

**AGENDA of the
Portfolio Committee: Investment & Infrastructure
6 July 2022
(Also the agenda for the Mayoral Committee Meeting: 25 July 2022)**

2.

NOTICE OF INTENTION TO EXEMPT ALL WESTERN CAPE MUNICIPALITIES FROM CERTAIN PROVISIONS OF THE WESTERN CAPE LAND USE PLANNING ACT, 2014 (ACT 3 OF 2014) IN TERMS OF SECTION 60(1) THEREOF

15/1/3/10/4

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13 June 2022

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1. Executive Summary

To inform Council of Ministry of Local Government, Department of Environmental Affairs and Development Planning's intent to exempt all Western Cape Municipalities from certain provisions of the Western Cape Land Use Planning Act, 2014 (act 3 of 2014) in terms of Section 60(1) thereof.

2. Service Delivery and Budget Implementation Plan - IGNITE

Infrastructure and Planning
Town and spatial Planning

3. Compliance with Strategic Priorities

Provision of democratic, accountable, and ethical governance
The encouragement of structured community participation in the matters of the Municipality
Promotion of tourism, economic and social development

4. Delegated Authority

Executive Mayor

5. Legal Requirements

Western Cape land use planning act, 2014 (act 3 of 2014) Amendment By-Law on Municipal Land Use Planning, 2020

6. Background/Discussion/Evaluation/Conclusion

Background

Ministry of Local Government, Department of Environmental Affairs and Development Planning gave notice of its intention to exempt all Western Cape Municipalities from certain provisions of the Western Cape Land Use

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Planning Act, 2014 (act 3 of 2014) in terms of Section 60(1). The Notice is attached per Annexure A.

In terms of Overstrand's Amendment By-Law on Municipal Land Use Planning 2020 Section 65(1) and (2) as quoted hereafter, is relevant to the notice as issued by Provincial Government.

“65. Exemptions to facilitate expedited procedures

- (1) The Municipality may in writing and subject to Section 60, 61 of the Land Use Planning Act-
 - (a) exempt a development from compliance with the provisions of this By-law to reduce the financial or administrative burden of-
 - i. integrated application processes as contemplated in Section 46;
 - ii. the provision of housing with the assistance of a state subsidy; or
 - iii. incremental upgrading of existing settlements;
 - (b) in an emergency situation authorise that a development may depart from any of the provisions of this By-law.
- (2) If the Provincial Minister grants an exemption or authorisation to the Municipality in terms of Section 60 of the Land Use Planning Act, the Municipality is exempted from or authorised to deviate from any corresponding provision in this By-law.”

Thus, should the Minister, after receiving comments on the notice, exempt local authorities, in terms of Section 60(1) of LUPA exempt Local Authorities from Section 43 and 44 of LUPA as well as from Section 35(2), 39(2) and 41(1) and LUPA, it will mean that the Minister also acted in terms of Section 65(1)(2) of Overstrand By-law on Development Plan. (Section 43 and 44 of LUPA is attached per Annexure B)

Section 35(2) states the following;

“When a municipality on its own initiative rezones land of which it is not the owner, the municipality must comply with Sections 43 and 44 and must have regard to at least the matters referred to in Section 49(a) to (e).”

Section 39(2) state the following:

“Notice of the application must be served in accordance with section 44 on at least the following persons:

- a) Any person mentioned in the title deed for whose benefit the restrictive condition applies; and
- b) Any other person whose rights or legitimate expectations will be affected by the approval of the application.”

Section 41(1) state the following:

“When a municipality, on its own initiative or on application, amends or waives a condition of approval or imposes additional conditions of approval, it must comply with sections 40 and 44.”

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Discussion

The main aim of the exemption is to allow for applications where an application is subject to two or more pieces of legislation, such an application's public participation process could be combined into one. Thus, if notice is served on an application in terms of Environmental Legislation such notice could be deemed sufficient as notice of the application in terms of the Land Use Planning Act and Municipality Land Use Planning By law. This is then exempted from serving such a notice in terms of the Planning Legislation.

Although this will reduce cost and time in terms of planning applications, it needs to be approached cautiously, as in many of the instances the first notice does not maintain the application in terms of Planning Law.

Secondly most of the processes followed in terms of different legislation have different prescribed time frames. This could mean that a long time period could lapse before the planning application is dealt with.

Thirdly it is often the case that an application is amended by the conditions of approval, for instance when the Record of Decision is issued. This in itself would mean that the application in terms of Planning Legislation need to be re-advertised and public participation be undertaken regarding the revised application.

The second aim of the exemption is to allow Municipalities to explore an alternative method of public participation and serving notices. This in itself could mean that the cost of serving notices could be reduced, like for instance serving electronic notices.

This option of serving of electronic notices is currently being investigated by the department in conjunction with Treasury.

Conclusion

Thus, the notice of intend to exempt Municipalities in the Western Cape from Section 43 and 44 of LUPA, together with the further exemption as proposed is positive and should be supported. However, these exemptions should be cautiously implemented.

7. Financial Implications

None

8. Staff Implications

None

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9. Comments from other Departments, Divisions and Administrations

None

10. Annexures

Annexure A: Notice

Annexure B: Section 43 and 44 of LUPA

RECOMMENDATION:

that Council gives its support towards the notice of intent to exempt Municipalities in the Western Cape in terms of Section 60(1) of LUPA exempt Local Authorities from Section 43 and 44 of LUPA as well as from Section 35(2), 39(2) and 41(1) and LUPA, it will mean that the Minister also acted in terms of Section 65(1)(2) of Overstrand By-law on Development Plan.

RESPONSIBLE OFFICIAL:	R KUCHAR
TARGET DATE FOR IMPLEMENTATION:	N/A
TARGET DATE TO INFORM APPLICANT:	N/A
TARGET DATE TO INFORM OBJECTOR:	N/A



**Western Cape
Government**

Ministry of Local Government, Environmental Affairs and Development Planning
Mr A Bredell
Minister

Reference number: 15/2 & 15/3/1/11/3

CIRCULAR: DEA&DP 0004/2022

To the Executive Mayors, Municipal Managers, Municipal Planning Heads Municipal Planners, and Planning Consultants in the Western Cape; South African Association of Consulting Professional Planners, Southern Region; SALGA (Western Cape); National Department of Agriculture, Land Reform and Rural Development; and provincial sectoral departments - Transport and Public Works, Human Settlements, Education and Local Government

Dear Sir/Madam/Ms

NOTICE OF INTENTION TO EXEMPT ALL WESTERN CAPE MUNICIPALITIES FROM CERTAIN PROVISIONS OF THE WESTERN CAPE LAND USE PLANNING ACT, 2014 (ACT 3 OF 2014) IN TERMS OF SECTION 60(1) THEREOF

1. Purpose

- 1.1. The purpose of this Circular and the attached Provincial Notice is to invite comment on the intention to exempt all Western Cape municipalities from a number of provisions of the Western Cape Land Use Planning Act, 2014 (Act 3 of 2014) ("LUPA") in terms of section 60(1) thereof.
- 1.2. In terms of section 60(1) of LUPA, the Provincial Minister may, by notice in the *Provincial Gazette*, exempt a municipality from a provision referred to in Chapter III or IV of the Act to reduce the financial or administrative burden of integrated application processes contemplated in section 67 of LUPA, the provision of housing with assistance of a state subsidy, or the incremental upgrading of existing settlements. This is an attempt to reduce red tape and shorten application processes and reduce the administrative burden on all involved in the development of land.
- 1.3. The intention is to exempt all Western Cape municipalities from certain provisions in Chapter IV of LUPA, as set out in detail in the attached Provincial Notice and also in paragraphs 3.10-3.15 below.

2. Background

- 2.1. LUPA, as provincial framework legislation, regulates certain aspects of municipal planning and includes a number of minimum requirements, which a municipality has to abide by, such as the publication and serving of notices of the intention to consider certain land use applications.
- 2.2. LUPA also recognises that there are instances where an exemption or a deviation from its provisions may be desirable and justifiable.
- 2.3. Section 60(1) of LUPA provides that the Provincial Minister may, by notice in the *Provincial Gazette*, exempt a municipality from a provision referred to in Chapter III or IV to reduce the financial or administrative burden of integrated application processes contemplated in section 67 of LUPA, the provision of housing with assistance of a state subsidy or the incremental upgrading of existing settlements.

- 2.4. The Department is constantly investigating ways to reduce red tape and shorten application procedures, as well as to reduce the administrative burden on all parties involved in the development of land. One of the most effective ways to achieve this, is to enable the integration of different legislative processes as contemplated in section 67 of LUPA. However, to ensure the complete integration of processes, exemptions from certain provisions of LUPA are required.
- 2.5. The Department encourages the parties involved in land use applications to integrate processes and to avoid duplication. The proposed exemption will facilitate more efficient, cost-effective and timeous public participation. It will enable municipalities to regard public participation processes in terms of land use planning and other legislation (such as the National Environmental Management Act, 1998 (Act 107 of 1998) ("NEMA")), as sufficient for the purposes of the municipality's public participation process in terms of LUPA.
- 2.6. Public participation is an important requirement, and the aim of the proposed exemption is not to exempt any party from the requirements relating to public participation *per se*, but merely to ensure public participation is done more efficiently, timeously and cost-effectively.

3. Relevant minimum requirement in legislation

- 3.1. In addition to a land use approval from a municipality in terms of SPLUMA, LUPA and a municipality's land use planning By-law, a proposed development may also require an environmental authorisation in terms of NEMA, or an approval in terms of the National Heritage Resources Act, 1999 (Act 25 of 1999). Other legislation may also require an approval before development may proceed in a specific instance.
- 3.2. In most instances, the processes in terms of other legislation also include a public participation process. For a development that requires various approvals it is quite possible that multiple public participation processes have to be conducted in terms of the different pieces of legislation that apply to that proposed development. The different applications are often processed sequentially, resulting in duplicate processes that are time consuming and costly, often taking more than five years to complete.
- 3.3. In *Maccsand (Pty) Ltd v City of Cape Town and Others* 2012 (4) SA 181 (CC), the Constitutional Court found that "[t]he Constitution allocates powers to three spheres of government in accordance with the functional vision of what is appropriate to each sphere. But because these powers are not contained in hermetically sealed compartments, sometimes the exercise of powers by two spheres may result in an overlap. When this happens, neither sphere is intruding into the functional area of another. Each sphere would be exercising power within its own competence. It is in this context that the Constitution obliges these spheres of government to cooperate with one another in mutual trust and good faith, and to co-ordinate actions taken with one another" (par [47], footnotes omitted).
- 3.4. The Department has issued Circular DEA&DP 0026/2020 to advise municipalities on considerations for the integration and alignment of development planning applications and decision-making.
- 3.5. Whilst the Department has actively promoted the integration of processes required by the various pieces of legislation, it is almost impossible to implement these integrated processes without falling short of (and being in non-compliance with) some of the procedural requirements set out in LUPA.
- 3.6. To enable municipalities to use an integrated process, whilst still complying with all the relevant legislation (e.g. LUPA, SPLUMA, the relevant By-law, NEMA, etc.), it is necessary to grant an exemption from some of the minimum requirements contained in LUPA.
- 3.7. Even though the legislation already provides for, and promotes, the integration of application processes, the Department needs to encourage such integration, by proactively providing an exemption from certain provisions of LUPA to reduce the financial or administrative burden of (a) integrated application processes contemplated in section 67, (b) the provision of housing with the assistance of a state subsidy, or (c) the incremental upgrading of existing settlements.
- 3.8. Section 29(1) of SPLUMA requires municipalities to consult an organ of state responsible for administering legislation relating to any aspect of an activity that also requires approval in terms of

SPLUMA, in order to coordinate activities and give effect to the respective requirements of such legislation, and to avoid duplication.

- 3.9. Section 29(2) of SPLUMA provides that a municipality may enter into a written agreement with such organ of state, to avoid the duplication of the submission of information or the carrying out of a process relating to any aspect of an activity that also requires authorisation under SPLUMA. Section 29(3) of SPLUMA provides that a municipality (through its Municipal Planning Tribunal) may take account of any process authorised under the legislation covered by the above-mentioned agreement, as adequate for meeting the requirements of SPLUMA.
- 3.10. Section 67(5) of LUPA provides that a municipality or the Head of Department may decide on an application that also requires approval in terms of other legislation on the basis of a process prescribed under that legislation, but only if that process meets the requirements of the applicable by-laws and this Act. The underlined part is, however, an obstacle since various provisions in LUPA require the publication and serving of notices.
- 3.11. The provisions of section 60(1) of LUPA can be utilised to enable the implementation of integrated processes, by granting exemptions from those provisions in LUPA that result in the duplication of processes or submission of information. Currently, the following minimum requirements in LUPA are problematic in respect of integrated processes: section 43 of LUPA requires the publication of notices regarding a municipality's intention to consider certain land use applications (public notification), section 44 of LUPA requires the serving of notices regarding a municipality's intention to consider certain land use applications (direct notification), and section 45(1) of LUPA requires municipalities to refer certain land use applications to the Head of Department for written provincial comment.
- 3.12. An exemption in terms of section 60(1) of LUPA is limited to provisions in Chapters III and IV of LUPA. As a result, the Minister may not grant an exemption relating to provisions in other Chapters of LUPA that deal with the specific requirements relating to certain types of land use applications.
- 3.13. The provisions in Chapter III of LUPA are not relevant, as Chapter III focusses on spatial planning and spatial development frameworks.
- 3.14. In order for the exemption from the provisions of sections 43 and 44 of LUPA to be effective, it will also be necessary to grant an exemption regarding the following provisions:
 - 3.14.1. section 35(2), which deals with rezoning, on a municipality's own initiative, of land of which the municipality is not the owner, but only in so far as it refers to sections 43 and 44;
 - 3.14.2. section 39(2), which deals with applications for the removal, suspension or amendment of restrictive conditions, but only in so far as it refers to section 44;
 - 3.14.3. section 39(3), which deals with the removal, suspension or amendment of restrictive conditions on a municipality's own initiative, but only in so far as it refers to sections 43; and
 - 3.14.4. section 41(1), which deals with the amendment or waiver of a condition of approval, or the imposition of additional conditions of approval, on a municipality's own initiative or on application, but only in so far as it refers to sections 44.
- 3.15. The condition that a public participation process in terms of land use planning or other applicable legislation has been followed, will apply to the proposed exemption.

4. Notice and comment

- 4.1. Although Section 60(1) does not prescribe any particular process to be followed, the Department decided to consult the public and the industry regarding the intention to grant the exemption and to invite them to submit representation or objections.
- 4.2. Written representations on or objections to the proposed exemption must be submitted in the manner and within time period as set out in the Provincial Notice.

5. Implications

- 5.1. The proposed exemption will not mean that parties involved in development applications will be relieved of their obligations relating to public participation. It merely means that if an application (e.g. an environmental authorisation application in terms of NEMA) has been subjected to public participation, a municipality is no longer obligated to notify the public again in terms of LUPA. The exemption will have the effect that the use of such other public participation process will not result in non-compliance with LUPA.
- 5.2. Most municipal land use planning By-laws include a section that is similar to section 60(1) of LUPA, but that also provides that if the Provincial Minister grants an exemption or authorisation to deviate from a provision of LUPA to a municipality in terms of section 60 of LUPA, the municipality will also be exempted from or authorised to deviate from any provision of its own By-law that corresponds to the relevant provision of LUPA.
- 5.3. Notwithstanding the exemption, a municipality is not obligated to grant an exemption regarding other sections of its By-law just because the Minister has granted an exemption in terms of LUPA.
- 5.4. Municipalities must still ensure that interested and affected parties have been consulted efficiently and effectively, albeit through another process. Municipalities have the discretion to decide whether they want to utilise the proposed exemption.
- 5.5. Section 60(6) of LUPA empowers the Minister to impose, withdraw or amend a condition of any exemption so granted.

If any further information or assistance is required in this regard, please contact Kobus Munro at (021) 483 4796 or kobus.munro@westerncape.gov.za or Theo Rebel at (021) 483 8375 or theo.rebel@westerncape.gov.za.

Yours sincerely

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Date:

MINISTER : LOCAL GOVERNMENT, ENVIRONMENTAL AFFAIRS AND DEVELOPMENT PLANNING

Publication of notices

43. (1) When a municipality intends to consider the following, it must at least cause a notice to be published as contemplated in subsections (2) to (4) of its intention:
- (a) a land use application for a rezoning or a rezoning on its own initiative contemplated in section 35; 5
 - (b) the subdivision of land larger than five hectares inside the outer limit of urban expansion as reflected in its municipal spatial development framework;
 - (c) the subdivision of land larger than one hectare outside the outer limit of urban expansion as reflected in its municipal spatial development framework;
 - (d) if the municipality has no approved municipal spatial development framework, the subdivision of land larger than five hectares inside the physical edge, including existing urban land use approvals, of the existing urban area; 10
 - (e) if the municipality has no approved municipal spatial development framework, the subdivision of land larger than one hectare outside the physical edge, including existing urban land use approvals, of the existing urban area; 15
 - (f) the closure of a public place contemplated in section 37;
 - (g) a land use application in respect of a restrictive condition contemplated in section 39;
 - (h) the approval, amendment, repeal or review of a zoning scheme, or approval of a zoning scheme map; 20
 - (i) the regulation of exemptions contemplated in section 61;
 - (j) other applications that will materially affect the public interest or the interests of the community if approved.
- (2) A notice contemplated in subsection (1) must be published—
- (a) in accordance with section 21 of the Municipal Systems Act in at least two of the official languages of the Province most spoken in the area concerned; and 25
 - (b) if publication as contemplated in paragraph (a) is considered to be ineffective, through other effective means, including announcements through a loudhailer, publication on websites or community notice boards, or communication through email lists or social media. 30
- (3) A municipality must consider whether a notice contemplated in subsection (1) has to be displayed on the land concerned.
- (4) If a notice is displayed on the land, the municipality must ensure that the notice remains legible for the notice period.
- (5) A notice contemplated in subsection (1) or a notice in terms of the land use planning requirements of a municipality must contain at least the following information: 35
- (a) the purpose of the matter that is being published;
 - (b) a description of the land unit or land units to which the notice relates;
 - (c) where and when particulars of the matter that is being published are available for inspection; and 40
 - (d) the procedure for persons who are interested and affected by the notice to submit written comments within a period of at least 30 days.
- (6) The publication of a notice contemplated in subsection (1) does not release a municipality from the obligation to cause a notice to be served in the instances contemplated in section 44(1). 45

Serving of notices

44. (1) When a municipality intends to consider the following, it must at least cause a notice to be served as contemplated in subsection (2) of its intention:
- (a) a determination of a zoning or a deemed zoning contemplated in section 34;
 - (b) a land use application for rezoning or rezoning on its own initiative 50 contemplated in section 35;
 - (c) a land use application for subdivision or the amendment or cancellation of a subdivision contemplated in section 36;
 - (d) the closure of a public place contemplated in section 37;
 - (e) a land use application for consolidation contemplated in section 38; 55
 - (f) a land use application for the removal, suspension or amendment of a restrictive condition contemplated in section 39;
 - (g) the imposition, amendment or waiver of a condition contemplated in section 40 or 41.

- (2) A notice in terms of subsection (1) or in terms of the land use planning requirements of a municipality, must be served—
- (a) on each person whose rights or legitimate expectations will be affected if the matter or application is approved;
 - (b) in accordance with section 115 of the Municipal Systems Act; and 5
 - (c) in at least two of the official languages of the Province that are most spoken in the area concerned.
- (3) A municipality must, when causing a notice to be served in terms of subsection (1) or in terms of the land use planning requirements of a municipality, ensure that the person who is notified is able to obtain the following information from the notice: 10
- (a) the purpose of the matter to which the notice relates;
 - (b) a description of the land unit or land units to which the notice relates;
 - (c) where and when particulars of the matter of which notice is given are available for inspection; and
 - (d) the procedure for that person to submit written comments within a period of at least 30 days. 15

Provincial comment on land use applications

45. (1) A municipality must refer a land use application relating to the following to the Head of Department for written provincial comment once the application is complete in accordance with the requirements of the municipality and section 42: 20
- (a) a development outside the municipality's planned outer limit of urban expansion as reflected in its municipal spatial development framework;
 - (b) if the municipality has no approved municipal spatial development framework, a development outside the physical edge, including existing urban land use approvals, of the existing urban area; 25
 - (c) a rezoning of land zoned for agricultural or conservation purposes;
 - (d) any development as determined by the municipal manager;
 - (e) development as prescribed that affects a provincial functional area;
 - (f) any other category of land use applications as may be prescribed for the purpose of supporting and strengthening the capacity of municipalities. 30
- (2) The Head of Department must, within 60 days of a request for comment contemplated in subsection (1), submit written provincial comments to the municipal manager.
- (3) The municipality may not decide on a land use application referred to in subsection (1) until— 35
- (a) it has received and considered the provincial comments referred to in subsection (2); or
 - (b) the end of the period referred to in subsection (2) and if no provincial comments were received during that period.
- (4) The period referred to in subsection (2) may be extended with the concurrence of 40 the municipality.
- (5) The regulations contemplated in subsection (1)(f) may differentiate between different kinds of—
- (a) municipalities, which may be defined in relation to— 45
 - (i) the unique circumstances of respective municipalities, including financial resources, capacity and financial viability;
 - (ii) the categories of municipalities in terms of the Constitution; or
 - (iii) categories as may be prescribed with regard to the supervision and monitoring of local government; or
 - (b) land use applications, which may be defined in relation to the categories of 50 land use applications referred to in this Act.
- (6) The Provincial Minister may, after consultation with the Provincial Cabinet, appoint a coordinating committee representative of provincial departments to coordinate and compile the comments contemplated in subsection (1).

Maximum time for decision-making 55

46. (1) A municipality must decide on a land use application within the period as may be prescribed, calculated from the day that the application is complete in accordance with the requirements of the municipality and section 42.