COMMENT ON DRAFT RULES AND REGULATIONS FOR THE PLANNING PROFESSION

Submitted to:

The Department of Land Affairs
For the Attention of: Mr Gavin Benjamin
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And to:

The South African Council for Planners
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Prepared on behalf of:

The Law Society of South Africa

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1. INTRODUCTION

This document is submitted on behalf of the Law Society of South Africa, ("LSSA") in response to a notice issued by the SA Council of Planners of revised Rules and Regulations for the Planning Profession under section 30(2) of the Planning Professions Act, 2002, and follows a Workshop on the proposals held at the Manhattan Hotel on 4 June 2012, under the project leadership of Ivan Pauw and Partners.

2. THE PROPOSED RULES RELATING TO RESERVED WORK

In December 2008 the Law Society objected *in toto* to the content of draft Regulation 5 (reservation of Work), read with draft Schedules A and B to the draft Rules and Regulations that were then published for comment in the Government Gazette. The basis of the objection was the effect those regulations would have had upon the planning work done by persons who were not registered under the Act. In the Law Society's view the effect of that was both unconstitutional and anti-competitive. It is unfortunate that the present draft Regulations suffer from exactly the same defect.

3. THE PROVISIONS OF THE ACT

Subsection 16(2) of the Act empowers the Council to prescribe areas of planning work to be reserved for each category of registered persons. Planning work is not defined, but presumably it is intended to cover the generic areas of work included in the definition of "planner" in s. 1 of the Act.

Subsection 16(3) provides that the reservation of work prescribed under ss.16(2) restrains any persons not registered in terms of the Act from undertaking reserved work. That is the clear effect of ss. 16(1)(a) which states that "…A person who is not registered in terms of this Act, may not - …(a) perform any kind of work reserved for any category of registered persons...". That subsection on its own would permit the Council to establish a monopoly on work which is not, and never has been, the exclusive preserve of the planning profession.

Subsection 16(4) of the Act appears to recognise that difficulty by providing that the Council may identify areas of work that are concurrently carried out by members of other professions, and which overlap with areas of planning work.

Impermissible reservation

The Law Society has no objection to the Planning Profession delineating, according to differing levels of experience and training, the different areas of planning work that may be conducted by various categories of its registered members. That clearly is the intent behind the provisions of ss. 16(2) of the Act.

However, a great number of the areas of "planning" work are the legitimate domain of many non-planners. For illustration, subsections 19(1)(a)(i) to (iv) – which with subsections 19(1)(b)(i-(iii) set out the exclusive work areas – include concept and framework planning, rezoning and scheme amendments, special consent applications and the assessment of all such applications. The proposed reservation applies to all categories of "non-planners", and is so wide as to prevent an owner him- or herself from making an application in any of these categories even in respect of his or her own land. It is noted that the previous draft included schedules which identified planning work concurrently carried on by other professionals. Indeed, that was expressly intended by the way in which the Act provided for a schedule for planning work done by members of other professions. No cognisance at all has been given to the need to recognise the overlapping areas of planning work in the present draft.

What makes the provisions even more objectionable is that section 18 gives the Council the sole prerogative to add to the list of "planning work" at any time in the future, thereby with the sweep of the brush excluding other work legitimately done by other professionals and "non-planners".

4. LEGAL PROFESSION

It is unacceptable to the Law Society that rezoning, special consent and other "standard" planning applications are reserved only for registered planners. Lawyers routinely prepare and lodge land development applications for projects entailing the amendment of approved plans and policies. Rezoning, special consent and DFA applications fall into this category, and it would be absurd to suggest that lawyers should henceforth be excluded from such work. Indeed, certain senior practitioners specialising in these forms of legal work have more expertise than recently registered professional planners, and know a great deal more about the processes involved.

5. OTHER CATEGORIES OF WORK PROVIDERS

Lawyers are not the only groups of persons impermissibly excluded by the Regulations from reserved work. Engineers, surveyors and others do township applications, and these frequently involve some aspect of scheme and plan amendments. Many of them have been doing so for years. Quite simply put, Chapter 4 of the Draft Rules, and section 4 of the Regulations constitute a massive attempt by the planning profession to annexe areas of work for which they may not claim an exclusive right, and which they do not do exclusively at present. It is presently being done by an array of others.

6. THE CONSTITUTION AND OTHER LAWS

It was stated at the Workshop that the Planning Profession seeks to impose this reservation in the public interest, in order to ensure that only competent persons submit planning applications, do planning work, and assess and make planning recommendations to authorities.

Whilst those objectives may in themselves be laudable, the proposed measures in these instruments are firstly misplaced, secondly too broad, and for these and other reasons, unconstitutional and anti-competitive. We will deal with each of these categories in turn.

The prohibitions are misplaced

One of the stated aims of the planning profession in promoting this work reservation is a desire to ensure, in the public interest, that framework and other concept planning, as well as applications for discreet planning permissions are competently made and executed. Furthermore the Regulations seek to prohibit any non-planner from assessing any planning document or giving any kind of expert report thereon or evidence and/or recommendations to any person or body or authority.

Planning is, however, the competence of the various spheres of government, and as a consequence, the various spheres of government are the only bodies that have the legislative power to decide who, and in what circumstances, plans will be prepared, and planning applications will be made or assessed. We believe it to be incompetent for the planning profession through the mechanism of their own professional rules, to bind the hands of authorities in any or all of these respects. In the event that any of those spheres of government wish to impose limitations upon

any or all of those activities, is up to them to make those enactments provided they are lawful. These regulations are consequently misplaced.

The prohibitions are too broad

It can scarcely have been intended that a landowner is prohibited from bringing a scheme amendment or consent application in respect of his or her own property. If that is accepted, a landowner can obtain whatever assistance the landowner wishes to seek, in preparing such an application. If it is thus unreasonable and unjustifiable to prohibit an owner from bringing such an application, it must be equally unreasonable and unjustifiable to seek to prevent an owner from seeking assistance in bringing such an application, from whatever quarter the owner chooses. It is comment practice for planning practitioners to prepare applications in the name of an owner, and if this enactment is pursued, its enforcement at a practical level will become impossible, and the law will become un-implementable. The test of implementation is a fundamental rule for the enactment of laws.

We furthermore take the view that these prohibitions, in their present breadth, are not in the public interest. The planning profession, in promoting these rules, clearly has in mind a first world environment, operating in the major cities and towns of South Africa. These regulations will however apply across the length of the country - in areas in which registered planners do not operate and in other more rural areas – and this prohibition will create great hardship for those unable to afford the services of registered planners or unable to access them. A range of professionals in those areas – which includes engineers, lawyers, project managers, surveyors and the like and who are competent - cannot and should not be prevented from giving assistance to those persons. To prohibit such assistance would make the law inaccessible to the vast bulk of the population.

These regulations are therefore too broad, and the avowed aim to ensure competence in the bringing of applications is not assured in the proposals. In fact, it will in all probability have the opposite effect, and exclude the most needy from the assistance they need..

The prohibitions are unconstitutional

The Constitution guarantees freedom of trade, occupation and profession. Whilst a profession may be regulated by law, as may any occupation, such regulation must be reasonable and justifiable and in all respects conform to the provisions of section 36 of the Constitution. The proposed regulations substantially limit those rights.

In order to pass constitutional scrutiny, fundamental rights can be limited only in defined circumstances. The reasonableness of such a limitation is assessed in the

light of *inter alia* the nature of the right to perform that occupation, the importance of the purpose of the limitation, the nature and extent of the limitation, the relation between the limitation and its purpose, and whether there are less restrictive means to achieve that purpose.

We were unable to understand, nor were the Council and the Department able to explain at the workshop why the proposed reservation of work (and hence the limitation of other professionals' rights to perform such work) is reasonable and justifiable. If the objective is to advance the public benefit or to ensure that there is competence in planning matters, we believe - for the reasons stated above - that the regulations go too far. It is certainly impermissible to vest in a Council, the power to expand work reservation by executive fiat.

The prohibitions are impermissibly anti-competitive

It is our view that the regulations constitute a restrictive practice as defined by the Competition Act 1998. It is our view further, on a consideration of that Act and the schedules to that Act, that the regulations cannot stand. In their present form, the rules are substantially anti-competitive and are not reasonably required to maintain professional standards or the ordinary functioning of the planning profession. They are, in essence, an attempt by the profession to reserve work solely in the interests of its members, and in the present form, they do not serve the public interest for the many reasons stated above.

7. CONCLUSIONS

The planning profession consists of persons trained in spatial planning. SACPlan seeks to protect that work for its members' economic interests. It has stated that the protection serves the public, but in truth it does not. It does exactly the opposite because it cuts the public off from sources of competent alternative professionals who doubtless will charge for their work (if they charge at all in certain circumstances) at different rates. That will maintain much-needed competition in a critical public service.

The Regulations have confused the interests of the Planning Profession, and the public interest. They are not synonymous, whilst for these regulations to succeed, they must be. In the result, the reserved work provisions in these regulations are anti-competitive, unconstitutional and antithetical to the interests of the public.

As has been demonstrated, the regulations in their present form go beyond permissible limits. They will therefore be opposed by the Law Society until they conform to the principles set out in paragraph 6 hereof.

DATED and SIGNED at Westville on this 11th day of June 2012.

Norman Brauteseth

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For and on behalf of the LSSA