rural development
& land reform
Department:
Rural Development & Land Reform
REPUBLIC OF SOUTH AFRICA

Chief Directorate: Spatial Planning & Information
Private Bag X 833, Pretoria, 0001; Tel: 012 312 9371; Fax: 086 692 8882; 184 Jacob Mare Street, Pretoria, 0001
Email. sogunronbi@ruraldevelopment.gov.za, Cell: 082 577 5655
Enquiries: Sunday Ogunronbi, Executive Manager: Spatial Planning & Information.

Postscript to Statement by the Department of Rural Development and Land Reform on the Spatial Planning and Land Use Management Bill (SPLUMB) and the Constitutional Court Judgment in the Development Facilitation Act (DFA) case.

28 March 2012

[1] In paragraph 4.1 of the original statement issued (below) we contended in respect of applications received in terms of the DFA before the 17 June 2012 that:

> *"(b) applications received by Development Tribunal before 17 June 2012 will continue to be heard and determined by the Tribunals even after 17 June 2012 as if the Constitutional Court had not declared invalid chapters V and VI of the DFA* ***BUT*** *subject to:*
>
> *(i) no Development Tribunal must exclude any legislation from applying to land forming the subject matter of an application to it; and*
>
> *(ii) Development Tribunals must take into consideration in all applications before them the Spatial Development Frameworks (SDFs) and plans of the municipality where the land is situated.*
>
> *(c) Since the appointments of Development Tribunal members were done in terms of Chapter III of the DFA (which remains unaffected by the Concourt order) tribunal members may continue to hold office beyond the 17 June 2012 until the DFA is repealed.*
>
> *(d) The appointment of other public functionaries performing any function (such as Designated Officers) including the consideration and disposal of all applications received before 17 June 2012 is unaffected by the Concourt order and may continue to hold office beyond the 17 June 2012 until current applications before the Development Tribunals are disposed of and the DFA is repealed."*

[2] The Department has realised that:

(i) Doubts remain on the possible use of Chapters V and VI of the DFA from the 18 June 2012 to consider and finalise applications lodged before the 17 June 2012, and therefore on the correctness of our statement above; and

(ii) The interpretation placed on the Constitutional Court judgment is not consistent with the Order as granted by the Constitutional Court.

[3] The Department wishes to respond as follows:

3.1 The Department re-affirms the correctness of the statement made in paragraph 4.1 of the original statement as issued.

3.2 The basis for the correctness of paragraph 4.1 of the original statement issued is found on the two pillars that:

(i) Repeal of laws (including provisions in a law) is generally effected in two instances (a) by the Parliament (or a Provincial Legislature in the case of Provincial laws); and (b) by a Court such as the Constitutional Court as empowered by section 172 of the Constitutional. [Limited instances of concept of *implied repeal* do not apply in this instance].

(ii) The Interpretation Act 33 of 1957 applies to "*to the interpretation of every law ... or **order** ... unless there is something in the language or context of the law ... or **order** repugnant to such provisions or unless the contrary intention appears therein.*"

3.3 The expiration of a statute (such as the chapters V and VI of the DFA as ordered by the ConCourt) has the same effect that the repeal of the statute, effective on the date of the expiration of the statute, would have had.

3.4 The net effect of section 12 (2) *(c)* of the Interpretation Act No 33 of 1957 is that the repeal of any statute shall not have the effect to release or extinguish any privilege, obligation or liability incurred under such statute (such as the DFA), unless the repealing statute (such as the ConCourt Order) shall so expressly provide; and such statute shall be treated as still remaining in force for the purposes of sustaining any proper action or prosecution for the enforcement of such , privilege, obligation or liability.[1]

3.5 The relevant part of section 12 (2) *(c)* of the Interpretation Act No 33 of 1957 states that:

> *"Where a law repeals any other law, then unless the contrary intention appears, the repeal shall not-*
>
> *(a) ...; or*
>
> *(b) ...; or*
>
> *(c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any law so repealed; or*
>
> *(d) ...; or*
>
> *(e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, forfeiture or punishment as is in this subsection mentioned,*
>
> *and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealing law had not been passed.*"

[1] The South African Law Reform Commission, in its Discussion Paper 112 on " Statutory Revision: review of the Interpretation Act 33 of 1957" stated at paragraph 3.154 that:

> *"Section 12(2) of the Interpretation Act is a typical transitional provision. All actions, transactions, processes, prosecutions, etc, which were instituted, but not yet completed, in terms of legislation which has meanwhile been repealed, must be completed as if the legislation has not been repealed. It forms a bridge between pending actions and the repealed legislation."*

3.6 It is instructive to note that in terms of the Order of the Constitutional Court, applications could not be received from the 18 June 2010 in terms of the DFA in areas of the City of Johannesburg and Ethekwini Metropolitan Municipalities, YET matters lodged by that date were to be finalised in terms of the DFA. Same Court decided that applications could be received outside of City of Johannesburg and Ethekwini Metropolitan Municipalities till the 17 June 2012. It is logically (and lawful as supported by the Interpretation Act) that such applications received by the 17 June 2012 may continue to be discharged in terms of the DFA as if the declaration of unconstitutionality is not in effect.

[4] The Department wishes to reiterate that all efforts are on-going to ensure that the Spatial Planning and Land Use Management is passed in to law during June 2012. The Executive arm has no control over the operations of the Parliament. As such, the final position on when the Bill is passed is beyond the national government. There is no express or implied acceptance that the Bill will not be passed by June 2012.

[5] The Department further reiterates that unless it can be established that "*no other viable alternative exists to processing land applications in any part of the country except via the DFA*" an application for an extension to the Constitutional Court may not be advisable. Hence, the Department is currently soliciting views on the practical realities in relation to land development applications around the country to see if indeed the DFA is the only legal route available in any part of the country and what can be done if a legal vacuum is found to exist.

[6] If there is any legal opinion of note pointing to the incorrectness of the Department's views, as opposed to mere inconvenience which may be obviated by other administrative means, the Department requests that such be brought to its attention.

[7] The Department strongly advises that any proposed application to the Constitutional Court for an extension or variation of the Court Order be done in consultation with the Department as the administering authority of the legislation. The rules of the Constitutional Court demands so.

Issued by the Chief Directorate: Spatial Planning and Information, Department of Rural Development and Land Reform

Further enquiries, please contact:

Sunday Ogunronbi
Executive Manager: Spatial Planning & Information
Department: Rural Development & Land Reform
Cell. +27 82 577 5655
Work +27 12 312 9371
Fax 086 692 8882
Email. sogunronbi@ruraldevelopment.gov.za
Email. splumb@ruraldevelopment.gov.za

Statement by the Department of Rural Development and Land Reform on the Spatial Planning and Land Use Management Bill (SPLUMB) and the Constitutional Court Judgment in the Development Facilitation Act (DFA) case.

22 March 2012

1.1 The Department is pleased to announce that the Cabinet has approved the Spatial Planning and Land Use Management Bill (SPLUMB) on the 20 March 2012 for introduction to Parliament. Cabinet further approved that the Leader of Government Business will liaise with Parliament to explore expedited processing of this Bill through Parliament.

1.2 This Bill is approved against the background of the pending expiration on the 17 June 2012 of the deadline imposed by the Constitutional Court judgment in the Development Facilitation Act (DFA) case.

1.3 On the 18th June 2010 the Constitutional Court in the case between the City of Johannesburg Metropolitan Municipality vs Gauteng Development Tribunal and others declared chapters V and VI of the Development Facilitation Act No 67 of 1995 as constitutionally invalid.

1.4 In terms of its reach, the Constitutional Court Order included:

(a) the constitutional invalidity of chapters V and VI of the DFA which was suspended for 24months;

(b) Parliament must within 24months from 18 June 2010 remedy the defects in the DFA or enact a new legislation to address the same;

(c) with effect from the 18 June 2010 no Development Tribunal must exclude any legislation from applying to land forming the subject matter of an application to it;

(d) with effect from the 18 June 2010 Development Tribunals must take into consideration in all applications before them the Spatial Development Frameworks (SDFs) and plans of the municipality where the land is situated; and

(e) no new application to be received with effect from the 18 June 2010 in respect of any land within the areas of the City of Johannesburg Metropolitan Municipality or eThekwini Metropolitan Municipality.

2. Considering that the Development Facilitation Act at its inception was conceived by the State as an interim piece of legislation, the Spatial Planning and Land Use Management Bill will be processed through Parliament as a response to the defects in the DFA and to achieve other related policy objectives.

3. The Department acknowledges that there is genuine apprehension on the following issues:

(a) possibility of the non-enactment of the Spatial Planning and Land Use Management Bill (SPLUMB) by the 17 June 2012 to respond in time to the judgment of the Constitutional Court;

(b) clarity on applications pending before the Development Tribunals as at 17 June 2012;

(c) clarity on the regulatory and administrative environments for receiving, processing, determining land use/land development applications from the 18 June 2012;

(d) clarity on whether, when and how the Government will respond to the looming deadline of the 24 months suspension of the constitutional invalidity of chapters V and VI of the Development Facilitation Act No 67 of 1995, and whether a request for

extension of the deadline determined by the Order of the Constitutional Court will be considered by the State.

4. The explanations to these issues are as follows:

4.1 Official position on the DFA regarding applications received in terms of the DFA before the 17 June 2012

(a) the Constitutional Court did not order the repeal of the whole of the DFA but found only chapters V and VI of the Development Facilitation Act as constitutionally invalid;

(b) applications received by Development Tribunal before 17 June 2012 will continue to be heard and determined by the Tribunals even after 17 June 2012 as if the Constitutional Court had not declared invalid chapters V and VI of the DFA **BUT** subject to:

(i) no Development Tribunal must exclude any legislation from applying to land forming the subject matter of an application to it; and

(ii) Development Tribunals must take into consideration in all applications before them the Spatial Development Frameworks (SDFs) and plans of the municipality where the land is situated.

(c) Since the appointments of Development Tribunal members were done in terms of Chapter III of the DFA (which remains unaffected by the Concourt order) tribunal members may continue to hold office beyond the 17 June 2012 until the DFA is repealed.

(d) The appointment of other public functionaries performing any function (such as Designated Officers) including the consideration and disposal of all applications received before 17 June 2012 is unaffected by the Concourt order and may continue to hold office beyond the 17 June 2012 until current applications before the Development Tribunals are disposed of and the DFA is repealed.

(e) No new application may be received by the any Development Tribunal in terms of the DFA on a date beyond 17 June 2012.

4.2 Official position on all land development applications with effect from the 18 June 2012

(a) The Government accepts and abides with the declaration of unconstitutionality of chapters V and VI of the DFA, and offers the Spatial Planning and Land Use Management Bill as the remedy and response to the judgment.

(b) Application to the Constitutional Court by the Government for an extension to the 24 months will be made in time if it is established that no other viable alternative exists to processing land applications in any part of the country except via the DFA.

(c) The Department notes that the volume of applications brought in terms of the DFA are substantially small in numbers compared to applications in terms of the others existing laws such as the Ordinances. For instance, 14,000 applications in terms of the Ordinance were received in Gauteng Province in 2008 compared to the 62 DFA applications in that province in the same year (Source: Urban Land Mark 2008).

(d) The DFA did not repeal existing pre-1995 planning laws and they remain on the statute book. Land development applications in terms of these laws continued to be the case exclusively and not under the DFA in Western Cape, Free State, and Northern Cape.

(e) In KwaZulu-Natal Land development applications are now maintained in terms of the KwaZulu-Natal Planning and Development Act. These will continue to be the case until the enactment of the Spatial Planning and Land Use Management Bill into an Act of Parliament.

(f) In the North-West, Limpopo, Mpumalanga, Eastern Cape, and Gauteng Provinces it is important to note that the pre-1995 laws on land development management remains in the law books. These laws are still in use, and they will continue to be used until the enactment of the Spatial Planning and Land Use Management Bill into an Act of Parliament.

(g) The Department notes that in some geographic areas of the country, such as a number of former homelands and self-governing territories, laws were enacted to deal with land development applications and while these laws remains on the statute books, there may not be institutional mechanisms to give effect to these laws.

(h) In provinces where reliance will be placed on the pre-1995 laws from the 18 June 2012 and the Municipalities that may fall outside of the Ordinance, National Government will ensure that adequate support is offered on appropriate institutional capacity to handle Land Development Applications without any major disruptions. It is also noted that the volume of land Development applications in these areas are not substantial and appropriate mechanisms will be put in place to deal with these.

(i) Engagement workshops with Provinces and Municipalities and other Stakeholders on the approved Bill and the transitional/interim arrangements have been scheduled for the 26 March through to 04 April 2012.

5. In conclusion, the Department of Rural Development and Land Reform continues to assure all interested persons and professionals involved in the land development and land use management fields that the Department will not allow a situation where a vacuum is allowed to exist in this regulatory environment. The Department remains open to dialogue, engagement and interaction on matters of clarity regarding the processing of the Spatial Planning and Land Use Management in Parliament and the impact of the Constitutional Court judgment on land development management.

Thank you

Further enquiries, please contact:

Sunday Ogunronbi
Executive Manager: Spatial Planning & Information
Department: Rural Development & Land Reform
Cell. +27 82 577 5655
Work +27 12 312 9371
Fax 086 692 8882
Email. sogunronbi@ruraldevelopment.gov.za