UNIVERSITY of the WESTERN CAPE

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Department of Agriculture, Forestry and Fisheries

Att: Mr Hein Lindeman

Bellville, 28 October 2016

Dear Mr Lindeman

IN RE: SUBMISSION BY DULLAH OMAR INSTITUTE AND STEPHEN BERRISFORD ON PRESERVATION AND DEVELOPMENT OF AGRICULTURAL LAND BILL, 2016

Many thanks for the opportunity to share our views on the abovementioned Bill.

The **Dullah Omar Institute** (formerly Community Law Centre) is a research and advocacy unit of the Law Faculty of the University of the Western Cape. Our work focuses on democracy and human rights and we have a dedicated focus on local government. We are a partner in the National Research Foundation's Centre of Excellence on Food Security, specifically to assess the intersection of food security and multilevel government. **Stephen Berrisford** is an independent consultant working at the intersection of law and land use planning. He works closely with the Dullah Omar Institute and is also an honorary associate professor at the University of Cape Town's African Centre for Cities.

The Bill is envisaged as a critical part of government's legislative architecture to promote agricultural production. In particular it addresses the 'preservation' of agricultural land. It is clearly crucial to have in place measures to control activities on agricultural land that could jeopardise agricultural production. We are however, of the view that the mechanisms proposed by this Bill will run into constitutional difficulties. Over and above the constitutional difficulties, the Bill is premised on an assumption that the preservation of agricultural land requires controls over both the subdivision and change of use of that land. Regulating both of these activities lie at the heart of the Bill, however we would point out that it is not clear to what extent the regulation of subdivision, or of farm size, is necessarily a means to promoting agricultural production. What constitutes a viable farm unit varies widely across the country, depending on soil conditions, rainfall and population growth. As the Constitutional difficulties we outline in this letter will inevitably arise we would caution against proceeding with attempts to regulate the size of farms, without a clear policy basis for doing so. A definition of what constitutes 'preservation' in this context would also be helpful.

We also would like to point out that the Subdivision of Agricultural Land Act, 1970, was in fact repealed in 1998 so the provisions of section 62, which announce that statute's repeal are superfluous. All that is required is for the President to sign the Subdivision of Agricultural Land Repeal Act, 1998, which was approved by the legislature eighteen years ago.

Our submission, however, focuses on the manner in which the Bill intersects with the powers of local government with regard to 'municipal planning'. In our view, the Bill does not adequately consider the firm views expressed by the Constitutional Court on the national-provincial-local interface surrounding 'municipal planning'. If adopted, there is a serious risk that these provisions will be challenged in court and, in our view, they will then not pass constitutional muster. This, we argue, will compromise government's ability to design and implement a sound system of exercising the necessary control over developments on agricultural land.

Much of this submission is based on five successive Constitutional Court judgments pertaining to the intersection of municipal planning and land use related competences of national and provincial governments. In our view, these judgments are a very strong indicator that many of the provisions of the Bill are unconstitutional.

Importantly, all five judgments were handed down after the Constitutional Court's judgment in *Wary Holdings (Pty) Ltd v Stalwo* (Pty) Ltd and Another 2009 (1) SA 337 (CC). *Wary Holdings* is the judgment that preserves the constitutionality of the Subdivision of Agricultural Land Act 70 of 1970 (SALA). It is clear from the Bill that the approach of SALA on the national-provincial-municipal interface is continued in this Bill. However, we submit that these five recent judgments, and not *Wary Holdings*, ought to determine how the national-provincial-municipal powers must be calibrated in this Bill.

This submission first discusses the five judgments briefly before discussing a number of provisions of the Bill.

CONSTITUTIONAL COURT JUDGMENTS ON 'MUNICIPAL PLANNING'

In the first case, *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* 2010 (9) BCLR 859 (CC), the City of Johannesburg took issue with provincial tribunals rezoning land and deciding on the establishment of townships in its area. Johannesburg argued that these powers fell within its constitutional competency "municipal planning" and that provinces may not exercise powers that fall within that competency. The Constitutional Court agreed and held that –

> "municipal planning … is a term which has assumed a particular, well-established meaning which includes the zoning of land and the establishment of townships. In that context, the term is commonly used to define the control and regulation of the use of land". (para 57)

It ruled that **rezoning and township establishment are part of "municipal planning" and that other spheres of government may not usurp that power**. The Court struck down those parts of the DFA that established and empowered the provincial tribunals to rezone land and decide on the establishment of townships.

It is important to note that the establishment of townships and the subdivision of land are virtually identical statutory activities, albeit with different names: both relate to the decision to divide land parcels into smaller pieces. The difference is historical as they developed under different provincial dispensations.

The second judgment built on the precedent set by the *DFA* judgment. The dispute was triggered by Maccsands, a mining company that wanted to mine for sand in Mitchell's Plain. The question was whether the fact that Maccsands had obtained a mining license obviated the need for it to obtain municipal land use approvals (in terms of the Cape Land Use Ordinance). Maccsands, supported by the national Minister of Minerals and Energy, argued that the granting of a mining license trumps municipal authority over "municipal planning": otherwise national government's exclusive authority over mining would be usurped by the municipality. In *MEC for Local Government, Environmental Affairs and Development Planning, Western Cape Province In re: Minister for Mineral Resources and Swartland Municipality and Others and Maccsand (Pty) Ltd and The City of Cape Town and Others* [2012] ZACC 10 (29 May 2012), the Constitutional Court dismissed this argument with the simple argument that "LUPO regulates the use of land and not mining". *Maccsands* was an important marker in the development of a better understanding of the division of powers between spheres of government. A particular activity, regulated by local government (such as the rezoning or subdivision of land) may very well also attract the legislative attention of other spheres of government but that is not in itself constitutionally problematic. Each sphere must exercise its own powers, though. The fact that one sphere of government makes a decision with regard to that activity does not mean that other spheres are no longer competent to make their own decision.

In *Minister of Local Government, Environmental Affairs and Development Planning of the Western Cape v Lagoon Bay Lifestyle Estate (Pty) Ltd and Others*, 2014 (2) BCLR 182 (CC), the dispute revolved a large and controversial development. Its impact stretched beyond the boundaries of the municipality. On the basis of (now repealed) provincial laws, the MEC vetoed the municipality's decision to rezone and subdivide the land to enable this development. The developer went to court and argued, on the basis of the *Gauteng Development Tribunal* judgment that only municipalities may decide on rezoning and subdivision. In response, the MEC argued that there is a category of planning decisions which have an impact beyond the area of a single municipality and that therefore fall within the ambit of "provincial planning" and/or "regional planning and development" as contained in Schedules 5A and 4A respectively. For technical reasons, the Court could not decide on these arguments. However, the Constitutional Court elaborated, in five neat points, on what would have been its argument:

1. National and provincial spheres are, in principle, not entitled to usurp the functions of local government.
2. The constitutional vision of autonomous spheres of government must be preserved.
3. While the Constitution confers planning responsibilities on each of the spheres of government, those are different planning responsibilities, based on "what is appropriate to each sphere".
4. "'Planning' in the context of municipal affairs is a term which has assumed a particular, well-established meaning which includes the zoning of land and the establishment of townships".
5. The provincial competence for "urban and rural development" is not wide enough to include powers that form part of "municipal planning".

These factors lead the Court to the conclusion that "there is therefore a strong case for concluding that, under the Constitution, the Provincial Minister was not competent to refuse the rezoning and subdivision applications".

The fourth judgment in *Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v The Habitat Council and Others* [2014] ZACC 9 dealt with the constitutionality of a provision in provincial law that allowed persons aggrieved by a land use control decision taken by a municipality to appeal to the Premier. After considering the appeal the Premier could then replace the municipal decision with his or her own decision. The Court held that section 44 of LUPO is unconstitutional, asserting that "[t]he provincial appellate capability impermissibly usurps the power of local authorities to manage "municipal planning", intrudes on the autonomous sphere of authority the Constitution accords to municipalities, and fails to recognise the distinctiveness of the municipal sphere". The MEC had urged the Constitutional Court to retain the provincial appeal authority in cases where the development has impact beyond the municipality's boundary. Without the provincial executive 'surveillance', the provincial government would be powerless to stop big decisions with extra-municipal effects, so the MEC argued. The Court, with reference to *Maccsands,* did not accept this argument. No matter how big the development, **provinces must use powers of their own to stop the undesirable ones instead of relying on a power to reverse municipal decisions**.

The last of the series of cases dealing with these questions was the case of *Tronox KZN Sands (Pty) Ltd v The Kwa-Zulu Natal Planning and Development Appeal Tribunal and Others* [2016] ZACC 1. In *Tronox* the Constitutional Court had to decide on a variation of the *Habitat* scenario. Is it constitutional to have an appeal from municipal planning decisions to a provincial appeal body that comprises independent experts? The Court was unequivocal in its reinforcement of municipal planning as an area for municipal decision-making. Irrespective of the composition of the body that decides the appeals, the municipal power to make municipal planning decisions cannot be usurped. So the Constitutional Court once again came down the side of municipal planning powers, cementing an unambiguous trend and establishing a clear position to be applied in the future.

The most salient points of the five judgments are summarised in the table below.

DFA (2010)	**Maccsands (2012)**	**Lagoon Bay (2013)**	**Habitat Council (2014)**	**Tronox (2015)**
Can province take 'town planning' decisions?	Does having a national mining license make municipal land use approval unnecessary?	Can province overrule municipality when impact of the development straddles the municipal boundary?	Can the province be appeal body for municipal planning decisions?	What if the provincial appeal is independent expert body?
No, municipality takes town planning decisions (rezoning & township development)	**No**, municipality must still take its own decision.	**No**, municipality must still take its own decision.	**No**, appeal from municipal to province is not constitutional	**No**, appeal from municipal to province is not constitutional (confirming Habitat Council)

Four critical points flow from the above five judgments:

1. Municipalities are constitutionally empowered to decide on rezoning and township establishment (or subdivision) because this is part of "municipal planning".
2. Legislation that empowers a national department to veto a municipality's decision with regard to rezoning, township establishment or subdivision is unconstitutional. The same applies to legislation providing for national or provincial appeal powers.
3. The fact that such a municipal decision results in land use with impact beyond the municipality's boundary (e.g. impact on agricultural production in the region, province or the country) is irrelevant: it remains the municipality's decision to make.
4. If a national or provincial government wants to control the 'extra-municipal' impact of certain land uses (e.g. the impact on agricultural production in the region, province or the country), it must do so in terms of its own legislation. This legislation must then establish a permitting scheme in terms of which the national or provincial government makes its own decisions. It may not subject municipal decisions to national or provincial approval.

These four points form the background to the examination of selected provisions that follows below.

DISCUSSION OF SELECTED PROVISIONS OF THE BILL

Section 4

In sections 4(1)(c) and 4(2)(c), the Bill seeks to place itself above the Constitution. These provisions state unequivocally that the Act and its regulations always prevail over municipal by-laws. The legal status of by-laws vis-à-vis other laws is regulated in section 156(3) of the Constitution. It is section 156(3) of the Constitution, not this provision in the Act, that will determine whether a by-law prevails or not. The difference is crucial because the test in section 156(3) of the Constitution contains an important qualification, namely "[s]ubject to section 151(4)". This qualification is missing from sections 4(1)(c) and 4(2)(c) of the Bill. The qualification in the Constitution means that, if a national or provincial law trespasses on the powers of a municipality, its by-law will prevail and not the national or provincial law.

Section 9

Section 9 provides that the agricultural sector plan (ASP) must be prepared as part of the municipality's integrated development plan (IDP). The IDP is regulated in the Municipal Systems Act, which also provides for timeframes for adoption and review of the IDP and for a provincial engagement and review of IDPs. However, in Section 9(6) the integration of the agricultural sector plan into the IDP is undermined when it refers to the Minister of Agriculture extending the date for the submission of agricultural sector plans.

Section 12

Section 12(1)(b) instructs a municipality to include agricultural land use zones in its ASP. These zones indicate what activities may take place in those zones. This provision interferes with the operation of Chapter 5 of the Spatial Planning and Land Use Management Act 16 of 2013 on land use schemes and, more importantly, with the meaning and purpose of land use or zoning schemes.

A land use or zoning scheme has binding external effect. It grants land use rights (s 26 SPLUMA). A spatial development framework and/or an IDP does not. It is a forward planning document that binds the municipality as a policy document but does not bind other persons (s 35(1) Systems Act / s 22 SPLUMA). Section 12 of this Bill conflates forward planning with land use management.

Section 13

Section 13(1) provides that the ASP does not have any binding effect unless it has been approved by the Minister. However, section 9 earlier provided that the ASP is part of the IDP, which is adopted by the municipality. The (internally) binding effect of the IDP emanates from the municipality's approval and is regulated in the Municipal Systems Act.

The confusion stems from the misconception that Parliament may, without more, make municipalities responsible for the preservation of agricultural land (by making them adopt ASPs). The Constitution does not allocate the preservation of agricultural land to municipalities. It allocates that function to national and provincial governments. Therefore, they, and not municipalities, must adopt and implement the ASPs.

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If the national government wants to make municipalities responsible for the preservation of agricultural land, it may use the constitutional mechanisms at its disposal, namely the assignment of (parts of) the agriculture function to local government or to a specific municipality. Sections 44(1)(a)(iii) and 99 of the Constitution, read with sections 9, 10 and 10A of the Municipal Systems Act provide the mechanism for that. Importantly, by compelling municipalities to perform critical components of the agriculture function, the Bill contravenes these provisions, which are designed to protect municipalities against the imposition of unfunded mandates.

Section 16(6)

Section 16(6) compels municipalities to incorporate the Protected Agricultural Areas (PAAs) as determined by the Minister in their IDPs, MSDFs and land use management Schemes. While it is appropriate for municipalities to consider them when preparing their IDPs and MSDFs, the compulsory inclusion in land use management schemes is problematic. It suggests that municipalities must grant land use rights based on these PAAs. This is unconstitutional: municipalities may only grant land use rights based on their own municipal planning considerations. This law may not force municipalities to grant land use rights based on national and provincially determined zonings.

Sections 19 and 21

Section 19(1) prohibits subdivision of agricultural land without the Minister's consent. In principle, this is constitutionally permissible as the national government may subject the use of agricultural land to its own permitting scheme. However, a different term needs to be used, in order to distinguish the municipality's decision to subdivide from the Minister's decision. By defining 'subdivision' as the process of dividing agricultural land into smaller pieces the Bill seeks to appropriate the entire concept 'subdivision'. This ignores that the division of urban land into smaller pieces is also often called 'subdivision', depending on the prevailing planning terminology.

The same applies to the term 'consolidation' in section 21(3): the national government may subject the use of agricultural land (e.g. the combination of agricultural erven) to its own permitting scheme. However, a different term needs to be used, in order to distinguish the municipality's decision to consolidate land parcels from the Minister's decision approve the combination of agricultural erven.

Section 20

Section 20(2) subjects the municipality's decision to permit development on agricultural land to compliance with the "development controls" imposed by the Minister. The "development controls" seem to refer to specific parameters and conditions to development imposed by the Minister for a specific development. This provision is constitutionally problematic.

The problem is not that the Minister imposes development controls on agricultural land. The Minister is constitutionally competent to do so, based on the national government's power over 'agriculture'. However, the onus to comply with them is on the developer and not on the municipality. Furthermore, it is the Minister's responsibility to implement and enforce the development controls that he or she would have imposed. It is not the municipality's responsibility

to implement and enforce development controls imposed by another organ of state. The municipality may only implement and enforce the development controls that it imposes.

Section 30

Section 30(1) makes a by-law, SDF and land use scheme subject to the Minister's consent if it affects agricultural land. In doing this, the Bill goes beyond what the Constitution permits. Section 156(2) of the Constitution empowers a municipality to adopt a by-law on municipal planning. There is nothing in the Constitution that permits the national government to make the exercise of this power subject to national approval. Section 156(1)(a) of the Constitution empowers a municipality to adopt an SDF and a land use scheme because these two executive decisions constitute the exercise of 'municipal planning'. Again, there is nothing in the Constitution that permits the national government make the exercise of this power subject to national approval.

No doubt, the reasoning behind section 30(1) is that the adoption by a municipality of a by-law, SDF or land use scheme affecting agricultural land impacts on 'agriculture', which the national government has competence over. In essence, the need to protect agricultural land is 'bigger' than the municipality and therefore the ministerial approval is permitted, so the argument goes. However, this argument breaks down on the abovementioned five Constitutional Court judgments. Perhaps the most direct repudiation of this line of thinking can be found in *Lagoonbay* where the Court remarked as follows:

> "All municipal planning decisions that encompass zoning and subdivision, no matter how big, lie within the competence of municipalities. This follows from this Court's analysis of "municipal planning" in *Gauteng Development Tribunal*. Provincial and national government undoubtedly also have power over decisions so big, but *their powers do not lie in vetoing zoning and subdivision decisions, or subjecting them to appeal. Instead, the provinces have coordinate powers to withhold or grant approvals of their own* (para 19, footnotes omitted, emphasis added)

The national government is competent to make certain activities on agricultural land subject to its approval. It may use its powers to make laws, proclaim regulations, adopt spatial plans, establish schemes and enforce all of those. However, it may not veto the exercise of municipal planning powers. This has been made very clear by the Constitutional Court.

Section 30(4) prohibits a municipality from allowing development on agricultural land by imposing development parameters or controls that are less restrictive than the Minister's. This provision is unconstitutional for similar reasons as above. It again proceeds from the premise that the national government may exercise 'agriculture powers' by micro-managing municipal decision making. It may not. The national government may impose and enforce development controls and parameters on agricultural land to preserve agricultural production. It has power over 'agriculture' (Schedule 4A of the Constitution). The owner of the land must comply with these controls and parameters. A municipality is competent to impose and enforce development controls and parameters to regulate land use within its jurisdiction. It has power over 'municipal planning (Schedule 4B of the Constitution). Again, the owner of the land must comply with those. However, the national government may not prescribe to a municipality how it must exercise its 'municipal planning' powers and that is what section 30(4) seeks to do.

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Sections 39 – 42

Sections 39 to 42 repeat the provisions of Chapter 4 of the Intergovernmental Relations Framework Act 13 of 2005 (IGRFA). It is not clear why this is necessary. In any event, the repetition causes confusion. For example, it copies the phrase "Minister, applicable Minister or the MEC concerned" a number of times. This phrase makes sense in the IGRFA with its generic ambit but not in this Bill where the Minister is clearly defined.

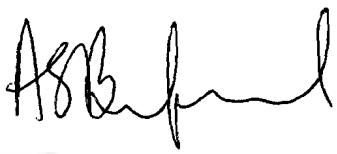
CONCLUSION

In the interest of the need to pursue the objectives of this Bill, it is necessary to revisit the manner in which it deals with the interface with local government. In our view, given that the Bill goes against a very stern and consistent line of Constitutional Court judgments, there is little chance it will survive a constitutional challenge.

What is needed is a fresh approach to national regulation of development on agricultural land that respects the boundaries of municipal powers. The Constitutional Court's message has consistently been that national and provincial governments must use their own powers to stop development that is undesirable for national or provincial considerations and not seek to do so by interfering with municipal planning powers. Land use and the control of land development are already heavily regulated by national legislation, such as through the National Environmental Management Act's environmental impact assessment regulations and the National Water Act's General Authorisations on water use licencing. Careful thought should be given to achieving the optimal benefit from those statutorily prescribed processes before designing and new regulatory framework, especially one which seems to raise so many constitutional red flags.

In summary, we hope that our inputs can make a positive contribution to the further development of this Bill. Should you require further input or want us to elaborate on these points, please do make contact. We will not hesitate to make ourselves available.

Yours Sincerely



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