Commentary on Draft Municipal Planning By Law ('the By Law')

We have reviewed the above By law and have the following concerns relating thereto[1].

1. Introduction

The Greater Cape Town Civic Alliance is a non-profit public interest association not for gain comprising of civic based organisations, ratepayers residents and similar organization that aim to ensure accountable and transparent government, with particular emphasis on public participation in matters relating to Municipal powers.

As such the GCTCA has been duly mandated in terms of its founding documents, to intervene with regard to matters of land use planning. It is against this backdrop that we offer our commentary on the Draft Municipal Planning By Law.

2. Interaction of the Municipal Planning By Law with other land use planning legislation

The Municipal Planning By Law and our commentary thereon, should be viewed against the other relevant land use planning legislation, such as the Spatial Planning Land Use Management Act 16 of 2013 ('SPLUMA') and Land Use Planning Act. In particularly the Constitutionality or otherwise of certain provisions of the Municipal Planning By Law cannot be read in isolation without having regard to these other land use planning acts.

We are therefore of the view that the constitutionality of the By Law would ultimately be determined in conjunction with the constitutionality of the above legislation.

Whilst the evaluation of the Constitutionality or otherwise of SPLUMA and LUPA do not fall within the ambit of this document, it must be considered insofar as the draft Municipal Planning By Law have been drafted on the assumption of the existence and validity of these acts of national legislation. In particular, the aspects of concern in the legislation as it now stands are:

1. The repeal of laws such as the Removal of Restrictions Act 84 of 1967 without ensuring that proper protections are re inserted.
2. Inadequate promotion of cooperative governance between different spheres of government in land use planning matters. Inadequate resolution of demarcation of powers of land use planning matters among different spheres of government.

[1] We acknowledge the inputs received from the Legal Resource Centre as to the Spatial Planning and Land Use Planning Management Bill 14 of 2012 dated 25 May 2012 which we have incorporated into this document insofar as we regarded it relevant to our member base on whose behalf we make submissions.

3. The new suite of legislation has significantly devolved power and responsibilities on municipalities without adequately addressing how the resultant capacity constraints will be overcome.
4. Inadequate consolidation and managing of conflict in land use planning legislation amongst the three spheres of government.
5. Inadequate consideration of sustainability principles as required in terms of section 24 of the Constitution and section 2 of NEMA.
6. Greater clarify required to ensure that the appeal process, and the identification of persons entitled to an appeal are specifically aligned with section 33 of the Constitution and PAJA. In particular the right of appeal, it is does not include the right to substantively overturn a decision would not be consistent with section 33 of the Constitution.
7. Inadequate substantive public participation, and inadequate provisions detailing with capacity building and conflict resolution renders it inconsistent with section 33 of the Constitution.
8. Inadequate consideration and recognition of customary forms of tenure, specifically relevant to rural and or agricultural forms of tenure.
9. Inadequate consideration of the interaction of mining, sustainability considerations and land use applications.

Recommendation As amplified below, we recommend that the By Law be referred back for reconsideration, pending the outcome of the Constitutionality or otherwise of SPLUMA and LUPA.

These aspects are dealt with in further detail below, insofar as these aspects have been raised in the Draft Municipal Planning By Law.

3. Insufficient consideration of sustainability factors and consultation with relevant state departments

The By law gives insufficient consideration to the evaluation and inclusion of climate change factors such as water scarcity and energy security. There is furthermore inadequate provision for consultation with relevant state departments charged with the administration of the environment and water affairs in the various land use planning applications contemplated within the By law.

This failure to adequately consider sustainability considerations into all decision making concerning land use and land development, results in a non compliance of the provisions of section 24 of the Constitution of the Republic of South Africa 108 of 1996 ('the Constitution'), the so called environmental right. The principle of sustainability is furthermore included in the National Environmental Management Act 107 of 1998 ('NEMA'). Furthermore the Constitutional Court made it clear in the Fuel Retailers case[2] requires those who enforce and implement the Constitution to balance between conflicting principles, i.e. socio-economic and environmental.

[2] Fuel Retailers Association of Southern Africa v Director-General: Environmental Management Department of Agriculture, Conservation and

We accordingly believe that the Municipal Planning By Law and SPLUMA would be set aside insofar as these legislative acts do not give effect to the principle of sustainability.

Recommendation: This deficiency would be capable of rectification by referring and incorporating the principle of sustainability as an overarching factor to be taken cognizance of in the context of land use planning decisions.

4. Discretionary powers granted to the City in terms of the By law too wide

The Constitution expressly mandates and requires democratic and accountable local government, with community participation being encouraged (section 152).

Section 16 of the Municipal Systems Act 32 of 2000 ('the Municipal Systems Act') obligates the municipality to develop a culture of community participation in amongst other, its affairs, its integrated development framework and the like.

An act or by law that substantially derogates from this would be deemed to be unconstitutional in our view. We have a grave concern that the extent to which the City has drafted the By Law in giving itself extensive discretionary powers without such powers being counterbalanced by an appropriate level of public participation, exposes the Bill to be successfully challenged on constitutional grounds on the grounds of being tantamount to a capricious, arbitrary and unreasonable exercise of administrative powers.

We do not object to the granting of discretionary powers to the City in principle, but believe that such discretionary powers and the instances in which such discretions may be exercised should be carefully circumscribed. The granting of too wide discretions opens the scope for abuse and creates an uncertain legal framework. The granting of such discretions in the absence of a well-regulated public participation and notification process is therefore unacceptable. Furthermore, our views are that these wide discretions discussed in more detail below, would render the applicable sections unenforceable on the basis that they contradict the Constitution and the Municipal Systems Act.

We are furthermore of the view that an argument supporting the curtailment of public participation on the basis that it is necessary in order to achieve service delivery and for approval processes not to be unduly delayed by the so called serial objectors, cannot be reasonably sustained on the basis that it falls within the acceptable bounds of limitation of rights as contemplated in section 36 of the Constitution. The extent to which substantive public participation processes have been eroded in the By law, renders it

The examples contained in the draft by law, which we believe afford too wide a discretion are itemized below:

- Section 5 affords the City Manager the discretion to determine the process to amend the municipal spatial development framework. This discretion in the absence of at a minimum including a substantive public participation process is too wide.
- Section 8 affords the City the discretion to deviate from the municipal spatial development framework. In the absence of specifying the exceptional circumstances when this may happen, it effectively means that the municipal spatial development framework is a moving target that can be changed at will without any degree of substantive public participation.
- Section 22 affords discretion to amend or withdraw an overlay zone, which is too wide in the absence of a specified public participation process.
- Section 41 affords the City on its own initiative to rezone a property that it does not own. This is too wide a discretion and opens the scope for abuse. A case in point would be for instance be the commercialization of the Green Point Stadium by changing the zoning from public open space or public amenity to commercial or business zoning and do so without consultation with the community or public.
- Section 45 similarly affords the City to remove suspend or alter restrictive title deed conditions on its own initiative. This discretion is too wide in the absence of being accompanied by a rigorous public participation process and renders it void on Constitutional grounds.
- Section 45 deals with the removal, suspension or amendment of restrictive conditions. The discretion afforded in section 45(3)(e) to only cause the notice to be served on the public or any other person if the City so requires, is too wide, potentially opens scope for abuse and should be curtailed.
- Section 63(5) affords the City discretion to waive a developer charge; again the discretion is too wide unless the discretion is curtailed. In particular it is worrying that the absence of a transparent process in this regard and the absence of disclosure setting out instances where this developer charge had been waived, would open the door for abuse and corruption.
- Subdivision and consolidation applications generally are subject to a notification process, but section 64 provides for certain exemptions from an approval process in terms of the By Law. The following exemptions in particular are worrying:
    - Subsection 64(1)(d) where it relates to a survey of public open spaces in order to consolidate with an abutting land unit: this would enable owners of properties bordering a public open space from acquiring this land and incorporating into their own properties, without a public participation process. Practically this means that land zoned public open space can be acquired at a nominal amount, after which it would be rezoned and incorporated into a single residential zoned property, with a considerable impact on the value of the property post consolidation. This represents a loss to the fiscus and the

absence of a formal approval process would preclude members of the public or affected neighbours from making the requisite inputs.
    - Subsection 64(1)(g)(b) relating to the registration of a servitude or lease for the provision or construction of an encroachment into the City's road reserve. This would seem to enable persons who had encroached on a road reserve to regulate this afterwards by means of the registration of a servitude without a notification or approval process.
    - Subsection 64(2) further affords the discretion to the City, to by 'notice in the Provincial Gazette, exempt any other subdivision from the need for approval in terms of this By-Law'. This discretion is extraordinarily wide, and at a minimum should prescribe a limited set of extraordinary circumstances in which this exemption could apply, for instance limited to emergency situations.
- The discretion afforded to the City manager with regard to pre application consultation procedure in section 67 is too wide and should be curtailed.
- Section 76 affords the City the discretion to exempt an application from a public notification process if the application 'does not materially and adversely affect the rights of the public'. This discretion is far too wide and should be curtailed.
- The discretion afforded to the City Manager in section 80 as to representatives on who notice must be served, is too wide.
- The discretion afforded to the City Manager in terms of section 81 as to notices relating to rezoning, subdivision, consolidation applications and the like relating to no objection are too wide.
- Section 85 affords the City Manager the discretion to circulate an application to relevant departments within the City: '*The City Manager may forward an application simultaneously to every department of the City which may have a direct interest in the application*.' This discretion is simply too wide, the City manager per definition would have the discretion to determine which departments would have a direct interest in the matter, and should not in addition have the discretion to circulate the application or not. This discretion would potentially pave the way for contentious developments to be 'fast tracked' by avoiding circulation to departments who may be opposed to the approval of such applications.
- Section 96(1)(b) allows for the approval of an application, even where it deviates from the municipal spatial development framework where such deviation is 'permissible'. In the absence of defining what would constitute such permissible criteria to allow a deviation, the discretion afforded to the City is too wide.

Recommendation: We recommend, as required by section 33 of the Constitution read with PAJA that administrative decisions, which include decisions relating to land use planning, be lawful, reasonable and administratively fair. This at a minimum would require:

- The discretions granted to the City manager or other officials, should be exercised sparingly and this should be specified in the by law, i.e. limit the exercise of discretion to emergency situations, acts of God etc.
- The discretion and the circumstances in which it may apply, be carefully circumscribed so as to render it clear that this is the exception and not the rule to be availed of when convenient.
- The exercise of the discretion should only be afforded where it is granted simultaneously with a substantive public participation process.
- The granting of a discretion and simultaneous public participation process should be subject to an appeal process, and such appeal process should comply with the provisions of section 33 of the Constitution and PAJA and at a minimum allow a substantive appeal allowing an overturning of the decision, not a 'procedural appeal only'.

Failure to adhere to the above recommendations would in our view render the application by law or legislation unconstitutional.

5. **Consultation processes referred to but not defined**

Various sections of the By law refer to consultation processes having to be followed but does not give substance to what this consultation process must comprise nor whom should be consulted. This opens the possibility of such consultation processes being given lip service and not being substantively adhered to. In particular:

- Section 4(2) with regard to the municipal spatial development framework refers to a consultation process, but does not specify what this process must entail at a minimum.
- Section 12 and 16 with regard to the amendment of the local or district spatial development framework.
- Section 27 with regard to the adoption, change or amendment of a zoning map.

We believe that these provisions are not consistent with section 33 of the Constitution or PAJA. Section 33 of the Constitution and PAJA requires administrative action to be lawful, reasonable and procedurally fair. The absence of clarification of what a procedure (including a consultation procedure) renders it clearly and incontrovertibly inconsistent with the provisions of the Constitution and PAJA.

Recommendation: The By law should specify the persons whom must be consulted, i.e. interested and affected persons whose rights or legitimate expectations are affected and or the public.

6. **Alignment of appeal process within the By law, and with that of review application in terms of PAJA and the Constitution**

Firstly we raise the concern surrounding the Mayoral removal of SPELUM's decision-making powers and that SPELUM now makes recommendations to Mayco. This has the effect that the decision in terms of which a land use planning matter is taken is not a delegated decision anymore. Accordingly the appeal process provided in terms of section 62 of the Municipal Systems Act is no longer available. We are concerned that this manner of decision-making constitutes an unreasonable exercise of power with the purpose of denying a right of appeal.

Section 3 of PAJA requires administrative action that 'materially and adversely affects the right of legitimate expectations of any person' to be procedurally fair etc. and prescribes the requirements of giving effect to this requirement and subsequent sections deal with when a judicial review is available etc.

The right of appeal however in terms of the By Law exists and is available to persons 'whose rights are affected by a decision or deemed refusal' in terms of section 107 of the By law. The current reading of the By law would result in a person whose legitimate expectations that were affected, would have a right of judicial review without having had to appeal, whereas a person whose rights are affected, would have to exhaust the appeal process in terms of the By law, before having a right to judicial review, a consequence that could not have been intended. In addition, it is not clear whether the difference in thresholds, i.e. materially and adversely was intentionally omitted from the By Law. It is requested that the provisions of the By Law accordingly be more clearly aligned with those of PAJA.

Section 45(3)(c) provides that notice of the removal, suspension or alteration of restrictive conditions should be served on persons whose 'rights or legitimate expectations are materially and adversely affected.'

Section 107 however only affords a right of appeal to a person whose rights were affected. It seems anomalous to recognize the need to serve notice of an application in terms of section 45 on a person whose legitimate expectations are concerned, but then deny that same person a right of appeal in terms of section 107 should they subsequently be aggrieved by the outcome of an application in terms of section 45.

Section 79 requires notices relating to rezonings, subdivisions and consolidations to be served on persons whose rights or legitimate expectations are materially and adversely affected. Read with section 107, this would mean that someone whose legitimate expectations were affected, would have been notified of the application as required in terms of section 79, but would not have a right of appeal in terms of section 107 as no 'right' was affected, only a legitimate expectation. Likewise someone, whose rights were affected, would have a (theoretical) right of appeal, but if there rights were not materially or adversely affected, they would not have been required to be notified. These anomalies clearly could not have been intended and should be rectified.

Similar inconsistencies exist between section 76 and 107: section 76 affords the City the discretion to exempt an application from a notification process, if the

application does not 'materially and adversely affect the rights of the public'. Hence if the rights of the public are not materially affected, they would have a right of appeal in terms of section 107, but the application may have been exempted from a notification process. This is not acceptable.

The Habitat judgement has severely curtailed the availability of an automatic substantive appeal to province in respect of land use matters, including matters now regulated in terms of the By law. The Habitat judgement however, subject to confirmation by the constitutional Court, has however not removed such a right of appeal completely. Our interpretation of the Habitat judgment, and confirmed by the City's legal department, is that the right of appeal in terms of the now repealed LUPO is as follows:

> *If the appeal deals with a municipal planning matter, then Province has limited powers in terms of its monitoring and supervisory powers to deal with the matter. The Minister may only set aside such decision if the municipality failed to perform its municipal planning function effectively. The Minister will consider inter alia whether—*
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> *(i) fair administrative procedures were followed;*
> *(ii) relevant considerations were not considered;*
> *(iii) irrelevant considerations were taken into account which affected the decision;*
> *(iv) the decision is rationally connected to the information presented;*
> *(v) the decision is rationally connected to the reasons provided for the decision;*
>
> *and will not reconsider the desirability of the application per se, but will decide on whether the municipality has indeed considered section 36 of the LUPO.*
>
> *In this case, Province will set aside the decision and will send the matter back to the Municipality to re-consider the matter. There will be no further section 44 appeals on this subsequent decision.*
>
> *If the appeal deals with a Provincial planning matter, then Province may set aside the decision and substitute its own decision i.e. it a normal section 44 appeal.*

It would appear that the so called 'procedural' appeal i.e. when it relates to a municipal planning matter as sanctioned by section 139(1) of the Constitution has not been given effect to as the section 108(9) of the By law affords the City the discretion to refer the matter to province i.e. no appeal to province as of right if the procedural aspects are challenged. We submit that an automatic right of appeal as to the procedural aspects referred to above should exist as contemplated in section 139(1) of the Constitution and this should not be a discretion afforded to the City.

We furthermore question the Constitutional validity of the extensive powers granted to a single individual, i.e. either the executive mayor, or a political office holder or official as the appeal authority in terms of section 113(2) of the By Law. We believe that at best (not that this in itself is necessarily ideal) the appeal authority should comprise MayCo as committee and that such powers should not vest in a single individual. The wording of the current by law would in our view grant far too wide and extensive powers to a single individual, which will result in the ability of an executive Mayor to act in an arbitrary and capricious manner without due regard to the public interest.

Section 36 of the SPLUMA refers to the establishment of a Municipal Planning Tribunal. We believe that the concerns arising as to the Constitutional enforceability of the far reaching powers granted in terms of the Municipal Planning By Law could be addressed should a designated representative from the recognized civic based organization of a particular area, be appointed as a member of the Municipal Planning Tribunal as contemplated in section 36(1)(b) of SPLUMA, i.e. someone who is not a municipal official but has the requisite knowledge and experience relating to land use planning matters. It is submitted that chairpersons of rate payer organizations who have been in such positions for a period of say 5 years or longer would have the requisite experience and knowledge and as such qualify as required in terms of SPLUMA.

We would in addition request clarity and confirmation that a ratepayer association, provided the wording of its founding documents or constitution are adequate, would be regarded as an entity whose rights are affected in principle by land use planning decisions taken in respect of properties situated within its geographic area.

Recommendations:

- Notification and consultation processes are to be aligned with the appeal process internally within the by law.
- The Appeal process should be expressly made subject to the provisions of PAJA, including the fact that a substantive right of appeal must exist.
- Appointment of civic based representation as outlined above as part of the Municipal Planning Tribunal to be incorporated into the by law.
- Confirmation to be given in terms of the By Law that ratepayer associations, civic based organisations and the like would have locus standi to intervene.

7. **Developer charges**

Section 63 deals with developer charges. We have commented elsewhere on the unacceptability of the discretion to waive the developer charge in the absence of full public disclosure thereof, as the scope for abuse and nepotism embedded in this discretion is readily inferred therefrom.

In addition we are concerned that the quantification of the developer charge is confined to the direct impact of a proposed development and does not take into account the impact that a particular development may have on the overall capacity constraints of the municipal infrastructure.

We would furthermore like to see developments that are more needs based, with due cognizance being taken of environmental constraints, rather than having developments 'development' led.

Recommendation:

- Developer charges to be levied and imposed with reference to general sustainability principles and capacity constraints at a broader level.
- Waiver or reduction of developer charges to be subject to a public participation and consultation process that at a minimum should set the criteria and basis for reduction of the developer charge. Consideration to be given to the financial ability of the developer to pay the levy, and a 'but for' test, i.e. but for the reduction of the developer levy, the development would not take place, reduction of the developer levy only to apply in the context of the provision of low cost housing to indigent persons.

8. **Calculation of notice periods**

The notification periods and time frames provided for in sections 99,101,102, 106-108 should be calculated to exclude the builders' holidays from approximately 15 December to 2 January of each year. This would be similar to regulation 2 of the NEMA EIA regulations published on 18 June 2010 in Government Gazette 33306.

Recommendation:

The redrafting should be done with reference to the wording contained in the regulations applicable to EIA referred to above.

9. Refund of application fees in event of a deemed refusal

Section 100(1) deems the failure to make a decision by the City as a refusal. The constitutionality hereof is to be dealt with more explicitly, and the refund of application fees payable in these instances.

Recommendation:

Application fees should be refundable where the deemed refusal is not due to any act or omission on behalf of the applicant, i.e. a deemed refusal due to incomplete or inadequate application process.

10. **Impact of non compliance with procedural aspects such as notification processes on validity of the decision**

The by law should deal with the impact on the validity of a decision taken where the procedural requirements with regard to notification processes have not been adhered to i.e. that non compliance with the prescribed formalities are deemed to be a substantive flaw and would render the decision invalid. Failure to expressly provide this would provide scope for abuse that could result in procedurally flawed decisions remaining valid.

Failure to provide that the non-compliance with a procedural aspect would render the decision void, would result in the frustration of the provisions of section 33 of the Constitution and PAJA, and would open the scope for abuse to bypass a procedural requirement only in order to 'regret the oversight' afterwards.

Recommendation:

The by law should deal explicitly with the fact that in order to align the by law with the Constitution and PAJA. Non compliance with procedural aspects would be deemed to be a substantive non compliance and render the decision void, subject to certain provisos:

- The procedural irregularity would not be regarded as substantive if all affected parties had agreed to it being procedural in nature only.
- A procedural irregularity is deemed to be substantive if an interested or affected party had complained about it.
- A procedural irregularity must be made publicly known.

11. **By law to deal with mining**

SPLUMA has been criticized by some as not dealing adequately with the impact of mining and in the interaction thereof with sustainability consideration and land use.

Recommendation:

We recommend that further guidelines be contained in both SPLUMA and the By law as to what and how land use applications to allow mining licenses are to be incorporated into land use planning decisions and take due cognizance of sustainability considerations.

12. Rural land reform, customary law application to land use planning

The promulgation of SPLUMA was influenced by the repeal of certain pieces of legislation such as the Development Facilitation Act, and was guided by the Green Paper on Development and Planning. Key considerations into the background of SPLUMA was the law reform surrounding rural land reform, including security of

tenure for farm workers, and the incorporation of customary law into land use planning decisions.

These considerations do not appear to have been expressly given effect to in the By Law nor SPLUMA or LUPA.

Recommendation:

We recommend that these considerations be expressly considered in the context of SPLUMA, LUPA and the By Law.