use property in contravention with zoning.
- Owner complied with court order













Erf 403, Blue Downs, Cape Town

- Property is zoned SR1 and is situated within a residential neighbourhood
- Owner applied to City for temporary departure to permit liquor outlet – City refused application
- Owner proceeded to convert living room and garage into liquor outlet. Owner also deviated from approved building plans.
- Notices to cease liquor outlet was served, but ignored by owner
- City instituted criminal proceedings – owner paid AOG fine of R850
- Liquor outlet still in operation
- City's attorney sent letter of demand – owner was required to give undertaking that unauthorised use will cease, failing which the City will approach the High Court. Letter of demand was ignored.
- City approached High Court. High Court granted order compelling owner to cease liquor outlet and demolish unlawful building work within 3 months.
- Owner also ordered to pay City's legal costs.





**THANK
YOU**



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