Western Cape Government
Environmental Affairs and Development Planning

HEAD OF DEPARTMENT
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TO: ALL MAYORS, MUNICIPAL MANAGERS, MUNICIPAL PLANNING HEADS AND PLANNING CONSULTANTS

CONSIDERATIONS FOR THE INTEGRATION AND ALIGNMENT OF DEVELOPMENT PLANNING APPLICATIONS AND DECISION-MAKING

1. Introduction

1.1 In DEA&DP Circular No 3/2008, dated 5 November 2008, the Department made known an operational policy for the processing of applications and the relationship between the Land Use Planning Ordinance, 1985 (Ordinance 15 of 1985), the National Environmental Management Act,1998 (Act 107 of 1998) (NEMA) and Guide Plans in terms of the Physical Planning Act, 1991 (Act 125 of 1991).

1.2 Since then, the legal environment has changed dramatically due to law reform initiatives involving all three acts mentioned above as well as constitutional judgements during this period that brought about more clarity to certain aspects within the development planning field. These law reform initiatives and court judgements have also brought new insights and changes to the way the various development planning applications are processed, integrated and aligned, which necessitated the Department revisiting the operational policy communicated in Circular No 3/2008.

1.3 In any event, Circular No 3/2008, is now redundant because of the law reform initiatives and court judgements and is hereby withdrawn. Whereas Circular No 3/2008 also dealt with consistency with and amendment of Guide Plans in terms of the Physical Planning Act (which has since been repealed by the Spatial Planning and Land Use Management Act, 2013 (Act 16 of 2013) ("SPLUMA"), a separate circular will be issued on consistency with and amendments of Spatial Development Frameworks in terms of SPLUMA and the Western Cape Land Use Planning Act, 2014 (Act 3 of 2014) ("LUPA").

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2. Background

2.1 The regulatory burden on authorities to deliver municipal infrastructure and to process and approve development applications has again been highlighted in the recent past. Several challenges exist within sectors and one of the opportunities that were identified is the alignment and integration of statutory application processes.

2.2 It has come to the attention of the Department that in many instances the consideration of municipal planning applications / processes only commences once the Environmental Impact Assessment (EIA) in terms of NEMA, the Heritage Impact Assessment (HIA) in terms of the National Heritage Resources Act, 1999 (Act 25 of 1999), the Water Use License Application (WULA) in terms of the National Water Act, 1998 (Act 36 of 1998) and in some instances even Subdivision of Agricultural Land Act, 1970 (Act 70 of 1970 (SALA) processes have been concluded. Some municipalities do not even accept a planning application before the above-mentioned processes have been concluded. Whereas limited opportunity exists to reduce the duration of planning processes *per se*, the biggest opportunity to reduce the duration of the overall process, is to process the planning applications in parallel/synchronised with the other application processes. The parallel/synchronised processing also allows for improved co-operative governance and informed decision-making, as will be explained below.

2.3 While Chapter 3 of the Constitution always required that all three spheres of government and all the organs of state within each sphere must provide coherent governance and must co-operate with one another by, amongst other requirements, assisting and supporting one another, informing one another of and consulting one another on matters of common interest, co-ordinating their actions and legislation with one another, both environmental and planning legislation have been amended to now make provision for agreements to be reached by the EIA and Planning authorities (in particular at Municipalities) to coordinate their respective processes to avoid duplication in the submission of information or the carrying out of processes and even allowing for authorities to agree to follow an integrated process. While full integration of processes is only possible once such agreements are entered into, until integrated processes are agreed to, nothing stops applicants and authorities to run EIA and Planning processes in parallel/synchronised, as already required by Chapter 3 of the Constitution.

3. Integration, alignment and agreements in relation to processes and authorisations in terms of different legislation

At this point it is important to distinguish between the different terms used in legislation and the different opportunities created by the respective Acts.

3.1 Integrated Decisions – SPLUMA (Section 30) and LUPA (Section 67), in respect of an activity which requires authorisation in terms of SPLUMA or LUPA but is also regulated in terms of another law, allows that the authorities may issue either separate authorisations or may issue an integrated authorisation/approval.

3.1.1 While Section 30 of SPLUMA and Section 67 of LUPA specifically provide for different authorities to issue an integrated (planning) decision, it might be difficult for the other authority (i.e. not the planning authority in terms of SPLUMA/LUPA) to be party to the issue of an integrated authorisation/approval if the legislation governing the other authority does not likewise allow for integrated authorisation to be issued with other authorities. In this regard, it must be noted that:

- In terms of EIAs: Section 24L(4) of NEMA provides that the EIA competent authority may regard an authorisation issued in terms of any other legislation that meets all the requirements stipulated in Section 24(4)(a) and (b) of NEMA, to be an environmental authorisation in terms of NEMA. In other words, if the requirements in terms of Section 24(a) and (b) of NEMA are integrated into the municipal planning process and the municipal planning authorisation, the NEMA competent authority could regard the municipal planning authorisation/approval to be an environmental authorisation in terms of NEMA (i.e. in such an instance the municipal planning authorisation/approval would be the integrated authorisation as contemplated in terms of SPLUMA/LUPA/Municipal Planning By-Law on the one hand and NEMA on the other hand).
- In terms of HIAs: Section 38(8) of the National Heritage Resources Act, 1999 (Act 25 of 1999) provides that if an evaluation of the impact on heritage resources (an HIA) is required in terms of any other legislation, then a separate approval from the relevant heritage authority is not required, provided that the consenting authority (e.g. the Municipal/Provincial Planning Authority) ensures that the HIA fulfils the requirements of the relevant heritage resources authority, and any comments and recommendations of the relevant heritage resources authority with regard to such application must been taken into account by the consenting authority (e.g. the Municipal/Provincial Planning Authority) prior to the granting of the consent/planning authorisation/approval.
- In terms of WULAs: Section 22(3) of the National Water Act, 1998 (Act 36 of 1998) provides that the responsible water authority may dispense with the requirement for a Water Use Licence if it is satisfied that the purpose of National Water Act will be met by the granting of a licence, permit or other authorisation under any law. In other words, if it is ensured that the Municipal Planning process and the Municipal Planning authorisation/approval satisfies the purpose of the National Water Act, then the responsible water authority may decide that a Water Use Licence is not required (i.e. for all intents and purposes the Municipal Planning authorisation/approval would be an integrated authorisation/approval as contemplated in terms of SPLUMA/LUPA/Municipal Planning By-Law on the one hand and the National Water Act on the other hand).

With different authorities having different requirements regarding compliance monitoring, operating and performance requirements in terms of authorisation/approvals/permits as well as in terms of amendments/variations of such authorisation/approvals/permits, it might at times be decided by the different authorities to not issue integrated authorisation/approvals/permits/consent.

3.2 Integrated Processes – SPLUMA in Sections 29 and 30(3) and LUPA in Section 67 make provision for the submission, public- and intergovernmental consultation and assessment of multiple applications to be integrated, but that the separate decisions still be issued by the respective authorities authorised in terms of the respective laws; i.e. integrated processes, but separate decisions.

3.2.1 Both LUPA and SPLUMA also make provision that an application may be decided on the basis of a process prescribed under another law (e.g. NEMA). Both acts however, contain a *proviso* that such other process must also meet the requirements of either the applicable Municipal Planning By-law or LUPA (whichever is applicable). Due to different processes and requirements, the last requirement often means that in practice this option is of little benefit. Reforms under consideration for LUPA may soon relax this requirement, which will then result in expedience if this option is followed.

3.3 Aligned/parallel/synchronised processes – The third option involves the compiling and processing of the different applications, processes and decisions, but in a way that it is aligned/runs in parallel/synchronised with processes in terms of other legislation. Alignment in time means applications can be compiled/processed in parallel/a synchronised manner, and also that information generated through one process can be available to processes in terms of other legislation (e.g. information generated through the EIA process is available to the planning process). Chapter 3 of the Constitution in fact always required such alignment.

3.3.1 This option, for instance, means that the EIA and Municipal Planning applications must each be subjected to the process set out in terms of the respective legislation and each must be considered on its own merits in respect of the relevant considerations in terms of the respective legislation.

3.3.2 Whilst all three options outlined above is available, this communication will focus on the third option: alignment of/parallel/synchronised processes. The other options will be further investigated and implemented in due course.

Notwithstanding the above, there are principles that authorities should adhere to when aligning application processes as suggested, particularly if planning and EIA applications are run in parallel/synchronised. These are discussed below.

4. **Principles when aligning Planning and EIA processes**.

4.1 In terms of aligned processes, EIA and Municipal Planning applications must each be subjected to the process set out in terms of the respective legislation and each must be considered on the relevant considerations stipulated in the respective legislation. Legislation does not provide for the process in terms of one piece of legislation to be delayed because of another process required by another piece of legislation. The legislation also does not provide for one process to be held up or delayed because of another process required by another statute.

4.2 These principles have been established by our courts and the following three Constitutional Court judgements, specifically highlight the aspects referred to in this communication

- **Maccsand** (Pty) Ltd v City of Cape Town and Others (CCT103/11) (CC) [2012] ZACC 7; 2012 (4) SA 181 (CC); 2012 (7) BCLR 690 (CC) (12 April 2012);
- Minister of Local Government, Environmental Affairs and Development Planning of the Western Cape v **Lagoonbay** Lifestyle Estate (Pty) Ltd and Others (CCT 41/13) [2013] ZACC 39; 2014 (1) SA 521 (CC); 2014 (2) BCLR 182 (CC) (20 November 2013);
- **Fuel Retailers** Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province and Others (CCT67/06) [2007] ZACC 13; 2007 (10) BCLR 1059 (CC); 2007 (6) SA 4 (CC) (7 June 2007).

4.3 In **Maccsand** the Constitutional Court found:

> *"The 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."*

4.4 The Constitutional Court found in **Lagoonbay**:

> *It seems clear that environmental authorities and planning authorities may therefore consider some of the same factors when granting their respective authorisations. But that cannot detract from their statutory obligations to consider those factors, and indeed to reach* ***their own conclusions*** *in relation thereto."*(own emphasis)

4.5 In **Fuel Retailers** the Constitutional Court found:

> *"Need and desirability are factors that must be considered by the local authority in terms of the Ordinance. The local authority considers need and desirability from the perspective of town-planning and an environmental authority considers whether a town-planning scheme is environmentally justifiable. A proposed development may satisfy the need and desirability*

criteria from a town-planning perspective and yet fail from an environmental perspective. (...) *By their own admission therefore the environmental authorities did not consider need and desirability. Instead they relied upon the fact that (a) the property was rezoned for the construction of a filling station; (b) a motivation for need and desirability would have been submitted for the purposes of rezoning; and (c) the town-planning authorities must have considered the motivation prior to approving the rezoning scheme. Neither of environmental authorities claims to have seen the motivation, let alone read its contents. They left the consideration of this vital aspect of their environmental obligation entirely to the local authority. This in my view is manifestly not a proper discharge of their statutory duty. This approach to their obligations, in effect, amounts to unlawful delegation of their duties to the local authority. This they cannot do.* (…) *It is no answer by the environmental authorities to say that had they themselves considered the need and desirability aspect, this could have led to conflicting decisions between the environmental officials and the town-planning officials. If that is the natural consequence of the discharge of their obligations under the environmental legislation, it is a consequence mandated by the statute*. (…) *even if the environmental authorities were entitled to rely on the prior rezoning, I am of the view that it was incumbent on the environmental authorities to consider the matter afresh in the light of the provisions of NEMA* (…) *"*

4.6 Whilst planning legislation requires that the impact of development proposals on the environment be assessed as well, it is our experience that MPT's, Authorised Officials and Appeal Authorities regularly not only completely ignore the information generated through an EIA process, they also rely on the environmental authorities' assessment of that information and base their decision on that assessment. This is a practice the Constitutional Court in Fuel Retailers found *"amounts to unlawful delegation of their duties."* In the instance of a planning application this would mean that the decision taker has unlawfully delegated its duty to consider the environmental information to the environmental authorities. This the Constitutional Court states the decision taker cannot do.

4.7 This very important principle not only reminds us how planning decisions should consider, relevant considerations, but it very importantly also highlights the opportunity to be much more effective in dealing with applications. In **Maccsand** the Constitutional Court states that the Constitution obliges the spheres of government to cooperate with one another in mutual trust and good faith, and to co-ordinate actions taken with one another. It is within this context that we are calling on environmental and planning authorities and consultants in future coordinate EIA and planning applications much better.

4.8 Whilst taking these principles into consideration, municipalities are encouraged therefore to accept and process planning applications in parallel with other development applications, specifically EIAs and not wait for those processes to be finalised / decided. Soon formal agreements between the Department and municipalities may provide more regulated guidance, but as these agreements take time to conclude there is nothing preventing us from implementing a much better alignment of our processes, immediately.

4.9 In **Maccsand** this principle is established by the Constitutional Court, "*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."*

4.10 Notwithstanding the fact that the two processes are conducted completely independent from each other, it is often the case that the planning and environmental decisions are required to take into consideration very similar sets of information. Both Acts require the consideration of biophysical, social and economic considerations. If the two applications are compiled and processed in parallel it is likely that environmental information is generated through the EIA processes and that may be information required also by the planning authorities. In fact, most Municipal Planning by-laws (Section 65(1)(f)) now provide that information generated in an EIA "must" be considered in the planning process.

4.11 Practically, the above means that whilst it is not necessary for the planning process to wait for the EIA decision, it should wait for the information generated through the EIA process to become available for consideration in the planning process. If the relevant information is not available through the EIA process it must be obtained through the planning process or from other sources, but the decision-makers in terms of the planning legislation must have access to this information, if required. If this information is not considered it would result in relevant considerations not being considered, which could render the decision vulnerable to a judicial review in terms of PAJA Section 6(2)(e)(iii): *"A court or tribunal has the power to judicially review an administrative action if the administrative action was taken because… relevant considerations were not considered"* .

4.12 Whilst similar sets of information may be taken into consideration by the different authorities, it does not mean that similar decisions will be taken or that similar conditions may be imposed. The same information if viewed from an environmental perspective may have different outcomes from a process viewing that information from a municipal planning perspective. An important principle therefore is that one decision-taker cannot rely on the assessment or interpretation of the information by another authority in terms of another act. (Refer to ***Fuel Retailers*** above). Each authority must consider the importance and impact of the information in terms of the specific legislation. As an example, a municipal planning tribunal cannot rely on the EIA decision? to consider any environmental information. That environmental information must be considered independently in terms of the planning legislation, if required, by the relevant decision-taker and those advising it.

4.13 Authorities may also not ignore other processes and simply take a decision which is made subject to the outcome of a process in terms of another statute. Municipalities have in the past decided planning applications and as a condition determined that the application is subject to the outcome and conditions of the EIA process. In terms of the Promotion of Administrative Justice Act (PAJA), this practice is impermissible, firstly as it places the final decision before a legal prerequisite from another authority which is not authorised in terms of the Act to decide the application. Refer Section 6(2)(a)(i): "*A court or tribunal has the power to judicially review an administrative action if the administrator who took it was not authorised to do so by the empowering provision."*

4.14 Secondly, it is also impermissible in terms of PAJA, as the decision is then taken without relevant information being available to the decision taker.

4.15 From the above it follows that an appeal process should not have any effect on the processing of other related development planning applications. The basic principle is that the decision-taker should be satisfied that all relevant information and documentation has been sourced from other application processes and is **also** not required to wait for the outcome of the appeal. However, if during any appeal process, new information is generated that would or could have a bearing on the outcome of other processes which have not been decided, such information becomes relevant to the decision and should be obtained and considered by the decision-taker.

4.16 Finally, the principles outlined above also mean that authorities may reach different decisions and may impose different conditions in terms of the legislation and guidelines that governs the specific sector, even though some of the information sets might be the same. It may even result in one authority approving an application whilst another refuses it.

5. Municipal Differentiation

5.1 We acknowledge that circumstances between municipalities differ and the capacity to implement intricate integrated processes is not always available. Notwithstanding the capacity challenges, we believe that this opportunity to fast track development reviews and authorisations in general should be encouraged.

5.2 The Department of Environmental Affairs and Development Planning will provide the necessary support and capacity where possible to assist municipalities in their efforts to implement this proposal.

5.3 Our Country is currently in a deep financial and economic crisis, which requires that all of us must think differently about our role and how we can contribute to rebuilding our economy.

If any further information or technical assistance is required, please direct such request to Theo Rebel at theo.rebel@westerncape.gov.za or Kobus Munro at kobus.munro@westerncape.gov.za. Kindly acknowledge receipt of the authorisation.

Yours sincerely

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