



Circular 8 /2013

TO ALL MAYORS, MUNICIPAL MANAGERS AND MUNICIPAL TOWN PLANNERS IN THE
PROVINCE OF THE WESTERN CAPE

**PROCEDURES REGARDING APPEALS IN TERMS OF THE LAND USE
PLANNING ORDINANCE, 1985 (ORDINANCE 15 OF 1985)**

1. The Department of Environmental Affairs and Development Planning is currently finalising a new provincial planning law, the proposed Land Use Planning Act (LUPA), which together with the recently promulgated national planning Act, the Spatial Planning and Land Use Planning Act, 2013 (Act 16 of 2013) (SPLUMA) will provide the governing framework for planning into the future. SPLUMA was assented to by President Jacob Zuma on 5 August 2013, although the date of implementation is still to be determined. Whilst this process (SPLUMA and LUPA) is unfolding the current old order legislation is still in operation in the Western Cape and is increasingly coming under constitutional scrutiny.
2. With regard to the above and following on the judgment in *Shelfplett 47 (Pty) Ltd v MEC for Environmental Affairs and Development Planning and Another* (Case No. 16416/10) where one of the former guide plans was found to contain unconstitutional elements, the Department withdrew all the remaining guide plans operational in the Western Cape (see Circular No.14/2012 of 1 August 2012). In August 2013, the Department also amended the General Structure Plan to ensure that the relevant first instance planning decision-making in terms of the Land Use Planning Ordinance, 1985 (Ordinance 15 of 1985) (Cape) (hereafter referred to as "LUPO") is delegated to municipal level in an attempt to remove further unconstitutional elements (see Circular No. 7/2013 of 6 August 2013).
3. This circular therefore aims to set out the procedure to be followed in dealing with appeals in terms of the LUPO having regard to Western Cape High Court judgment delivered on the

14 August 2013 in the *Habitat Council and Another v the Provincial Minister of Local Government, Environmental Affairs and Development Planning, Western Cape and Another* (Case No. 6227/13) matter.

4. In *Habitat Council judgment* the Court declared that section 44 of the LUPO was unconstitutional and invalid. It should, however, be noted that this order has been referred to the Constitutional Court for confirmation of the order of constitutional invalidity. Pending the finding of the Constitutional Court in the confirmation proceedings, the Minister will deal with LUPO appeals in terms of section 44 of LUPO, in accordance with section 44(2) and (3) of the LUPO, as it is deemed to read in terms of the court order.
5. This circular consequently amends and replaces Circular No. 1/2007 of 2 February 2007, which dealt with the procedures regarding appeals in terms of section 44 of the LUPO, with immediate effect.
6. In the *Habitat Council judgment*, the Honourable Mr Justice Davis made the following Order on 14 August 2013, as interpreted by this Department for ease of implementation:
 - 6.1. Section 44 of the LUPO is declared unconstitutional and invalid.
 - 6.2. Subject to the requirements provided below, the declaration of constitutional invalidity referred to above is suspended for a period of 24 months from the date of this order, to afford the Provincial Legislature an opportunity to amend section 44 of the LUPO, alternatively to replace same, so as to make this provision constitutionally valid.
 - 6.3. During the period of suspension or until such sooner date when the amendment or replacement of LUPO as contemplated above comes into force, section 44(2) and (3) of the LUPO will be deemed to read as follows:

“(2) The Administrator may, after consultation with the council concerned, in his discretion dismiss an appeal contemplated in subsection (1), or, subject to subsection (3), uphold it wholly or in part.

(3) The Administrator:

 - (a) may uphold, wholly or in part, an appeal contemplated in subsection (1) concerning a municipal planning local government matter referred to in Part B of Schedule 4 of the Constitution of the Republic of South Africa, 1996 (“the Constitution”), only if the upholding of the appeal is necessary for the exercise by the Government of the Western Cape Province of its authority to see to the

effective performance by the council concerned of its functions in respect of such local government matter, in which event the Administrator shall set aside the decision or part of the decision of the council and refer the matter back to the council for reconsideration together with a statement of reasons for his decision; provided that no further appeal shall lie to the Administrator in terms of this paragraph against any decision made by the council after considering a matter referred back to it by the Administrator; and

(b) may uphold, wholly or in part, an appeal contemplated in subsection (1) to the extent that it concerns the functional area of concurrent national and provincial competence of regional planning and development or urban and rural development in Part A of Schedule 4 to the Constitution or the functional area of exclusive provincial legislative competence of provincial planning in Part A of Schedule 5 to the Constitution, if, in the Administrator's opinion, the decision of the council is incorrect, in which event the Administrator shall substitute his decision for the decision of the council."

7. The above-mentioned amendments to section 44 of the LUPO means that the Minister will continue to decide on LUPO appeals in one of three possible ways:

7.1 Dismissal of an appeal

In terms of the amended section 44(2) of the LUPO, the Minister may, after consultation with the Municipality, dismiss an appeal against the decision of a Municipality. This will be the case when the Minister agrees that the Municipality has effectively performed their municipal planning decision-making function. The aforementioned dismissal of a LUPO appeal, by the Minister, can occur if the application pertained to a purely municipal planning matter or to a matter that concerns the concurrent national and provincial competence of regional planning and development or urban and rural development as contained in Part A of Schedule 4 to the Constitution or the functional area of exclusive provincial legislative competence of provincial planning as contained in Part A of Schedule 5 to the Constitution.

7.2 Setting aside of municipal decision

In terms of section 44(3)(a) of the LUPO, as amended, the Minister may, in instances where the Minister is of the opinion that a Municipality did not effectively perform its functions in respect of a municipal planning matter, set aside the entire decision or part of a decision, and refer the matter back to the Municipality for reconsideration. The Minister will provide

reasons for the setting aside of the decision and the Municipality will reconsider the matter taking into account the Minister's reasons.

It should be noted that once a matter is referred back to the Municipality for reconsideration and the Municipality reconsiders the application and issues a new decision, no further right of appeal shall exist with the Minister against the Municipality's 'new' decision. The only remedy then available for an aggrieved party to challenge the Municipality's 'new' decision will be to approach a Court to review the decision.

7.3 Substitution of Municipal Decision

In terms of section 44(3)(b) of the LUPO, as amended, the Minister may, in instances where the Minister is of the opinion that:

- the application also concerns the concurrent national and provincial competence of regional planning and development or urban and rural development as contained in Part A of Schedule 4 to the Constitution or the functional area of exclusive provincial legislative competence of provincial planning as contained in Part A of Schedule 5 to the Constitution; and
- the Municipality made an incorrect decision on these aspects or did not consider these aspects,

substitute his/her decision for that of the municipality.

In such cases, where the Minister has replaced a Municipality's decision with his own decision, the only remedy for an aggrieved party will be to approach a Court to review the decision.

7.4 It is anticipated that there may also be instances where LUPO appeals will not always fall neatly into one of these categories as stipulated in paragraphs 7.1 to 7.3 above. Various permutations and possibly even combinations of the situations as described above may arise. The decision of the Minister, however, will always be one of or a combination of the three possible decisions described above and each specific appeal will be analysed carefully to ensure the appropriate response is applied.

7.5 Whilst the consideration of LUPO appeals which were previously referred to the Minister permitted the Minister to evaluate the application afresh, the abovementioned Habitat Council order has effectively restricted the LUPO appeal process to a narrower appeal:

- a) In instances where applications concern municipal planning matters, the Minister may only set aside such a decision if the municipality failed to perform its municipal planning function effectively. In determining this the Minister will consider *inter alia* whether—
- (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.
- b) In LUPO appeals where the Minister is of the opinion that the application also concerns provincial planning and /or regional planning and development and/or rural and urban development matters, and the Minister is considering to substitute his/her decision for that of the Municipality, the test the Minister will apply to determine whether an application has provincial significance requires that there be a significant impact on *inter alia*:
- (aa) the orderly, co-ordinated and harmonious development of a region or the Province; or
 - (bb) the general welfare of the inhabitants of a region, another municipality or the Province due to –
 - (i) The nature or scale of the proposed land use in question; or
 - (ii) The cumulative impact of multiple developments.
8. The Habitat Council order further provides that the declaration to the effect that section 44 of LUPO is unconstitutional and invalid does not have retrospective effect, save that all appeals made to the Minister in terms of section 44 of the LUPO which have been delivered to the Minister's offices as at the date of the order, but have as yet not been determined by him, shall be decided in accordance with sections 44(2) and (3) of the LUPO, as amended, and as explained above.

9. Existing appeals with the Minister (those LUPO appeals received prior to the Habitat Council judgment):

9.1. In light of the above, LUPO appeals made to the Minister in terms of section 44 of the LUPO which have been submitted to the Minister as at the date of the order, but have as yet not been determined by him, will be decided by the Minister in accordance with sections 44(2) and (3) of LUPO, as amended. Accordingly, the Minister is in the process of determining whether the above-mentioned LUPO appeals concern municipal planning local government matters or regional planning and development, urban and rural development or provincial planning.

9.2. Once the above determination has been concluded the Minister will act in accordance with the relevant scenarios as listed in paragraph 7 above.

9.3 Amendment to the General Structure Plan and applicable scheme regulations (as per Circular 7/2013 dated 6 August 2013):

9.3.1 It should be noted that in terms of the recent amendment to the General Structure Plan and applicable scheme regulations, all rezoning and subdivision applications have been delegated to municipalities for first instance decisions and accordingly first instance decisions will ordinarily no longer be made by the Minister. It must also be noted that these decisions are now subject to the section 44 appeal in terms of the LUPO, as amended.

9.3.2 Any rezoning application:

- of land outside the approved urban edge of a town in terms of the approved Spatial Development Framework (SDF) of a municipality, or in cases where no approved SDF exists the built up area of a town; or
- of an area from agriculture, conservation or similar purposes,

must be referred to the Department for comment prior to any municipal decision-making. The Department will provide comment on the application within 30 days after having received the request for comment along with the relevant documentation. Should the Department not provide comment within the 30 day response period, then the municipality must deem the Department not to have any comment on these applications and the municipality should proceed with their decision making.

9.3.3 The amendment to the General Structure Plan and applicable scheme regulations has the following implications:

9.3.3.1 Municipalities will consider all rezoning applications and will only be required to refer specific applications to the Department for comment prior to decision making.

9.3.3.2 Municipalities will not be able to refer planning applications delegated to them in terms of the General Structure Plan to the provincial sphere of Government as "development packages" for a final decision.

9.3.3.3 Restrictive Title Deed conditions do not have to be removed or amended prior to the LUPO application being granted. Municipalities must, however, inform applicants that they may not act on an approved rezoning or subdivision decision until and unless the Restrictive Title Deed condition has been removed or amended.

9.3.3.4 An application, which is not consistent with an approved section 4(6) structure plan, need only be referred to this Department for comment if it was specifically listed as one of the exclusions in Circular 7/2013 (listed in paragraph 9.3.2 above).

10. The following procedures are proposed in respect of the administration of LUPO appeals in terms of the amended section 44 of the LUPO:

10.1 If a right of appeal exists in terms of section 44(1)(a), (b) or (c) of the LUPO, the appellant shall exercise his/her right as prescribed by regulation (regulation 22 of the regulations made in terms of section 47(1) of the LUPO and promulgated in Provincial Notice 413 of 27 September 1996).

10.2 This requires that the appellant shall submit a motivated LUPO appeal in writing, accompanied by all the relevant supporting documentation, on the Director: Land Management of this Department within **twenty one (21) days** of the date of registration of the letter informing him/her by post of the Municipality's decision. The appellant is also required, within the afore-mentioned period, to submit a copy of the LUPO appeal to the Municipality.

10.3 A Municipality may not give effect to a decision in terms of which a right of LUPO appeal exists until the expiry of the time period for such appeal, i.e. before the expiry of the above-

mentioned 21 day period. It is suggested that municipalities liaise with this Department before deciding on the validity of the appeal received. When a decision is relayed to the applicant and objectors, municipalities are also requested to provide reasons for their decision in terms of the LUPO to applicants and objectors, in order to assist them in the formulation of their LUPO appeals. Furthermore, it is suggested that municipalities, when relaying a decision in terms of the LUPO to the applicant and objectors, refer the applicants and objectors to the Habitat Council judgment and to this circular (Circular 8 of 2013) so as to provide them with clarity with regards to the Minister's consideration of LUPO appeals.

- 10.4 On receipt of a LUPO appeal and as soon as it has been established that the LUPO appeal is legally valid, the municipality shall, by registered post, inform all persons who have submitted legally valid objections against the application, that the LUPO appeal has been received, is open for inspection during office hours at a specified address and that comment on the appeal may be submitted in writing to the Municipality within thirty (30) days of the date of registration of the letter. In the case of a petition, the Municipality needs to only inform the organiser of the petition of the LUPO appeal.
- 10.5 In the event of a LUPO appeal against a decision of a Municipality by an objector, the Municipality shall, by registered post, inform the applicant that a LUPO appeal has been received, is open for inspection during office hours at a specified address and that comment on the appeal may be submitted in writing to the Municipality within thirty (30) days of the date of registration of the letter.
- 10.6 If in the opinion of the Municipal Manager –
 - 10.6.1 Any comments received from objectors contains new issues, the Municipality shall, by registered post, inform the applicant that comments from objectors containing new issues/information (which must be described in general terms) have been received, that the comment is open for inspection during office hours at a specified address and that a response to the new issues/information may be submitted in writing to the Municipality within thirty (30) days of the date of registration of the letter; or
 - 10.6.2 Any comments received from an applicant pursuant to a notice in terms of paragraph 10.5 above contain new issues, the municipality shall, by registered post, inform all persons who submitted valid objections against the application that a LUPO appeal has been received from an objector, that comment on the LUPO appeal from the applicant containing new issues/information (which must be described in general terms) have been received, that the

comment is open for inspection during office hours at a specified address and that a response to the new issues/information may be submitted in writing to the municipality within thirty (30) days of the date of registration of the letter.

- 10.7 The Municipal Manager shall, within one month after the expiry of the thirty (30) day period submit the municipality's comment on the LUPO appeal and any other comment, together with all necessary supporting documentation for the consideration of the appeal, to the Department for further processing.
- 10.8 The supporting documentation referred to in paragraph 10.7 above must include the following:
 - 10.8.1 A statement on how the Municipality advertised the said application.
 - 10.8.2 A statement on how the Municipality processed the said application.
 - 10.8.3 A statement on how section 36 of the LUPO was applied to the application.
 - 10.8.4 A statement on the relevant information considered in assessing the application and reaching the decision.
 - 10.8.5 A statement on the reasons for the decision on the said application.
 - 10.8.6 A statement/comment on the appeal/s received.
- 10.9 In the event that the Municipality's comment is not yet available after this period, the Municipal Manager shall submit all the documentation available (e.g. reports to the municipality, a copy of the application, advertising details and all public comment received) to the Department, in order for the Department to proceed with the processing of the LUPO appeal/s. If the municipality's comment is not immediately available, it must be submitted to the Department as soon as possible, in order to receive consideration in the processing of the LUPO appeal/s.
- 10.10 It should be mentioned that the actions required in terms of paragraphs 10.5 to 10.9 above effectively allows a municipality approximately three to four months from the date of receipt of a LUPO appeal/s to submit its comments to the Department.
- 10.11 The 21 and 30 day period provided for the lodging of and comment on a LUPO appeal respectively, shall commence on the day following the date of registration of the Municipality's letter informing parties of their right of appeal/comment. If, however, the last day of the 21 or 30 day period happens to fall on a weekend or on a public holiday, the

following working day shall be reckoned to be the last day for receipt of the appeal/comment.

- 10.12 In order to enable the Municipal Manager to comply with regulation 24 of the regulations made in terms of section 47(1) of the LUPA and promulgated in Provincial Notice 1050 of 5 December 1988 (i.e. to comment to the Department on a LUPA appeal within one month of its receipt), a LUPA appeal shall be deemed to be complete (received in full) on the day following the day on which the thirty (30) day period allowed for parties to comment on the appeal mentioned in paragraphs 10.4 and 10.5 above, or on the new matter mentioned in paragraph 10.6 above.
- 10.13 Kindly note that all decisions taken and information conveyed by municipalities must be in accordance with applicable delegations and must be properly recorded.
- 10.14 All appeals regarding applications in terms of the LUPA, as amended, may be submitted by post, by hand or by facsimile, but not by e-mail. The Department's street and postal addresses are as follows:

Regions 1 and 2:

Street Address:

The Director: Land Management
(Region 1 or 2)
Department of Environmental Affairs
and Development Planning
Utilitas Building
1 Dorp Street
CAPE TOWN
8001

Postal Address:

The Director: Land Management
(Region 1 or 2)
Department of Environmental Affairs
and Development Planning
Private Bag X9086
CAPE TOWN
8000

Region 3:

Street Address:

The Director: Land Management
(Region 3)
Department of Environmental Affairs
and Development Planning

Postal Address:

The Director: Land Management
(Region 3)
Department of Environmental Affairs
and Development Planning

York Park Building
93 York Street
GEORGE
6530

Private Bag 6509
GEORGE
6529

- 10.15 Any enquiries in the above regard may also be directed to the following official within said Regions:

REGION 1

Municipalities: City of Cape Town (Northern, Tygerberg & Khayelitsha Districts), Cape Winelands District, Witzenberg, Drakenstein, Stellenbosch, Breede Valley, Langeberg.

Contact Person: Jeremy Benjamin: Tel (021) 483 2899, Fax (021) 483 3633, e-mail Jeremy.Benjamin@westerncape.gov.za

REGION 2

Municipalities: City of Cape Town (Southern, Cape Flats, Mitchells Plain & Helderberg Districts), Overberg District, Theewaterskloof, Overstrand, Cape Agulhus, Swellendam

Contact Person: Andre Lombaard: Tel (021) 483 3638, Fax (021) 483 0782, e-mail Andre.Lombaard@westerncape.gov.za

Municipalities: City of Cape Town (Blaauwberg & Table Bay Districts), West Coast District, Matzikama, Cederberg, Bergrivier, Saldanha Bay, Swartland

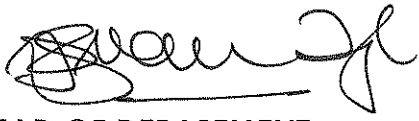
Contact Person: Riette Fourie: Tel (021) 483 8778, Fax (021) 483 0782, e-mail Riette.Fourie@westerncape.gov.za

REGION 3

Municipalities: George, Mossel Bay, Knysna, Bitou, Laingsburg, Beaufort West, Prince Albert, Kannaland, Hessequa, Oudtshoorn, Central Karoo District & Eden District

Contact Person: Bulelwa Nkwatani: Tel (044) 806 8605, Fax (044) 874 2423, e-mail Bulelwa.Nkwatani@westerncape.gov.za

- 10.16 Please be advised that officials from this Department will be visiting with the respective municipalities in due course, to provide further clarify on the contents of this Circular.

A handwritten signature in black ink, appearing to read "B. J. J.", with a horizontal line underneath.

HEAD OF DEPARTMENT

Date: 28. 08. 2013

Postscript: The previous Circular 7/2013: **AMENDMENT OF GENERAL STRUCTURE PLAN AND SCHEME REGULATIONS (SECTION 7(2) AND 8) IN TERMS OF THE LAND USE PLANNING ORDINANCE, 1985 (ORDINANCE 15 OF 1985) IN ORDER TO EXTEND DELEGATIONS FOR PLANNING APPLICATIONS TO MUNICIPALITIES**, was issued to all Mayors, Municipal Managers and Chief Town Planners.