COMMENT ON DRAFT RULES AND REGULATIONS FOR THE PLANNING PROFESSION

Submitted to:

The Minister Rural Department and Land Reform

For the Attention of: Mr Gavin Benjamin

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(per email to: sacplanregs@ruraldevelopment.gov.za)

Prepared on behalf of:

The Law Society of South Africa

9 December 2013

1. INTRODUCTION

This document is submitted on behalf of the Law Society of South Africa, ("LSSA") in response to the notice published in the Government Gazette dated 8 November 2013 (as amended by Correction Notice 1111 of 2013), calling for comment on the draft regulations under section 30(2) of the Planning Professions Act, 2002.

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.

In June 2012 the Law Society also objected *in toto* to the content of draft regulations that were published for discussion, and were the subject of a workshop that took place at the Manhattan Hotel on 4 June 2012, under the project leadership of Ivan Pauw and Partners.

A copy of the Law Society's June 2012 comments are attached hereto marked **"A"**.

3. THE LATEST DRAFT REGULATIONS

The present regulations confine themselves solely to matters of work reservation, and except in two respects, are identical to those discussed in June 2012. The two material changes are that the latest draft contains a reservation in respect of removal of conditions applications (Reg 4(1)(a)(iv); and a grandfather clause in respect of professional land surveyors and practising lawyers (Reg 4(4)-(7)).

Since the substance of the work reservation provisions in the draft regulations is no better than before, and is in fact now expanded to include removals applications, all of the Law Society's previous objections remain. Kindly therefore consider the previous objections to constitute the Law Society's objections to these as well.

The grandfather clause, furthermore, seems to be nothing more than a palliative to go some way towards mollifying the two professions which were present at, and advanced strong objections to the draft regulations at the June 2012 workshop.

It seems to have been entirely overlooked by the drafters of the legislation that the Law Society is not primarily concerned with the protection of its own profession's interest in planning work. It has made it plain throughout that it is has made its comments in the public interest. The cardinal objection that the Law Society has consistently raised against these regulations is that they seek unreasonably and unjustifiably to prevent persons who are not registered planners, from carrying out certain "planning" work for which they are perfectly competent, and which it is in the public interest that they perform. The two most obvious groups of professionals who have for many years been carrying out such work are land surveyors and attorneys, but there are a host of others such as architects and others in the built environment professions, as well as unregistered planners.

Added to that are property owners themselves, as well as building plan draftspersons, who routinely lodge "planning applications" that are allied to building plan applications such as side- and rear-space applications, and other such simple planning applications.

Grounds of objection

We made it clear in our previous submissions that 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 is the intent behind the provisions of ss. 16(2) of the Act.

However, in seeking to reserve every conceivable area of work that might in some broad sense be deemed "planning", the regulations overstep the bounds of what is reasonableness and justifiability. We urged that the regulations should

make it clear what work is considered – in the public interest – to be work that only the Planning Profession should undertake, and what work can be done by others as well. No attempt has been made to do so in the current regulations, even though the Act envisages such a delineation being made. In the result, even the "planning" work that can obviously be done by others is declared to be work exclusive to persons registered under the Planning Profession Act.

4. THE CONSTITUTION AND OTHER LAWS

It has been stated by our Constitutional Court that the exercise of a legislative power (such as to promulgate these regulations) is subject to two constitutional restraints: firstly there must be a rational connection between the legislation and the achievement of a legitimate government purpose; and secondly, there must be no infringement of any of the fundamental rights enshrined in the Bill of Rights.[1]

Rationality

We have considerable doubt whether the measures proposed to limit the rights of others to engage in work that the Planning Profession deems to be "planning" work, is rational.

The Preamble to the Planning Profession Act includes as one of the Act's objects "…*to authorise the identification of areas of work for planners*…". Section 16(2) of the Act authorises the Council to prescribe ".. *the areas of planning work to be reserved for each category of registered person*". However, "*planning work*" is not defined in the Act, and no attempt has been made anywhere in the regulations to define its ambit.

The Constitutional Court in the *Affordable Medicines* case and elsewhere has defined the test for rationality as the absence of capriciousness or arbitrariness. There must be a rational connection between the purpose for which the power was given to regulate planning work, and the regulation that flowed from it.

In the view of the Law Society, the only way in which section 16 of the Act can rationally operate is if there is an objective definition of planning work. It would

[1] Affordable Medicines Trust and Others v Minister of Health and Others 2006 (3) SA 247 (CC)

be absurd to suggest that the council could decide, in its entire discretion, what can and cannot be considered a planning matter. Until that has been done, the entire exercise of regulating who may and may not do planning work, is meaningless.

The illustration of this fundamental point is this: every planning application involves land. It must often be consolidated or subdivided, or both, as part of the planning proposal. In some cases it needs release from the Subdivision of Agricultural Land Act, and in some cases it also requires the removal of restrictive title conditions. Some proposed uses (and in some cases the proposed change in land use itself) require environmental approvals. Which of these acts constitute planning work? Is the planning work limited to the land use change application, and if so, does the application – insofar as it involves these other elements – require that those components of the application must be prepared by the other professionals?

Until planning work is properly defined, it is the Law Society's respectful view that these regulations are arbitrary and capricious, subject only to the whim of the Council to decide what in its view constitutes planning work, and consequently the attempt to limit others from such work is simply not rational. For the record, the Law Society disputes that the descriptions of work set out in the regulations are either planning work, or exclusively planning work. Much of them are work done by other persons and professionals than planners, and there is no rational basis to designate them as only "planning work".

In order for section 16, and the regulations promulgated thereunder to have any rational basis, it is necessary first to determine what work is "planning work".

Constitutionality

Detailed representations were made in this regard in the Law Society's previous submission.

These regulations severely curtail a number of the rights contained in the Bill of Rights, including section 10 (the right to dignity) and section 22 (the right of freedom to choose a trade, occupation or profession). Those rights may only be restricted to the extent allowed by the formulation of the right itself, and the general provisions of section 36 of the Constitution. In general, any such restriction must be reasonable and justifiable in an open and democratic society

based on human dignity, equality and freedom, taking into account all relevant features.

It is not intended here to expound in any detail on the nature of those provisions: save to say that in *S v Makwanyana and Another*[2] the Constitutional Court found that the freedom to engage in productive work – even where it is not required in order to survive – is an important component of human dignity. From it flow self-esteem and self-worth and being accepted as socially useful which, the Court held, are the fulfilment of what it means to be human. That right, the court acknowledged, could in terms of section 36 be restricted, but only within narrow bounds:

> *"The limitation of constitutional rights for a purpose that is reasonable and necessary in a democratic society involves the weighing up of competing values, and ultimately an assessment based on proportionality. This is implicit in the provisions of section 33(1). The fact that different rights have different implications for democracy, and in the case of our Constitution, for "an open and democratic society based on freedom and equality", means that there is no absolute standard which can be laid down for determining reasonableness and necessity. Principles can be established, but the application of those principles to particular circumstances can only be done on a case by case basis. This is inherent in the requirement of proportionality, which calls for the balancing of different interests. In the balancing process, the relevant considerations will include the nature of the right that is limited, and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited and the importance of that purpose to such a society; the extent of the limitation, its efficacy, and particularly where the limitation has to be necessary, whether the desired ends could reasonably be achieved through other means less damaging to the right in question. In the process regard must be had to the provisions of section 33(1), and the underlying values of the Constitution…"*

[2] 1995(3) SA 391 (CC)

No attempt to justify the restrictions

Simply put, no attempt has been made to justify why it is in the public interest to restrict "planning work" to registered persons. The proportionality test the Court has referred to, would require that in respect of each of the proposed restrictions, the right to freely engage in work is balanced against the public interest for it to be reserved to registered persons. The sheer breadth of the proposed regulations is testimony to that weighing process having been ignored.

Unless the reservations are reasonable and justifiable, they will not stand constitutional scrutiny. The Law Society has consistently questioned why the more obvious, simple, routine work cannot be done by a broad range of persons active in the building arena. The Law Society has expressed the view that other more complicated work is presently done, and can competently be done by others in other professions.

Unless and until these regulations recognise these distinctions, they will remain objectionable, and will be unable to stand a constitutional challenge.

5. CONCLUSION

The Law Society recognises that there may be areas of specialist planning work which, in the interests of the public, should only be done by registered persons under the Act. It is however entirely unclear what those areas include. What is clear, however, is that the Council seeks to restrict the rights of land owners and other from doing a broad range of work that it considers to be planning work, where there is no justification for such restriction. As such, it is the considered view of the Law Society of South Africa that these regulations will operate to advance the interests of the planning profession, largely at the expense of the interests of the public and those legitimately capable of doing that work.

The Law Society calls upon the Minister not to promulgate the proposed regulations, and rather to first engage with interested stakeholders to delineate

what work is “planning work” and the criteria for determining, on an objective basis, what work should only be done by planning professional registered under the Act.

DATED and SIGNED at Westville on this 9th day of December 2013.

Norman Brauteseth

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For and on behalf of the LSSA

COMMENT ON DRAFT RULES AND REGULATIONS FOR THE PLANNING PROFESSION

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Prepared on behalf of:

The Law Society of South Africa

11 June 2012

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