ENGAGEMENT WITH CITY OF CAPE TOWN REGARDING MUNICIPAL PLANNING BY-LAW, REGULATIONS AND IMPLEMENTATION THEREOF

6 June 2017

1. Background:

The Western Cape Property Development Forum has been requested to engage with the City of Cape Town Commissioner: Transport and Urban Development as to the industry's experience in using the Municipal Planning By-Law and to give input on possible changes that should be considered by the City.

This memorandum serves as the basis for the formal engagement with the Commissioner.

2. Methodology:

The WCPDF has sent a call for comment to its membership. In addition, a works session was facilitated on 24 May 2017 in preparation for the formal engagement with the Commissioner. The professional associations affiliated to the WCPDF, and specifically the South African Association of Consulting Professional Planners, have been requested to participate in this discussion. The Western Cape Law Society has also mandated its Property Committee to participate in this process.

This memorandum summarises the conclusion of the work session of 24 May 2017 as well as input received through an additional 14 written comments received after the work session.

It is accepted that individual members of both the WCPDF and the SAACPP may not necessary agree with individual comments contained in this Memorandum. Possible contentious points raised have been included so as to give a fair reflection on the debate in the industry. This Memorandum is therefore deemed to be a working document.

The Memorandum is issued on 6 June 2017 in preparation for the formal engagement on 8 June 2017.

3. Feedback:

The discussion group concluded to give feedback on three under three specific headings:

3a. By Law

Section 5 (3): Amendment of SDF's

The By-Law makes provision for the City Manager to prescribe the form and process governing a request to amend the Municipal Spatial Development Framework ("SDF") on an *ad hoc* basis, i.e. other than because of the annual IDP review process contemplated in the Municipal Systems Act. Although there is no problem with this section, the City has not acted on this ability and therefore has not given clarity to the industry on the procedure and requirements.

It is further noted that the City does not appear to have the relevant resources to review the SDF on a 5-yearly basis irrespective of its best intentions.

[Note: the SAACPP made a submission to the City regarding the IDP and SDF processes on behalf of itself and the WCPDF. The letter was not acknowledged and no indication has been given that the City intends to act on the submission]

- **Site specific applications / deviation from the SDF:**

  Great uncertainty exists. We would suggest that a clear, official guideline document be prepared, setting out the criteria for evaluating a site-specific application. There also does not seem to be certainty among officials dealing with these applications on how to interpret and evaluate these cases.

Section 11: District Plans

The By-Law makes provision for District Plans. Although there is no problem in having District Plans, there are many further studies that the City undertake to do which have not been completed in the last 5 years. Examples of these are the following:

- Scenic route studies have not been completed and in many cases, draft scenic routes are deemed to be proclaimed when in fact they are not.

- The concept of Peripheral Rural Residential is unique to the Helderberg District Plan. The plan itself undertook to create guidelines and detail on the concept. This has not been done and continues to remain a frustration to industry.

The problem we have with the present planning regime, is that the enactments regulating development create the framework for great planning but very little planning is done. If proper DSDF's and LSDF's are in place, developers will know with more certainty what kinds of developments are likely to succeed in a particular area. They will be able to invest with more certainty. In a system where one has high level plans only, there plainly is not enough certainty. Unfortunately, this is still the case in the City.

This problem is obviously not so much a By-law one, but rather a capacity and implementation problem.

Section 12: Local Spatial Development Frameworks

The intention in the By-Law is to create a level of planning and thus certainty at Local Area scale. This section does not appear to have been implemented in the City. This is a By-law problem as such only insofar as there is agreement that the section should read that LSDF's "must" (as opposed to "may") be adopted.

Again, the question presents whether the City has the capacity to undertake the full planning role and functions that the By-Law foresaw.

Section 21: Policies to guide decision making

There appears to be an ad hoc process of practice notes being issued to guide decision making. It is imperative that the By Law be workshopped with industry in its totality and relevant guidelines be developed that may give clarity to the implementation of the By Law in totality. [**Note:** Such guidelines will address many of the points raised in this document.]

This is happening very effectively through the Zoning Practice notes forum. And in fact, the officials use this forum to discuss proposed amendments to the MPBL as well.

Practice notes should be published on the City's website and be accessible by officials, consultants and developers alike.

Section 24 (3): Overlay zones

The principle of overlay zones is not questioned. The City however needs to implement a review process of all existing overlay zones and clarify whether they give guidance to or constrain development.

- Heritage overlay zones read in conflict with Urban Development Zones and Road Schemes, such being the case in the Woodstock area.

Section 30: Error in zoning map

The process of correcting zoning errors has been elevated to a formal application process even in the cases where substantial information exists to assess the error. The problem is not that this is an application, but that it takes so long to sort out. Perhaps this should be an exempt application with 30-day time limit, to be decided by the DM?

Section 35 (4): Use right and conditions

The purpose of the zoning scheme is to spell out the rights of a property. Conditions are to be used only when the scheme is not clear on limitations or where the City requires further limitations or obligations not reflected in the scheme.

Aspects such as the design of bulk, link and township services and detailing should be addressed in services agreements and should not be allowed to complicate the statutory application process.

A condition of approval should be imposed only when deemed critically necessary.

Bearing in mind that conditions of approval reflect the formal position of the City in a point of time a condition should reflect the City's policy and not the respective officials' opinion.

It stands that conditions must be consistent and important enough to impact on the land for an extended period.

The interpretation of the By-Law and the requirements at application phase requires further work.

Section 38: General lapsing provision:

The two-year period is non-sensical when seen in context of the development market realities.

Section 44 (1): Rezoning

The City should develop a formal procedure for this process, specifically setting out the process of adopting conditions of rezoning when land, which the City does not own, is pro-actively rezoned by the City. Where land is rezoned against the owner's will provision should be made for compensation.

Section 47: Lapsing of rezoning, consent use or departure

Bearing in mind that these actions originates from SPLUMA, the City should approach the right structures to change this section (43(2)) since this is the greatest dis-incentive to complex, large scale mixed use precincts of which a number exist within City of Cape Town.

Section 54: Transfer of land unit arising out of approved subdivision

The practical implication of this section is that the applicant is forced to break a development into a plethora of phases to allow incremental rates clearances to be obtained. Any variance from the phasing plan results in an application for an amendment to the conditions of approval.

This section of the By-Law needs to be reviewed in its entirety to address the industry realities whilst giving the City the protection which it requires in the event that applicants do not comply with all conditions of approval.

Section 55 (4) (b): Confirmation of subdivision

It should by now be clear that any development wishing to submit building plans prior to the fulfilment of Section 54 is being hamstrung by Section 55. Section 55(4)(b) should be unpacked as a standard operating procedure to give clarity and certainty. This section is being interpreted and applied in an inconsistent manner. At the very least the decision-making power in terms of section 55(4)(b) should be delegated to a level where decision-making can happen quickly.

[**Note:** This section read with Section 137 is far too onerous on developers resulting often in the need for a Section 55(4)(b) application, which is not favoured by, and granted reluctantly by officials. For example, Section 137 requires a fully serviced site prior to allowing for the submission of building plan applications. This undermines entrepreneurial risk taking by developers in the development of show houses or the preparation of stock for sale.]

Section 57: Land for public places and other uses

The method of compensation for land being provided for public places should be spelt out specifically when the land requirement exceeds the needs that will be generated by the development.

Section 58(2) – Ditto Section 57

Section 62 (2): Constitution of owners' associations

The City does not have the resources to vet every Home Owners' Association's Constitution. Allowance should be made for a conveyancing attorney to confirm that a Constitution complies with subsection (1)(a) in an equivalent manner that a structural engineer signs off on structural designs.

Templates developed by the City does not address market needs adequately.

Section 65(5): Engineering services charges

This section conflicts with the City's Development Contribution Policy. The policy sets out to create a predictable charge on costs to be incurred by an applicant whilst giving the City certainty on an income. If the City wishes to recover additional costs

from an applicant it stands that an applicant should benefit when the actual costs of bulk services are less than the DC policy determination. Consistency is required in this clause.

Section 65(9): Engineering standards

Although not specifically intended in this clause, the lack of practical engineering standard and over specification expectation by City officials has a detrimental impact on the development industry. Engineering standards should follow industry norms and standards.

The City should develop an engineering standards guideline which is acceptable to both the development industry and City for use in its own developments.

Section 67: Exemptions

This section has resulted in formal application process which often result in longer time periods than had an aspect been included in a normal application process. This section should be reviewed and practice guidelines should be developed to guide City officials and industry.

If a subdivision or consolidation is excluded in terms of section 67(1) a quick and efficient endorsement process that should not take longer than a few days should be put in place. Section 67(1) requires merely a confirmation of a factual situation, not the exercising of a discretion.

Section 70: Pre-application meetings

The intention of pre-application meetings is reasonable and should be welcomed. It should however be noted that these meetings are often used to direct applicants outside of official City policies. Personal and subjective interpretations of officials often form the basis of conflict with industry. The City should implement an "ombudsman" concept where disagreements can be objectively tested against City policy. If policy does not exist, the benefit of the doubt should fall to the applicant.

Based on the work of the joint City and WCPDF working group on plan application processes and related it is our contention that having consistent and appropriate

pre-application processes that are tailored to the unique needs of the range of applications would see a significant improvement in the effectiveness and efficiency of application processes. This is particularly the case for large and or complex building plan and land use applications. The development of such a process within City would need to encompass encompass a comprehensive review of all management processes and systems.

The SAACPP has assisted the officials in drafting a standard operating procedure (SOP) for PAC meetings and this is likely to be finalised soon. Once finalised this should be published on the City's web site.

Section 72: Application fees

The principle of application fees is acceptable on condition that the City keeps to the legislated time frames set out in the By-Law.

The application fees should be reviewed in terms of the complexities and need for multiple phases caused by the By-Law.

[**Note:** A separate discussion should be held regarding the various quantum's in the application fee schedule. The perception exists that application fees are now a revenue stream for the City rather than a cost recovery. Bearing in mind that property rates generates ongoing income for the City care should be taken not to place an additional burned on the industry, one which is in any case passed on to the end user.]

Section 74: Call for additional information

This section is often used by officials to move outside of the legislated time frames. The procedure and vetting of the need for additional information should be clearly spelt out and a formal sign-off procedure should be developed i.e. the District Manager needs to sign-off.

Section 90: Objection to an application

In the same manner that an applicant is charged an application fee, an objector should be made to have some form of financial obligation in the process. Such fee

can be waived during the hearing of the objection. This should specifically apply in the case where an objector pays professional fees to a consultant to prepare such an objection i.e. the objector is able to pay such an objection fee.

Objections are often made to delay applicants for commercial and market reasons even if this does not reflect in the payment of a bribe.

This section should be reviewed and considered from an industry perspective.

Section 90(4): Late submissions

In practice, late submissions from commenting entities and I&AP's are accepted by officials without referring to the City Manager. Officials often do not adhere to this clause. However, applicants not adhering to Clause 92(3) are often penalised.

If such late comments are accepted without reference to the City Manager, it is an implementation, rather than a By-law issue. The By-law issue is that I&AP's can seek and be given condonation in terms of section 90(4) if they are out of time but if an applicant is out of time with his response to objections, there is no provision for condonation. Applicant should be given the right to apply for condonation.

Section 97 (2): Time periods

The City does not adhere to time periods set out in the By-Law or those set by the City Manager. Some form of compensation (waiving of application fees) should take place where the City is not able to meet the time frames. This will result in real monitoring of time periods and provision of resources required to meet time frames. It could also assist with the rationalisation of the application process and level of information required to make an informed decision.

The recently gazetted timeframes are simply not practical for either the officials or the private sector – and forcing compliance or increasing the number of staff will not solve the problem. If the timeframes are not revised, the system will fall apart and already officials are not adhering to the timeframes.

Section 99: Criteria for deciding application

This section is used by officials to overrule exemptions granted in terms of other legislation. An example is where the City's own Electrical Department is formalising the reservation of land for an electricity depot in Muizenberg. This application entails a subdivision. Although a report from the Heritage Consultant was submitted to Heritage Western Cape, who confirmed that the site has no heritage value and exempted it from a full HIA, the planner in the district insists on a full HIA. Section 99 is given as reason for such a request.

Herewith the extract from the official's email to the planning consultant:

> "*The request for the heritage report has absolutely nothing to do with HWC or the NHRA. It is solely related to the MPBL which requires that the heritage impact be taken into account when assessing applications in terms of Section 99. Council is not in any way obliged to go along with another government agencies such as HWC and can come to a different conclusion regarding heritage. It will not be adequate when doing a heritage assessment in terms of the MPBL to simply refer to the outcome of the HWC process. It is thus in the best interests of your client that the heritage report gets done. Note however, that this is not an absolute requirement, but it is a strong recommendation given the issues raised in the objections."*

Such a request leads to additional and unnecessary costs being incurred. The independent heritage consultant has repeatedly indicated that such a report will be of no value as the land has already been indicated to have no heritage value, and therefore any costs for such a report will be a waste of funds. As this is a City funded project, a case can be made out for Fruitless and Wasteful Expenditure. This matter is used as an example on how planners can use there 'discretion' to cause unnecessary delays and costs, even when it is not a private developer.

Section 100: Conditions of approval

The principle of approving with conditions is acceptable. The details of such conditions are often not. The City should develop standard conditions. An applicant

should nominate the relevant conditions to be applied. Where officials want to place additional conditions, such should be explained and reasons given why this should be attached to an approval. The process of inclusion of conditions is not transparent or pro development.

It appears that Section 100 (7) has installed the By-Law in a gate keeping role in that all parallel approvals required from other tiers of government are now required before a decision can be made in terms of the By-Law. Bearing in mind that an application requires a suite of approvals it does not hold that one application must be held back until approvals from another tier of government is obtained.

Section 102: Timeframe for decisions

It is proposed that where the City is not able to meet legislated time frames, such applications should immediately be referred to the Planning Tribunal for consideration. This will result in time frames being monitored and remedial actions being implemented by the City in its own systems and resources. There is a concern that this would imply that virtually every application would end up at the MPT. This would not be viable but at least offer a true reflection of whether the City can in fact keep to its own promulgated timelines.

Section 113: Integrated Decisions / Duplication of information

The City's SDF and Environmental Management Frameworks currently do not provide the level of protection against duplicate applications having to be made:

Act 70/1970 – It appears that the City did not obtain sufficient input from the Department of Agriculture when setting its urban edge. Applicants dealing with land within the urban edge still need to apply for approval from the national department.

The EMF do not clarify sufficiently where NEMA applications may still be required.

A formal agreement should be entered with the Department of Environmental Affairs and Development Planning to define the role of the Municipality in land use applications vs the environmental applications. Preferably NEMA delegations should be devolved to City to run in parallel with land use applications and thus prevent

duplications. If District Plans underpin SEF's then it holds that applications complying with District Plans should be exempted from NEMA.

Section 129 and 130

The By-Law must clearly provide for cases where the current owner of a property did not cause the contravention of the by-law. In cases where the contravention was the result of a previous owner's actions, the current owner should be issues with a 0% penalty.

Section 137: Transfer certificate

Section 137 clearance is far too onerous upfront on developers, requiring the need for a section 55.4(b) application. An application not favored by and granted reluctantly by council.

- Conditions of 137 require a fully serviced site, prior to allowing for building plan application submission. The lead times on numerous factors (water meters for example) can take up to 6 months to be installed.

3b. Zoning regulations

The Cape Institute of Architects are requested to comment in detail on this section.

3c. Interpretation and culture

The Workgroup has concluded that although there are some changes that should be implemented in the By-Law and the Zoning regulations the bulk of the challenge lies in the following areas:

- Continuous changes, not least the DAMS and the recent ODTP, places strain on the officials or alternatively creates excuses for non-performance.

- In certain geographic areas officials tend to place onerous expectations on developments which the City does not adhere to itself on its own developments. Often such expectations lie outside of official policy. There is no objective body

who an applicant can approach for clarification or adjudication. Applicants are often held ransom.

- There is a lack of consistency in interpretation of requirements between staff, between departments and between regions.

> *"One particular project saw the LUM department specifically state to the Project Manager that each subdivided erf needed its own, complete building plan application. This resulted in a total of 4215 documents being submitted, of which around 80% were repetitive documents relating to the entire scheme. Once the project reached BDM it was contested as to why the developer had submitted so much information for building plan approval, stating that only a few of the documents were relevant, the balance was completely useless."*

- Non-adherence to time frames, partly because focus areas are ill defined, lead to frustration. Time should be spent to define those areas that should receive detail scrutiny by the City as governing entity.

- Registered professionals should be required to take responsibility for their respective disciplines i.e. a town planner should warrant that an application falls within the ambit set out in the zoning scheme etc.

- Standardisation of interpretation must take place between regions on all disciplines. More training and case study analysis should take place to ensure that Planning Districts do not improvise and follow standard interpretations. The City's organisation development management system needs to be reviewed and revised to cater to the needs of setting and controlling application performance standards that are relevant and consistent.

- A recourse facility should be created to obtain finality on points of dispute during the preparation phase of an application vs having to wait for the full application process to follow its course.

- There is a dire need for statistical reporting and monitoring of application processes. The monitoring and oversight capacity of the DAMS system should be expanded and the relevant political oversight structures should be empowered to know what the real performance are of the relevant departments. It appears that this is currently not the case.

- Other than the issues related to the DAMS, an additional practical issue is that the system is very often not accessible/operational via the planning portal (apparently as result of user overload/capacity constraints in the system). Coupled with same, the unwillingness of certain City Officials to provide applicants with critical information uploaded to the DAMS also via e-mail, results in unnecessary delays in application processes.

- It is proposed that the City implements a policy / introduces internal requirement that DAMS communication must be extended to include e-mail correspondence in addition to the current SMS notification system, to resolve this matter (albeit only in the interim until DAMS capacity constraints has been resolved). This is a simple solution to an issue with significant collective impact.

- Delegated responsibilities should be implemented specifically in the transversal management system.

- SDP submissions are requested with far too much detail, often to a degree expected on building plan applications. This causes delays as officials analyses the information and then request greater detail, unnecessary at SDP stage.

  > *"On a specific project an official requested a cross section of a wheelchair ramp into a building on a project at SDP stage and refused to give clearance until this was provided."*

- Should one minor change be made to the site layout (building footprint moves by a meter, changes orientation slightly, then an entire new SDP application is expected prior to any other applications (such as building plan approval) will be

entertained. The term 'generally in accordance with' is not upheld.

- Occupation certificate clearance are sometimes hindered by officials shifting goal posts, demanding changes on site to be made to the as built product (built off approved plans) prior to clearing the building(s) for occupancy.

  "Twice the Fire Department official in one region demanded changes to the buildings after his approval of the drawings."

4. Concluding remarks

In reviewing the inputs received, although there are some aspects of the By-Law that should be reviewed, the bulk of the industry comments are found in interpretation and subjective opinion of City officials.

In summary, we offer our conclusions and make proposals for consideration by the City of Cape Town:

4.1 Practical impacts of the By-Law

The Memorandum sets out several unintended consequences of the By-Law. These should be assessed and corrected to allow for streamlining of the application and development processes.

4.2 By-Law intentions vs reality

The By-Law allows for several provisions that require further policy and regulation development. Although many of these intentions are laudable, the lack of implementation bring the By-Law into question and allows for officials to give subjective interpretations to these intentions.

The City is advised to review the By-Law through the lenses of "*use it or lose it*". If there is no political intention to address these intentions then it should be removed from the By-Law until such time that the political view changes.

An in-principle decision must be made to either match the By-Law with the available resources, or alternatively, to allocate the resources so that the By-Law can be fully functional. The By-Law should be reviewed within this context.

4.3 Working outside of the ambit of the By-Law and policies

Due to lack of clarity and subjective interpretation, it appears that many officials give their own "spin" to the by-law. There needs to be a uniform interpretation of the By-Law amongst all officials and it is proposed that a By-Law guide be developed to clarify interpretation and areas of discretion.

The guide should be workshopped with industry and published on the final version should be published on the City's Planning Portal.

4.4 Adequate resourcing

The implementation of the DAMS system indicated scare regard for adequate resourcing.

General feedback from staff indicate a perception of staff being overworked or alternatively, obsessed with detail which is perhaps not relevant.

In response, we suggest that all job descriptions must be clarified and levels of mandate be clearly stated. Technical resourcing must be provided to allow optimal functioning.

Ongoing assessment and client interviews must be held to ensure that officials do not spend unnecessary time on issues that are not material to the application process as envisaged in the By-Law.

4.5 Need for neutral adjudicator / ombudsman

There is a need for a multi-disciplinary adjudicator or ombudsman for a number of reasons:

- To adjudicate issues of dispute that may result from different interpretation of the By-Law and the regulations, prior to applications being submitted
- To provide clarity on issues where clarity is not obtained from officials prior to submission
- To address areas where officials appear to act outside of formal policy as is often the case where draft guidelines and proposed policies are interpreted as being in existence already
- To issue ongoing practice notes on issues that appear to be regular queries
- To collate statistics and identify bottlenecks in processes or in planning regions

4.6 Dire need for accurate statistics

Research undertaken on the DAMS system indicate the dire need for accurate statistics, for the identification of bottlenecks, and for the reporting on performance of processes that impact on investment by the development sector.

The industry should be allowed to assist the relevant portfolio committee to prepare a reporting template that will accurately measure the working of the application and decision-making processes.

4.7 Performance criteria and review

An anonymous client/applicant survey process should be developed to assess, ono an ongoing basis, the performance of all City staff that participate in the assessment process.

Performance review and reward of staff should be linked to the survey process which by implication will escalate through to management levels.

Clients / applicants should be able to nominate staff for a reward system in which exceptional performance can be rewarded.