Chapter 29

BACKGROUND, DEFINITIONS AND KEY SECTIONS OF SPLUMA

1. Introduction

1.1 Focus of this chapter

1.1.1 This chapter deals with the provisions of the **Spatial Planning and Land Use Management Act 16 of 2013** (SPLUMA)**,** which came into operation in 2015.[1]

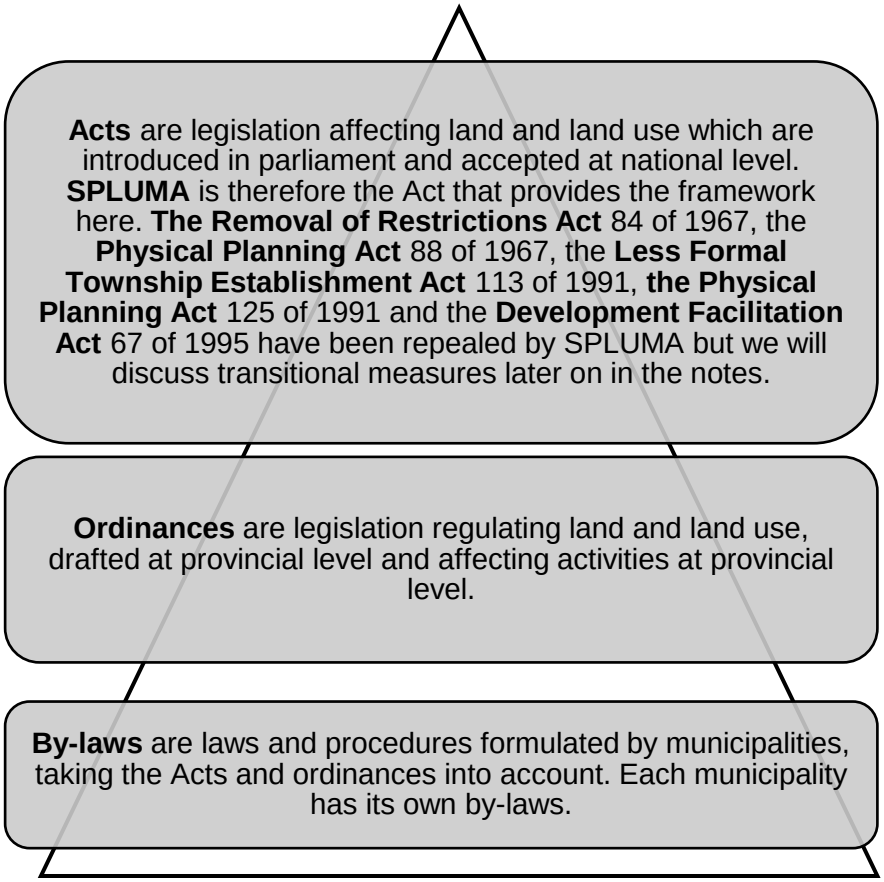
1.1.2 Because this Act creates a regulatory framework for:

- spatial planning (forward planning – the municipality's vision of where they want to go)
- structures for land use management;[2] and
- land use schemes (systems),

[1] SPLUMA came into operation on 1 July 2015 and the Regulations under SPLUMA came into operation on 13 November 2015.

[2] Land use management refers to the process that takes place when existing rights need to be changed so as to move to the "go–to-plan"; it is therefore based on interaction between the applicant and the vision of the municipality.

the spatial development frameworks must be prepared and adopted by national, provincial and/or municipal spheres of government and the different frameworks should be consistent with each other.[3]



1.1.3 Hierarchy diagram for Spatial Planning and Land Use:

1.2 Specific terminology

1.2.1 The Spatial Planning and Land Use Management Act 16 of 2013 will be referred to in these notes as “SPLUMA” or “the Act”.

1.2.2 The Regulations in terms of the Spatial Planning and Land Use Management Act 16 of 2013 will be referred to as the “SPLUMA Regulations”.

1.2.3 The former Transvaal Provincial Town-Planning and Townships Ordinance 15 of 1986 will be referred to as “Ordinance 15”.

[3] It is important to note that SPLUMA is merely framework legislation and that it therefore cannot provide the procedures to follow in land development and land use applications. The by-laws provide the step-by-step procedures to follow.

1.2.4 The former Transvaal Provincial Division of Land Ordinance 20 of 1986 will be referred to as "Ordinance 20".

1.2.5 The City of Tshwane Land Use Management By-law will be referred to as "Tshwane By-law".

1.2.6 The Gauteng Removal of Restrictions Act 3 of 1996 will be referred to as "The Gauteng Removal Act".

2. Background

2.1 Township establishment in South Africa takes place in terms of the provincial ordinances applicable in the specific province.[4] The process, which is overseen by municipalities, is a lengthy one, sometimes taking up to three years before a township is ready for occupation (Van Wyk, 2010).

2.2 Frustrated developers, tired of waiting for approvals and eager to provide exclusive high-income developments, discovered a loophole in the Development Facilitation Act 67 of 1995 (DFA) that would allow them, instead of following the municipal route, to apply for permission from provincial development tribunals to establish so-called land development areas in terms of the less cumbersome chapters V and VI of the DFA[5] (Van Wyk, 2010).

2.3 However, the Constitutional Court's decision in the landmark case of ***City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal***[6] declared Chapters V and VI of the DFA to be unconstitutional[7] and ruled that land use management decisions should in fact be taken by municipalities[8] (Van Wyk, 2010).

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4 Each province has its own provincial ordinances that must be followed in land development applications. Cape Town, for example, used to follow the Land Use Planning Ordinance; they use Township registers and not Subdivision registers.

5 Although the DFA provided a decision far more speedily than the Ordinance (in approximately 150 days), it never actually stipulated the steps to be taken for township establishment, as the Ordinance did. The DFA left it to the Gauteng Development Tribunal to dictate the process and owing to different interpretations the Chairperson of that Tribunal frequently failed to stipulate the correct steps to be taken. Section 16 of the Tshwane By-law now sets out the step-by-step procedures for each land use application.

6 (CCT 89/09) [2010] ZACC11; 2010 (6) SA 182 (CC); BCLR 859 (CC)

7 Section 60 of SPLUMA provides that all applications, appeals or other matters pending before a tribunal established in terms of section 15 of the DFA at the commencement of SPLUMA that have not been decided or otherwise disposed of must proceed and be disposed of in terms of SPLUMA.

8 National and provincial spheres can still pass Acts but only within the scope of their designated powers.

2.4 This in turn triggered the urgent introduction of legislation providing for a national framework of land use planning in the form of SPLUMA.[9]

3 Role of the Constitution of South Africa in SPLUMA

3.1 It is the State's obligation to realise the imperatives contained in the following sections of the Constitution: [10]

- **section 24** – to have the environment protected for the benefit of present and future generations through reasonable legislative and other measures, which include a land use planning system that is protective of the environment;
- **section 25** – to ensure the protection of property rights, including measures designed to foster conditions that enable citizens to gain access to land on an equitable basis;
- **section 26** – to have the right of access to adequate housing, which includes an equitable spatial pattern and sustainable human settlements; and
- **section 27(1)(b)** – to ensure that the State takes reasonable legislative measures, within its available resources, to achieve the progressive realisation of the right to sufficient food and water.

3.2 SPLUMA applies to the entire area of the Republic and is legislation enacted in terms of [11] –

- **section 44(2)** of the Constitution, insofar as it regulates provincial planning. Parliament may intervene, by passing legislation in accordance with section 76(1), with regard to, among others, a matter falling within a functional area listed in Schedule 5, when it is necessary to establish minimum standards required for the rendering of services.
- **section 151(4)** of the Constitution, which provides that the national or a provincial government may not compromise or impede a municipality's ability or right to exercise its powers or perform its functions[12]
- **section 155(7)** of the Constitution, which provides that the national government, subject to section 44, and the provincial governments have the legislative and executive authority to see to the effective performance by municipalities of their functions in respect of matters listed in Schedules 4 and 5 of the Constitution, by

9 It was also a matter of urgency to provide for the parts of our urban and rural areas which currently do not have any or have only limited spatial planning and land use management legislation and are therefore excluded from the benefits of these systems.

10 Part of the preamble to the Act.

11 Refer to section 2(1)(a) and (b) of SPLUMA.

12 The municipalities should therefore be the institution of first instance and **not** the provincial sphere. From this perspective, Ordinance 15 (as an example), which is provincial legislation, is inconsistent with SPLUMA insofar as it gives the province decision-making authority. SPLUMA stipulates that municipalities have decision-making authority regarding land use.

regulating the exercise by municipalities of their executive authority referred to in section 156(1)

- **section 156(1)** of the Constitution, which confers on municipalities the right to administer local government matters listed in Part B of Schedules 4 and 5

4 Objectives of the Act

4.1 The preamble to the Act indicates that fragmentation, duplication and unfair discrimination have been caused by multiple laws at national and provincial spheres of government in addition to laws applicable in the previous homelands and self-governing territories. Some parts of our urban and rural areas do not even have spatial planning and land use management legislation.

4.1.1 The **objectives** of the Act as captured in **section 3** are as follows:

3(a) To provide for a uniform,effective and comprehensive system of spatial planning and land use management for SA ***(section 4)***	3(b) To ensure that the system of spatial planning and land use management promotes social and economic inclusion	3(c) To provide for development principles and norms and standards ***(sections 6-8)***
3(d) To provide for the sustainable and efficient use of land **(*sections 7(b) and (c)*)**	3(e) To provide for cooperative government and intergovernmental relations amongst the national, provincial and local spheres of government **(*sections 9-11*)**	3(f) To redress the imbalances of the past and to ensure that there is equity in the application of spatial development planning and land use management systems

4.1.2 The objectives are fairly clear and do not need any further comment, save to emphasise the intention of the legislature to provide a **national** framework for spatial planning and land use management and provide for cooperative government and intergovernmental relations among the national, provincial and local spheres of government in an attempt to prevent the difficulties caused in municipal planning departments by applying national and provincial procedures in parallel.[13] The objectives are therefore an indication of what SPLUMA is attempting to do.

4.1.3 Section 12(2) of SPLUMA stipulates that "the national government, a provincial government and a municipality must participate in the spatial planning and land use management processes that impact on each other to ensure that the plans and programmes are coordinated, consistent and in harmony with each other". Thus the main objective (which is not very clearly spelt out) is that an application needs to be a once-off, integrated application where all sectors in the national, provincial and municipal spheres collaborate. An applicant would therefore not need to apply to the municipality for permission for land use development as well as obtain consent from provincial departments.

[13] Referring to case law in the form of *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal*.

5 Definitions[14]

In order to appreciate the extent of the impact of the Act in the context of conveyancing, certain key definitions must be investigated and understood. The most important of these are discussed below.

"Applicant" means a person who makes a land development application contemplated in section 45[15]

"Land" means any erf, agricultural holding or farm portion, and includes any improvement or building on the land and any real right[16] in land

"Land development" means the erection of buildings or structures on land, or the change of use of land, including township establishment, the subdivision or consolidation of land or any deviation from the land use or uses permitted in terms of an applicable land use scheme

''Land use'' means the purpose for which land is or may be used lawfully in terms of a land use scheme, existing scheme or in terms of any other authorisation, permit or consent issued by a competent authority, and includes any conditions related to such land use purposes;

''Land use management system'' means the system of regulating and managing land use and conferring land use rights through the use of schemes and land development procedures;

''Land use scheme'' means[17] the documents referred to in Chapter 5 for the regulation of land use;

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14 Definitions are captured in section 1 of SPLUMA.

15 In terms of this clause the application may only be made by – (a) an owner, including the State, of the land concerned; (b) a person acting as the duly authorised agent of the owner; (c) a person to whom the land concerned has been made available for development in writing by an organ of state or such person's duly authorised agent; or (d) a service provider responsible for the provision of infrastructure, utilities or other related services.

16 The only real right recognised in our law is the right of ownership. This is where a person has complete title (or control) over a thing or property. It is important to note that a person may also hold a limited real right in relation to property. This is a subcategory of real rights but an important distinction is that they are held by a person in relation to someone else's property. It establishes a legal relationship between a thing/property and a person (Rey, 2015). Examples of real rights are land leases, mineral rights and real rights in respect of units in a sectional title scheme. In the context of servitudes one could mention praedial servitudes like a right of way.

17 The land use scheme is a system of land use management, in terms of legislation, which allocates legal rights to land within its area for development and the erection and use of buildings within the ambit of specific conditions and control measures. A land use scheme is the same as the "old" town planning scheme and consists of maps covering the whole scheme area down to an individual stand level, with zonings indicated in colour codes, plus Annexures indicating conditions and controls for each stand" (City Scope, 2012). When Ordinance 15 refers to the "amendment of a town planning scheme" this is equivalent to an application for rezoning – to change the land use from, for example, residential to commercial. Broad categories of land uses in the land use scheme indicate different zonings, for example Residential 1, or Special Residential, Business 2, Industrial 1, Public Open Space, Undetermined, etc. The Tshwane By-law now also refers to rezoning rather than amendment.

''Municipal Planning Tribunal'' means a Municipal Planning Tribunal referred to in Chapter 6;

''Owner'' means the person registered in a deeds registry as the owner of land or who is the beneficial owner in law;[18]

''Restrictive condition'' means[19] any condition registered against the title deed of land restricting the use, development or subdivision of the land concerned;

''Spatial development framework'' means[20] a spatial development framework referred to in Chapter 4;

"This Act'' includes the regulations made in terms of this Act;

''Township register'' means an approved subdivision register of a township in terms of the Deeds Registries Act;

''Township'' means an area of land divided into erven, and may include public places and roads indicated as such on a general plan; and

''Zone'' means a defined category of land use which is shown on the zoning map of a land use scheme.

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[18] Beneficial ownership is not defined in SPLUMA, but it is defined in the Tshwane By-law. Applicants in terms of Deed of Grants (R293), informal ownership and 99-year leasehold can now also apply for land use changes**.**

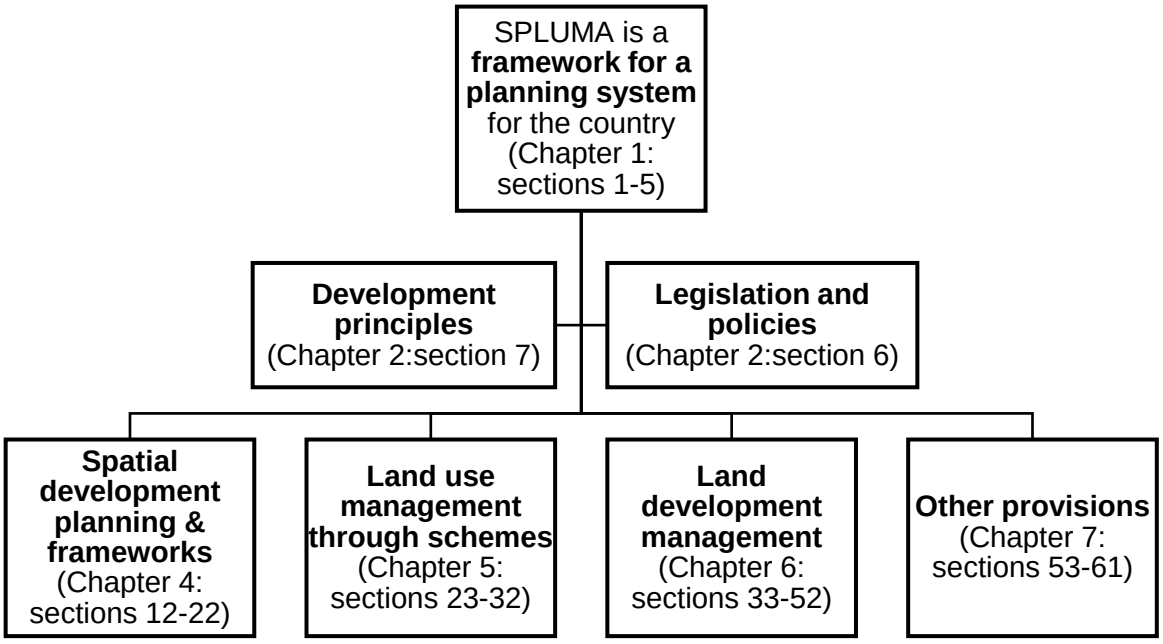
[19] The Gauteng Removal of Restrictions Act 3 of 1996 will ***no longer*** play an important role in rezoning applications and the consequent removal of restrictive conditions in the title deed. Section 45(6) of SPLUMA says the following: "Where a condition of title, a condition of establishment of a township or an existing scheme provides for a purpose with the consent or approval of the administrator, a Premier, the townships board or any controlling authority, such consent may be granted by the municipality and such reference to the administrator, a Premier, the townships board or controlling authority is deemed to be a reference to the municipality." An applicant therefore needs to apply for the removal of any restrictive conditions in terms of section 16(2) of the Tshwane By-law.

[20] A spatial development framework is a "policy document of the Municipality, drafted in terms of the requirements of the Municipal Systems Act and representing the physical or spatial component of the Integrated Development Plan (IDP). This document presents a preferred land use pattern, against which development proposals are adjudicated by the authorities. The Integrated Development Plan in turn sets out the development vision of the Municipality in terms of physical, financial, institutional, social, political and operational criteria. It serves as a budgeting tool for the Municipality for capital spending" (City Scope, 2012). It is suggested in SPLUMA that this colour-coded plan should have different layers, namely:

- one from the Department of Agriculture depicting high-value to low-value areas in different colours,
- one from the Department of Minerals depicting the areas that have new mineral rights,
- one from the Department of Environmental Affairs depicting sensitive areas, and
- one from the Department of Rural Development and Land Reform depicting land claims, 99-year leaseholds and R293 grants.

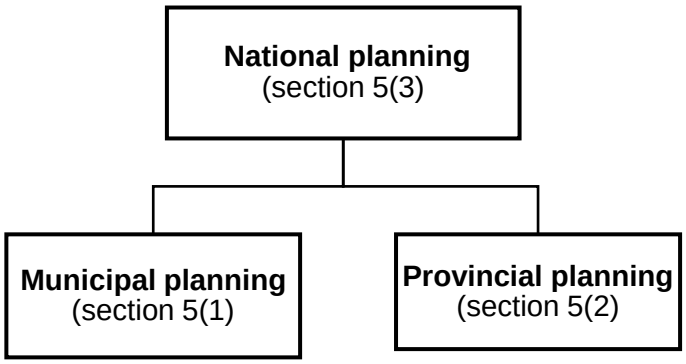
6 Key sections of the Act

6.1 Schematic representation of the different sections of the Act



6.1.1 **Section 2 – Application of Act**

This Act applies to the entire area of the Republic and is legislation enacted to regulate:[21]



[21] Legislation enacted in terms of sections 155(7) and 44(2) of the Constitution. Spatial development frameworks must be prepared and adopted by national, provincial and municipal spheres of government and the different frameworks should be consistent with each other.

Legislation that is **not repealed**[22] by this Act may not prescribe an alternative or parallel mechanism, measure, institution or system for spatial planning, land use, land use management and land development in a manner which is inconsistent with the provisions of this Act.[23]

6.1.2 Section 5 – Categories of spatial planning

Municipal planning	Provincial planning	National planning
• The compilation, approval and review of integrated development plans; • the compilation, approval and review of the components of an integrated development plan prescribed by legislation and falling within the competence of a municipality, including a spatial development framework and a land use scheme; and • the control and regulation of the use of land within the municipal area where the nature, scale and intensity of the land use do not affect the provincial planning mandate of provincial government or the national interest.	• The compilation, approval and review of a provincial spatial development framework; • monitoring compliance by municipalities with this Act and provincial legislation in relation to the preparation, approval, review and implementation of land use management systems; • the planning by a province for the efficient and sustainable execution of its legislative and executive powers insofar as they relate to the development of land and the change of land use; and • the making and review of policies and laws necessary to implement provincial planning.	• The compilation, approval and review of spatial development plans and policies or similar instruments, including a national spatial development framework; • the planning by the national sphere for the efficient and sustainable execution of its legislative and executive powers insofar as they relate to the development of land and the change of land use; and • the making and review of policies and laws necessary to implement national planning, including the measures designed to monitor and support other spheres in the performance of their spatial planning, land use management and land development functions.

6.1.3 Section 6 – Application of development principles

The general principles set out in this Chapter apply to all organs of state and other authorities responsible for the implementation of legislation regulating the use and development of land, and guide –

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[22] The following legislation **<u>has NOT been repealed</u>** by SPLUMA:
- ✓ Proclamation 293 of 1962 – thus all applications submitted in terms of that Act can be finalised under that Act (not SPLUMA)
- ✓ Gauteng Removal of Restrictions Act 3 of 1996
- ✓ Ordinance/Other Legislation (NOT repealed by SPLUMA) e.g. Act 70 of 1970, Act 21 of 1940.

[23] Section 2(2) and section 33(1) of SPLUMA imply that although certain legislation has not been repealed, it may NOT be inconsistent with SPLUMA. Section 33(1) of SPLUMA specifically stipulates that "Except as provided in this Act, all land development applications must be submitted to a municipality as the authority of first instance." Therefore, no alternative or parallel systems for land use management and land development will be valid – which is a specific reference to, among others, Gauteng Ordinances 15 and 20 of 1986. This specific clause is of great importance to municipalities since this subsection gives all municipalities planning powers until they promulgate their own by-laws.

- the preparation, adoption and implementation of any spatial development framework, policy or by-law concerning spatial planning and the development or use of land;
- the compilation, implementation and administration of any land use scheme or other regulatory mechanism for the management of the use of land;
- the sustainable use and development of land;
- the consideration by a competent authority of any application that impacts or may impact upon the use and development of land; and
- the performance of any function in terms of this Act or any other law regulating spatial planning and land use management.

6.1.4 **Section 7 – Development principles**[24]

Schematic representation of the development principles that apply to spatial planning, land development and land use management:

The principle of spatial justice

- Section 7(a)(ii) stipulates that spatial development frameworks and policies at all spheres of government must address the inclusion of persons and areas that were previously excluded, with an emphasis on ***informal settlements***, former homeland areas and areas characterised by widespread poverty and deprivation.

The principle of spatial sustainability

- This principle promotes land development that is within the ***fiscal***, institutional and administrative means of the Republic.
- In terms of the principle of spatial sustainability, spatial planning and land use management systems must, among others, ensure that special consideration is given to the protection of prime and unique agricultural land.

The principle of efficiency

The principle of spatial resilience, whereby flexibility in spatial plans, policies and land use management systems is accommodated to ensure sustainable livelihoods in communities most likely to suffer the impacts of economic and environmental shocks

The principle of good administration

[25]

[24] The DFA was the first Act to move away from legislative provisions to planning principles and SPLUMA also made provision for principles rather than legislative provisions in section 7 of the Act. The development principles in SPLUMA therefore form the basis on which the by-laws are drafted.

[25] SPLUMA does not define **"informal settlement"** but it is clear from the development principles in SPLUMA that the previously excluded informal settlement needs to be addressed. SPLUMA does not stipulate how to address informal settlement development and this needs to be clarified by the

6.1.5 Section 8 – Norms and standards

The Minister may, in consultation with or at the request of another Minister responsible for a related land development or land use function and after public consultation, prescribe norms and standards to guide the related sectoral land development or land use.[26]

6.1.6 Sections 9, 10 and 11 – Intergovernmental support

These three sections can be summed up as follows: the provincial sphere must take their role of providing support and monitoring very seriously to facilitate a "one port of call" system. At present, if an application for land development is made to the municipality, the applicant must also submit the application to various provincial and national departments for their comments as well (e.g. SANRAL, the Department of Agriculture, etc.). If this section were fully operational, the national and provincial sphere would coordinate a one-stop shop in their departments, instead of the poor applicant being expected to go from one department to the next to obtain their comments.[27]

6.1.7 Sections 12 to 22 – Spatial development frameworks[28]

These sections deal with the spatial planning component which requires national, provincial and local spheres to reach agreement on the direction in which they collectively want to go. As previously mentioned, the current position requires an application to go in turn to the municipality, the Department of Agriculture, Gautrans, etc. Once there is an integrated spatial development framework in place (including sector plans for each department) it will be easier for an application to go through the channels much faster, since planning based on input from all the departments will be taken into account.

Municipal By-law. (In terms of Ordinance 15 anything informal is illegal in terms of land use and the municipality has to go to court to obtain an order to close and remove said informal settlement, thus the Ordinance does not make provision for informal settlements.) The by-law stipulates, however, that no illegal townships are permissible, but to accommodate informal settlements, it provides that if a regulatory or formalised process is applicable to informal settlements, they will be deemed to be legal townships.
The Tshwane By-law addresses the "**fiscal means"** by stipulating that a development cannot take place unless the services are paid for, otherwise the municipality will have to pay for the services.

[26] Although land use management and development are now regulated by SPLUMA, provincial legislation and the by-laws, the Minister has left a door open so that in future he will be able to declare norms and standards additional to the current legislation. An example might be that no fees are payable on rezoning applications and this norm would be enforceable on the whole country. There is therefore no certainty at this stage as to what will be declared to be norms and standards and at what stage said norms will be promulgated.

[27] SPLUMA Regulation 16 stipulates that the departments must provide their comments within a prescribed period and if comments are not provided within that time frame, it is deemed that there are no comments. While this sounds attractive, in practice township establishment is not possible without those comments.

[28] Sections 1–15 of the Tshwane By-law deal with the integration of spatial planning development frameworks as provided for in SPLUMA Chapter 4. (Chapter 4 contains planning on "where we want to go to – the vision".)

6.1.8 **Section 24 – Land use scheme**

- A municipality must adopt and approve a single land use scheme for its entire area within five years from 1 July 2015.[29]
- A land use scheme must –
  - include appropriate categories of land use zoning and regulations for the entire municipal area, including areas not previously subject to a land use scheme;
  - take cognisance of any environmental management instrument adopted by the relevant environmental management authority, and must comply with environmental legislation;
  - include provisions that permit the incremental introduction of land use management and regulation in areas under traditional leadership, rural areas, informal settlements, slums and areas not previously subject to a land use scheme;
  - include provisions to promote the inclusion of affordable housing in residential land development;
  - include land use and development incentives to promote the effective implementation of the spatial development framework and other development policies;
  - include land use and development provisions specifically to promote the effective implementation of national and provincial policies; and
  - give effect to municipal spatial development frameworks and integrated development plans.

6.1.9 **Section 25 – Purpose and content of land use scheme**

- A land use scheme must give effect to and be consistent with the municipal spatial development framework and determine the use and development of land within the municipal area to which it relates in order to promote –
  - economic growth;
  - social inclusion;
  - efficient land development; and
  - minimal impact on public health, the environment and natural resources.

- A land use scheme must include –
  - scheme regulations setting out the procedures and conditions relating to the use and development of land in any zone;
  - a map indicating the zoning of the municipal area into land use zones; and
  - a register of all amendments to such land use scheme.

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[29] A municipality is primarily responsible for land use management ("How are we going to get there?"– this involves existing rights and cases where we amend the rights to run parallel with the "go to plan", thus land use management is a reactive process) and the primary instrument for response is the land use scheme (for example, if an applicant wants to change an erf from residential to commercial, the municipality will consult their "plan" and if according to the location of the erf on the plan it seems to be a good idea to effect said change, the municipality will consent to the change). The land use schemes must be consistent with each other (SPLUMA section 12) and give effect to municipal spatial development frameworks***. Section 16 of the Tshwane By-law reflects the land use management procedure.***

6.1.10 Section 26 – Legal effect of land use scheme

Land use schemes that have been adopted and approved have the force of law and all land owners and users of land, including a municipality, a state-owned enterprise and organs of state [30]within the municipal area, are bound by the provisions of such land use scheme.[31]

6.1.11 Section 28 – Amendment of land use scheme and rezoning[32]

- A municipality may amend its land use scheme by rezoning any land considered necessary by the municipality to achieve the development goals and objectives of the municipal spatial development framework.
- Where a municipality intends to amend its land use scheme in terms of subsection (1), a public participation process must be undertaken to ensure that all affected parties have the opportunity to make representations on, object to and appeal the decision.
- The Minister must, after consultation with the competent authorities, provide further guidance to provinces and municipalities to achieve national norms and standards relating to land use changes.
- Despite sections 35 and 41, any change to the land use scheme of a municipality affecting the scheme regulations setting out the procedures and conditions relating to the use and development of land in any zone in terms of section 25(2)(a) may only be authorised by the Municipal Council.

6.1.12 Section 32 – Enforcement of land use scheme

A municipality may pass by-laws aimed at enforcing its land use scheme.[33]

6.1.13 Section 33 – Municipal land use planning

All land development applications must be submitted to a municipality as the authority of first instance. Despite submitting same to the municipality, where an application or authorisation is required in terms of any other legislation for a related land use, such application must also be made or such authorisation must also be requested in terms of that legislation.[34]

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30 SPLUMA Section 45(1) provides that only an owner may apply for land development and "owner" includes the state. The state is therefore also bound to the land use scheme of a municipality.

31 All land development applications must be decided within the context of the land use scheme.

32 The Tshwane By-law dedicated Chapter 4 (sections 9–13) to land use schemes – to their drafting, review, amendment and contents, as well as public participation. Township schemes are not amended by rezoning only but also by a few types of application as set out in section 41 of SPLUMA.

33 The Act, as such, does not deal with registration issues in deeds registries. It is primarily framework legislation, thus making the by-laws important in conveyancing.

34 RC 16 of 2015 – The effect of this is that consents required in terms of legislation NOT repealed by SPLUMA (e.g. Act 21 of 1940 or Act 70 of 1970) must be issued by that specific controlling authority. That function is NOT delegated to the municipality. Deeds office examiners will then ensure that where authorization is also regulated in terms of another law, the relevant Municipality **and** the authority in terms of that legislation may exercise their powers jointly in an integrated document or by separate documents as provided for in SPLUMA Section 30. (RC 3 of 2016)

6.1.14 Section 35 – Establishment of Municipal Planning Tribunals [35]

A municipality must, in order to determine land use and development applications within its municipal area, establish a Municipal Planning Tribunal.[36] A municipality must categorise development applications into those to be considered by an official[37] and those to be considered by the Municipal Planning Tribunal.

6.1.15 Section 36 – Composition of Municipal Planning Tribunals

- A Municipal Planning Tribunal must consist of –
  - officials in the full-time service of the municipality; and
  - persons appointed by the Municipal Council who are not municipal officials and who have knowledge and experience of spatial planning, land use management and land development or the law related thereto.
- Municipal councillors may not be appointed as members of a Municipal Planning Tribunal.[38]
- A Municipal Planning Tribunal must consist of at least five members or more as the Municipal Council deems necessary.
- The Municipal Council must designate –
  - a member of the Municipal Planning Tribunal as chairperson; and
  - another member as deputy chairperson, to act as chairperson of the Municipal Planning Tribunal when the chairperson is absent or is unable to perform his or her duties.

6.1.16 Section 40 – Determination of matters before Municipal Planning Tribunals

Section 40(7) sets out the powers of the Municipal Planning Tribunal:

- approve, in whole or in part, or refuse any application referred to it in accordance with this Act;
- in the approval of any application, impose any reasonable conditions, including conditions related to the provision of engineering services and the payment of any development charges;
- make an appropriate determination regarding all matters necessary or incidental to the performance of its functions in terms of this Act and provincial legislation;[39]

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35 Municipal planning tribunals and authorised officials are the decision-making authorities with regard to land development applications like applications for rezoning, township establishment and subdivision. Applications are sorted into opposed and unopposed categories and then decided by either the MPT or the authorised official, depending on which category the application falls into.

36 The municipalities may co-operate to establish Joint Municipal Planning Tribunals. The tribunals consist of municipal officials and suitably qualified external persons appointed by the Municipal Councils (sections 34 and 36).

37 The authorised official has the same powers and functions as the Tribunal.

38 The role of municipal councillors is to make policy, therefore great emphasis is placed on the spatial development framework as the primary mechanism for dictating direction in a municipality. A councillor's involvement on an application-by-application basis compromises objectivity in dealing with applications.

39 Although the MPT does the conditional approval, there is a process that takes place between conditional approval and actual registration which specifically relates to SPLUMA (section 53 and section 16(10) of the by-law). The MPT members are not legally qualified people – so they may

- conduct any necessary investigation;
- give directions relevant to its functions to any person in the service of a municipality or municipal entity;
- decide any question concerning its own jurisdiction; or
- appoint a technical adviser to advise or assist in the performance of the Municipal Planning Tribunal's functions in terms of this Act.

6.1.17 **Section 41 – Change with approval of Municipal Planning Tribunal**[40]

The Municipal Planning Tribunal, upon application in the prescribed manner, may:

change the use, form or function of land; or

remove, amend or suspend a restrictive condition

An application contemplated in this section includes an application for:

The amendment of a land use or town planning scheme, except any change affecting the scheme regulations in terms of section 25(2)(a) -- *thus regulations setting out the procedures and conditions relating to the use and development of land in any zone*

Township establishment

Subdivison of land

Consolidation of different pieces of land

Removal, amendment or suspension of a restrictive condition

indicate in broad outline any servitude to be registered, but the details would appear in the section 16(10) or section 53 certificate to be lodged with the Registrar.

40 This section merely sets out the different applications that could be made but the details of the process of these and other applications are contained in section 16 of the Tshwane By-law. RC 3 of 2016 stipulates that "SPLUMA will find application if the controlling authority determines that the land claim will ultimately have the effect of change of the use, form or function of land, as determined in Section 41(1). This has the effect that a Municipality will have to lodge a certificate that all requirements and conditions of approval has been met in all matters where the usage of the land will change or if a person obtain land as a beneficial owner in excisions as an example." (RC 3 of 2016)

6.1.18 Section 42 – Deciding an application

In considering and deciding an application a Municipal Planning Tribunal must –

- be guided by the development principles set out in Chapter 2
- make a decision which is consistent with norms and standards, measures designed to protect and promote the sustainable use of agricultural land, national and provincial government policies and the municipal spatial development framework; and
- **take into account –**[41]
  - the public interest
  - the constitutional transformation imperatives and the related duties of the State;
  - the facts and circumstances relevant to the application
  - the respective rights and obligations of all those affected[42]
  - the state and impact of engineering services, social infrastructure and open space requirements; and
  - any factors that may be prescribed, including timeframes for making decisions.
- When considering an application affecting the environment, a Municipal Planning Tribunal must ensure compliance with environmental legislation.
- An application may be approved in whole or in part, or rejected.

6.1.19 Section 43 – Conditional approval of application

An application may be approved subject to such conditions as –

- are determined by the Municipal Planning Tribunal; or
- may be prescribed.
- A conditional approval of an application lapses if a condition is not complied with, within –
  - a period of five years from the date of such approval if the approval did not specify a date by which said approval must comply; or[43]
  - the period for compliance specified in the approval (which together with any extension which may be granted, may not exceed five years).[44]

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41 This is another important section (section 42(1)(c)) in which the matters to be taken into account when arriving at a decision are set out. The Council can, however, make further provisions in line with the spatial development frameworks.

42 These include servitudes, mineral rights, etc., **so this is the point in the conveyancing certificate where the conveyancer must set out all the rights to the property that are affected – rights of third parties, national and provincial departments, etc.**

43 SPLUMA is not applied retrospectively and the Municipality may refuse an application for extension.

44 Conditional approval referred to in SPLUMA Section 41 lapses if a condition is not complied with, within a period of 5 years from the date of approval. The approval can prescribe a shorter period for compliance. If extension is granted, it may not exceed 5 years from date of the original approval. This has the effect that a new land development application need to be applied for if not registered within said period.
This lapsing of the application if not completed within 5 years will also apply to Sectional Titles. If a developer reserves a Real Right of Extension in terms of Section 25 of the Sectional Titles Act, the

6.1.20 Section 44 – Timeframes for applications

- The Minister must, after public consultation, prescribe timeframes for the consideration and determination of an application before a Municipal Planning Tribunal.[45]
- A Municipal Planning Tribunal must consider, hear and determine a land development application within a timeframe prescribed by the Minister in terms of subsection (1).
- Regulations relating to timeframes may –
  - apply differently to Municipal Planning Tribunals; or
  - differentiate types of land development applications to which different timeframes apply.

6.1.21 Section 45(6) – Parties to land development application

Where a condition of title, a condition of establishment of a township or an existing scheme provides for a purpose with the consent or approval of the administrator, a Premier, the townships board or any controlling authority, such consent may be granted by the municipality and such reference to the administrator, a Premier, the townships board or controlling authority is deemed to be a reference to the municipality.[46]

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proposed development need NOT to be complied with within the 5 years period as the said right is not conditional approval as referred to in Section 43(2) of SPLUMA.
SPLUMA is NOT applicable on registration of a subdivision of a section in terms of Section 22 or a consolidation of sections in terms of Section 23 of the Sectional Titles Act, as Section 41 of SPLUMA does not make reference thereto and no new conditions are included. (RC 3 of 2016)
Section 16(1)(x)(i) and (ii) of the Tshwane By-law sets out that an applicant shall within a period of 12 months or such further period as the Municipality may allow, which period shall not exceed five years as contemplated in section 43(2) of the Act:

(i) provide proof that he has complied with the provisions of sections 21 and 22 of this By-law read with section 40(7) of the Act, with regard to conditions related to payment of development charges and/or contributions, the provision of engineering services and the provision of parks and open spaces; and

(ii) complied with the conditions as contemplated in subsection (v), which conditions must be complied with prior to the land use rights being adopted, coming into operation or being exercised in terms of subsection (y);

failing which the application shall lapse.
Section 16(6)(d) of the Tshwane By-law also stipulates that where the applicant has lodged the plans, diagrams or other documents contemplated in subsection (a) but fails to comply with any requirements set by the Surveyor-General, within a time period determined by the Surveyor-General, which determination of time shall take into account the provisions of this By-law, read with section 43(2) of the Act, and shall not cumulatively exceed 5 years, the application shall lapse.

[45] It is important for conveyancers to note that the timeframes are already set out in SPLUMA Regulation 16 as well as in section 16 of the Tshwane By-law. It is thus very important to stay within these timeframes (or apply for extension where necessary) regardless of the fact that an application might need to be resubmitted because it was incomplete. If the timeframe exceeds the five years stipulated in the above footnote, the township approval will lapse

[46] I respectfully refer to a mistake made in RC 16 of 2015, which states the following: "Conditions of title or a condition of establishment of a township or an existing scheme requiring consent or approval of the Administrator, a Premier, the Townships Board or a controlling authority, will from 1 July 2015 be issued by the Municipality." ***SPLUMA does not refer to the Municipal Planning Tribunal as the***

6.1.22 Section 46 – Notification to Surveyor-General and Registrar of Deeds[47]

A Municipal Planning Tribunal must, within the prescribed period after a land use decision affecting the use of land not in accordance with a condition in a title deed, notify the –

- Registrar of Deeds in whose office the deed or document is filed of such approval; and
- office of the Surveyor-General, where such approval affects a diagram or general plan filed in that office.

Upon receipt of the notification, the Registrar of Deeds or the Surveyor-General must endorse the affected records to give effect to such decision.

6.1.23 Section 47 – Restrictive conditions

- A restrictive condition may, with the approval of a Municipal Planning Tribunal and in the prescribed manner, be removed, amended or suspended.
- A removal, amendment or suspension of a restrictive condition contemplated in subsection (1) must, in the absence of the contemplated written consent, be effected –
  - in accordance with section 25 of the Constitution and this Act;
  - with due regard to the respective rights of all those affected, and to the public interest; and[48]

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decision making authority, consent will therefore be issued by the Townships Board. However consents required in terms of legislation NOT repealed by SPLUMA (for example Act 21 of 1940, Act 70 of 1970, etc.) must be issued by that controlling authority, as section 45 (6) of SPLUMA refers only to conditions. This function is thus not delegated to the Municipality". The **Gauteng Removal of Restrictions Act** refers to the substitution of authority in section 2(a) (any reference to a Minister, Administrator, Townships Board, Competent Authority or Controlling Authority shall be construed as a reference to the municipality, thus delegation or a substitution of authority did take place here). The only **conflict** that arises between **SPLUMA** and the **Gauteng Removal Act** is that the Gauteng Removal Act does not give the municipality the authority in matters listed in section 3(3) (for example any building line restriction in terms of the Advertising on the Roads and Ribbon Development Act of 1940). SPLUMA sections 45(6) and (7) stipulates that the delegated authority to the municipality is not taken away in matters where a national department's consent is needed, but that said application simply needs to be referred to that specific department as well. RC 3 of 2016 rectified the error by stating the following: "Only where powers of the controlling Authority have been assigned to the Municipality, will the municipality on its own be able to issue such consents. Section 45(6) should be narrowly interpreted. The provisions of sections 33(2) and 30 must be applied where powers of the controlling authority have not been assigned to the municipality. Examiners must therefore ensure that an integrated consent by the municipality and the authority in terms of the mentioned legislation or separate consents are lodged. (RC 3 of 2016)

[47] The "how", "the where" and "the what" are not stipulated in SPLUMA – said detail being captured in the Tshwane By-law. According to RC 3 of 2016 the notification referred to in SPLUMA Section 46(1), may only be lodged with the lodgement of an application or with the deeds to be registered. In the case of a new Township to be opened, the notification can be filed on the Township file together with the conditions of establishment. (RC 3 of 2016)

[48] Section 47 of SPLUMA therefore stipulates that any restrictive conditions (including Conditions of Establishment) may be removed in terms of this Act. Servitudes cannot be removed in terms of SPLUMA, but have to be removed in terms of the Gauteng Removal Act. ***SPLUMA*** defines **''restrictive condition''** as any condition registered against the title deed of land restricting the use, development or subdivision of the land concerned (thus no mention of the word "servitude"). ***The Gauteng Removal Act*** stipulates in section 3(1)(a) that among other restrictions, the municipality may

- in the prescribed manner, if such removal, amendment or suspension will deprive any person of property as contemplated in section 25 of the Constitution.

➢ A Municipal Planning Tribunal considering an application to remove, amend or suspend a restrictive condition is not liable to compensate any person for any loss arising from or related to a decision made in good faith and in terms of this Act to remove, amend or suspend a restrictive condition.

- Notice of an application to remove, amend or suspend a restrictive condition which operates for the benefit of the State must be in writing and given in the prescribed manner to the organ of state which is responsible for the administration of the law or the performance of the function to which such condition relates.
- An applicant at whose instance a restrictive condition is removed, amended or suspended in terms of this Act, must, within the prescribed period and in the prescribed manner, apply to the Registrar of Deeds concerned for the appropriate recording of such removal, amendment or suspension, and the Registrar of Deeds must in the prescribed manner record such removal, amendment or suspension.[49]

6.1.24 Section 49 – Provision of engineering services[50]

➢ An applicant is responsible for the provision and installation of internal engineering services.
➢ A municipality is responsible for the provision of external engineering services.
➢ Where a municipality is not the provider of an engineering service, the applicant must satisfy the municipality that adequate arrangements have been made with the relevant service provider for the provision of that service.
➢ An applicant may, in agreement with the municipality or service provider, install any external engineering service instead of payment of the applicable development charges, and the fair and reasonable cost of such external services may be set off against development charges payable.
➢ If external engineering services are installed by an applicant instead of payment of development charges, the provision of the Local Government: Municipal

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amend, suspend or remove servitudes against the title of its own accord or on application by an applicant. ***The Tshwane By-law*** defines "restrictive condition" as a restrictive condition as contained in SPLUMA, read with the Gauteng Removal of Restrictions Act 3 of 1996 and section 2(2) of SPLUMA. SPLUMA does not mention "servitude" and the Gauteng Removal Act does, so that in this respect it is inconsistent with SPLUMA; the Tshwane By-law does not mention "servitude" either. Different processes would therefore be needed to remove "servitudes" in terms of SPLUMA and the Tshwane By-law.

[49] RC 14 of 2015. There are no prescriptive provisions in the Act or Regulations in respect of how and when such application must be made. The provisions of the Deeds Registries Act 47 of 1937 must, however, be applied here for the recording of the removal, amendment or suspension of the condition. An application must be lodged in terms of section 3(1)(v) of Act 47 of 1937 in which reference is made to the relevant Act /by-law /land use scheme by which the condition has been removed/amended/suspended. RC 3 of 2016 confirmed this as well.

[50] Chapter 7 of the Tshwane by-laws is dedicated to the detailed provisions regarding engineering services. A conveyancer must therefore scrutinise the approval conditions for servitudes to be registered in favour of the municipality regarding services.

Finance Management Act 56 of 2003, pertaining to procurement and the appointment of contractors on behalf of the municipality does not apply.

6.1.25 Section 51 – Internal appeals

- A person whose rights are affected by a decision taken by a Municipal Planning Tribunal may appeal against that decision by giving written notice of the appeal and reasons to the municipal manager within 21 days of the date of notification of the decision.
- The municipal manager must within a prescribed period submit the appeal to the executive authority of the municipality as the appeal authority.[51]

6.1.26 Section 53 – Commencement of registration of ownership

The registration of any property resulting from a land development application may not be performed unless the municipality certifies that all the requirements and conditions for the approval have been complied with.[52]

6.1.27 Section 54 – Regulations

The Minister may make regulations consistent with the Act, prescribing, among other things:

- procedures concerning the lodging of applications and the consideration and decision of such applications;
- fees payable in connection with applications and appeals.

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[51] Parties aggrieved by municipal land use decisions are no longer able to appeal such decisions at provincial level through the mechanism of section 44 of the Land Use Planning Ordinance 15 of 1985 ("LUPO"). The Constitutional Court, in *Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v The Habitat Council and Others; Minister of Local Government, Environmental Affairs and Development Planning (CCT 117/13),* confirmed the order of the Western Cape High Court declaring section 44 unconstitutional and invalid. Anyone intending to appeal a decision made in terms of LUPO, after exhausting a municipality's internal remedies, will now have to approach the courts for relief. Website address for the court case: http://www.saflii.org/za/cases/ZAWCHC/2013/112.html.
A similar provision exists in section 59 of the Transvaal Town planning Ordinance 15 of 1986 and it has the effect that the condition as contained in the Transvaal Ordinance will similarly be unconstitutional. Upon the enactment of SPLUMA and the Tshwane By-laws, the Township Board of Gauteng will also be unconstitutional. The Township Board, in acknowledgement of this constitutional court case, is thus in the process of winding down their operations. SPLUMA and the by-law contemplates that appeals must be submitted internally to the municipality in terms of section 53 of SPLUMA read with section 19 of the by-law.
The appeal body in terms of SPLUMA in this section is the "executive authority", namely the mayor. (Ironically, the mayor is a council member and according to SPLUMA a council member may not be part of the Municipal Planning Tribunal, but here the mayor, who is a council member, is on the Board of Appeal.)

[52] **Therefore all services will need to be installed before registration may take place.**
Section 16(10) of the Tshwane By-law sets out in detail when transfer and registration are restricted. This Section has the effect that a municipality will have to lodge a certificate that all requirements and conditions for approval have been complied with in all cases where an opening of a sectional title scheme is lodged in terms of Section 11(1) of the Sectional Titles Act, Act 95 of 1986. (RC 3 of 2016)

Regulations in force under any law repealed by section 59 must, despite the repeal, continue to apply if they are not inconsistent with the provisions of this Act.[53]

6.1.28 **Section 55 – Exemptions**[54]

The Minister may, in the public interest, at the request of a province or municipality, by notice in the *Gazette* –

- exempt from one or all the provisions of this Act –
  - a piece of land specified in the notice;
  - an area specified in the notice;
- substitute alternative provisions consistent with this Act to apply in such a case; and withdraw an exemption granted in terms of paragraph *(a)*.The exemption or withdrawal contemplated in subsection (1) may be made subject to such conditions, inclusive of directives relevant to the performance of any function by any organ of state or competent authority within a specified time limit as the Minister, after consultation with the said organ of state or competent authority, considers appropriate.

6.1.29 **Section 59 – Repeal of laws**

The laws mentioned in Schedule 3 are hereby repealed to the extent indicated in the third column of that Schedule:

- Removal of Restrictions Act 84 of 1967 – the whole[55]
- Physical Planning Act 88 of 1967 – the whole
- Less Formal Township Establishment Act 113 of 1991 – the whole
- Physical Planning Act 125 of 1991 – the whole
- Development Facilitation Act 67 of 1995 – the whole[56]

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53 The Regulations were published on 23 March 2015 and came into effect on 13 November 2015.

54 RC 3 of 2016 states that the Surveyor-General must refer to an Exemption on the applicable diagram or general Plan. (RC 3 of 2016)
A municipality would want to apply for exemption is if it is a very small local authority where it is not possible in terms of the available personnel and the knowledge base to institute a land use scheme within the time frame. They could apply in terms of this section of SPLUMA to be exempted from its provisions. The Minister might afford them seven years to institute a land use scheme instead of five years, for example. Our own City of Tshwane has just completed the public participation phase with their town-planning scheme (before the promulgation of SPLUMA) and they were given permission to apply for exemption from the five-year provision in terms of section 24 of SPLUMA. Tshwane decided, however, to go ahead with a new land use scheme to enable them to get rid of the "old" land use scheme, and therefore passed a new by-law together with its new land use scheme; the new by-law makes provision for certain details which will now be included in the land use scheme but which it was not possible to insert into the Ordinance.

55 Section 60(1) of SPLUMA provides that the repeal of laws does not affect the validity of anything done in terms of those laws. The consequence is therefore that all applications received by municipalities before 1 July 2015 will be finalised in terms of that Act. After 1 July 2015, no applications can be submitted in terms of any Acts repealed by SPLUMA.

6.1.30 **Section 60 – Transitional provisions**

(1) The repeal of laws referred to in section 59 of the Act or by provincial legislature in relation to provincial or municipal planning does not affect the validity of anything done in terms of that legislation.

(2) *(a)* All applications, appeals or other matters pending *(thus all applications received prior to 18 June 2012)* before a tribunal established in terms of section 15 of the Development Facilitation Act 67 of 1995 at the commencement of this Act (*SPLUMA*) that have not been decided or otherwise disposed of, must be continued and disposed of in terms of this Act (*SPLUMA*).[57]

(b) A reference to a tribunal in terms of section 15 of the Development Facilitation Act, 1995, must for the purposes of deciding or otherwise disposing of any application, appeal or other matters pending before a tribunal at the commencement of this Act be construed as a reference to a local or metropolitan municipality.[58]

(c) References to a designated officer and the registrar in terms of the Development Facilitation Act, 1995, must for the purposes of deciding or otherwise disposing of any application, appeal or other matters pending before a tribunal at the commencement of this Act be construed as references to an official of a local or metropolitan municipality designated by such municipality to perform such function.

(d) The Minister may prescribe a date by which such applications, appeals or other matters must be disposed of, and may prescribe arrangements in respect of such matters not disposed of by that date.[59]

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[56] RC 15 of 2015. Pending matters will be finalised in terms of the Regulations under the DFA. As section 60 of SPLUMA does not refer to the Municipal Planning Tribunal as the decision-making authority, all pending matters will be decided by a local or metropolitan municipality. Section 60(2)(d) of SPLUMA provides that the Minister may prescribe a date by which pending matters must be disposed of. The Department of Rural Development and Land Reform has decided that 24 months would be a reasonable timeframe within which to deal with all pending matters. The period will start from the date of Gazetting (which lies in the future).

[57] The problem here is that SPLUMA does not provide the detailed process to follow, as the DFA did.

[58] The City of Tshwane has taken note of section 60(2)(a) – the fact that all pending DFA matters have to be finalised in terms of SPLUMA (this Act). However, section 60(2)(b) and (c) contradicts section 60(2)(a) in that the detail of the content of section 38 of the DFA refers back to a number of provisions in the DFA which could not be found in SPLUMA. Therefore, the interpretation by the City of Tshwane is that the pending DFA matters cannot be concluded in terms of SPLUMA but in terms of the DFA, taking into account section 60(2)(a) and (b).

[59] The municipalities are putting pressure on the Minister to promulgate the cut-off date for DFA applications, Ordinance applications and Gauteng Removal of Restrictive Conditions applications as soon as possible. Thus the interim arrangement will apply until the by-law has been promulgated or the cut-off date published, whichever occurs first. (The Tshwane by-law was thus first in being promulgated on 2 March 2016)

(3) Despite the repeal of the Development Facilitation Act, 1995, a municipality must continue to perform the functions conferred on a designated officer in terms of the Development Facilitation Act, 1995.

(a) to inform the Registrar of Deeds that the conditions of establishment which have to be complied with prior to the commencement of registration have been complied with as contemplated in section 38(1)*(c)* of the Development Facilitation Act, 1995; and

(b) to inform the Registrar of Deeds that the applicant and the municipality have fulfilled their obligations relating to the provision of services as contemplated in section 38(1)*(d)* of the Development Facilitation Act, 1995.

6.1.31 Schedule 1 – Matters to be addressed in provincial legislation[60]

This Schedule to the Act provides that Provincial legislation regulating land development, land use management, township establishment, spatial planning, subdivision of land, consolidation of land, removal of restrictive conditions may, amongst other things –

- repeal or amend provincial legislation, including ordinances, that deals with matters relating to municipal and provincial planning (Thus, as soon as the municipal by-laws have been promulgated, they will regulate township establishment, subdivisions, consolidations and removal of restrictive conditions.)[61]
- determine procedures relevant to the approval of an application for, amongst other things –
  - the establishment of a township
  - the suspension, alteration or cancellation of servitudes or conditions of the title deed of the property
  - the subdivision of land, including land used for agricultural purposes or farming land
  - the consolidation of land
- provide post-approval processes, including provisions relating to the submission of documents to the Surveyor-General and the Registrar of Deeds.

[60] Schedule 1 to the Act provides for Provincial legislation to regulate land development, land use management, township establishment, spatial planning, subdivision and consolidation of land, removal of restrictive conditions and other land use matters. (RC 3 of 2016)

[61] Once the by-law has been enacted (which was promulgated on 2 March 2016 and became effective on the same date), that is what will prevail according to Regulations 14, 15 and 16 under SPLUMA. Therefore, "old" provincial legislation that is inconsistent with SPLUMA and the powers and authorities of evolving local municipalities can be replaced by municipal by-laws. By-laws will therefore prevail over provincial legislation that contravenes the by-law ***only insofar as municipal planning is concerned*** which is the exclusive competency of local government.

6.1.32 **Schedule 2 – Scheduled Land Use Purposes**

This schedule contains a list of land uses, together with definitions, for example “agricultural purposes”, business purposes”, “industrial purposes” and “residential purposes”.

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