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MAKING LAW

A GUIDE TO MUNICIPAL COUNCILS



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Local Government Project



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Foreword

The first fully democratic municipal elections held on 5 December 2000 saw local government take its rightful place as the third sphere of government.

Chapter seven of the Constitution has now come into full operation. A municipality now enjoys protected status as a legislative body. This means that it has the authority to make laws on local government matters without undue interference by other spheres of government.

However, a constitutionally protected legislative authority brings with it a responsibility. The onus is now on municipalities to use the legal space provided by the Constitution in a manner that is democratic, accountable and developmental. This is certainly not an easy task: the challenges

of sustaining, improving and extending service delivery and local democracy are great. The legislation that will guide newly elected councillors in the final phase of transformation further enables municipalities to be development agents and builders of democracy.

This manual provides a useful guide for councillors to familiarise themselves with:

- the scope of the legislative authority that their councils enjoy;
- procedural aspects around making law; and
- the legal and constitutional requirements relating to the content of by-laws.

It will be a significant aid to councillors in their pivotal role as policy- and lawmakers.

Thabo Mokwena
Chief Executive Officer:
South African Local Government Association

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How to use this manual

One of the most important tasks of a municipal council is the passing of by-laws. The information provided in this manual will guide you in the important

and challenging task of legislating for your municipal area. This manual discusses the most important legal issues pertaining to the making of by-laws and centres around three themes:

Theme	Chapters
Legislative power of local government	1, 2, and 3
Requirements for the content of by-laws	4 and 5
Requirements for procedures around making by-laws	6

Relevant statutory provisions and court judgments are quoted in the blocks like the one on the left. Where possible, summaries and overviews are

given at the end of each section or chapter. Difficult words and legal terms are explained in the Glossary, at the end of this manual.

Introduction

In this chapter:

- What is the status of local government in the Constitution?
- What does the power to make laws mean?

1.1 NEW DISPENSATION

On 5 December 2000 a new dispensation for local government was introduced. The election of 231 local councils, 47 district councils and 6 metropolitan councils, establishes local government as a fully-fledged sphere of government alongside national and provincial government.

The Constitution provides in section 43 that the legislative authority –

- of the national sphere of government is vested in Parliament;
- of the provincial sphere of government is vested in the provincial legislatures; and
- of the local sphere of government is vested in the municipal councils.

Section 40(1) of the Constitution:

In the Republic, government is constituted as national, provincial and local spheres of government which are distinctive, interdependent and interrelated.

This means that the power of municipal councils to make law is protected in the Constitution. It cannot be taken away without amending the Constitution. This is a radical break with the past. Before the first democratic elections in 1995/6, local authorities were under the control of the national or provincial government. Their powers were given or delegated to them by the national or provincial governments and therefore could be taken away at will. Moreover, a court of law could review any by-law made by a municipality on the same grounds as it could review an executive act of that municipality. The new Constitution has changed this.

1.2 CONSTITUTIONAL POWER TO MAKE LAWS

In the *Fedsure* case the Constitutional Court affirmed the status of local government as an independent and distinct sphere of government. The Court

held that local government no longer merely exercises powers delegated to it by the national or provincial governments. Instead, the Constitution itself gives the powers to local government and protects them. Municipal councils are legislative assemblies and their legislative acts, which include the levying of taxes and the adoption of budgets, are not subject to administrative review.

The municipal council is a *deliberative* body whose members are elected and whose legislative deci-

sions are influenced by political considerations for which the council is politically accountable to the electorate.

The fact that by-laws are proper legislative acts and thus not subject to administrative review does not make them immune from review by the courts. The Constitutional Court held that the principle of legality – that all legislation should be taken within the parameters of the law, including the Constitution – is fundamental to the new constitutional dispensation. This means that municipal councils may not exercise powers or perform functions that are not given to them by law. Chapter 2 explains which lawmaking powers are given to local government.

Constitutional Court in *Fedsure*:

[A municipal] council is a deliberative legislative assembly with legislative and executive powers recognised in the Constitution itself.

1.3 DISCRETION TO PASS LAWS

Section 156(2) of the Constitution:

A municipality may make and administer by-laws for the effective administration of the matters which it has the right to administer.

As a general rule, there is no positive duty on a municipal council to pass any law. This general principle is based on practical and principled considerations. In principle, it is the elected political bodies that decide what and when poli-

cies are to be adopted and implemented through law. It would be impractical to impose duties which the government cannot perform because of a lack of capacity. In general, courts are reluctant to impose duties which have major policy and cost implications.

A municipality ‘may make and administer by-laws’. It is not compelled to legislate in any of its functional areas.

There is legislation that stipulates that some decisions of the council must be laid down in by-laws. The council is free to decide whether or not it takes that decision, but *if it does*, it must be in a by-law.

Section 75(1) of the Municipal Systems Act:

A municipal council must adopt by-laws to give effect to the implementation and enforcement of its tariff policy.

Section 98(1) of the Municipal Systems Act:

A municipal council must adopt by-laws to give effect to the municipality's credit control and debt collection policy, its implementation and enforcement.

1.4 NO DELEGATION OF LEGISLATIVE POWER

The power to make law vests in the municipal council. The council cannot dispose of that power by delegating it to any committee, office-bearer or municipal official. The approval of a budget, which is a law, can also not be delegated.

Section 160(2) of the Constitution:

The following functions may not be delegated by a Municipal Council:

- (a) The passing of by-laws;
- (b) the approval of budgets;
- (c) the imposition of rates and other taxes, levies and duties; and
- (d) the raising of loans.

Legislative powers

In this chapter:

- What lawmaking powers does a metropolitan municipality have?
- What lawmaking powers does a district municipality have?
- What lawmaking powers does a local municipality have?

2.1 INTRODUCTION

Sources of legislative power

The Constitution gives two sources of legislative power to local government.

- 1) A municipality can make by-laws on the matters listed in Schedule 4B and Schedule 5B of the Constitution. Schedules 4B and 5B contain the matters on which the Constitution has given local government the power to make law.

- 2) A municipality can also make laws on any other matter that has been assigned to it by national or provincial government. Assignment takes place when national or provincial government delegates one of its own legislative competencies, or parts of that competency, to local government.

Incidental powers

The Constitution also says that a municipality can exercise any power, including the power to make by-laws if that is necessary for, or directly related to, the effective performance of a local government function.

Local government matters of Schedule 4B and Schedule 5B

The matters in Schedule 4B or Schedule 5B on which a municipality can make by-laws, depend on the *category* of municipality. In other words, the issues that a municipality can make by-laws on depends on whether it is a –

Section 156(1) and (2) of the Constitution:

- (1) A municipality has executive authority in respect of, and has the right to administer –
 - (a) the local government matters listed in Part B of Schedule 4 and Part B of Schedule 5; and
 - (b) any other matters assigned to it by national or provincial legislation.
- (2) A municipality may make and administer by-laws for the effective administration of the matters which it has the right to administer.

- category A (metropolitan) municipality;
- category B (local) municipality; or
- category C (district) municipality.

In 2.2, the legislative powers of metropolitan municipalities are discussed. Part 2.3 deals with the legislative powers of district and local municipalities.

2.2 METROPOLITAN MUNICIPALITIES

Legislative power

Metropolitan municipalities (category A) can make by-laws *on all the matters listed in Schedule 4B and Schedule 5B of the Constitution*.

Metropolitan municipalities also have the power to make by-laws on matters that have been assigned to them by national or provincial government.

Section 155(1)(a) of the Constitution:

Category A: A municipality that has exclusive municipal executive and legislative authority in its area.

Schedule 4B and Schedule 5B matters

The table below lists *all the matters of Schedule 4B and Schedule 5B of the Constitution*, together with a definition of what the competency entails.

Competency Schedule 4B	Definition
Air pollution	Regulation and control of all pollution in the air from sources such as vehicles, industries, fires etc Includes standard setting and inspection
Building regulations	Regulation and control of building activities in respect of construction, demolition, aesthetics etc Includes standard setting, building plans and inspection
Child care facilities	Establishment, regulation and control of crèches, day care facilities, nursery schools, play centres etc Includes standard setting and inspection with regard to building/infrastructure/safety but excludes welfare, education, health and housing related issues
Electricity and gas reticulation	Regulation and control of an electricity and gas reticulation network Includes consumption charges, tariff policy, debt collection, disconnections and maintenance of electricity network

Firefighting services	<p>Establishment, operation, control and regulation of firefighting services</p> <p>Includes safety regulations, safety of premises and dangerous substances</p> <p>Excludes disaster management</p>
Local tourism	<p>Regulation and control of tourism industry</p> <p>Includes marketing and developing tourism in the area, establishment and management of tourist attractions, fees for admission to attractions</p>
Municipal airports	<p>Establishment, regulation, operation, management and control of an airport facility</p> <p>Includes location, infrastructure, safety, opening hours, charges for usage</p> <p>Excludes aviation matters</p>
Municipal planning	<p>Formulate and implement a local integrated development plan, incorporating local land use planning, transport planning, infrastructure planning and the promotion of integrated local economic development</p>
Municipal health services	<p>Establishment, regulation, operation, management, control of municipal health services, which includes environmental health care, preventive and promotive health care and may include curative primary health care</p>
Municipal public transport	<p>Establishment, regulation, operation, management and control of a municipal public transport service over- or underground</p> <p>Includes municipal bus, taxi, railway and subway services, ranks, stands, stopping places, tariff policy and collection</p>
Municipal public works	<p>Provision of all infrastructure required for the effective carrying out of a municipality's powers and functions</p>
Pontoons, ferries, jetties, piers and harbours, excluding the regulation of international and national shipping and related matters	<p>Establishment, operation, management, control and regulation of the physical facility of pontoons, ferries, jetties, piers and harbours</p> <p>Excludes regulation and control of national and international shipping matters</p> <p>Includes activities in the harbour, access thereto, safety issues, hours of operation</p>

Stormwater management systems in built-up areas	Provision, planning, control, regulation and maintenance of stormwater systems in built-up areas
Trading regulations	Regulation of formal and informal trading Includes hours, location, safety and health requirements, permits, inspection, control, age of traders
Water and sanitation services limited to potable water supply systems and domestic waste-water and sewage disposal systems	Establishment, operation, management and regulation of a potable water supply and sanitation system Includes regulation and provision of water conservation, purification, reticulation and other distribution, bulk supply to local supply points, metering, tariffs setting and collection Establishment, operation, management and regulation of a system for the collection, removal, disposal or purification of human excreta and domestic waste-water Includes provision of a sewage system, sewage collection, removal, destruction, bulk sewage collection, disposal purification and treatment, trunk mains, bulk sewage pump stations, regulations with regard to maintenance (deposit prohibitions)
Competency Schedule 5B	
	Definition
Beaches and amusement facilities	Establishment, operation, management, control and regulation of amusement facilities and beach facilities Includes locations, days, hours, licensing and safety
Billboards and the display of advertisements in public spaces	Display, regulation and control of billboards and the display of advertisements in public spaces Includes signs erected or situated on private property but visible from public spaces
Cemeteries, funeral parlours and crematoria	Establishment, operation, management, control and regulation of cemeteries, funeral parlours and crematoria
Cleansing	Provision of service to clean and maintain public streets and public places and the regulation and control thereof
Control of public nuisances	Regulation and control of public nuisances Includes policing and prevention of any matter that could cause a public nuisance
Control of undertakings that sell liquor to the public	Regulation and control of establishments and undertakings that sell liquor to the public Includes hours, location, safety and health requirements, permits, inspection, control, age of traders

Facilities for the accommodation, care and burial of animals	<p>Establishment, operation, management, control and regulation of facilities used in connection with the accommodation, care and burial of animals</p> <p>Includes kennels, animal parlours, pet cemeteries</p>
Fencing and fences	<p>Provision, operation, management regulation and control of erection, maintenance and repair of fences and gates</p> <p>Includes fencing of dams, wells, excavations, quarries</p>
Licensing of dogs	<p>Regulation of the keeping of dogs through licensing</p> <p>Includes license fees, seizure and destruction of (dangerous) animals</p>
Licensing and control of undertakings that sell food to the public	<p>Regulation, control and licensing of undertakings and establishments that sell food to the public</p> <p>Includes hours, location, safety and health requirements, permits, inspection, control, age of traders</p>
Local amenities	<p>Establishment, operation, management, control and regulation of public amenities</p> <p>Examples of local amenities: squares, camping sites, swimming pools, gardens, hiking trails</p> <p>Includes admission fees, opening times, safety regulations</p>
Local sport facilities	<p>Establishment, operation, management, control and regulation of local sport facilities</p>
Markets	<p>Establishment, operation, management, control and regulation of markets</p> <p>Includes market permits, location, times, conduct</p>
Municipal abattoirs	<p>Establishment, operation, management, control and regulation of abattoirs</p>
Municipal parks and recreation	<p>Establishment, operation, management, control and regulation of municipal parks and recreational facilities</p>
Municipal roads	<p>Establishment, operation, management, control and regulation of roads serving the municipal area</p> <p>Includes:</p> <ul style="list-style-type: none"> • making, constructing, reconstructing, altering and maintaining roads

	<ul style="list-style-type: none"> • opening, closing or deviating roads • entrance and exit to roads • law enforcement relating to roads • signposts, warning signs, resting places, fencing • stormwater drainage, distance indicators, signposts, warning signs, resting/parking places
Noise pollution	Control and prevention of noise pollution
Pounds	Establishment, operation, management, control and regulation of pounds
Public places	<p>Establishment, operation, management, control and regulation of public places and a system to maintain and clean public places</p> <p>Includes prohibitions on obstructions, encroachments, prevention of endangerment</p>
Refuse removal, refuse dumps and solid waste disposal	<p>Establishment, operation, management, control and regulation of a system for the removal of refuse</p> <p>Establishment, operation, management, control and regulation of refuse dumps and solid waste disposal sites</p>
Street trading	Regulation and control of street trading
Street lighting	Establishment, operation, management, control and regulation of a system for the provision of street lighting in the municipal area
Traffic and parking	<p>Control of traffic and provision, regulation, control of parking</p> <p>Includes promotion of road safety, combating road congestion, road traffic engineering, traffic law enforcement, vehicle and driver testing, determination of parking areas and loading zones, determination and collection of parking fees/fines, parking meters/parking attendants</p>

2.3 LOCAL AND DISTRICT MUNICIPALITIES

Shared legislative power

Local and district municipalities share the authority to make by-laws. *How* the district and local municipality share the authority has been regulated in the Municipal Structures Act.

Section 155(1)(b) and (c) of the Constitution:

Category B: A municipality that shares municipal executive and legislative authority in its area with a category C municipality within whose area it falls.

Category C: A municipality that has municipal executive and legislative authority in an area that includes more than one municipality.

Section 84(1) and (2) – the division of powers

Section 84(1) of the Municipal Structures Act lists the powers and functions of the district municipality. These powers and functions are derived from the local government matters in Schedule 4B and Schedule 5B of the Constitu-

tion.

Section 84(2) says that the local municipality has authority over *all other local government matters* not men-

tioned in section 84(1), in its area of jurisdiction.

However, this division can be changed. Functions and powers can be shifted from district to local level and from local to district level. The power to change the division rests with the Member of the Executive Committee (MEC) for Local Government in the province, or the national Minister of Provincial and Local Government (the Minister), depending on the subject matter. The requirements and procedures for changing the division are explained on pages 15–16.

What follows on the next page is a list of all the matters listed in Schedule 4B and 5B of the Constitution and the division between local and district municipalities in terms of section 84(1) and (2) of the Municipal Structures Act. For a definition of the Schedule 4B and 5B matters, see pages 5–9.

The Schedule 4B and Schedule 5B matters are listed in the first column of the table, followed by the division of that competency between district and local municipalities in the second and third columns.

Constitution: Competency Schedule 4B	The division in section 84(1) and (2) of the Municipal Structures Act	
	District municipality – s 84(1)	Local municipality – s 84(2)
Air pollution	No powers	Full powers in the area of jurisdiction
Building regulations	No powers	Full powers in the area of jurisdiction
Child care facilities	No powers	Full powers in the area of jurisdiction
Electricity and gas reticulation	Bulk supply of electricity, which includes for the purposes of such supply, the transmission, distribution, and where applicable the generation of electricity	Reticulation of electricity
Firefighting services	Firefighting services serving the area of the district municipality as a whole, which includes – (i) planning, co-ordination and regulation of fire services (ii) specialised firefighting services such as mountain, veld and chemical fire services (iii) co-ordination of the standardisation of infrastructure, vehicles, equipment and procedures (iv) training of fire officers	Remaining powers in the area of jurisdiction
Local tourism	Promotion of local tourism for the area of the district municipality (Does not include regulation and control of tourism industry)	Remaining powers in the area of jurisdiction
Municipal airports	Municipal airports serving the area of the district municipality as a whole Establishment, regulation, operation and control of airport facility that serves the area of the district municipality	Airports that serve only the local municipality
Municipal planning	Integrated development planning for the district municipality as a whole, including a framework for integrated development plans of all municipalities in the area of the district municipality	Integrated development planning for the area of the local municipality

Municipal health services	Municipal health services	No powers
Municipal public transport	Regulation of passenger transport services	Establishment, operation, management and control of a municipal public transport service over- or underground for the area of the local municipality subject to district municipality's regulation
Municipal public works	Municipal public works relating to any of the above functions or any other functions assigned to the district municipality	Municipal public works relating to the local municipality's powers and functions
Pontoons, ferries, jetties, piers and harbours, excluding the regulation of international and national shipping and matters related thereto	No powers	Full powers in the area of jurisdiction
Stormwater management systems in built-up areas	No powers	Full powers in the area of jurisdiction
Trading regulations	No powers	Full powers in the area of jurisdiction
Water and sanitation services limited to potable water supply systems and domestic waste-water and sewage disposal systems	Potable water supply systems Domestic waste-water and sewage disposal systems	No powers

Constitution: Competency Schedule 5B	The division in section 84(1) and (2) of the Municipal Structures Act	
	District municipality – section 84(1)	Local municipality – section 84(2)
Beaches and amusement facilities	No powers	Full powers in the area of jurisdiction
Billboards and the display of advertisements in public spaces	No powers	Full powers in the area of jurisdiction
Cemeteries, funeral parlours and crematoria	The establishment, conduct and control of cemeteries and crematoria serving the area of a major proportion of municipalities in the district	Remaining powers in the area of jurisdiction
Cleansing	No powers	Full powers in the area of jurisdiction
Control of public nuisances	No powers	Full powers in the area of jurisdiction
Control of undertakings that sell liquor to the public	No powers	Full powers in the area of jurisdiction
Facilities for the accommodation, care and burial of animals	No powers	Full powers in the area of jurisdiction
Fencing and fences	No powers	Full powers in the area of jurisdiction
Licensing of dogs	No powers	Full powers in the area of jurisdiction
Licensing and control of undertakings that sell food to the public	No powers	Full powers in the area of jurisdiction
Local amenities	No powers	Full powers in the area of jurisdiction
Local sport facilities	No powers	Full powers in the area of jurisdiction

Markets	Establishment, operation, management, control and regulation of fresh produce markets...serving the area of a major proportion of municipalities in the district Restricted to markets that sell fresh products, such as vegetables, flowers and meat and excluding car markets, utensils, souvenirs	Remaining powers in the area of jurisdiction
Municipal abattoirs	Establishment, operation, management, control and regulation of abattoirs...serving the area of a major proportion of municipalities in the district	Establishment, operation, management, control and regulation of abattoirs that serve the area of the local municipality only
Municipal parks and recreation	No powers	Full powers in the area of jurisdiction
Municipal roads	Municipal roads which form an integral part of a road transport system for the area of the district municipality as a whole The establishment, operation, management, control and regulation of roads that link local municipalities within the district, fall under the authority of the district municipality	The establishment, operation, management, control and regulation of roads that serve the area of the local municipality
Pounds	No powers	Full powers in the area of jurisdiction
Public places	No powers	Full powers in the area of jurisdiction
Refuse removal, refuse dumps and solid waste disposal	Solid waste disposal sites, insofar as it relates to – (i) the determination of a waste disposal strategy (ii) the regulation of waste disposal (iii) the establishment, operation and control of waste disposal sites, bulk waste transfer facilities and waste disposal facilities for more than one local municipality in the district	Remaining powers in the area of jurisdiction, including the establishment, operation, management, control and regulation of refuse dumps and of solid waste disposal sites that serve the area of the local municipality
Street trading	No powers	Full powers in the area of jurisdiction
Street lighting	No powers	Full powers in the area of jurisdiction
Traffic and parking	No powers	Full powers in the area of jurisdiction

Additional district municipal powers

Section 81(1) of the Municipal Structures Act also gives district municipalities the following supplementary functions and powers:

- ‘The receipt, allocation and if applicable, the distribution of grants made to the district municipality.’
- ‘The imposition and collection of taxes, levies and duties as related to the above functions or as may be assigned to the district municipality in terms of legislation.’

Changes to the division

The division of powers in section 84(1) and (2) can be changed in the case of each municipality by either the Minister or the provincial MEC. This can be done by means of authorisations or adjustments.

Authorisations

An authorisation allows a district municipality to perform a function of a local municipality or allows a local municipality to perform a function of a district municipality in its area of jurisdiction. This does not mean that the district or local municipality loses the function; it merely allows the other municipality also to perform that function. However, staff assets and other resources will be transferred accordingly.

Authorisations by the Minister – Section 84(3) of the Municipal Structures Act gives the Minister the power to authorise a local municipality to per-

form a district function related to water, sewage, electricity or health services or parts of such a function.

The authorisation is effected by notice in the *Government Gazette*.

Temporary authorisations by the MEC – Section 18 of the Municipal Structures Amendment Act provides for temporary authorisations by the MEC. If a district or local municipality is not able to fulfil a specific function allocated to it in terms of section 84 (other than those relating to water, electricity, sewage and health services), the MEC may temporarily authorise either the district or the local municipality to perform that function which has not been allocated to it. The MEC may issue such an authorisation if the following requirements are met:

- the district or local municipality cannot or does not perform a function, or if, for any other reason, it is necessary to ensure the continued performance of the function in that area; and
- the Municipal Demarcation Board has recommended the authorisation.

Note: The power of the MEC to issue temporary authorisations will lapse on 5 December 2002.

The temporary authorisation is effected by notice in the *Provincial Gazette*.

Adjustments

Section 85 of the Municipal Structures Act provides that the MEC may adjust the division of powers between district and local municipalities, as determined in section 84.

The MEC can adjust the division of powers on the following condition: where either the district or the local municipality lacks the capacity to perform a specific function, then the municipality which has the required capacity may be given that function. For example, if a local municipality cannot deal with air pollution, the MEC may allocate that function to the district municipality. The MEC can only make such an ad-

justment on the recommendation of the Municipal Demarcation Board.

The functions relating to water, electricity, waste-water and sewage, and health are excluded. The MEC cannot adjust these functions. Only the Minister may deal with these functions in terms of the authorisations.

An adjustment in terms of section 85 must be reflected in the section 12 notice of the municipality concerned.

2.4 DISTRICT AND LOCAL MUNICIPAL POWERS SUMMARISED

Local municipalities can make by-laws on –

- **Schedule 4B and Schedule 5B matters, namely –**
 - the local matters, referred to in section 84(2) of the Municipal Structures Act – these are the Schedule 4B and Schedule 5B matters **minus** the district matters of section 84(1);
 - district matters that the local municipality has been authorised to perform by the Minister in terms of section 84(3) of the Municipal Structures Act;
 - district matters that the local municipality has been temporarily authorised to perform by the MEC in terms of section 18 of the Municipal Structures Amendment Act; and
 - matters that have been allocated to the local municipality by the MEC in terms of an adjustment of section 85 of the Municipal Structures Act.
- **Assigned matters**
 - In addition, district municipalities can make by-laws on matters that have been assigned to them by national or provincial government.

District municipalities can make by-laws on –

- **Schedule 4B and Schedule 5B matters, namely –**
 - the district matters, listed in section 84(1) of the Municipal Structures Act;
 - local matters that the district municipality has been temporarily authorised to perform by the MEC in terms of section 18 of the Municipal Structures Amendment Act; and
 - local matters, that have been allocated to the district municipality by the MEC in terms of an adjustment of section 85 of the Municipal Structures Act.
- **Assigned matters**
 - In addition, district municipalities can make by-laws on matters that have been assigned to them by national or provincial government.

National and provincial laws on local government matters

In this chapter:

- What are the lawmaking powers of national government on local matters?
- What are the lawmaking powers of provincial government on local matters?

3.1 INTRODUCTION

National and provincial governments can also make laws on the local government matters listed in Schedule 4B and Schedule 5B.

If there is national or provincial legislation on a Schedule 4B or Schedule 5B matter, a by-law on the matter should not conflict with that legislation. A by-law that is in conflict with national or provincial legislation is invalid.

Therefore, two important questions that need to be asked when considering a by-law are:

- *Is there national or provincial legislation on this subject?*

If there is no national or provincial legislation on the matter, the municipality has a free hand in deciding on the content of the by-law.

- *If yes, does the proposed by-law conflict with that legislation?*

Part 3.2 explains what kind of legislation national and provincial govern-

Section 156(3) of the Constitution:

Subject to section 151(4), a by-law that conflicts with national or provincial legislation is invalid.

ment can make on Schedule 4B matters. Part 3.3 explains what kind of legislation national and provincial government can make on Schedule 5B matters.

General principle

In general, the Constitution instructs each sphere of government to use its powers in a way that recognises the other sphere's place in the Constitution of the country.

In terms of the Constitution, the municipality must determine the *actual content* of the laws on Schedule 4B and Schedule 5B matters while, in most cases, national and provincial government may determine standards, limits and frameworks with regard to these matters. For example, a municipality can make a by-law on 'billboards'. The municipality decides where billboards are allowed, what the

requirements are for erection of a billboard and what the fee is for approval to erect a billboard. National or provincial government cannot make those decisions but may provide a framework and standards which the municipality must follow.

The extent to which national and provincial government can legislate on a listed local government matter depends on:

- whether it is national or provincial government that wants to make laws; and
- whether it is a Schedule 4B or a Schedule 5B matter.

3.2 SCHEDULE 4B MATTERS

Powers of national government on Schedule 4B matters

National government can legislate on Schedule 4B matters in terms of section 155(7) of the Constitution. This provision gives national government the power to ‘regulate’ how municipalities exercise their executive authority. The term ‘regulate’ means that national government can, among other things, set national standards and minimum requirements and establish monitoring procedures. Section 155(7) does not allow national government to determine the actual content of the laws on Schedule 4B matters.

However, national government can also use section 44(1)(a)(ii) of the

Section 44(1)(a)(ii) of the Constitution:

The national legislative authority as vested in Parliament...confers on the National Assembly the power...to pass legislation with regard to any matter, including a matter within a functional area listed in Schedule 4...

Constitution to make laws on Schedule 4B matters.

In principle, there is no limitation on the use of this legislative power except for section 41(i)(g) of the Constitution. This section requires that the national government may not encroach on the functional or institutional integrity of the municipality (see page 17). This applies in *every* re-

Section 155(7) of the Constitution:

The national government, subject to section 44, and the provincial governments have the legislative and executive authority to see to the effective performance by municipalities of their functions in respect of matters listed in Schedule 4 and 5, by regulating the exercise by municipalities of their executive authority referred to in section 156(1).

Section 41(1)(g) of the Constitution:

All spheres of government and all organs of state within each sphere must...exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere.

relationship between a municipality and other spheres of government. Therefore, even though national government has the power to make laws on

Schedule 4B matters, it cannot make rules that are unreasonable in that they negate a municipality's status in the Constitution.

Powers of provincial government on Schedule 4B matters

Provincial government can legislate on Schedule 4B matters in terms of section 155(7) of the Constitution (see page 18). Section 155(7) gives provincial government the power to 'regulate' how municipalities exercise their executive authority. This means that provincial legislation can, for example, set provincial standards and minimum requirements, and establish monitoring procedures. Section 155(7) does not allow provincial government to determine the actual content of the laws on Schedule 4B matters.

Section 155(6)(a) of the Constitution instructs provinces to monitor and support local government and to promote the development of local government capacity. This duty on the province can entail passing legislation on Schedule 4B matters with a monitoring framework or with rules governing the way in which municipalities administer Schedule 4B matters. A monitoring framework can entail certain measures or tests at intervals to see if municipalities are complying with national and provincial legislation or with the Constitution itself.

Section 155(6) of the Constitution:

Each provincial government must...by legislative or other means... –

- (a) provide for the monitoring and support of local government in the province; and
- (b) promote the development of local government capacity to enable municipalities to perform their functions and manage their own affairs.

Laws on Schedule 4B matters:

- Local government can make by-laws on Schedule 4B matters.
- Provincial government has the power to set a legal framework for Schedule 4B matters, which can include minimum standards and monitoring procedures. Provincial government cannot determine the actual content of the rules on Schedule 4B matters.
- National government has a general power to legislate on Schedule 4B matters. Like the power of provincial government, it is limited by section 44(1)(g): national government cannot make laws that are unreasonable in that they negate local government its status in the Constitution.

3.3 SCHEDULE 5B MATTERS

Powers of national government over Schedule 5B matters

Section 44(2) of the Constitution:

Parliament may intervene by passing legislation...with regard to a matter falling within a functional area listed in Schedule 5, when it is necessary –

- (a) to maintain national security;
- (b) to maintain economic unity;
- (c) to maintain essential national standards;
- (d) to establish minimum standards required for the rendering of services;
- (e) to prevent unreasonable action taken by a province which is prejudicial to the interests of another province or to the country as a whole.

The national government can only make laws on Schedule 5 matters for one or more of the reasons outlined in Section 44(2) of the Constitution. These reasons include, for example, ‘economic unity’ or ‘national security’.

Powers of provincial government over Schedule 5B matters

The provincial government’s legislative powers in respect of Schedule 5B matters are the same as its powers in respect of Schedule 4B matters. Provincial government can legislate on Schedule 5B matters in terms of section 155(7) of the Constitution, which allows the province to ‘regulate’ (see pages 18 and 19) provincial standards, minimum requirements, monitoring procedures etc.

Provinces can also legislate on the basis of section 155(6)(a) of the Constitution (see page 19), which instructs provinces to monitor and support local government and to promote the development of local government capacity. This duty on the province can entail passing legislation on Schedule 5B matters with a monitoring framework or with rules on the way in which municipalities should administer Schedule 5B matters.

Laws on Schedule 5B matters:

- Local government can make by-laws on Schedule 5B matters.
- Provincial government has the power to set a legal framework for Schedule 5B matters, which can include minimum standards and monitoring procedures. Provincial government cannot determine the actual content of the rules on Schedule 5B matters.
- National government has general legislative powers over Schedule 5B matters, provided the law that it wants to enact is necessary to achieve one or more of the reasons set out in section 44(2).

3.4 CONFLICT BETWEEN A BY-LAW AND NATIONAL OR PROVINCIAL LEGISLATION

After a by-law has been passed, a conflict can arise between the by-law and national or provincial legislation. If the matter is referred to a court, the court will have to determine whether or not the national or provincial law prevails over the by-law

When there is national or provincial legislation on the same subject matter as a by-law *and the content of the by-law conflicts with that legislation*, a court will have to address two issues:

- *Is the national or provincial law valid?*

National or provincial legislation on Schedule 4B or Schedule 5B matters is valid if it falls within the legislative powers (see 3.2 and 3.3 above) of the national or provincial government on that particular subject matter.

- *Does the national or provincial legislation impede the municipality's ability to perform its task?*

Even if the national or provincial legislation is valid, it may not impede a municipality's ability to perform its task. In other words, national or provincial legislation must still comply with section 151(4) of the Constitution, even if it has been enacted in the context of the rel-

evant legislative powers on local government matters.

If a national or provincial law does not comply with section 151(4), the by-law remains valid and the national or provincial law becomes 'inoperative'.

Section 151(4) of the Constitution:

The national or a provincial government may not compromise or impede a municipality's ability or right to exercise its powers or perform its functions.

The requirement of section 151(4) is different from the validity requirement. The validity requirement deals with the question as to whether or not national or provincial government in fact *has the power to make laws on Schedule 4B or Schedule 5B matters*.

After it has been determined that national or provincial government has the power to make these laws, section 151(4) deals with *the way in which the power is exercised*. This power may not be exercised in an unduly intrusive manner or be too prescriptive.

If, for instance, the national or provincial legislation provides for a monitoring framework with reporting obligations on municipalities which result in an unreasonable administrative burden, it could be regarded as unduly intrusive.

Similarly, if very high or rigid standards are required by national or provincial legislation, the legislation might be in conflict with section 151(4) because it is too prescriptive.

Summary

	Schedule 4B matters	Schedule 5B matters
Local government	Can make by-laws	<u>Section 151(4):</u> National and provincial government may not make rules that make it difficult for local government to perform its task
Provincial government	Regulatory powers <ul style="list-style-type: none"> • power to set legal framework, which can include minimum standards and monitoring • cannot determine actual content of rules 	
National government	General legislative power, limited only by section 41(1)(g): cannot negate the status of a municipality in the Constitution	

Developmental local government

In this chapter:

- Giving effect to developmental local government in by-laws.

4.1 DEVELOPMENTAL PRINCIPLES

The Constitution spells out the aims or ‘objects’ of local government. These should guide each municipality in all its activities, including the making of by-laws.

The Constitution also imposes specific developmental duties on municipalities. In making by-laws, municipal councils must take these duties into account.

Section 152 of the Constitution:

- (1) The objects of local government are –
- (a) to provide democratic and accountable government for local communities;
 - (b) to ensure the provision of services to communities in a sustainable manner;
 - (c) to promote social and economic development;
 - (d) to promote a safe and healthy environment; and
 - (e) to encourage the involvement of communities and community organisations in the matters of local government.
- (2) A municipality must strive, within its financial and administrative capacity, to achieve the objects set out in subsection (1).

Section 153 of the Constitution:

A municipality must –

- (a) structure and manage its administration, and budgeting and planning processes to give priority to the basic needs of the community, and to promote the social and economic development of the community; and
- (b) participate in national and provincial development programmes.

These two provisions in the Constitution centre around four ‘developmental’ principles:

democracy	representative, accountable and participatory governance
development	sustainable service delivery, social and economic development and the prioritisation of basic needs
safe and healthy environment	environmentally healthy and secure environment
co-operative government	participation in national and provincial development programmes

These principles compel a council, when it debates a by-law, to pause and ask the question: Does this by-law promote the developmental principles or does it impede them? In some cases, the nature of the by-law will be such that the principles do not apply. However, in most cases, they will be relevant. Each principle will be discussed briefly.

4.2 DEMOCRACY

The three elements of democracy are:

- representative governance;
- accountability; and
- participation.

Representative governance

Representative governance means that councillors are elected by the residents of the municipality to be their

Section 59(2)(a) and (e) of the Municipal Systems Act:

A delegation or instruction...must not conflict with the Constitution, this Act or the Municipal Structures Act...and...does not divest the council of the responsibility concerning the exercise of the power or the performance of the duty.

Section 81(1) of the Municipal Systems Act:

If a municipal service is provided through a service delivery agreement...the municipality remains responsible for ensuring that that service is provided to the local community in terms of the provisions of this Act.

representatives and to lead their municipality. Consequently, the council cannot dispose of the duties entrusted to it by the electorate.

Where a council may delegate a function or a duty to a municipal official, executive organ or other committee of the council (see page 3), it must be done in such a manner that the council remains responsible for the proper performance of that function or duty. This also applies to outsourcing the provision of municipal services.

The questions that need to be asked when considering a by-law are:

- Does the council, in this by-law, hand over the *responsibility* for the mandate, entrusted to it by the electorate, to the municipal management, the executive mayor, the executive committee, or another committee of the council?

- Does this by-law place the *responsibility* for the provision of a municipal service in the hands of an organisation outside of Council's control?
- Does the by-law promote the right of residents to transparent governance?

Accountability

Accountability means that residents can demand explanations from, and be given reasons by, the municipality for policies and decisions, or the lack thereof. The issue here is: Does the by-law, in terms of its nature, topic and operation, promote or hinder accountability?

The questions that need to be asked, when considering a by-law are:

- Does the by-law provide for measures promoting accountability to the residents of the municipality?
- Does the by-law provide for recourse against officials and councillors?
- Does the by-law promote the right of residents to hold the municipality accountable through individual complaints?

Section 5(1)(a) and (b) of the Municipal Systems Act:

Members of the local community have the right –

(a) through mechanisms and in accordance with processes and procedures provided for in terms of this Act or other applicable legislation to...submit...complaints to the municipal council or to another political structure or a political office bearer or the administration of the municipality.

(b) to prompt responses to their...complaints.

Participatory governance

Participatory governance refers to an ongoing process of debate, dialogue and communication between the local government authority and the community. This process must be valued and nurtured in order to ensure trust and agreement on decisions.

It is very easy to talk about participatory governance and community participation without understanding their meaning:

- A one-off meeting where municipalities inform communities about their plans does not result in participatory governance.
- Receiving input from those with 'expertise', 'knowledge' or power does not represent true participation either. Poor and marginalised people are often excluded from these processes. This kind of input is usually dominated by groups with a lot of resources.
- Community participation should also not be seen as a process whereby every decision and action has to be sanctioned and approved by the community. This often causes confusion about who is responsible for what.

A culture of participation by communities in local government affairs needs to be developed. If communities are not aware of how local gov-

ernment works, who is in charge, what are the issues and what are the means available to them to participate, they will not be able to participate.

The questions that need to be asked when considering a by-law are:

- Does the by-law provide for mechanisms and systems that involve communities in decision making around

the aspects dealt with in the by-law?

- Does the by-law provide for the communication of information about municipal services – price, service delivery options, and general local governance issues to enable the community to participate meaningfully?

4.3 DEVELOPMENT

The three key elements of development in the constitutional provisions on local government are:

- sustainable service delivery;
- social and economic development; and
- the prioritisation of basic needs.

Sustainable service delivery

Service delivery is sustainable when it is provided in a manner which ensures that –

- the consumer of services can afford them; and
- the supplier can provide services on an ongoing basis.

Section 73(2)(b) and (c) of the Municipal Systems Act:

Municipal services must –

- (b) be provided in a manner that is conducive to...the prudent, economic, efficient and effective use of available resources...;
- (c) be financially sustainable.

The questions that need to be asked when considering a by-law are:

- What are the financial implications of this by-law for both the municipality and the residents?
- Can potential users afford the service provided for in this by-law?
- Does the municipality have the funds to sustain the delivery of this service?

Social and economic development

The Constitution instructs local governments to promote social and economic development.

‘Development’ means:

- improving the social and economic conditions of people; and
- giving people choices – people must be part of the process whereby decisions that impact on them are made.

Residents are part of decision making by voting for their council but they are also involved in decision making by actively participating in local government affairs. Without being aware of and reacting to the needs of com-

munities, local government cannot be truly developmental. Councillors and officials cannot decide what kind of 'development' is needed without taking their lead from the needs of communities.

Section 6(2)(a) of the Municipal Systems Act:

The administration of a municipality must...be responsive to the needs of the local community.

The questions that need to be asked when considering a by-law are:

- Does the by-law promote the improvement of social and economic conditions of all the residents in the municipality?
- Does the by-law impede the upliftment of people in disadvantaged areas?
- Where does the need for the by-law come from? Was the local community involved in identifying the need for the by-law or its particular content?

Prioritise basic needs

The Constitution obliges municipalities to prioritise the fulfilment of peo-

ple's basic needs. Basic needs that are relevant in terms of local government's legislative competencies are issues such as water, health care and a safe environment.

A municipality must, through means such as making by-laws, provide residents with access to services that meet these basic needs. In other words, by-laws are part of the set of measures through which the municipality has to prioritise basic needs.

A by-law should not impede access to basic services for residents who cannot afford them.

(See also Chapter 5.3 for a discussion on needs and socio-economic rights.)

Section 73(1)(c) of the Municipal Structures Act:

A municipality must...ensure that all members of the local community have access to at least the minimum level of basic municipal services.

Section 74(2)(c) of the Municipal Systems Act:

A tariff policy must reflect at least the following principles, namely that...poor households must have access to at least basic services through –

- (i) tariffs that cover only operating and maintenance costs;
- (ii) special tariffs or life line tariffs for low levels of use or consumption of services or basic levels of service; or
- (iii) any other direct or indirect subsidisation of tariffs for poor households.

4.4 HEALTHY AND SAFE ENVIRONMENT

Healthy environment

Section 73(2)(d) of the Municipal Systems Act:

Municipal services must...be environmentally sustainable.

Section 4(2)(d) and (l) of the Municipal Systems Act:

The council of a municipality, within the municipality's financial and administrative capacity and having regard to practical considerations, has the duty to...strive to ensure that municipal services are provided to the local community in a...environmentally sustainable manner; and... promote a safe and healthy environment in the municipality.

The council must assess each by-law in terms of the consequences for the environment.

By-laws can have serious implications in terms of –

- pollution of air, water or land;
- sustainable use of resources;
- noise pollution; and
- healthy living environment of people etc.

The questions that need to be asked when considering a by-law are:

- Does this by-law have an effect on the environment?
- If the effect is negative, is it sufficiently minimised or can other measures be taken to combat it?

Safe environment

The council must assess each by-law in terms of consequences for the safety of the environment, including the safety of communities in the area. For example, by-laws on street lighting, public places, amusement facilities or control of undertakings that sell liquor can have safety consequences for the area.

The questions that need to be asked when considering a by-law are:

- Does this by-law have an effect on the safety of the people living in the affected areas?
- If the effect is negative, is it sufficiently minimised or can other measures be taken to combat it?

4.5 CO-OPERATIVE GOVERNMENT

Development does not take place in isolation. A municipality cannot fulfil its developmental mandate without being part of the national and pro-

Section 3(1) of the Municipal Systems Act:

Municipalities must exercise their...legislative authority within the constitutional system of co-operative government envisaged in section 41 of the Constitution.

vincial development agenda. That is why the Constitution specifically instructs municipalities to participate in national and provincial development programmes.

The questions that need to be asked when considering a by-law are:

- Does this by-law impede provincial or national development initiatives, policies or legislation?
- Could this by-law have negative effects on other municipalities?

Bill of Rights

In this chapter:

- When is a by-law in conflict with the right to equality?
- When is a by-law in conflict with the right to freedom of expression?
- What is required from a by-law in terms of socio-economic rights?

When making a by-law, the question that must always be asked is: Does this by-law comply with the Bill of Rights? Any by-law that is incompatible with the Bill of Rights is invalid. The Bill of Rights sets norms on a broad range of issues, many of which fall within the legislative powers of councils.

This chapter deals with some important rights in the Bill of Rights. It also gives examples of how the Bill of Rights has been applied to municipalities.

Section 7 of the Constitution:

- (1) The Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.
- (2) The state must respect, protect, promote and fulfil the rights in the Bill of Rights.
- (3) The rights in the Bill of Rights are subject to the limitations contained or referred to in section 36, or elsewhere in the Bill.

Section 2 of the Constitution:

This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.

5.1 THE RIGHT TO EQUALITY

Section 9 of the Constitution:

- (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
- (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories or persons, disadvantaged by unfair discrimination may be taken.
- (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
- (4) No person may unfairly discriminate directly or indirectly against anyone on one or more of those grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
- (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

Municipalities have been subjected to many court cases in which their acts or legislative provisions have been alleged to be in conflict with the equality clause in the Bill of Rights. Examples of such cases include property rights, electricity rates, zoning conditions and even dog licenses.

This part of Chapter 5 explains how a court will deal with a challenge that a by-law violates the right to equality. When a court is confronted with such a challenge, it will ask three questions, namely –

- Does the by-law make a distinction between people and is that distinction rational?
- If yes, does the distinction amount to unfair discrimination?
- If yes, is the unfair discrimination justified?

Each of these questions is discussed in turn.

1. Does the by-law make a distinction between people or groups of people and is the distinction rational?

Does the by-law make a distinction between people or groups of people? If it does, the distinction ‘must make sense’ when viewed against what is aimed to be achieved with the by-law. In the absence of a good reason, the by-law is invalid.

2. If yes, does the distinction constitute ‘unfair discrimination’?

This question is divided into two parts:

(1) Does the distinction amount to discrimination?

If the distinction made in the by-law is based on one of the grounds listed in section 9(3) (namely race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language or birth), the court will accept that the by-law is discriminatory.

If the distinction is based on another ground, the court will examine whether or not the ground has the potential to degrade or dehumanise people. These grounds are often based on biological aspects or other characteristics, over which people have no control, or on ways in which people practice religion or culture.

Indirect discrimination – The state is prohibited from discriminating either *directly* or *indirectly*. *Indirect* discrimination occurs when a distinction is made on the basis of a ground that at first appears to be neutral. However, the result of the distinction is that persons belonging to a particular group are affected disproportionately. It is especially important for municipalities to be aware that differentiation on the basis of geographical area – an apparently ‘neutral’ ground – can amount to *indirect* discrimination on the basis of race or colour. This is so because of the the history of racial segregation in South Africa.

(2) If the distinction amounts to discrimination, is the discrimination unfair?

If the discrimination, directly or indirectly, is based on one of the grounds listed in section 9(3) of the Constitution, the court will presume that it is unfair. It is then up to the party defending the provision – the municipality – to prove that it was in fact not ‘unfair’. To determine whether or not the discrimination is ‘unfair’, three factors are particularly important, namely:

- What is the position of the persons affected? Do they belong to a

‘vulnerable’ group, which, for example, has suffered from discrimination in the past?

- What is the nature of the measure in question and what is meant to be achieved? In other words, is there a good reason for the discrimination?
- To what extent does the measure affect the rights or interests of the complainants? Does it affect their human dignity?

If the measure is an *executive* act, then the enquiry ends here. An executive act that amounts to unfair discrimination is unconstitutional. However, if the measure is a *legislative* act – a by-law – a third question must be addressed.

3. If the discrimination is unfair, is it nevertheless justified?

A by-law that unfairly discriminates can still be ‘saved’ from unconstitutionality by section 36 of the Constitution. In other words, even though the by-law violates the right to equality, it is still constitutional if it passes the test laid down in section 36.

In this final leg of the equality test, the burden of proof is on the municipality. The municipality must prove that the by-law, which discriminates unfairly, is ‘reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom’.

An important factor in section 36 is proportionality. The by-law should

Section 36 of the Constitution:

- (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including –
 - (a) the nature of the right;
 - (b) the importance of the purpose of the limitation;
 - (c) the nature and extent of the limitation;
 - (d) the relation between the limitation and its purpose; and
 - (e) less restrictive means to achieve the purpose.
- (2) Except as provided in subsection (1) or in any other provision in the Constitution, no law may limit any right entrenched in the Bill of Rights.

impair the right to equality no more than is necessary to achieve the desired objective. If there are other, less restrictive measures which could achieve the same objective, the by-law is deemed unconstitutional.

Summary

When a court is confronted with a by-law which is alleged to be unconstitutional because it is in conflict with the right to equality, it must answer three questions:

1. Does the by-law make a distinction between people or groups of people?
 → Yes? → Then continue
2. Does the distinction constitute 'unfair discrimination'?
 → Yes, and it is an executive act → Then unconstitutional
 → Yes, and it is a by-law → Then continue
3. Is this unfair discrimination justified under the limitation clause?

EXAMPLE: Equality and unequal rates

CITY COUNCIL OF PRETORIA V WALKER

The facts

Residents of the black areas of Mamelodi and Atteridgeville paid for their electricity on the basis of a 'flat rate'. This is a fixed amount, based on

the average usage of electricity in a particular area. Residents of the old white Pretoria paid for their electricity on the basis of a 'metered rate'. This is an individual amount based on actual usage. The metered rate was higher than the flat rate. Did this distinction amount to unfair discrimination against the residents of the white community of old Pretoria?

In considering the case, the Constitutional Court asked the following questions:

1. Did the rates policy make a distinction and was that distinction rational?

The policy did make a distinction between groups of people depending on where they lived. The Court accepted that the distinction had a legitimate purpose and that it 'made sense' when viewed against that purpose. The purpose was to continue rendering the service, while trying to phase in a situation of equal services for equal prices throughout the entire area.

2. Did the distinction constitute 'unfair discrimination'?

(1) Did the distinction amount to discrimination?

The distinction was based on an apparently 'neutral' ground, namely geographical area. However, the Court said that it amounted to *indirect* discrimination on the grounds of race. The effect of apartheid is that race and geography are linked. Making distinctions along geographical lines, although seemingly neutral, may in fact be racially discriminatory.

(2) Was the discrimination unfair?

Since the discrimination was based on race – a specified ground – the municipality had to prove that the discrimination was 'fair'. The Court considered the following three factors:

- **Position of complainants in society** – The persons affected be-

longed to the white community of old Pretoria, which had not been disadvantaged by past discrimination but rather benefited from it.

- **Nature and purpose of the policy; was there a good reason for the discrimination?** – The Court considered that the council had to deal with the disparities caused by apartheid. The council not only had to try to eliminate flat rates and institute metered rates instead, it also had to upgrade and develop disadvantaged areas. The council had no other reasonable choice than to allow the continuation of the distinction. There were no meters in the townships and a flat rate throughout would have been unscientific as well as more harmful than the present situation. The fact that the residents of old Pretoria were 'subsidising' Mamelodi and Atteridgeville did not make the distinction unfair. Cross-subsidisation is a normal part of the pricing of electricity and it is unavoidable between different categories of consumers.
- **The impact on complainants; to what extent does the policy affect the rights or interests of the complainants?** – The distinction in rates did not violate Walker's dignity. The high standard of service delivery in old Pretoria had not deteriorated, while delivery in the townships was still unsatisfactory.

Conclusion

The Court came to the conclusion that the distinction in rates did not amount to unfair discrimination. Rates may vary from user to user, depending on the quality of services and the circumstances of the user.

Selective debt collection

In the same case, the Court also had to review the municipality's policy of non-enforcement of payment of electricity accounts in the townships. This was a policy that was not recorded, not

officially authorised by the council, and based on *ad hoc* decisions by council officials. Because it was not properly formulated and shared with the communities, the Court found it to be discriminatory. For a policy, whereby disadvantaged areas are treated 'with a softer hand', to be constitutional, it would have to be carefully formulated, announced and debated in public. It would also have to be implemented in a way which does not seriously impair the rights and interests of other residents of the municipality.

EXAMPLE: Equality and equal rates

LOTUS RIVER, OTTERY, GRASSY PARK RESIDENTS ASSOCIATION V SOUTH PENINSULA MUNICIPALITY

Facts

To balance its budget, South Peninsula Municipality implemented a general property rates increase of 19%. The valuation on which the property rates were assessed was outdated. Some of the valuation rolls were based on valuations conducted in 1974. The result of the outdated valuation rolls was that further increases in value of property since the last valuation had not been taken into account when the rates were determined. This had led to a skewed structure of rates, because

the value of the property in white areas had boomed since the last valuation, while property in the disadvantaged areas had not increased much in value. This skewed rates structure was now made worse by a general increase which impacted disproportionately on black homeowners in previously disadvantaged areas. The Court asked the following questions:

1. Did the rates increase make a distinction between people or groups of people and was the distinction rational?

The municipality was compelled by legislation to present a balanced budget. At the same time, it faced difficult and complex fiscal problems. The Court accepted that the increase was rationally connected to the purpose of balancing the budget.

2. Did the distinction constitute 'unfair discrimination'?

(1) Did the distinction amount to discrimination?

The Court held that there was indeed *indirect* discrimination on the basis of colour. An overwhelming majority of property owners in previously disadvantaged areas, which suffered the disproportionate impact of the rates increase, were black.

(2) Was the discrimination unfair?

Discrimination on the basis of colour is presumed to be unfair, unless this presumption is proved not to be the case. It was therefore up to the municipality to convince the Court that the rates increase did not unfairly discriminate against people of colour in the affected disadvantaged areas. The municipality acknowledged that the rates increase made the unequal position even worse, but emphasised that it was an interim measure, pending the completion of a General Valuation of the entire area. The fact that the complainants belonged to a group that was previously disadvantaged undoubtedly

played a role. It was concluded that the discrimination was unfair and violated the right to equality.

3. Was the unfair discrimination justified?

Because rates decisions are legislative acts and not administrative acts, the third question was whether or not the unfair discrimination could be justified under section 36. The key issue was the notion of less restrictive means: the law should impair the right no more than is necessary to achieve the desired objective.

The Court was convinced that the municipality had a limited range of viable options and that it chose to increase the rates only after careful consideration. It did consider alternatives to the increase in order to adopt the least restrictive means to achieve its purpose. The Court took into consideration the financial consequences of the restructuring of local government, the fact that external subsidies were no longer available and that the General Valuation was well underway. The violation of the right to equality was justified under these circumstances and the rates increase was held not to be unconstitutional.

5.2 FREEDOM OF EXPRESSION

The right to receive or impart information or ideas is important for local governments, especially when local governments make by-laws regarding advertising, billboards and public displays.

Section 16 of the Constitution includes the following rights:

Everyone has the right to freedom of expression, which includes –

- (a) freedom of the press and other media;
- (b) freedom to receive or impart information or ideas;
- (c) freedom of artistic creativity;

...

The right in subsection (1) does not extend to –

- (a) propaganda for war;
- (b) incitement of imminent violence; or
- (c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.

EXAMPLE: Freedom of expression and billboards:

CITY OF CAPE TOWN v. AD OUTPOST

A Cape Town by-law required any person who intends to display a sign to make a written application for prior approval by the municipality. Displaying or attempting to display a new sign without prior approval constituted an offence. The conditions for approval required that the sign describe the

trade or activity conducted *on the site*. The by-law thus effectively prohibited third party advertising, including the erection of billboards on vacant land.

Ad Outpost, a company in the business of setting up billboards for their clients, was erecting two signs without permission. The City of Cape Town obtained a court order prohibiting Ad Outpost from displaying the sign. Ad Outpost challenged the by-law on the basis of the right to freedom of expression.

The Court said that, despite its commercial nature, this type of expression (billboards) is protected by the Constitution. This mode of advertising seeks to communicate to the public and therefore falls under the protection of the right to receive and impart information. The Court held that Cape Town's by-law did in fact breach Ad Outpost's right to freedom of expression. The by-law effectively prohibited any form of advertising on premises where the advertised article is not for sale or where the advertised activity is not conducted.

The breach of this right could only be saved by the limitation clause in section 36(1) of the Constitution. However, the limitation clause did not help the City of Cape Town. Firstly, the by-law was in fact inadequate and too rigid. Secondly, Cape Town could have employed means that are less restrictive than a blanket prohibition on third party advertising. For those reasons, the Court found that the by-law could not be justified in terms of section 36(1).

5.3 SOCIO-ECONOMIC RIGHTS

Introduction

The Bill of Rights includes socio-economic rights. These rights are different from the other rights in the Bill of Rights, such as the right to equal treatment and the right to freedom of expression, which generally require the state to *refrain from* interfering with them. Socio-economic rights are different in that they often also require *positive* state action.

In general, courts will be reluctant to stipulate *what kinds of state action* are required, since these are policy decisions which are to be taken by elected governments. However, the Constitution has clearly made the socio-economic rights ‘enforceable’, which means that the government can be taken to court if it violates any of these rights.

Socio-economic rights are particularly important for the vulnerable and disadvantaged groups in society. These rights aim to provide people with access to resources, opportunities and services so that they can achieve an adequate standard of living.

Socio-economic rights that are relevant for municipalities, are:

- the right to a healthy environment (section 24);
- the right of access to land, to tenure security, and to land restitution (section 25);

- the right of access to adequate housing and protection against arbitrary evictions and demolitions (section 26);
- the right to have access to health care services, sufficient food and water and social security (section 27);
- the right for children to basic nutrition, shelter, basic health care services, social services and protection against maltreatment, neglect, abuse or degradation (section 28); and
- the right to education (section 29).

For a more in-depth discussion of socio-economic rights, consult *Socio-Economic Rights in South Africa*, produced by the Community Law Centre. This resource book contains plain language explanations, examples, guidelines, court case summaries, case studies and discussion ideas on socio-economic rights.

Who is responsible for the implementation of socio-economic rights?

Section 7(2) of the Constitution places the obligation on *the state* to implement all fundamental rights, including socio-economic rights. It imposes four different types of obligations:

- To *respect* these rights means that the state must refrain from interfering with the enjoyment of these rights.

Section 7(2) of the Constitution:

The state must respect, protect, promote and fulfill the rights in the Bill of Rights.

- To *protect* these rights means that the state must prevent violations by third parties.
- To *promote* fundamental rights means that the state must encourage and advance the realisation of these rights, which includes ensuring public awareness.
- To *fulfil* fundamental rights means that the state must take appropriate legislative, administrative, budgetary, judicial and other measures towards realisation.

How should municipalities approach these rights, considering that social and economic rights require positive state action with substantial budgetary consequences? How must these rights be viewed against what local government is mandated to do, in other words, the competencies of local government in terms of the Constitution and other legislation? For example, local government's involvement in education is limited in that it is a competency shared by national and provincial government. The Constitu-

tion does not mandate local government to provide education.

Municipalities are, just as much as national and provincial governments, obliged to *refrain from interfering* with these rights, to *protect residents against violations* by third parties and to *advance the realisation* of these rights. In other words, local governments cannot make by-laws that interfere with any of the socio-economic rights, regardless of whether or not the issue falls within their range of competencies. Local governments must also protect rights, such as the right to education, against violations by other persons or organisations and be involved in promoting the right to education.

However, when it comes to *fulfilling* an economic, social or cultural right in terms of taking legislative, administrative, budgetary, judicial or other similar measures, the extent of local government's responsibility is dependent on its legislative power. Municipalities can only make by-laws on matters, in which they are competent.

Section 26 of the Constitution:

- (1) Everyone has the right to have access to adequate housing.
- (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.
- (3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.

EXAMPLE: Access to housing

GOVERNMENT v GROOTBOOM

An example of an important socio-economic right is the right to housing.

Mrs Grootboom was part of a group of people living in appalling circumstances in an informal settlement. The

group moved to nearby land and illegally occupied this land, which was earmarked for low-cost housing. They were forcibly evicted. Their shacks were bulldozed and burnt and their possessions destroyed. They could not go back to their original settlement. They asked the Court to order the state to provide them with basic shelter.

The Constitutional Court distinguished between the *negative* obligation to refrain from impairing the right to housing and the *positive* obligation to take measures to provide access to housing. It was the latter part of the right of access to housing, namely the measures that the state had taken, which were tested in this case.

Constitutional Court in *Grootboom*:

In any challenge based on section 26 in which it is argued that the state has failed to meet the positive obligations imposed upon it by section 26(2), the question will be whether the legislative and other measures taken by the state are reasonable.

The Court examined whether or not the state had violated Grootboom's right to housing by asking the question: Were the measures taken by the state reasonable?

It was clear that no real policy existed which could be applied to people in need of crisis housing. Apart from the normal channels, namely application for low-cost housing, which could take years, there was no relief for Mrs Grootboom. There was no provision in any policy, whether na-

tional, provincial or local, that applied to her desperate situation.

The Court said that, in order for a policy to be reasonable, it cannot ignore those whose needs are the most urgent. A policy aimed at providing access to housing cannot be aimed at long-term statistical progress only. Those in desperate need must not be ignored. Their immediate need can be met by 'second-best' facilities that perhaps fall short of accepted housing standards, but nevertheless provide a basic form of shelter.

This case dealt with the right to housing, which is a competency of national and provincial government. The Court placed the onus on national government to ensure that the appropriate legislative and budgetary framework is in place for the implementation of the right to housing. The Court affirmed that the responsibility for implementation is generally given to the provinces.

However, the Court also said that '[a]ll levels of government must ensure that the housing programme is reasonably and appropriately implemented...Every

Constitutional Court in *Grootboom*:

They [those in desperate need] are not to be ignored in the interests of an overall programme focussed on medium- and long-term objectives.

Section 27 of the Constitution:

- (1) Everyone has the right to have access to –
 - (a) health care services, including reproductive health care;
 - (b) sufficient food and water; and
 - (c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.
- (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.
- (3) No one may be refused emergency medical treatment.

step at every level of government must be consistent with the constitutional obligation to take reasonable measures to provide adequate housing.’

This judgment is important also with regard to other socio-economic rights, where local government is even more closely involved, such as the provision of water. The provision of potable water is clearly one of a municipality’s critical competencies.

The *Grootboom* case makes it clear that when local governments make by-laws on issues such as the provision of water or basic municipal health care, they cannot ignore the needs of the people in most desperate situations just in order to achieve a better overall statistical result in the long term. Short-term needs of the most disadvantaged cannot be ignored at the risk of being in violation of the Bill of Rights.

The procedure to make a by-law

In this chapter:

- What is the correct procedure to follow when passing a by-law?

The Constitution, the Municipal Structures Act and the Municipal Systems Act set the framework in terms of which a municipal council must pass by-laws. Within this framework, a council may make a by-law to further regulate its internal procedures of lawmaking.

The Constitution sets two basic requirements for municipal lawmaking:

- First, a by-law must have the support of the majority of all the councillors.
- Second, the community must have enjoyed the opportunity to have its say with regard to that by-law.

The making of a by-law entails the following steps:

Step 1 A draft by-law is prepared by a councillor or a committee of the council.

Step 2 The council must consult with the community with regard to the draft by-law. It must at least publish the by-law for comment by the public.

Step 3 The by-law is introduced in and debated by the council.

Step 4 The municipal council votes on the by-law.

Step 5 If passed by the council, the by-law is published and becomes law on that date or a later date set in the by-law.

Step 1: DRAFTING A BY-LAW

Any councillor or a committee of a municipal council may prepare a draft by-law. It is usually drafted by a municipal department on the instructions of a council committee.

Standard draft by-laws

In order to assist municipal councils, the Minister responsible for local government or the provincial MEC may make standard draft by-laws on any matter that a council may make laws on. These standard draft by-laws are

not binding on councils. A council may decide to use such a by-law as a basis for its own by-law. A council may change the standard draft by-law to fit in with local conditions or circumstances. It may also ignore the standard draft by-laws altogether.

When a council uses a standard draft by-law, it must follow the same

lawmaking process as when it drafts its own by-law.

A council may also make a by-law by incorporating, by reference, provisions of national or provincial legislation in that by-law. When it does so, the council must follow the same lawmaking process as when it drafts its own by-law.

Step 2: CONSULTING WITH THE COMMUNITY

Section 160(4) of the Constitution:

No by-law may be passed by a Municipal Council unless...the proposed by-law has been published for public comment.

The Municipal Systems Act requires municipalities to develop community participation in the process of making by-laws.

Once a draft by-law has been introduced in the council, the council must consult with the community regarding the draft by-law.

Publication for comment

Section 16(1) of the Municipal System Act:

A municipality must develop a culture of municipal governance that complements formal representative government with a system of participatory governance, and must for this purpose encourage, and create conditions for, the local community to participate in the affairs of the municipality.

The first step in the consultation process is to publish the draft by-law for public comment. This step is compulsory.

When publishing a draft by-law for comment, it must be done in

a manner that allows the public an opportunity to make representations. The council may make rules on how notice of the by-law is given to the public – whether it is by posters or through the media. The notice of the by-law must indicate by what date and to whom comments or representations may be given.

This opportunity to comment must be open to all residents. When the council invites the local community to submit written comments on a draft by-law, it must make special provision for people who cannot write. It must state in the invitation that a person who cannot write may come during office hours to a place where a municipal staff member will assist that person to write down comments and representations.

The council may take further steps to extend consultation. A municipality must establish its own mechanisms, processes and procedures to ensure effective consultation. When doing so, the municipality must take into account the special needs of –

- people who cannot read or write;

- people with disabilities;
- women; and
- other disadvantaged groups.

The municipality must also communicate to its community information about how residents can participate.

Advice from ward committees and other committees

The municipality may use the ward committees, where they have been established, to discuss the merits of a draft by-law. It may hold public meetings and hearings. The municipal council may establish one or more advisory committees that consist of persons who are not councillors to advise the council on any matter, including by-laws. Gender representation must be taken

into account when appointing these committees.

The duty to facilitate community participation can be further regulated by the national Minister responsible for local government. National regulations can be made and guidelines issued concerning minimum standards for implementing community participation in the affairs of the municipality. In doing so, the Minister must differentiate between different kinds of municipalities according to their capacity to comply with the regulations or guidelines. The Minister can also phase in the application of those requirements on community participation of the Municipal Systems Act which place a financial or administrative burden on municipalities.

Step 3: PROCEDURES IN THE COUNCIL CHAMBER

Introduction of a draft by-law

A member or a committee of a municipal council may introduce a draft by-law in the council. Any councillor is thus free to table a draft by-law.

Internal procedures

A council may make by-laws with rules and orders for making by-laws in the future. Once these rules and or-

Section 160(6) of the Constitution:

A Municipal Council may make by-laws which prescribe rules and orders for –

- (a) its internal arrangements;
- (b) its business and proceedings.

ders have been adopted the council must comply with them.

Reasonable notice to councillors

For the council to perform its democratic function, all proposed by-laws

must be subject to open debate. The Constitution thus requires in section 160(4)(b) that no by-law may be passed by the municipal council unless ‘all members of the Council have been given reasonable notice’. This means that councillors should be given a copy of the draft by-law, sufficient time to study the by-law, and adequate notice of when the by-law will be debated and voted on.

Report by executive committee or executive mayor

Before passing a by-law, a council that has an executive committee or executive mayor, must first require that committee or mayor to give a report and recommendation on the by-law.

A by-law that affects a traditional area

If a by-law has a particular impact on the area of a traditional authority, the council cannot vote on the by-law before giving the relevant traditional leader an opportunity to express his or her view on the by-law.

Section 81(3) of the Municipal Structures Act:

Before a municipal council takes a decision on any matter directly affecting the area of a traditional authority, the council must give the leader of that authority the opportunity to express a view on that matter.

Freedom of debate

Section 161 of the Constitution:

Provincial legislation within the framework of national legislation may provide for privileges and immunities of Municipal Councils and its members.

Debating the merits or the demerits of a draft by-law lies at the heart of democracy. Free and open debate is thus protected in the Constitution.

The Municipal Structures Act provides the national framework for provincial legislation that must still be passed. Such legislation must at least provide that councillors have freedom of speech in a council and its committees subject to the rules and orders of the council.

Councillors are also not liable for civil or criminal proceedings, arrest, imprisonment or damages for anything that they have said in, produced before or submitted to the council or its committees. The same rule applies to anything revealed as a result of what they said in, produced before or submitted to the council or any of its committees. A councillor cannot, for example, be sued for defamation for what he or she has said in the council chamber. The rules and orders of the council may, however, provide for rules to prevent the abuse of this freedom of speech.

Until provincial laws on the matter have been passed, the provision of the Municipal Structures Act will govern the privileges and immunities of councillors in their council debates.

Open to the public

To ensure that a council's lawmaking is accountable, responsive and open, members of the public have the right to attend council meetings. To exercise this right, the public must know where and when council meetings are to be held. They must also know what the meetings of the council are about.

The general rule is that council activities are open to the public.

The municipal manager must give notice to the public, in a manner determined by the council, of the time, date and venue of every ordinary meeting of the council. This duty also applies to special or urgent meetings of the council, except when time constraints make this impossible.

When the council deals with a by-law, the council, or a committee of the council, may not exclude the public, including the media. This rule applies when the council is considering or

voting on a draft by-law tabled in the council.

To ensure that the public can indeed attend council meetings, the council must, within its financial and administrative capacity, provide space for the public in the chambers and places where it and its committees meet.

To ensure the orderly conduct of its meetings, a council may also take reasonable steps to regulate public access to, and public conduct, at its meetings. The council may order the removal of persons who are disruptive at the meeting. Likewise, a council may determine whether or not the media may bring television cameras into the council chamber.

Section 160(7) of the Constitution:

A Municipal Council must conduct its business in an open manner, and close its sittings, or those of its committees, only when it is reasonable to do so having regard to the nature of the business being transacted.

Step 4: VOTING FOR A BY-LAW

Majority vote

For a council to pass a by-law, the majority of councillors must vote in favour of it. This means that 50% plus one of all the elected councillors must vote for the by-law.

Step 5: PUBLICATION AND COMING INTO FORCE OF A BY-LAW

After a by-law has been passed by the council, it must be published promptly in the *Provincial Gazette*. This is a necessary requirement before the by-

Section 162(1) of the Constitution:

A municipal by-law may be enforced only after it has been published in the official gazette of the province.

law can have any force or effect. The by-law takes effect when it is published in the *Gazette* or on a future date determined in the by-law.

The by-law can also provide for the mayor to issue a notice to bring the by-law into operation. A copy of the notice must be displayed at the municipal offices.

Where it is feasible, the by-law must be published in a local newspaper. If not, the council must find other practical ways of bringing the by-law to the attention of the local community.

When the community is notified through the media, it must be done:

- in the local newspaper(s);
- in a newspaper or newspapers circulating in its area and determined by the council as a newspaper of record; or
- by means of radio broadcasts covering the area of the municipality.

Such a notification must be done in the official languages of the area, as determined by the council.

Municipal code of by-laws

A municipality must compile and maintain a collection of all its by-laws in bound or loose-leaf form so that they are readily accessible. Where possible, the collection must also be kept in electronic format.

This compilation is called the municipal code, and is the municipality's official record of all applicable by-laws. A municipality must constantly update the code.

This code, which must be kept at the head office, should also be accessible to the public. The municipality must provide, at the request of a member of the public, a copy of or an extract from its municipal code. This may be done for a reasonable fee, determined by the council.

Section 162(3) of the Constitution:

Municipal by-laws must be accessible to the public.