

# MUNICIPAL BY-LAWS AS AN INSTRUMENT FOR CHANGE

NWU/KAS LOCAL  
GOVERNMENT  
CONFERENCE  
4 JUNE 2015



# What changes should local government aspire to achieve?

- Constitutional transformation – a human rights based perspective (many elements)
- Sustainable development
- Poverty relief
- Service delivery
- Economic development
- Energy security

# Are all of these issues concerns of local government?

Yes – municipalities are required by law to be developmentally oriented:

Constitution: Section 152: Objects of local government:

.....(b) to ensure the provision of services to communities in a sustainable manner;

(c) to promote social and economic development;

(d) to promote a safe and healthy environment; ....

Section 153: Developmental duties of municipalities:

A municipality must-

(a) Structure and manage its administration and budgeting and planning processes to give priority to the basic needs of the community, and to promote the social and economic development of the community;...

# The developmental duties of municipalities are further elaborated in the MSA (Local Government: Municipal Systems Act No. 32 of 2000)

Section 23: Municipal planning to be developmentally oriented.—

(1) A municipality must undertake developmentally-oriented planning so as to ensure that it— (a) strives to achieve the objects of local government set out in [section 152](#) of [the Constitution](#); (b) gives effect to its developmental duties as required by [section 153](#) of [the Constitution](#); and (c) together with other organs of state contribute to the progressive realisation of the fundamental rights contained in [sections 24, 25, 26, 27](#) and [29](#) of [the Constitution](#).

Section 25 requires municipalities to have integrated development plans.

# The developmental duties of municipalities are further elaborated in the MSA ..continued

Section 26 prescribes what IDP's must contain:

- (a) the municipal council's vision for the long term development of the municipality with special emphasis on the municipality's most critical development and internal transformation needs;
- (b) an assessment of the existing level of development in the municipality, which must include an identification of communities which do not have access to basic municipal services;
- (c) the council's development priorities and objectives for its elected term, including its local economic development aims and its internal transformation needs;
- (d) the council's development strategies which must be aligned with any national or provincial sectoral plans and planning requirements binding on the municipality in terms of legislation;
- (e) a spatial development framework which must include the provision of basic guidelines for a land use management system for the municipality; .....



# What does development mean in this context?

“development” means sustainable development, and includes integrated social, economic, environmental, spatial, infrastructural, institutional, organisational and human resources upliftment of a community aimed at— (a) improving the quality of life of its members with specific reference to the poor and other disadvantaged sections of the community; and (b) ensuring that development serves present and future generations. (definition from Section 1 of the MSA)

- a holistic picture taking all the needs of a community into account
- special consideration given to the poor and disadvantaged
- emphasis on sustainability
- environmental element – preserving natural resources for future generations

NB This vision of development must underpin the IDP and municipal by-laws.

# A human rights perspective



Municipalities are bound to uphold the Bill of Rights generally, but specifically to ensure fulfilment of the following rights (as per the MSA Section 23(1)(b)):

- Section 24: an environment that is not harmful to health and well being
- Section 25: the property right – access to land on an equitable basis
- Section 26: access to housing
- Section 27: health care, sufficient food and water and social security
- Section 29: basic education

(Note – these do not correspond exactly with the local government competencies set out in Schedules 4B and 5B of the Constitution. For example, housing and education are not on the schedules.)

# Local economic development



Municipalities are constitutionally mandated to govern many aspects of the local economy, eg tourism, trading, licensing of food outlets and markets, as per Schedules 4B and 5B to the Constitution.

Sustainable development has an economic element, and poverty relief and job creation are part of this.

In terms of Section 26(c) of the MSA, an IDP must contain the council's development priorities and objectives for its elected term, including its local economic development aims and its internal transformation needs.

Thus it is clear that local economic development is a responsibility of municipalities.



# Services



The schedules to the Constitution explicitly confer responsibility on municipalities with regard to solid waste management, water and sanitation services, stormwater management and public transport.

What about energy? A mandate for municipalities to deal with energy (including security of supply) may be inferred from its various statutory responsibilities relating to a clean and healthy environment, economic development and community upliftment. Economic development is dependent upon sustainable energy supply. Also, energy is foundational to the provision of many other services, eg water and sanitation. Thus energy security is a key local government issue. (Consider shack dwellers who have no electricity and burn wood for heat and cooking. Electricity is a fundamental requirement to lift them out of poverty.)

# And so..... What can municipalities legislate on?

Are the legislative powers of municipalities limited to the matters listed in Schedule 4B and 5B of the Constitution?

No – because municipalities have constitutional and other statutory obligations to govern many matters which are not on these lists.

No – as per the KZN High Court judgment in *Le Sueur and others v Ethekewini Municipality*\*:

*It is clear . . . that municipalities have traditionally been involved in regulating environmental matters at the local level and that their functions at this level have been recognised by the drafters of the Constitution. Hence, although environmental matters stood as the apparently exclusive area for national and provincial governance at those levels, it is clear that the authority of municipalities at local government level to manage the environment at that level has always been and still is recognised. It is inconceivable that the drafters of the Constitution intended by the manner in which the Constitution was framed to exclude municipalities altogether from legislating in respect of environmental matters at the local level. In any event, it is clear that national and provincial legislation in respect of environmental issues recognises the part to be played by municipalities at the local government level in managing and controlling the environment.*

The court recognised that municipalities have legislative powers with regard to environmental matters, which are not listed on Schedules 4B and 5B as municipal competencies.

\*(9714/11) [2013] ZAKZPHC 6

# TWO DIFFERENT ORIENTATIONS OF LOCAL GOVERNMENT LEGISLATION

- Regulatory - to ensure control and management of certain activities, eg traffic and parking, outdoor advertising, land use planning and building development. Many municipal by-laws which are predominantly regulatory are already in existence.
- Developmental – to achieve the aims set out in the Constitution and MSA, ie sustainable development, upliftment of the community, social and economic development, and ensuring human rights are upheld. By-laws oriented this way are rare.
- A by-law may contain regulatory and developmental imperatives. For example a stormwater management by-law may prohibit placing blockages in the stormwater system, but it may also determine how natural watercourses passing through private property are to be preserved. This could include incentivisation to conserve natural watercourses with assistance of the municipality.

# How does one draft a developmental by-law?

- Identify the issue/project/activity which the municipality wants to develop (would normally be stated in the IDP). For example it may wish to drive industrial development in a particular area, and also to promote the production of renewable energy infrastructure such as solar pv panels.
- Consider what could be done to achieve the aim/s. For example an industrial development zone could be earmarked for development of factories producing renewable energy infrastructure. Incentives by way of rates rebates and infrastructure cost discounts could be provided. These could be linked to job creation criteria.
- After doing the necessary feasibility assessment, a by-law could be drafted containing all of these elements.

# Municipal legislation in the broader context

Municipal law making is constrained in that by-laws conflicting with national or provincial legislation are invalid in terms of Section 156(3) of the Constitution. However this is subject to Section 151(4) which prohibits national and provincial government from compromising or impeding a municipality's ability or rights to exercise its powers or perform its functions. Thus in respect of matters which are clearly local government functions, municipalities are the primary law-making authority.

The inviolable nature of the land use management authority of local government was confirmed by the Constitutional Court in the Maccsand and Habitat Council matters. \* Although these are land use planning matters, they are authority for the recognition of municipal autonomy in its spheres of governance.

\*Maccsand (Pty) Ltd v City of Cape Town and Others (CCT103/11) (CC) [2012] ZACC 7; 2012 (4) SA 181 (CC) and Minister of Local Government, Environmental Affairs and Development Planning v Habitat Council and others ZACC 117/13.



# An interesting conundrum

Section 2(4) of the National Building Regulation and Building Standards Act, 1977:

(4) In respect of any building to be erected by or on behalf of the State, such plans, specifications and certificate as may be prescribed by national building regulation, shall before the commencement of such erection be lodged with the local authority in question for its information and comment.

Swartland Municipality By-law relating to the submission of building plans, 2015:

(3) Notwithstanding conflicting provisions in any act, including the Building Act, all persons, including organs of state, must submit building plans and specifications for consideration and approval by the municipality.

Is this a conflict? Or is it just a higher level of regulation for the same purpose? Swartland has been pro-active in this regard in asserting its building management authority by way of a by-law.

# The potential for a by-law to resolve service delivery prioritisation issues

Many different communities may all require water and sanitation services, roads or electrification at the same time. How should a municipality determine who gets services first? Drakenstein Municipality has come up with a scoring system whereby a project is rated and scored, with the higher scoring projects receiving priority:

<u>Rating Criterion</u>	<u>Weight</u>
Statutory requirement	10
Service delivery	12
Essential service	8
Economic stimulation	8
Community benefit	5
Permanent job creation	8
Labour intensive construction	7
Revenue generating	12
Aesthetical improvement	5
Social upliftment	5
Spatial development framework compliance	5
Risk factor	10
Time factor	5

A prioritisation model is suitable for promulgation as a by-law. It should allow for shifts in priorities over time.

# General comments



- Municipalities should fully understand their constitutional and other statutory responsibilities and develop their IDP's and legislative programmes accordingly.
- They should also understand their autonomy as law-makers in their designated areas of competence.
- They must embrace a developmental role and envision how to undertake this responsibility.
- In terms of the Constitution, previously disadvantaged persons and victims of discrimination must be given priority.
- A pro-active approach and a touch of imagination and inventiveness are useful!



Thank you.

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