Western Cape Government
Environmental Affairs and Development Planning

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Ref 15/14/1 Development Planning Law Reform

CIRCULAR DEA&DP 0006/2017

TO ALL MAYORS, MUNICIPAL MANAGERS, CHIEF MUNICIPAL TOWN PLANNERS, PLANNING PRACTITIONERS

SUBJECT: MATTERS RELATING TO:-

- **CERTIFICATION IN RESPECT OF EXEMPTION FROM MUNICIPAL APPROVAL FOR SUBDIVISION AND CONSOLIDATION**
- **PROVINCIAL COMMENTS FOR CERTAIN LUPO AND LUPA APPLICATIONS**

Dear Sir/Madam,

The purpose of this circular is to firstly provide municipalities with advice regarding certification of exemptions from municipal approval for certain categories of subdivisions and consolidations. Secondly it serves to highlight the obligation to refer certain land use applications to the Department for comment, before making a decision on an application.

1. Introduction

In all municipalities in the Western Cape, the Western Cape Land Use Planning Act, 2014 (LUPA) has now been implemented, meaning that all municipalities have also promulgated their respective by-laws on municipal land use planning. It is encouraging to see how municipalities engage with the new land use planning legislative regime and how experiences, challenges and possible solutions and approaches, are shared. Judging from the enquiries we receive on a daily basis as well as feedback from the various sectors, there are still frustrations and challenges which need to be addressed. The Department is committed to provide the necessary support and assistance to the municipalities as well as other role-players in the planning field. The use of circulars to share advice and best practice will continue as these circulars in themselves have been established as an institutionalised best practice communication channel in the Western Cape.

2. Certification of exemption from municipal approval for certain subdivisions and consolidations

The Department has over the last couple of months received various complaints, mostly from members of the South African Geomatics Institute (SAGI), regarding the way some municipalities deal with exemptions. It was found in some cases/municipalities that:-

- the request for certification is seen as an application and sometimes as an application which needs to be "evaluated/considered";
- irrelevant additional information is required;

- exorbitant application fees are charged;
- it takes too long to issue the certification;
- the certification is not issued due to other irrelevant considerations;
- certification is made conditional; and
- there is uncertainty on who the decision maker is.

Exemption is not a new concept. Since 1991, in terms of the Land Use Planning Ordinance, 1985 (LUPO) a number of subdivision "applications" were exempted from the application and approval procedure. Although there was also a requirement under LUPO that exemptions had to be certified by municipalities by means of a stamp on the subdivision diagram, a practice emerged over time where these matters were finalised between the applicant (mostly land surveyors) and the Surveyor-General. Municipalities were not even aware of many of these cases.

To lessen the administrative burden on municipalities and to save cost and time, the concept of exemptions was again provided for in LUPA.

Section 61 of LUPA provides that, in the case of a court ruling or an expropriation, subdivisions and consolidations are completely exempted. Section 61(2) of LUPA then provides that a municipality "may regulate" for the exemption of further categories of subdivision and consolidation and then provides a list of possibilities which municipalities could consider when regulating their own list of exemptions. These exemptions were adopted as part of the respective by-laws on municipal land use planning and in most cases section 24 of the by-laws provide for such a list.

The effect of section 24 of the by-laws and the list provided therein is that those categories of subdivision and consolidation <u>are exempted</u> from municipal approval, i.e. do not require municipal approval. However, LUPA section 61(3) determines that the Surveyor-General may not approve/amend a General Plan or SG Diagram without confirmation from the municipality that the particular matter is exempted.

Therefore, in respect of the list of exemptions, the municipality must do only two things:-

- determine and confirm that the particular case <u>is exempted</u> *(not "can it be exempted?")*; and
- certify in writing and on the plan that the particular case is exempted from municipal approval.

An owner does therefor not "apply for an exemption" as the list already indicates in which circumstances a municipal approval is not required – all that needs to be determined by the municipality is – whether <u>the case at hand is one of those mentioned in the list</u>. It is thus not an application to be considered and approved, it is merely a confirmation that the case at hand is indeed one of those in the list. **The only possible information that a municipality may/should require when it is requested to certify that a matter is exempted from a municipal approval, is that bare minimum information which may be required to make this determination.**

In such instances an applicant must therefore submit to the municipality documentation *(which may differ depending on the case)* that will enable the municipality to determine whether the case at hand is exempted or not. It is recognised that this warrants certain administrative actions and record keeping by a municipality, hence some administrative fee may be required. However, it needs to be noted that **it is not a land use application.** The purpose of this provision is to reduce the administrative burden and regulatory red tape for certain categories of

subdivision and consolidation applications and it is anticipated that municipalities should administer requests for certification of exemptions within a few days.

Neither LUPA nor the by-laws determine that an identified exemption is subject to an environmental authorisation. Neither LUPA nor the by-laws on municipal land use planning list or provide for a number of other "relevant considerations" to be taken into account when the municipality is requested to certify an exemption. The only information that must be provided is that which will enable a municipality to determine if the case at hand is one of the cases mentioned in the said list. If a particular subdivision (e.g. diagram for servitude for private right of way) is one that is exempted, it is of no consequence if the road already exist or if an environmental approval is necessary or not. There is other legislation that deals with those issues.

As a request for certification of an exemption is not a land development application provided for in SPLUMA, such determination does not have to be done by a Municipal Planning Tribunal or Officials Authorised to deal with certain categories of land use applications. The certification can be issued by an official to which this competence has been delegated. Municipalities must therefore ensure that there are delegations in place to officials to issue these certifications. Municipalities should therefore not overburden the process of certification with unnecessary long procedures as this would negate the very purpose of exemptions.

Some municipalities appear to be uncomfortable with these exemptions or at least some of the exemptions currently in their by-laws. Should a municipality be uncomfortable with exemptions *per se* or some of the exemptions, it is their prerogative to remove them from the by-law, **but** that would require amending the by-laws by following the processes provided for in sections 12 and 13 of the Local Government, Municipal Systems Act, 2000.

Lastly, a municipality can only exempt certain categories of subdivision and consolidation applications from municipal approval as provided for in LUPA, which consequently do not include any other kind of land use application.

3. Compulsory Provincial comment on land use applications

In a number of instances it has come to the attention of this Department that provincial comment on applications were not requested and that municipal decisions were taken without obtaining such provincial comment. This applies both to applications in terms of LUPO and LUPA. Certain land use applications, whether submitted in terms of LUPO or LUPA, require provincial comment before municipalities can decide on these applications a requirement of law.

For LUPO applications which may still be in municipal systems and that have not yet been considered, the following **rezoning applications** must be referred to the Department for comment prior to municipal decision making, as provided for in circular 7 of 2013:-

- *"any rezoning application of land outside of the approved urban edge of a town in terms of the SDF of a municipality or in cases where no approved SDF exists, the built up area of a town, and*
- *any rezoning application of an area from agriculture, conservation or similar purposes."*

For land use applications in the LUPA dispensation there is a similar requirement in terms of section 45 which determines that *"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"*. The subject section then provides a list of such instances.

Section 45(1) refers to "a land use application" and does not narrow this down to a rezoning application only, i.e. other types of land use applications that meet the criteria listed in section 45(1)*(a) – (f)* must also be referred for provincial comment. In a recent case, it was stated in the municipal planning tribunal's reasoning that, due to the application being a consent use with a specified time limitation, that section 45 of LUPA was not applicable and no comment from the Department was requested. *(Although it met the criteria in LUPA section 45(1))*

This approach is not accurate and would represent a procedural error in terms of the Promotion of Administrative Justice Act, 2000. (PAJA). Such procedural error will have the consequence that the decision can be taken on review in the Courts with huge potential financial implications to both the applicant and the municipality.

Although municipalities are not obliged to follow the advice provided in the comment from this Department, they have to take such comment into account when they consider and decide a land use application. In the event of a judicial review process, a municipality must, In terms of the requirements of PAJA, be able to provide record of such comments that were obtained, as well as how such comments were taken into account when the application was evaluated and the decision taken.

In conclusion, municipalities are required in law to obtain comments from this Department:-

- as a condition of delegation for certain LUPO applications;
- as a legislative requirement for certain LUPA applications; and
- for any development as determined by the municipal manager.

When requesting Provincial comment, it will be appreciated if municipalities can indicate in terms of which legislative requirement, a particular comment is requested.

The Department is not in possession of a comprehensive and updated list of Municipal Tribunal Chair Persons and Officials Authorised to deal with land use applications. It would be greatly appreciated therefore if the mayors, municipal managers or chief municipal town planners, would bring the contents of this and future circulars to their attention as well.

If any further assistance is required regarding the contents of this circular, please direct such request to **Theo Rebel** (021-483 8375)/ theo.rebel@westerncape.gov.za or **Kobus Munro** (021-483 4796)/ kobus.munro@westerncape.gov.za

Yours Sincerely

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Date: 28.03.2017