LEGAL ASPECTS OF INCLUSIONARY HOUSING IN SOUTH AFRICA
The National Land Value Capture Programme in South Africa was initiated by a tripartite partnership between the Development Action Group (DAG), the Lincoln Institute of Land Policy, and the National Treasury’s Cities Support Programme (CSP). Launched in March 2020, the three-year programme aims to strengthen the capability of metropolitan governments to efficiently and effectively implement innovative Land Value Capture tools and strategies. Simultaneously, the programme seeks to build capacity in built environment practitioners and civic organisations to influence institutional, regulatory, and other procedural changes required to implement appropriate Land Value Capture tools and strategies. This report is the second report published by the LVC Programme as a part of their evidence-based research. Pegasys Pty Ltd. was commissioned to undertake this legal review after an open call and fair application process.

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EXECUTIVE SUMMARY

There has been extensive consideration and debate regarding inclusionary housing in South Africa for over a decade. Actual implementation of inclusionary housing requirements however is still rare. Among the many challenges identified by stakeholders is the lack of clarity regarding the legality of inclusionary housing under South African law. This report addresses two specific aspects of legality that have been identified, namely (1) whether South African municipalities can require mandatory inclusionary housing conditions as part of proposed developments in existing development corridors and other areas where there are active urban land markets, and (2) whether South African municipalities can permit payments made by a developer as an alternative to providing inclusionary housing for a proposed development, also known as an “in-lieu fee” option.

The conclusions reached from a review of domestic and international laws and literature, as well as interviews with legal experts, is that there is likely sufficient legal basis under South African law to authorise municipal-imposed mandatory inclusionary housing requirements and, more tentatively, to provide for an in-lieu fee option. These conclusions are subject to a number of qualifications regarding the character of the policies and the means by which they are imposed. Also, particularly in the case of in-lieu fees, these conclusions depend on a presumption that courts will review such previously untested policies in a light favouring broad municipal power and foregrounding the obligation to pursue the inclusionary principles found in South Africa’s Constitution. While it is a fraught exercise to predict future judicial determinations, especially in light of the relative dearth of legal precedent or clear national law or policy regarding the inclusionary housing mechanisms discussed in this report, we believe that there is sufficient legal basis to support these mechanisms, particularly considering the context of South Africa’s Constitutional and legislative goals and principles. This report also highlights the manner in which policymakers could strengthen the legal basis for imposing mandatory inclusionary housing requirements and an in-lieu fee option.
South African policymakers at all levels of government have been considering inclusionary housing (IH) policies, which seek to leverage planning and land use regulations to create more affordable housing and foster social inclusion, for well over a decade. However, notwithstanding extensive consideration and debate, actual implementation of inclusionary housing in South Africa is still rare. As of publication of this report, the City of Johannesburg is apparently the only South African municipality imposing a comprehensive inclusionary housing policy authorised in law and implemented through a policy, a development which occurred in 2019. Other South African municipalities, including the City of Cape Town, are currently in the process of considering whether and how to implement their own inclusionary housing policies.

The challenges to crafting successful inclusionary housing requirements are many and include properly assessing and considering whether and how such requirements may be economically prudent, politically feasible, and practically effective. This report does not address any of these challenges. Instead, it addresses the legality of inclusionary housing under existing South African law, and specifically two particular aspects of inclusionary housing: (1) whether there is currently a sufficient legal basis in South Africa to require mandatory inclusionary housing conditions as part of proposed developments in existing development corridors and other areas where there are active urban land markets, and (2) whether the current existing South African legal framework legally supports payments made by a developer as an alternative to providing inclusionary housing for a proposed development, also known as an “in-lieu fee” option. These legal questions are important to address because stakeholders and policymakers have identified them as key areas of uncertainty regarding the imposition of inclusionary housing requirements. A more detailed analysis regarding these two questions thus is necessary to moving consideration of inclusionary housing policies forward in South Africa.
Broadly speaking, our analysis concludes that there is likely sufficient legal basis under South Africa’s Constitution and legal land use regulatory framework to authorise municipally-imposed mandatory inclusionary housing requirements and, more tentatively, to provide for an in-lieu fee option. These conclusions are subject to a number of qualifications regarding the character of the policies and the means by which they are imposed and also, particularly in the case of in-lieu fees, on a presumption that courts will review such previously untested policies in a light favouring broad municipal power and obligation to pursue the inclusionary principles found in South Africa’s Constitution. While it is a fraught exercise to predict future judicial determinations, especially in light of the relative dearth of legal precedent or clear national law or policy regarding the inclusionary housing mechanisms discussed in this report, we believe that there is sufficient legal basis to support these mechanisms, particularly considering the context of South Africa’s Constitutional and legislative goals and principles. In addition, this report also highlights the manner in which policymakers could strengthen the legal basis for imposing mandatory inclusionary housing requirements and an in-lieu fee option.

This report begins by discussing two issues that we believe are critical to framing our analysis. The first is that inclusionary housing must be understood as a planning and land use regulatory tool, and that therefore its use and powers are guided by the broader understanding of the power to regulate land use. The second is that legal decisions regarding the validity of inclusionary housing requirements and in-lieu fees will likely be determined based on how Constitutional and legislated rights are interpreted. More specifically, a literalist/textual approach to interpreting the law may prohibit inclusionary housing, based on the relative lack of express authority under existing law, while a more contextual approach may provide more room to find municipal authority to implement such requirements in light of constitutional and legislative prerogatives.

After discussion of these two framing issues, Sections 3 and 4 of this report analyse the two questions presented. Section 3 addresses whether mandatory inclusionary housing requirements are valid. In addition to concluding that mandatory housing is legally valid on the basis of review of existing Constitutional and legislative authority for planning and land use regulation, this section also discusses why a mandatory inclusionary housing requirement would likely not infringe on the constitutional protections of private property.

Section 4 of this report analyses the legality of in-lieu fee options, concluding that there is an argument for upholding their legality, although this argument has not yet been directly tested in South African courts. Because of the lack of direct precedent, this section pays close attention to analogous types of charges, particularly in-lieu fees for parks and open space as well as development charges.

This report was commissioned by the Development Action Group (DAG) as part of its ongoing work with the Lincoln Institute for Land Policy to advance the discussion of policies that implicate land value capture in South Africa. It is intended to serve policymakers and other stakeholders as discussions of inclusionary housing progress in South Africa. It does not constitute legal advice for any particular party.
SECTION 1
FRAMING ISSUES

We consider two issues to be critical to considering the legality of mandatory inclusionary housing requirements and in-lieu fee options in South Africa:

1.
Inclusionary housing must be understood as a planning and land use regulation tool, and that therefore its use and powers are guided by land use regulatory powers.

2.
Legal decisions regarding the validity of inclusionary housing requirements and in-lieu fees may likely turn on how broadly or narrowly courts interpret the authority provided under the Constitution and applicable legislation—narrower, more textual interpretations may exclude the possibility of implementing inclusionary housing and in-lieu fees, while broader, more contextual interpretation may provide municipalities the space to implement such provisions.

INCLUSIONARY HOUSING PROVISIONS ARE A FORM OF LAND USE REGULATION

Inclusionary housing is conventionally recognised as a land use regulatory mechanism to promote inclusion through housing policy

- Inclusionary housing provisions, including “mandatory” provisions, have been implemented in a number of countries, although their implementation vary considerably based on legal, socio-cultural, and economic circumstances.¹
- While the definition and characterisation of “inclusionary housing” varies between jurisdictions and amongst experts and scholars, it is conventionally understood to be a planning system tool used to create affordable housing and foster social inclusion through regulation of private development.²
- The focus of inclusionary housing is achieving racially and/or socio-economically integrated communities by confronting and addressing the exclusionary impact of development which, in many contexts has often been facilitated by planning and land use regulation in the first place.³ Therefore, “[i]nclusionary housing, by its very nature, straddles the housing and planning fields.”⁴
- Accordingly, while the impact of inclusionary housing requirements affects housing, the legal authority, theory, and mechanics of inclusionary housing are firmly based in land use regulation.⁵
Planning and land use regulation are well-established legal tools used to implement policies in the name of the public interest, and that validity limit personal rights, particularly those of property owners

- Both in South Africa and abroad, planning and land use regulation is recognised as a legitimate mechanism for regulating and modulating the use of land for the public good.6
- The legislation establishing South Africa’s planning and land use regulation framework, including SPLUMA, reflect the broad authority that municipalities possess in this respect.
  - Section 156 of the Constitution grants municipalities original constitutional executive and administrative authority over matters listed in Part B of Schedule 4 and Part B of Schedule 5, as well as “any other matter assigned to it by national or provincial legislation.” Part B of Schedule 4 includes “municipal planning”, which is not defined but which the Constitutional Court has stated assumes a “well-established meaning which includes the zoning of land and the establishments of townships” and “the control and regulation of land.”
  - National and provincial governments have legislative and executive authority to regulate the exercise by municipalities of their executive authority over Part B of Schedule 4 and Part B of Schedule 5.9
  - In accord with the Constitution, SPLUMA regulates the procedures and powers of planning, including municipal planning. SPLUMA defines the scope of municipal planning broadly to include “the control and regulation of the use of land within the municipal area where the nature, scale and intensity of the land use do not affect the provincial planning mandate of provincial government or the national interest.”10 “Land use” under SPLUMA refers to “the purpose for which land is or may be used lawfully in terms of a land use scheme, existing scheme or in terms of any other authorisation, permit or consent issued by a competent authority, and includes any conditions related to such land use purposes.”11
  - Provincial and municipal laws likewise provide for broad powers in the name of the public interest. For instance LUPA provides that “[m]unicipalities are responsible for land use planning” and that “[a] municipality must regulate . . . the development, adoption, amendment and review of a zoning scheme for the municipal area.”12 Municipalities also must regulate the imposition of conditions of approval for land use applications.13 The purpose of the zoning scheme is to “make provision for orderly development and the welfare of the community” and “determine use rights and development parameters with due consideration to” LUPA’s principles.14
  - The City of Cape Town Municipal Planning Bylaw provides for development management schemes, the purpose of which include: “regulation of use rights and control of the use of land”; “facilitation of the implementation of policies and principles set out in relevant spatial development frameworks and binding policies and principles set out in and in terms of national and provincial legislation”; “facilitation of efficient, economic and sustainable use of land”.15 “No person may use or develop land unless the use or development is permitted in terms of the zoning scheme or an approval is granted or deemed to have been granted in terms of this Bylaw.”16
  - While the use of private property has always been subject to limitation in the interest of neighbours and the public, most notably through common law recognition of private and public nuisance claims in Anglo-American jurisprudence, planning and land use regulation is a more recent form of restriction on property, founded in the rapid urbanisation of European and American cities and the perceived adverse impacts of urbanisation on public health and safety.17
  - Accordingly, planning and land use regulatory regimes both in South Africa and abroad are recognised as empowering municipalities to significantly restrict the use of property in a non-arbitrary manner, even where the value of the property is diminished, while still protecting property owners’ rights to use and enjoy their property in a reasonable manner.18

Spatial planning and land use regulations are a valid means of implementing housing policy and addressing housing issues

- “Housing provision and land use planning are inextricably linked, since plans designate the amount of land to be dedicated to housing development and lay out the ground rules for that development.”19
- In South Africa, the rights and obligations regarding housing are integral to the planning regime, notwithstanding the historical division between housing provision and spatial planning.20
- The Constitution’s grant of municipal authority over municipal planning provides municipalities with a tool to legitimately direct the law towards furthering the inclusionary principles regarding housing and access to land
and planning were often separated. In the 1990s, the transition to democracy led to a massive push to address housing inequality; however, housing efforts inadequately linked to planning considerations resulted in poorly located affordable housing on the periphery of cities, reinforcing apartheid patterns of development.

- The exclusionary impact of planning in South Africa is the express impetus for development of inclusionary housing provisions through planning systems.

**INTERPRETATION OF THE BILL OF RIGHTS UNDER THE SOUTH AFRICAN CONSTITUTION**

An important factor in determining the legality of municipal authority to impose inclusionary housing rests in how the constitution and the statutory framework is interpreted.

- As in other jurisdictions in which the judiciary plays an interpretive role in implementing the law, South African judges must determine the meaning and import of written laws.
- While there is a spectrum of theoretical approaches to legislative interpretation, two main approaches have dominated South African jurisprudence: a textualist/literalist approach and a contextualist approach.
  - The textualist/literalist approach focuses primarily on the formalistic, literal reading text of a law, with a de-emphasis on context, including, arguably, on interpretive principles provided for in legislation or the Constitution. Based in a positivist approach to the law that seeks to avoid judge-made law, this approach has roots in British common law and, prior to 1994, was considered the “orthodox” approach to statutory interpretation, and still holds sway in many South African courts.
  - The contextualist, or text-in-context approach follows the maxim that the purpose or object of the legislation is the prevailing factor in interpretation. This approach requires consideration of the object and scope of the legislation in arriving at a final determination regarding the import of a statutory provision. The text-in-context approach is now enshrined in South Africa’s Constitution.
- Application of textualist/literalist vs. contextualist interpretations to inclusionary housing in the current legislative context:

Planning in South Africa has historically been linked to policies pursuing exclusionary settlement patterns, suggesting both that implementation of planning to further housing purposes is acceptable, and that it is appropriate to address its misuse through the same mechanism.

- In South Africa, “one of the founding sources of urban planning in South Africa lay in continual efforts to dictate (and often restrict) the pattern of black settlement in urban environments.”
- During colonial and apartheid eras, the racial character of town planning policy was often premised on an attempt to completely or largely exclude black people from living in urban areas, which considered white areas.
- The justification for resettlement and land use regulation has historically centred on public health justifications, including the ostensible elimination of slum and “unsanitary” areas and the removal of black people to marginal areas and, particularly under the apartheid government, a more expressly institutionalised policy commitment to segregation of different identified races of people.
- While formal institutional connections and coordination between housing and planning in South Africa has often been disjointed, the issue of housing has always played a central role in the planning of South African cities, including racially segregating communities, ostensibly in the name of public health and the public good. Under apartheid, planning of segregated housing was at the core of the racist policies of the government at the time, even though the governmental tasks of housing provision
requires consideration of underlying rights-based principles. This has allowed for relatively broad authority to enable IH. See, for instance the Colombian Constitutional Court in case C-149 of 2010. 39 (holding that the location of low-income housing involves an exclusively local interest, and that accordingly municipalities have the autonomy to pursue such policies).

• South Africa’s constitutional framework more closely resembles countries with a progressive conceptualisation and protection of rights. 40 The South African Constitution is particularly progressive in terms of its acknowledgement and protection of human rights, as well as its intent to redress historical injustices and inequalities. 41

The South African’s constitution’s principles and the framing language guiding its interpretation provide that it should be interpreted contextually, i.e. “broadly”

• The Constitution, the supreme law of the land, enshrines normative rights, and affirmative obligations by the state to achieve those rights. 42
• South Africa’s Constitution enshrines a contextualist approach to statutory interpretation, which requires consideration of the Bill of Rights in interpreting any law, and promotion of human dignity, equality, and freedom in interpreting the Bill of Rights. 43
• Accordingly, “the starting point in interpreting any legislation” is the Constitution and the rights afforded under it. 44
• The Constitutional requires courts to interpret all statutes “through the prism of the Bill of Rights.” 45

The South African Constitutional Court’s decisions acknowledge and support the Constitution’s deference towards redress of past and present injustice, suggesting that applicable laws would be interpreted to allow for inclusionary housing requirements that seek to address inequality and segregation

• In a number of decisions the Constitutional Court has followed a contextualist approach to interpreting the rights and obligations provided for in the constitutional Bill of Rights broadly, including with respect to housing and planning law. 46

- A contextualist approach could lead to a “broad” reading with respect to (a) a municipality’s obligations to address social and economic injustice; and (b) a municipalities authority to pursue policies that achieve this goal is more likely to uphold a municipally-imposed inclusionary housing requirement.

- “Broad” interpretation would be contextual, based on principles and framing of rights under applicable law, as well interpretation by the courts.

- Some countries, e.g. Colombia and Brazil (through the concept of social function of property), have through constitutional and legislative changes altered the interpretation of rights to housing and to property, and municipal authority in a manner that
SECTION 2

CAN SOUTH AFRICAN MUNICIPALITIES IMPOSE MANDATORY INCLUSIONARY HOUSING REQUIREMENTS?

CONCLUSION

• Yes, we believe the South African Constitution and SPLUMA likely provide municipalities with sufficient authority to impose a mandatory inclusionary housing requirement as part of its planning and land use regulatory powers, subject to the following:
  – The municipality must implement and administer the inclusionary housing requirement through its local land use management scheme and/or land use approval process in conformance with SPLUMA.
  – To avoid challenges based on arbitrariness and/or lack of procedural justice, municipalities need to develop policies to guide their inclusionary housing requirements and amend their local bylaws to give legal effect to these policies. Practices of imposing ad-hoc mandatory inclusionary housing conditions through land-use approvals, or providing inclusionary housing requirements only through policy without more formal changes to municipal planning bylaws and spatial development frameworks, present a higher risk of invalidation based on the current requirements under SPLUMA, and constitutional requirements.47
  – Implementation through amendment of a zoning scheme, rather than on a discretionary, case-by-case basis through the MPT, would, in our opinion, better insulate an inclusionary housing requirement from challenges of arbitrariness and/or lack of procedural justice.
  – If implemented through the proper procedures for amendment of a municipality’s land use regulation powers, implementation of a mandatory inclusionary housing requirement would almost certainly not constitute an unconstitutional deprivation of property or expropriation.
  – While controversial, adjustment or restriction of unused development rights under an existing land use management scheme through the proper amendment process would not unconstitutionally infringe on private property rights.
  – A reviewing court will be more likely to uphold an inclusionary housing requirement if it assumes a “broad” interpretation of municipal authority and municipal obligation to pursue achievement of the right to housing under Section 25 of the Constitution and the principles of spatial justice and historical redress under SPLUMA.
THE POWERS GRANTED TO MUNICIPALITIES UNDER THE SOUTH AFRICAN CONSTITUTION TO REGULATE MUNICIPAL PLANNING PROVIDE SUFFICIENTLY BROAD AUTHORITY TO IMPOSE AN INCLUSIONARY HOUSING REQUIREMENT

• Under the Constitution, each sphere of government (national, provincial, municipal) has independent authority to secure public well-being. ⁴⁸
• General municipal powers and functions provided under the Constitution enable broad authority over local issues:
  – Section 151: Municipalities have the right to govern local affairs, subject to national/provincial legislation.
  – Section 152: Municipalities must ensure provision of services to communities in a sustainable manner, and must promote social and economic development.
  – Section 153: Municipalities must prioritise meeting of basic needs of the community and promoting social and economic development of the community.
• Section 156 of the Constitution grants municipalities original constitutional executive and administrative authority over matters listed in Part B of Schedule 4 and Part B of Schedule 5, as well as "any other matter assigned to it by national or provincial legislation." ⁴⁹ National and provincial governments have legislative and executive authority to regulate the exercise by municipalities of their executive authority over Part B of Schedule 4 and Part B of Schedule 5. ⁵⁰
• “Municipal planning” is not defined under the Constitution, but case law makes clear that this includes zoning and land use management. ⁵¹
• South African courts have held the Constitution requires that each sphere of government’s authority shall be “purposively interpreted in a manner which will enable [them] to exercise their respective legislative powers fully and effectively, without presumptive favour to any other sphere.” ⁵²
  – Each sphere of government “is allocated separate and distinct powers which it alone is entitled to exercise.” ⁵³
  – In particular, national and provincial spheres “are not entitled to usurp the functions of the municipal sphere except in exceptional circumstances, but only temporarily and in compliance with strict procedures.” ⁵⁴

THE DUTIES AND OBLIGATIONS OF MUNICIPALITIES TO ACHIEVE THE PURPOSES EXPRESSED IN THE SOUTH AFRICAN CONSTITUTION SUPPORT MUNICIPAL IMPOSITION OF AN INCLUSIONARY HOUSING REQUIREMENT

The constitution clearly and expressly obligates all spheres of government to seek to realize access to adequate housing

• Section 26 of the Constitution provides that everyone has the right to have access to adequate housing. ⁵⁵
• Section 26 also provides for an affirmative obligation – that the State must take reasonable measures within its available resources to achieve progressive realisation of this right. ⁵⁶

The right to housing under Section 26 of the Constitution is broadly interpreted to go beyond merely an obligation to build or fund housing

• The courts and legal observers have interpreted the right to housing to encompass a broad understanding of the right to housing, beyond actual “bricks and mortar”, and “suggests that it is not only the state who is responsible for the provision of houses.” ⁵⁷
• The mandate and obligation under Section 26 is not narrowly focused on government subsidies or direct provisioning, and includes the planning system. ⁵⁸

The Constitution provides a strong basis for reading governmental authority in conjunction with the right to access to adequate housing

• The Bill of Rights is the “cornerstone of democracy” and the State must respect, protect, promote and fulfil the Bill of Rights. ⁵⁹ The Bill of Rights applies to all law. ⁶⁰ Legislation must be interpreted to promote the Bill of Rights, and the Bill of Rights must be interpreted to promote human dignity, equality, and freedom. ⁶¹
• The rights enshrined in the Bill of Rights are not impervious to regulation, however, and may be permissibly limited in a reasonable and justifiable manner pursuant to an open and democratic society based on human dignity, equality and freedom.  

THE CONSTITUTIONAL PROTECTION OF PRIVATE PROPERTY UNDER THE BILL OF RIGHTS DOES NOT PROHIBIT IH

Mandatory inclusionary housing requirements impact private property, and therefore potentially implicate constitutional protections of property

• The potentially restrictive nature of mandatory inclusionary housing on land use presents an inherent tension with private property rights. Like many other forms of land use regulation, the effect of mandatory inclusionary housing may be to preclude, under certain circumstances, certain uses of land that might otherwise be conducted absent the regulation.
• The tension between inclusionary housing and property rights becomes particularly acute in cases where a government seeks to condition inclusionary housing on permitting uses that are legal and taken for granted under the existing land use regulations, rather than granting new legal uses in return for compliance with inclusionary housing provisions. Where new, previously un-enjoyed rights are granted under a land use regime, there is less of a question of whether limitation of those new rights constitute an infringement on private property rights. In contrast, where rights enjoyed by private land owners under an existing land use regime are curtailed in order to enable their re-allocation conditioned on compliance with inclusionary housing requirements, the impact on the existing use and enjoyment of property is more obviously impacted. The following sections address the more general implications of inclusionary housing requirements on property first before addressing the specific issue of “clawing back” of existing rights for the purposes of implementing inclusionary housing (see infra, s for discussion of the latter).
• South Africa’s Constitution protects private property from unconstitutional deprivation and expropriation of property.

• Deprivation: “No one may be deprived of property except in terms of a law of general application, and no law may permit arbitrary deprivation of property.”  
• Accordingly, the state may not deprive a person of property where either (1) it targets a specific individual or group in a discriminatory manner; or (2) the action is not sufficiently justified by reason, i.e. there is not sufficient consideration of the relationship between the means and the ends of such action.
• Expropriation: “Property may be expropriated only in terms of a law of general application (a) for a public purpose or in the public interest; and (b) subject to compensation . . . .”  
• Expropriation is a subset of deprivation that requires actual acquisition by the government. In addition to satisfying the requirements for deprivation, a valid state expropriation of property requires compensation.
• The factors for consideration of adequate compensation under the Constitution include factors other than the market value, such as the purpose of expropriation.
• The Constitution expressly limits the rights to property, including by stating that such rights may not impede the state from seeking to redress the results of past racial discrimination, and that the state must take reasonable measures to foster conditions that enable equitable access to land.

The protection of property in the Bill of Rights (Section 25) could conceivably be interpreted to restrict IH requirements

• South African courts have confirmed that constitutional violations of property rights under Section 25 arise after the conclusion of a six stage inquiry that proceeds as follows: (1) is the right or interest allegedly protected by s 25 actually constitutionally protected property (if not, then no violation); (2) if so, did the challenged law/activity constitute a deprivation of property (if not, then no violation); (3) if so, was the deprivation arbitrary (if not, then no violation); (4) if there is a deprivation, does the deprivation amount to expropriation; (5) if it was expropriation, was appropriate compensation provided (if so, no violation); (6) does the general limitations clause justify any deviation from the property clause standard? In light of the Constitutional Court’s decision in FNB, the most critical of these steps with respect to constitutionality is step (3) regarding arbitrariness.
The strong emphasis on protection of rights under the Bill of Rights could be construed as a basis for asserting that property owner rights should be afforded particular protection.

However, provisions of Section 25 indicate that the right to property is moderated by broader objectives of the Constitution towards equitable Access to Land and redress of past discrimination.

Section 25 includes a positive state obligation to foster equitable access to land, see Sections 25(5), and prohibits property rights from impeding state redress of past discrimination, subject to protections under Section 36(1) of the constitution.

Courts have interpreted Section 26 to recognise the “social boundedness of property”.

Provisions in SPLUMA providing for the reservation of land for public spaces suggests that the reservation of property for broader social purposes.

IH provisions probably affect property interests, i.e. the right to use and enjoy real property, including applicable development rights and arguably even the income derived therefrom.

There is no express constitutional or statutory definition of what constitutes property. However, the concept of property is a broad and pervasive concept, yet one that is paradoxically difficult to define with precision. With respect to movable property and land, rights in property entail both the nature of the right involved as well as the object of the right.

The Constitutional Court has ruled that, at least in the context of moveable property, rights in property exist whether or not they are used, and are not based on the subjective interest of the rights holder or the economic value of the right. It is likely that this analysis carries over with respect to property rights as well, meaning that the pressing social or public needs cannot affect the definition of land as property in itself.

Interpretation of the nature of property likely encapsulates the rights to use and enjoyment of property that are subject to municipal planning. Some observers have even argued that future earnings derived from a property should be considered a property interest.

An IH provision likely constitutes deprivation of property, but that deprivation is likely to be considered constitutional.

Deprivation of property occurs where there is, “at the very least, substantial interference or limitation that goes beyond the normal restrictions on property use or enjoyment found in an open and democratic society.”

Land use regulations are generally considered valid exercises of governmental authority that do not constitute deprivation, unless they “goes beyond the normal restrictions on property or the use or enjoyment found in an open and democratic society.”

Even where a land use regulation may be considered a deprivation, this deprivation may still be constitutional under South African law if it is implemented through a law of general application and is not arbitrary.

Arbitrariness of a deprivation of property is judged both in terms of procedure and substance.

- Procedural arbitrariness concerns review of whether the imposition of the requirement is procedurally fair; it is a flexible concept that depends on the circumstances.

- The standard for substantive arbitrariness rests most importantly on the connection between the means adopted and the ends sought, as well as the impact on property rights. If a limitation on property is extensive, more than a rational connection between the means and the ends sought must be shown, and there must be compelling reasons for the means sought.

Assuming that IH is a valid exercise of municipal planning and land use regulation powers, IH requirements would therefore likely constitute a constitutional deprivation of property in most cases. Constitutionality would also require the following:

- IH would need to be implemented through a law of general application – e.g., a municipal planning bylaw – to avoid unconstitutionality in the event that the IH provision were determined to be a deprivation of property.

- IH would need to be implemented in a procedurally fair manner: this would likely be achieved by following the process for public participation as required under a valid municipal planning bylaw.

- IH would need to be justified by sufficiently demonstrating a need to rectify urban spatial imbalances and their exclusionary impact on access to adequate housing, as well as that the IH measure could be reasonably considered to achieve this goal.
An IH requirement would not constitute expropriation of property

- The standard for a constitutional expropriation is: (1) it must be done through a law of general application; (2) it must be done for a public purpose or must otherwise be in the public interest; and (3) payment of compensation must be provided. Where expropriation takes place, and where it does not meet these criteria, it will be unconstitutional. Expropriation is treated as a genus or subset of deprivation of property.
- Expropriation under South African law generally requires actual acquisition of property.
- Although South African courts have allowed for the possibility of “constructive expropriation”, akin to the concept of ‘regulatory taking’ in the United States, none have applied it, and several courts have cautioned against providing for such a concept as it would “create[] a middle ground and blur[] the distinction between deprivation and expropriation.”
- Ownership need not be transferred to the state, but can be vested in a third party in the name of a public purpose or public interest.
- The threat of expropriation, or declaration, without actual expropriation, is not itself expropriation (or even deprivation), even if the property is held in indefinite limbo. Accordingly, planning or zoning designations themselves, which provide for intended uses but do not actually trigger that use, cannot be considered to constitute expropriation of property.
- Because it would not result in actual acquisition of property by the state, an IH requirement would not result in expropriation. Although it might be argued that IH vests property in a third party, this third party is not specifically determined by the state, but rather by the developer in conjunction with the housing market and the limitations under law (including the IH requirement itself). Furthermore, there is no requirement that the developer convey the property at all.
- Even if the actual acquisition of an IH unit by a beneficiary were considered to be expropriation, South African case law precedent indicates that the mere designation of a property as subject to an IH provision would not itself constitute expropriation until the transfer of property actually occurred. Furthermore, because Section 25(3) of the constitution, which provides for the criteria for determining just compensation for expropriation, includes factors other than fair market value of the property, including the purpose of the expropriation, the (reduced) compensation paid for an IH unit may likely be considered sufficient compensation to the developer for expropriation.

While controversial, adjustment or restriction of unused rights under an existing land use management scheme are subject to the same analysis as any other change to Such rights – i.e., changes that are properly justified and follow the appropriate processes would likely not unconstitutionally infringe on property rights.

- Consistent with land use regulations in general, the land use regulatory framework provided for under SPLUMA does not grant or establish any additional protection of “development rights”, which are grounded in regulatory restrictions authorised under SPLUMA. This understanding is reflected in national governmental interpretation of land use regulation: that “[t]he use rights and development rights of landowners are . . . generally encoded in

• This would determination would be highly fact-specific and require demonstrating spatial imbalance and exclusionary effect of the lack of affordable housing in particular areas targeted by the IH requirements.
• The validity of IH requirements would rest heavily on the compelling need to redress spatial imbalance and historical inequality in access to city opportunities, as indicated and demonstrated by the Constitution.
• The validity of IH as a strategy to address imbalance would be supported by its significant use in other countries with similar constitutional rights and/or land use regulatory regimes (e.g. United States, UK, Netherlands, India, Canada, New Zealand, Colombia, and Brazil, among others).
• The specific content of the IH requirements, particularly the extent to which they restrict the use and enjoyment of property, would also be an important determining factor. In this regard, conformance with international practices may help insulate an IH provision from argument that it is arbitrary.
• An IH provision that was particularly extreme in its limitation of development of a property (i.e. where the practical effect would be to impede any sort of use or development of the property) would be arguably arbitrary.
• A reviewing court that emphasized the novelty and dearth of use of IH requirements in the South African context, or that took a particularly strong stance with respect to the protection of property rights, might be more likely to hold an IH requirement to be substantively arbitrary.

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the zoning provisions of town planning schemes.  

- South Africa courts have recognized the distinction between common law property rights and rights created through land use regulation, e.g. “development rights”, indicating that the latter is not an independent form of property. In City of Cape Town v Da Cruz, the court noted that zoning that enables certain development rights do not convey an absolute right on owners to “build what they like.” In that case the court held that City failed to consider impact on neighbouring property owners where it approved a development proposal that provided for development up to the property line as permitted under the applicable zoning. Analysing the planning decisions below, the court noted that the decisionmakers “both erred in their fundamental premise that development rights of the Trust in terms of zoning, building and planning legislation reigned absolute and supreme over the rights of adjoining affected owners of units in the Four Seasons building, irrespective of the effect of what was to be built.”

- Statutory language reflects that any “as of right” uses or “development rights” provided for under a properly promulgated land use scheme or application process are designations based purely on the restrictions provided in the scheme and land use regulations procedures themselves, and consequently would not be afforded any additional legal standing by virtue of that designation. 

  - SPLUMA’s language indicates that “development rights” are established and defined through the land use scheme provided under the statute, rather than through the common law or the Constitution. SPLUMA defines “development rights” as “any approval granted to a land development application.” Section 26 of SPLUMA provides that “[a]n adopted and approved land use scheme... provides for land use and development rights.”

  - Based on this understanding, the creation or categorization of a particular use or “right” under an applicable land use scheme does not elevate its status so as to prevent its adjustment through the same regulatory mechanisms under which it was established in the first place.

  - Consequently, proper amendment of restrictions under a land use scheme that expand, restrict, or adjust “as of right” uses or previous “development rights” are equally as valid as the original zoning designations themselves, assuming the process by which the adjustments have been made accord with the requirements under SPLUMA.

  - Of course, adjustments to rights and restrictions under a land use scheme would be invalid of they, for example, were inconsistent with an applicable spatial development framework, or violated a constitutional right. In the context of private property rights under the Constitution, a finding of unconstitutional deprivation or expropriation of a property right would be assessed under the rubric discussed above.

THE CONSTITUTIONAL GUARANTEE OF ADMINISTRATIVE JUSTICE REQUIRES IMPOSES PROCEDURAL OBLIGATIONS ON ANY INCLUSIONARY HOUSING REQUIREMENTS

- The Constitution’s administrative justice requirements are implemented in national legislation through the Promotion of Administrative Justice Act (PAJA). PAJA requires that administrative actions that materially and adversely affect the rights or legitimate expectations of any person to be procedurally fair.

- PAJA Section 6(2) provides for judicial review of an administrative action if the action was procedurally unfair or of the action was taken for a reason not authorised by the empowering provision, or arbitrarily or capriciously.

- The requirements of procedural justice suggest that processes imposing an inclusionary housing requirement must be robust in providing public notice and opportunity to comment.

- The processes for amendment of land use schemes provide for public notice and comment that would satisfy the requirements of administrative justice.

- While the process for approving an individual land use application also provides for public notice and comment in satisfaction of the requirements of administrative justice, imposition of an inclusionary housing provision on a case-by-case basis through the land use approval process could invite more challenges of procedural unfairness, and require greater time and resources on the part of the MPT to guarantee adequate procedural fairness.
SPLUMA DOES NOT PROSCRIBE THE IMPOSITION OF AN INCLUSIONARY HOUSING REQUIREMENT, AND ARGUABLY IMPLICITLY AUTHORISES SUCH A PROVISION

SPLUMA provides the framework under which municipalities may regulate land use and, by implication, implement inclusionary housing requirements

- SPLUMA is authorised in terms of Section 155(7) of the Constitution, which provides national government with the power to regulate the exercise of municipal powers under the Constitution. SPLUMA defines spatial planning to include “control and regulation of the use of land” in a municipality.
- As discussed above in , inclusionary housing is generally and normally regarded as a land use regulatory tool and would therefore fall under the regulatory scope of SPLUMA.

SPLUMA’s framing, objectives, and principles make clear that redress of spatial inequality and social inclusion are central goals to be achieved through the statute

- SPLUMA’s framing statements in its preamble support IH – they specifically acknowledge the spatial planning legacy of racial inequality and segregation in the South African planning regime, the need to strive to meet the basic needs of previously disadvantaged, and the recognition of the right to housing, which includes equitable spatial patterns.
- SPLUMA’s stated objectives support IH; they include ensuring that planning and land use management promotes social and economic inclusion as well as redress of imbalances of the past and to ensure equity in the application of planning and land use management requirements.
- Several of the development principles provided under SPLUMA that are to guide governmental decision-making support IH:
  - Spatial justice – redress spatial imbalance through improved access to land, and inclusion of people previously excluded.
  - Spatial sustainability – the efficient and equitable functioning of markets, as well as the limit of sprawl.
  - Spatial efficiency – optimizing existing resources; minimisation of negative financial, social, and economic or environmental impacts.
  - Good administration.

SPLUMA’s MSDF requirements indicate that a municipality must at minimum consider the implementation of a national or provincial IH policy

- SPLUMA requires, at the very least, that a municipality develop a municipal spatial development framework that “identifies areas where a national or provincial inclusionary housing policy may be applicable.”
- Section 21(j) is the only explicit reference to “inclusionary housing” in SPLUMA. As discussed above, there is the possibility that this provision could be interpreted to limit municipal authority to implement an IH policy on its own, although we believe this interpretation would more likely not be interpreted in this manner.
- The sole reference to IH in relation to a national or provincial policy could conceivably be interpreted to suggest that an IH policy must be developed by the national or provincial government. This would be a highly textual interpretation based exclusively on the language of the individual provision. Even assuming this narrow interpretation, the statute clearly authorises municipalities to identify where an inclusionary housing policy would be applied, although it might suggest that the actual policy would need to come from national or provincial government.
- Conversely, a “broader” contextual interpretation would read the purpose and objects of SPLUMA together with an absence of a prohibition on inclusionary housing requirements and independent municipal authority over planning to endorse a municipally-driven IH policy. Indeed, the single express reference could be read as a minimum standard for implementing inclusionary housing, not a maximum limit of authority.
SPLUMA's provisions for review and approval of applications suggests it may provide authority to impose inclusionary housing conditions on a case-by-case basis

- Municipal Planning Tribunals (MPTs), which are the bodies authorised to review land use applications, may “impose any reasonable conditions, including conditions related to the provision of engineering services and payment of development charges” on such applications. 
- The phrase “any reasonable conditions” in Section 40 arguably suggests authority to impose an inclusionary housing requirement, assuming that there is sufficient basis in the facts and analysis supporting the decision.
- However, it is also possible that a court could interpret the additional clause “conditions related to the provision of engineering services and the payment of development charges” as limiting the scope of the “reasonable conditions”. This interpretation could be further supported by Section 49 of SPLUMA, which expressly provides for engineering services.
- MPTs regularly impose significant limitations on applicants. However, implementation of a mandatory IH requirement would be novel. For instance, in Cape Town, the MPT has repeatedly declined to impose a mandatory IH requirement, citing lack of legal obligation or sufficient policy guidance to do so.

SPLUMA’s broad authority under land use schemes (LUS) suggests that an IH policy could be implemented through proper amendment of the LUS

- Municipalities must adopt a land use scheme (LUS), which must “include appropriate categories of land use zoning and regulations for the entire municipal area”. That scheme must “include provisions to promote the inclusion of affordable housing in residential land development.”
- A LUS provides for land use and development rights and has the force of law against all land owners. Land may only be used as permitted under the LUS.
- A municipality may amend a LUS if it: (a) is in the public interest, (b) advances the interests of disadvantaged communities, and (c) furthers the vision and development goals of municipalities. A municipality may amend a LUS by rezoning any land considered necessary to achieve the goals of an applicable SDF (with appropriate consultation process).
- A municipality must review a LUS at least every 5 years for consistency with the applicable SDF. This suggests that incorporation of an IH requirement into an SDF could compel a revision of the LUS.
MANDATORY INCLUSIONARY HOUSING REQUIREMENTS

Provincial and municipal experience with inclusionary housing suggest that inclusionary housing requirements established through standard procedures are far more impervious to legal challenge

- The City of Johannesburg’s (CoJ) experience suggests that implementing inclusionary housing requirements through proper established planning and land use regulatory processes, which include public notice and consolation, helps insulate the resulting requirements from legal challenge.

- The City of Johannesburg (CoJ) has amended its SDF and MPBL to provide for a mandatory IH requirement, and has issued a policy detailing requirements. All of these underwent a public participation process.

- Inclusion of an inclusionary housing requirement in the SDF in particular has provided CoJ the basis for implementing its policy, as land use applications may only be approved if they are not inconsistent with the SDF.

- The process undertaken by CoJ in creating its inclusionary housing policy, conducted in consultation with stakeholders, has resulted in a specific policy that City officials believe is appropriate for its particular context. While the City’s policy may be criticised from both pro- and anti-inclusionary housing camps, the process itself and the documented outcome lend credence to the argument that the decision has been made with due consideration and in a procedurally fair manner.

- The Western Cape Province previously attempted to implement an inclusionary housing requirement but faced legal challenges in implementing it. Provincial and CoCT municipal officials currently question whether the existing law allow for implementation of an IH requirement.

- The holding in *SLC Property Group* rejected a Provincial attempt to implement an inclusionary housing requirement using similar language provided for public space under Section 50.

SPLUMA’s provision regarding the reservation of land for public space could support the argument that a municipality has the authority to implement an IH requirement; it could also serve as a template for amending SPLUMA if required

- Section 50, providing for reservation of land for parks and open space, suggests that the imposition of conditions that allocate private land for a public use is a valid exercise of the authority to regulation land use under SPLUMA. Like inclusionary housing, the parks and open space requirement reflects the broader authority to dedicate private property to certain specific purposes that further the greater public good.

- However, the express provision in Section 50 could also suggest the absence of any similar IH provision means that no authority currently exists under SPLUMA. This would constitute a “narrow” interpretation discussed earlier in this report, in contrast with a “broad” interpretation.

- If, in contrast, a “narrow” interpretation prevailed, a straight-forward fix on the national level would be to amend SPLUMA to provide for authority to impose an IH requirement using similar language provided for public space under Section 50.

- There is an argument that national policies, such as the National Development Plan (2012), might satisfy the requirement for a national policy. The NDP officially endorses the concept of inclusionary housing. The National Integrated Urban Development Framework (2016) identified the development of a national policy on inclusionary housing as a short-medium term policy priority, suggesting that there is no such existing policy on a national level. Furthermore, the Department of Housing’s 2007 Framework for an Inclusionary Housing Policy in South Africa laid out fairly detailed consideration of inclusionary housing policies, although it limited the imposition of mandatory housing, stating that “[i]n principle there should be no mandatory inclusionary requirement unless this is supported by reasonably proportional incentives.”

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– Both LUPA and the City of Cape Town Municipal Planning Bylaw contain planning and development principles that resemble SPLUMA’s.
– In the Western Cape, neither LUPA nor the City of Cape Town Municipal Planning Bylaw expressly provide for inclusionary housing. However, nothing in LUPA directly precludes implementation of an inclusionary housing requirement, and the provisions in the CoCT MPBL could be utilised to amend the land use management scheme to include a mandatory inclusionary housing provision.
– The authorisation of conditions under LUPA and the CoCT MPBL might possibly be interpreted to prohibit the imposition of a mandatory inclusionary housing requirement. LUPA, Section 40, provides that municipalities may impose conditions on land use applicants that are reasonable and that “arise from the approval of the proposed utilisation of the land.” The CoCT MPBL contains the same requirements as LUPA regarding conditions being reasonable and arising from approval of the proposed utilisation of the land.
– A “narrow” textual reading of the approval condition requirements might suggest that inclusionary housing does not “arise” from most proposed uses. However, a “broader” contextual reading of the principles and goals of LUPA and the CoCT MPBL would suggest that inclusionary housing could be considered to “arise from” the use of land, i.e. that use of well-located land that might otherwise be used for inclusionary housing purposes in order to rectify spatial injustice is reasonably related to the development of such land.
– Other provisions do not prohibit inclusionary housing. Provisions in LUPA allowing for conditions relating to “the provision of housing with the assistance of a state subsidy, social facilities or social infrastructure” and “settlement restructuring” might suggest that the provision of requirements regarding affordable housing are valid.
– CoCT’s MPT has declined to impose a mandatory inclusionary housing requirement based on the lack of a law requiring such provisions and lack of an inclusionary housing policy. While there is a valid basis for concern regarding the lack of a clear policy or authorisation in law, the failure to address developmental decisions that could in effect be described as exclusionary also leaves it susceptible to challenges in court based on its obligation to implement the land use planning principles provided under the SPLUMA framework.
– In previous land use applications CoCT’s MPT and Mayoral Committee has argued that it does not have the requisite policy framework and criteria for imposing inclusionary housing requirements, and that case-by-case decision-making impinges on the right to timely decisions.
– The MPT's position in this respect appears questionable in light of the broad powers to impose reasonable conditions on land use applications, and discretion exercised in mitigating other impacts, such as public nuisance conditions.
– Notwithstanding the MPT's broad authority to implement conditions, and its obligation and duty to apply statutorily-mandated planning principles in each case, it is understandable that the MPT would seek additional policy guidance. Indeed, imposition of ad-hoc decision-making by the MPT could require development of a record sufficient to meet the burden of demonstrating that the decision is not arbitrary in violation of s 25 (property), s 33 (administrative justice), and s 36 (infringement of Bill of Rights) of the Constitution.
– Maintaining decision-making regarding the imposition of inclusionary housing requirements at the application approval level would reflect discretionary planning systems similar to those historically used in the U.K. This system benefits from flexibility and the opportunity for negotiation between stakeholders, but also results in less certainty.
– The holding in SLC Property Group (Pty) Ltd potentially cautions against imposition of mandatory inclusionary housing conditions as part of an MPT approval process, rather than as an element of a zoning scheme, because the case-by-base nature of approvals does not offer as concrete a basis for overcoming challenges of violations of procedural justice.

OTHER RELATED STATUTORY REGIMES REGARDING MUNICIPAL AUTHORITY AND HOUSING ARGUABLY AUTHORISE AND SUPPORT IMPLEMENTATION OF A MUNICIPALLY-IMPOSED INCLUSIONARY HOUSING REQUIREMENT

The general authority provided under the Municipal Systems Act (MSA) supports municipal authority to govern local affairs, including an inclusionary housing requirement.
• The Local Government: Municipal Systems Act (MSA) authorises municipalities to govern the local affairs of the community, and exercise their executive and legislative authority without improper interference.

• Section 23 of the MSA requires that municipalities undertake developmentally-oriented planning to ensure the objects of the local government under section 152 of the Constitution, and developmental duties provided in section 153 of the Constitution are given effect.

• Under the MSA, a municipality is required to give effect to the provisions of the Constitution, and give priority to the basic needs of the local community. Municipal services must be equitable and accessible.

The general authority and obligations provided under the Housing Act supports municipal authority to take steps to address housing issues within the ambit of its powers, including land use regulation through inclusionary housing requirements

• The National Housing Act (Housing Act) is the principal legislation giving effect to the constitutional requirements to provide for housing. All levels of government must "facilitate active participation of all relevant stakeholders in housing development."

• Section 9 of the Housing Act requires that municipalities take all reasonable and necessary steps to ensure access to adequate housing.

• The allocation of housing as a function of concurrent national and provincial legislative competence under the Constitution does not absolve municipalities of playing a role in achieving progressive realisation of the right to access to adequate housing.

• However, there is a risk that a court might interpret an inclusionary housing provision as falling within the ambit of the Housing Act, rather than SPLUMA. A previous challenge in the Western Cape to imposition of an inclusionary housing provision as a condition of the Environmental Conservation Act (ECA) was held invalid because the "imposition of a condition which is aimed at the implementation of a housing policy is not rationally related to the purpose for which the powers under the ECA were given." A similar characterization of inclusionary housing as a "housing policy" might undermine its application as a land use regulation. Such a holding would run against the international concept of inclusionary housing as a land use regulation, however.

The Rental Housing Act does not directly preclude inclusionary housing, but it may be implicated in the application of inclusionary housing requirements on rental units, as this might constitute a form of rent control

• The Rental Housing Act regulates the relationship between tenants and landlords. It requires that government must "promote a stable and growing market that progressively meets the latent demand for affordable rental housing among persons historically disadvantaged by unfair discrimination and poor persons." This goal suggests support for an inclusionary housing policy.

• The Act provides only limited municipal authority to pursue the object of the Act within the national policy framework on rental housing. It authorises Rental Housing Tribunals, which are empowered to hear and adjudicate rental disputes and rule exploitative rentals to constitute unfair practice. The Rental Housing Amendment Act provides the Minister of Housing with authority to make regulation relating to "the calculation method for escalation of rental amounts and the maximum rate of deposits which may be payable in respect of a dwelling and which may be set per geographical area to avoid unfair practices particular to that area."

• There may be some question as to whether inclusionary housing provisions as applied to rental units would constitute a rent control and, if so, whether that would implicate the Rental Housing Act. While the provisions of the Rental Housing Act and Rental Housing Amendment Act above authorise some control over rental rates, this authority rests with the Rental Housing Tribunals or with the Minister of Housing, not with municipalities. While it is conceivable that the Minister could prescribe regulations under the provisions of these acts in a manner that facilitated inclusionary housing policies, even then the authority would address rent control over existing units, not necessarily inclusionary housing. On the other hand, the provisions of the Rental Housing Act do not appear to clearly prohibit an inclusionary housing policy implemented under other authority.
CONCLUSION

- There is an argument that SPLUMA satisfies the constitutional requirement that the municipal power to impose taxes, levies, or duties must be authorized by national law, i.e. SPLUMA is that law. This argument however depends on interpreting an IH in-lieu fee as the functional equivalent of a valid inclusionary housing requirement imposed under SPLUMA and applicable provincial and municipal laws. There is a basis for this argument in United States jurisprudence regarding IH in-lieu fees and also indirectly in South African jurisprudence regarding in-lieu parks and open space contributions. In order to make this argument, a municipality would need to include an in-lieu fee as part of an IH policy implemented through local planning and land use regulation procedures. The in-lieu fee would likely need to be imposed only where an underlying IH requirement could be imposed, and there would need to be sufficient administrative standards imposed so as to ensure funding was received, accounted for, and allocated specifically towards the provision of inclusionary housing.
- Short of this argument, it is likely that amendment to national legislation would be required to make clear that in-lieu fees for inclusionary housing was authorized. Other legal bases for imposition of in-lieu fees as a municipal service or a tax are less likely to be legally viable.159

THE CONSTITUTION EMPOWERS MUNICIPALITIES TO IMPOSE IN-LIEU FEES IF AUTHORIZED BY NATIONAL LEGISLATION

- The South African Constitution gives broad powers to municipalities to impose fees, but only if authorised by national legislation.
- Section 156(1) of the Constitution empowers municipalities with authority over the administration of local government matters and matters assigned to it by national or provincial legislation.160
- Section 229 of the Constitution prohibits a municipality from imposing a tax, levy, or duty without authorising national legislation. The Constitution does not define what constitutes a tax, levy, or duty.161

SPLUMA IS THE MOST LIKELY NATIONAL LEGISLATION TO AUTHORISE LOCAL IMPOSITION OF IN-LIEU FEES

While SPLUMA does not expressly authorise in-lieu fees for inclusionary housing, it arguably implicitly authorises such fees as the functional equivalent of a valid inclusionary housing requirement.
The previous section outlines the basis for the argument that inclusionary housing requirements may be imposed under SPLUMA. Assuming the validity of an inclusionary housing requirement, it is arguable that imposition of a fee in lieu of such a requirement would also be valid because it achieves the same outcome, i.e. would be “functionally equivalent”.

A municipality could assert this authority through a local land use bylaw enacted through the SPLUMA framework and that imposes land use regulatory authority in a manner consistent with the terms of SPLUMA.

This “functional equivalence” argument would likely need to be supported by the manner in which funds accrued were spent, i.e. funds would need to be identified and spent in a manner that achieved the same outcome as would occur if the inclusionary housing requirement were complied with by the applicant.

To adequately justify charging fees as an equivalent alternative to requiring direct provision of inclusionary housing, we believe that a municipality would need to sufficiently demonstrate the following:

- That there is sufficient basis in a local law and policy for imposing an underlying inclusionary housing requirement, and that the parameters of such a requirement are adequately delineated in terms of standard requirements and spatial application (see the previous section above for recommendations regarding imposition of an inclusionary housing requirement).
- That imposition of an in-lieu fee is clearly provided for under an applicable municipal planning bylaw and corresponding policy.
- That an in-lieu fee option is provided only where compliance to an underlying inclusionary housing requirement is applicable. Application of an in-lieu fee where an underlying obligation to provide for inclusionary housing is inapplicable suggests the fee charged is not related to regulation of the use of the particular land for which application to develop is being sought.
- While from a policy standpoint application of an in-lieu fee to development in areas of the city that are not appropriate for actual provision of inclusionary housing makes practical sense and would serve a complimentary purpose to the overall goals of an inclusionary housing requirement, we believe from a legal perspective this detaches the fee payment from its valid justification as an alternative to compliance with the underlying requirement, thereby rendering it vulnerable to legal challenge on the basis that it resembles a general tax on developers, rather than an exercise of land use regulatory powers.
- This conclusion does not preclude a municipality from pursuing alternative mechanisms for funding inclusionary housing or disincentivizing development that are poorly located in a manner that is complimentary to an inclusionary housing requirement. However, the means for effecting this would, in our opinion, need to be sought through other legal mechanisms, such as imposition of a separate charge, tax, or stricter limitations on development elsewhere.

- It may be possible for a municipality to structure an inclusionary housing requirement that is justifiably applicable to large portions or all of the city, but that is in practical terms more likely to result in payment of in-lieu fees in areas that are less suitable to inclusionary housing. For instance, CoJ has made the inclusionary housing requirements applicable throughout the entire city, it has determined that in lower density areas the in-lieu fees option will be a more attractive means of compliance for developers than actual provision of housing.

- That fees are accurately accounted for and spent exclusively on provision of inclusionary housing.
- That the municipality develop standards for calculating an in-lieu fee structure that accurately reflects the actual costs of providing inclusionary housing, to justify imposition.
- That the funds resulting from in-lieu fees must be spent on the provision of inclusionary housing that conforms to the goals and parameters of the underlying inclusionary housing requirement.
- Use of funds for other purposes, even those related to provision of affordable housing but that do not serve the purposes of the underlying inclusionary housing requirement, jeopardize the basis for providing an in-lieu fees alternative.
- The most robust means of ensuring accurate accounting of funds is likely through “ring-fencing” funding in an account specifically dedicated to inclusionary housing. This is unlikely to be possible in the current municipal system, but there will need to be clear accounting to show that the amounts raised through in-lieu fees are at least matched by expenditures on affordable housing.

Support for the “functional equivalence” argument rests in jurisprudence from the United States

- The highest courts in the U.S. states of New Jersey and California have held that fees imposed as an alternative to compliance with inclusionary zoning requirements are valid as the functional equivalent of, or alternative to, the requirement itself.
There is indirect support for the “functional equivalence” argument in support of IH in-lieu fees in South African jurisprudence regarding in-lieu fees for open spaces and parks under SPLUMA.

- SPLUMA authorises requiring developers to provide land for parks and open spaces as a condition of development approval, but does not mention an in-lieu fees option for the public space requirements.
- However, municipalities have long imposed such charges, and their imposition has not been challenged on constitutional or other grounds.
- Like IH, provision of park spaces is premised on conditioning the approval of development on contribution of land towards a broader social purpose, i.e. natural and recreational space for the community/public. The benefit to the developer or land owner is determinable but not necessarily direct or exclusive.
- In-lieu fees for public spaces has recently been upheld as a valid exercise of municipal authority authorized implicitly under SPLUMA.
- In Juicio, Gauteng High Court rejected a claim that the City of Johannesburg lacked authority to impose an in-lieu parks fee, holding instead that SPLUMA implicitly authorised imposition of the fee under a long-standing provincial law, and that s 229 of the Constitution and s 4(1)(c) of the MSA were therefore complied with.
- The Juicio court noted that “SPLUMA contains no provisions which indicate the extent of that obligation (to impose a park space requirement under s50) or the manner in which the amount thereof is to be determined.” Instead, the “manner in which the parks contribution is to be determined is to be found in the surviving provisions” of the older Provincial law.
- The court’s rationale in Juicio suggests that, as with park space in-lieu fees, authority for IH in-lieu fees under a provincial or municipal law is not inconsistent with SPLUMA and therefore is implicitly authorized under that national legislation. Since the manner in which either land for parks or for inclusionary housing is left undetermined by SPLUMA, municipal authorities may give effect to either by charging a fee in-lieu of a developer’s direct performance.
- The authorisation of parks and open space in-lieu fees under SPLUMA also lends support to the proposition that SPLUMA can provide the basis for municipalities to charge fees as part of their land use regulatory functions.
- There are notable distinctions between parks provision and IH, some of which might serve to undermine any
analogy between the two. However, we do not believe any of these are significantly problematic.

- There are specific guidelines established in South Africa for the provision of parks and open space, unlike with inclusionary housing. This suggests that a clear policy or law with standards for IH must be implemented in order for an in-lieu fee to be determined.
- The provision of land for public parks is expressed in SPLUMA, making it clearer that the underlying condition is valid. As discussed previously, the absence of a similarly express authorisation of inclusionary housing requirements could be used to argue that, under a narrow textual reading of the law, the underlying authority for IH is absent, and that therefore the authority to impose an in-lieu fee is likewise absent.
- Under the current law land provided for public parks vests in the local municipality, while IH land does not. This distinction does not affect the above analysis.

**SPLUMA’s indirect authorisation of development charges could lend support to implicit authorisation of IH in-lieu fees; however, there are distinctions between development charges and IH in-lieu fees that limit the analogy**

- SPLUMA indirectly authorises the payment of development charges, lending support to interpreting SPLUMA to allow municipalities to charge necessary fees even where such authority is not explicitly provided.
- SPLUMA references the payment of development charges for external engineering services, although it does not expressly authorize the charging of such fees. Nevertheless, these references have generally been accepted as sufficiently authorising municipalities to impose development charges.
- Development charges have long been authorised under provincial laws that preceded SPLUMA, a practice that continues under SPLUMA.
- Interpretation of SPLUMA to indirectly authorise development charges could lend support to the argument that SPLUMA could similarly be interpreted to implicitly authorise municipalities to charge IH in-lieu fees as an extension of its implicit power to regulate land use, including through valid inclusionary housing provisions.
- The character of and justification for development charges is fundamentally different from that of IH in-lieu fees; accordingly, comparison between the two is limited.
- Development charges are expected to address the direct financial impact to a municipality caused by the development, and to be tied directly to the cost of providing municipal services from which the developed property will benefit directly.
- In contrast, IH in-lieu fees are intended to contribute towards the provision of inclusionary housing, which serves to benefit lower- and middle-income households in order to address stark urban inequalities in terms of spatial segregation and access to services and social and economic opportunities.
- In this sense, development charges are distinct from IH in-lieu fees, whose justification is based on the benefits to the wider city and its residents, rather than direct service or benefit to the developer/land owner.
- A common critique of IH in-lieu fees is that there is not a sufficient relationship between approved project and in-lieu fees to justify assessment as fees. This reflects an inaccurate comparison between inclusionary housing and development charges, which seek to achieve different objectives.
- The distinction between inclusionary housing and IH in-lieu fees and development charges for engineering services is reflected in U.S. jurisprudence. One significant result of this distinction is that “the validity of the ordinance does not depend upon a showing that the restrictions are reasonably related to the impact of a particular development to which the ordinance applies. Rather, the restrictions must be reasonably related to the broad general welfare purposes for which the ordinance was enacted.”
- There are additional distinctions between development charges and IH in-lieu fees, which further limit an analogy between the two.
- The obligation for development charges is framed fundamentally differently from IH in-lieu fees. Development charges are a means for municipalities to recover the costs of a service they are obligated to provide, unless a developer elects to take responsibility for providing it for itself. In contrast, IH in-lieu fees are an alternative means for a developer to comply with an obligation it must satisfy, allowing the city to assume the obligation. While cost recovery is an essential element of both charges, development charges are based in a municipal obligation, while IH in-lieu fees are based in a developer’s obligation.
- There is a Draft national Policy Framework for Municipal Development Charges, as well as provincial and municipal policies guiding imposition of development charges. As with open space and park in-lieu fees, this might suggest the need for a national policy is required for IH in-lieu fees. While national policy does reference inclusionary housing, it does not provide any detail regarding how in-lieu fees should be determined. The Department of Housing 2007 inclusionary housing policy does provide for in-lieu fees, which suggests
that developers would receive relief from development charges in return for payment.\textsuperscript{186}

- The payment of development charges is explicitly referenced in SPLUMA (albeit in an indirect manner), making it clearer that they were anticipated by this legislation. As discussed previously, the absence of a similarly express authorisation of inclusionary housing requirements could be used to argue that, under a narrow reading of the law, the underlying authority for IH is absent, and therefore that the authority to impose an in-lieu fee is likewise absent.

**ARGUMENTS IN FAVOUR OF CHARACTERISING AN IH IN-LIEU FEE AS A FEE FOR MUNICIPAL SERVICE OR A TAX ARE LESS LIKELY TO BE LEGALLY VIALBE**

- IH in-lieu fees are not clearly a fee for a municipal service provided for under the Municipal Systems Act.\textsuperscript{187}
  - The MSA authorises municipalities to finance their affairs through (i) charging fees for municipal services provided; and (ii) imposing surcharges on fees, rates and taxes, levies, and duties.\textsuperscript{188}
  - "Municipal services" are defined under the MSA as "a service that a municipality in terms of its powers and functions provides or may provide to or for the benefit of the local community irrespective of whether (a) such a service is provided, or to be provided, by the municipality through an internal mechanism contemplated in section 76 or by engaging an external mechanism contemplated in section 76; and (b) fees, charges or tariffs are levied in respect to such a service or not."\textsuperscript{189}
  - "Municipal services" are defined under the MSA as "a service that a municipality in terms of its powers and functions provides or may provide to or for the benefit of the local community irrespective of whether (a) such a service is provided, or to be provided, by the municipality through an internal mechanism contemplated in section 76 or by engaging an external mechanism contemplated in section 76; and (b) fees, charges or tariffs are levied in respect to such a service or not."\textsuperscript{190}
  - Although the definition under the MSA of a "municipal service" might be interpreted to include an in-lieu IH fee, the particular structure of the MSA does not appear to easily fit well with an IH requirement.\textsuperscript{191}

**Additional policy guidance and legislative changes would further bolster support for a municipality to impose IH in-lieu fees**

- One option would be amendment of SPLUMA to include a provision authorising both inclusionary housing and IH in-lieu fees, at least to the same extent as is provided for parks and open space and/or development charges requirements. The "cleanest" amendment would be to include a provision substantially similar to s50 of SPLUMA for inclusionary housing.
- Alternatively or in addition, the national government could develop and adopt a national policy regarding IH in-lieu fees. This could provide additional authority and guidance for assessing IH in-lieu fees, particularly if paired with a legislative change. Even where there were no legislative change to accompany implementation of a national IH policy, such a policy could be read together with existing statutory authority (particularly SPLUMA s 8) to authorise implementation of a municipal IH policy, including an in-lieu fees option. However, such a policy also has the potential to restrict local flexibility in applying inclusionary housing and in-lieu fees, which could hamper response to local conditions and realities. Previously there has already been work done on the national level to frame inclusionary housing policies in South Africa.\textsuperscript{192}
- Amendment of provincial legislation to expressly provide for in-lieu fees, as is done for parks and open space in-lieu fees.

**LUPA and CoCT MPBL include provisions that might be interpreted to allow for in-lieu fees, but some language may be problematic**

- LUPA, Section 40, provides that municipalities may impose conditions on land use applicants that are reasonable and that "arise from the approval of the proposed utilisation of the land." Conditions may include the "cession of land or the payment of money" as well as "settlement restructuring."\textsuperscript{193}
- The CoCT MPBL contains the same requirement as LUPA regarding conditions being reasonable and arising from approval of the proposed utilisation of the land. It also allows for conditions to include the "cession of land or the payment of money."\textsuperscript{194}
- The limitation that conditions must "arise from the approval of the proposed utilisation of land" has been interpreted to limit the authority of municipalities to attach unreasonable or unrelated conditions; in the development charge context, these provisions have raised legal questions regarding the extent to which charges may be assessed. This issue also applies to in-lieu fees, although theoretically if the underlying provisions can be considered to be "arising from" approval of the proposed utilisation of the land, there would be a case for properly calculated and allocated fees would also pass muster.
- The reference to "settlement restructuring" could also be interpreted as supporting inclusionary housing, although the reference is somewhat vague and therefore may provide limited or indirect support for in-lieu fees.
Tariffs must be based on the use of the service by the payer, reflecting a more specific nexus between service and payer for municipal services. There is some case law support for a broader interpretation of the functions and services covered under the Municipal Systems. However, this precedent does not directly support consideration of IH as a municipal service.

- The national government has made clear that IH in-lieu fees should not constitute a tax.
  - Fee vs. tax: A tax (a) is compulsory, not optional; (b) is imposed or executed by a competent authority; (c) is enforceable by law; (d) is imposed for the public benefit and public purpose. It is not for a service for specific individuals, but for a service to the public as a whole, a service in the public interest.
  - The Municipal Fiscal Powers and Functions Act (MFP-FA) empowers the Minister of Finance to establish taxing instruments for municipalities. This power could conceivably be implemented to provide for in-lieu fees as a general tax, which could be implemented more broadly than a conventional in-lieu fee.
  - However, the National Treasury has made its position clear: “inclusionary housing requirements cannot be imposed as an additional tax on property developers.” This is in line with international understanding of IH in-lieu fees as being tied to specific land uses and not considered general taxes.

The inclusionary housing requirements is not an additional tax on property developers. This is in line with international understanding of IH in-lieu fees as being tied to specific land uses and not considered general taxes.
CONCLUSION

Based on our review of domestic and international laws and literature, as well as interviews with legal experts, we believe that there is sufficient legal basis under South African law to authorise municipally-imposed mandatory inclusionary housing requirements and, more tentatively, to provide for an in-lieu fee option. These conclusions are based on several assumptions and factors detailed herein, most important of which is that the law be read contextually to give broad effect to South Africa’s constitutional and legislative goals and principles regarding social inclusion and redress of past injustice. With respect to in-lieu fees, we take the position that the best justification for them under the current law is as a “functional equivalent” of an inclusionary housing requirement, although to our knowledge this legal theory has not been directly tested in South African courts.

Currently, most municipalities lack any express local legislative or policy authority to impose inclusionary housing or in-lieu fees. While it may be possible now for municipalities to impose mandatory inclusionary housing requirements and in-lieu fee payments on an ad-hoc basis through Municipal Planning Tribunals, doing so will likely invite legal challenges and greater susceptibility to unfavourable legal judgments. Instead, we believe the more prudent and legally defensible avenue is to incorporate mandatory inclusionary housing and in-lieu fees provisions expressly into municipal laws and policy documents, including municipal planning bylaws, land use schemes, spatial development frameworks, and implementing policies. The legal vehicles will likely vary based on local legislative and political conditions, as will the policies themselves. Of critical importance is that the substantive justifications for such provisions must be well articulated in terms of the policy objectives of South Africa’s land use laws, and the procedural requirements under South Africa’s planning and land use framework must be followed.

Until South African courts more squarely address the legality of mandatory inclusionary housing provisions and in-lieu fees, there will continue to be questions regarding the legality of these measures. To reduce legal uncertainty and facilitate the imposition of mandatory inclusionary housing provisions and in-lieu fees, there are several legislative and policymaking steps that could be taken at national and provincial levels. Some of these are briefly described below and are discussed in this report in more detail.

At national level:
• Amend SPLUMA to expressly authorise municipal imposition of inclusionary housing and in-lieu fees. One relatively straightforward change would be to add a provision for inclusionary housing similar to that currently in place for provision of parks and open spaces.
• Develop and prescribe inclusionary housing “norms and standards” and/or policies authorising municipal imposition of mandatory inclusionary housing and in-lieu fees. Such policies need not be overly prescriptive, as inclusionary housing is often a deeply local issue.
• For in-lieu fees, authorise collection through other vehicles, such as taxes or municipal fees, through legislative amendment.

At provincial level:
• Amend provincial planning and land use laws to expressly authorise municipal implementation of mandatory inclusionary housing and in-lieu fees.
• Develop inclusionary housing policies that authorise municipalities to impose mandatory inclusionary housing requirements and in-lieu fees.

Ultimately, providing an enabling legal and policy framework is necessary but insufficient on its own to implement inclusionary housing. Doing so will also require the political will and broader social acceptance that such policies are desirable or necessary. Once the legal framework is in place it is hoped that this will trigger the development of innovative financial models for the supply of inclusionary housing.
PROVINCE OF KWAZULU-NATAL DEPARTMENT OF HUMAN SETTLEMENTS


MUNICIPAL LAWS

- City of Cape Town Municipal Planning Bylaw, 2015 (as amended).
- City of Johannesburg Municipal Planning Bylaw, 2016.
- eThekwini Metropolitan Municipal Planning and Land Use Management By-law, 2016.
- Municipal Policies, Guidance, and Planning Documents
- City of Cape Town Development Charges Policy for Engineering Services for the City of Cape Town (Policy Number 20037) (2014).
- City of Cape Town City of Cape Town Development Charges: An Implementation Guid to the Development Charges Policy for Engineering Services for the City of Cape Town (28 November 2014).
- City of Cape Town Staff Circular 6 of 2020: Interim approach to Inclusionary Housing until the City adopts a formal policy (3 April 2020).

SOUTH AFRICA

CONSTITUTION


NATIONAL LAWS

- Municipal Housing Act 107 of 1997 (as amended).
- Municipal Property Rates Act 6 of 2004 (as amended).
- Promotion of Administrative Justice Act 3 of 2000.
- Rental Housing Act 50 of 1999.
- Social Housing Act 16 of 2008.
- Spatial Planning and Land Use Management Act (SPLUMA) 16 of 2013.
- National Policies, Guidance, and Planning Documents
- Department of Housing Framework for an Inclusionary Housing Policy (IHP) in South Africa (June 2007).
- Department of Human Settlements National Housing Policy and Subsidy Programmes (2010).

PROVINCIAL LAWS

- Gauteng Draft Inclusionary Housing Bill, 201
- Western Cape Land Use Planning Act (LUPA) 3 of 2014.
- Provincial Policies, Guidance, and Planning Documents
- Western Cape Government Western Cape Provincial Spatial Development Framework (2014).
- Western Cape Government Western Cape Provincial Spatial Development Framework: Inclusionary Housing Discussion Document (March 2009).
- Western Cape Government Western Cape Provincial Spatial Development Framework: Inclusionary Housing Discussion Document (March 2009).

SOUTH AFRICAN CASE LAW

- Agri South Africa v Minister for Minerals and Energy (CCT 51/12) (2013) ZACC 9; 2013 (4) SA 1 (CC); 2013 (7) BCLR 727 (CC).
- Berte van Zyl (Pty) Ltd v Minister for Safety and Security 2009 ZACC 11.
- City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another 2012 (2) BCLR 150 (CC).

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• Daniels v Scribante and Another 2017 (8) BCLR 949 (CC).
• Dark Fibre Africa (Pty) Ltd v City of Cape Town (7748/2017) [2017] ZAWHC 151; 2018 (4) SA 185 (WCC) (14 December 2017).
• First National Bank of SA Limited t/a Westbank v Commissioner for the South African Revenue Services and Another; First National Bank of SA Limited t/a Westbank v Minister of Finance (CCT19/01) [2002] ZACC 5; 2002 (4) SA 768; 2002 (7) BCLR 702.
• Geyser and Another v Msunduzi Municipality and Others 2003 (3) BCLR 235.
• Hangklip/Kleimond Federation of Ratepayers Associations v Minister for Environmental Planning and Economic Development: Western Cape and Others 2009 ZAWHC 151.
• Harksen v Lane NO and Others 1997 (11) BCLR 1489 (CC).
• Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In Re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others 2001 (1) SA 545 (CC); 2000 (10) BCLR 1079 (CC).
• Juicio Investments (Pty) Limited v City of Johannesburg and Others (GHC 0043505/2018).
• Law Society of South Africa and Others v Minister for Transport and Another 2011 (2) BCLR 150 (CC).
• Lebowa Mineral Trust Beneficiaries Forum v President of the Republic of South Africa and Others 2002 (1) BCLR 23 (T).
• Maccsand (Pty) Ltd v City of Cape Town and Others 2012 (7) BCLR 690 (CC).
• Minister of Local Government Environmental Affairs and Development Planning of the Western Cape v Lagoonbay Lifestyle Estate (Pty) Ltd and Others 2014 (2) BCLR 182 (CC).
• Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v The Habitat Council and Others [117/13] [2014] ZACC 9.
• Mkontwana v Nelson Mandela Metropolitan Municipality and Another 2005 (1) SA 530 (CC) at [32], 2005 (2) BCLR 150 (CC).
• Municipality of Stellenbosch v Shelf-Line 104 (Pty) Ltd [2012] 1 All SA 441 (SCA).
• Nhlabathi and others v Fick [2003] 2 All SA 323 (LCC).
• Offit Farming Enterprises (Pty) Ltd v Coega Development Corporation (Pty) Ltd [2010] 2 All SA 545 (SCA).
• Pharmaceutical Manufacturers of SA; In Re: Ex Parte Application of President of RSA 2000 (3) BCLR 241 (CC).
• Reflect-All 1025 v MEC for Public Transport Roads and Works Gauteng Provincial Government 2010 (1) BCLR 61 (CC).
• SLC Property Group (Pty) Ltd and Another v Minister of Environmental Affairs and Economic Development (Western Cape) and Another 2007 1 All SA 627 (C).
• Steinberg v South Peninsula Municipality [2001] JOL 9164 (A).
• Walele v The City of Cape Town and Others 2008 (11) BCLR 1067 (CC).
• Western Cape Provincial Government and Others: In re DVB Behuising (Pty) Ltd v North West Provincial Government and Another 2001 (1) SA 500 (CC).

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INTERNATIONAL

International Case Law

California Building Industry Assn. v City of San Jose 2015 61 Cal.4th 435 (California, United States).

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• Williams, Peter ‘The affordable housing conundrum: shifting policy approaches in Australia’ 2015 TPR, 86 (6) 651-675.
1. Georg De Kam, Barrie Needham & Edwin Buitelaar 'The embeddedness of inclusionary housing in planning and housing systems: insights from an international comparison' (2014) J. House and the Built Environments 29:389-402, 391. Jurisprudence on inclusionary housing from the United States is particularly relevant because both Euclidean zoning and inclusionary housing (through zoning regulations) were pioneered in the U.S., and because South Africa’s property markets and land use regulations bear significant similarity to those of the United States. See Jan Glazewski & Louise du Toit ‘Planning law and the environment’ In Environmental Law in South Africa (2020) Part 2, Ch. 9, s 9.1. Accordingly, this report makes extensive use of U.S. case law precedent, particularly from the courts of California and New Jersey, where inclusionary housing has been thoroughly litigated.


5. See California Building Industry Assn. v City of San Jose 2015 61 Cal.4th 435, 474 (California, United States).


10. Spatial Planning and Land Use Management Act (SPLUMA) 16 of 2013 s 5(1)(c).

11. ibid s 1.

12. Western Cape Land Use Planning Act (LUPA) 3 of 2014 ss 2(1)-(2)(a).

13. ibid s 2(2)(e).

14. ibid s 23.

15. City of Cape Town Municipal Planning Bylaw (CoCT MPBL), 2015 s 26(1)(a), (b), (c).

16. ibid s 35(2).


23. Ibid at 7-9.

24. Mabin & Smit op cit note 20 at 198.


26. See Phillip Harrison, Alison Todes, & Vanessa Watson Planning and transformation: Learning from the post-apartheid experience (2007).

27. See Mabin & Smit op cit note 20 at 202, 206, 212.

28. Ibid. at 206-07, 212.

29. Harrison, Todes & Watson op cit note 26 at 61, 123.


32. Ibid at 91-97.

33. Ibid at 97-98.

34. Ibid p 99 (discussing ss 1, 2, 8, 36, and 39 of the Constitution).


37. Daniels v Scribante 2017 (4) SA 341 (CC).

38. Ibid at para 162. In responding to the issue of “positive” versus “negative” obligations provided for under the Constitution, Justice Madlanga writing for the majority stated: “I see no basis for reading the reference in section 8(2) to ‘the nature of the duty imposed by the right’ to mean, if a right in the Bill of Rights would have the effect of imposing a positive obligation, under no circumstances will it bind a natural or juristic person (private persons). Whether private persons will be bound depends on a number of factors.” Ibid para 39.


42. Constitution supra note 7 s 1(c), 2; Halton Cheadle, Dennis Davis and Nicholas Haysom South African Constitutional Law: The Bill of Rights (2020) ch. 2.1.
43. Constitution supra note 7 ss 39(1)-(2), 1(a), Preamble. See also Botha op cit note 31 at p 99-100.
44. See Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism 2004 (4) 490 (CC) para 72.
46. See Daniels v Scribante supra note 37, Bato Star supra note 44, City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and another (Lawyers for Human Rights as amicus curiae) [2011] ZACC 33, 2012 (2) SA 104 (CC), 2012 (2) BCLR 150 (CC), Pharmaceutical Manufacturers Association of SA and Others, In Re: Ex Parte Application of President of the RSA and Others, 2003 (3) BCLR 241 (CC).
47. See the discussion infra ss 3.6.4, 3.6.5, and 3.6.7.
48. Constitution supra note 7 at ss 40, 41.
49. ibid s 156(1)(a)-(lb).
50. Constitution s 155(7).
52. Western Cape Provincial Government and Others: In re DVB Behuising (Pty) Ltd v North West Provincial Government and Another 2001 (1) SA 500 (CC) para 17 (discussing provincial and national authority).
53. Gauteng Development Tribunal supra note 50 para 43.
55. Constitution supra note 7 s 26(1).
56. ibid s 26(2).
57. Government of the Republic of South Africa and Others v Grootboom and Others 2000 (11) BCLR 1169 (CC), Cheadle, Davis & Haysom op cit note 42 ch. 21.3.
58. Grootboom supra note 56 para 36.
59. Constitution supra note 7 s 7.
60. ibid s 8.
61. ibid s 39.
62. ibid s 36(1).
63. Constitution supra note 7 s 25(1).
64. See Lebowa Mineral Trust Beneficiaries Forum v President of the Republic of South Africa 2002 (1) BCLR 23, para 29H(1) (discussing laws of general application).
66. Constitution supra note 7 ss 25(2).
67. See Lebowa para 30E (T).
68. Constitution supra note 7 s 25(3).
69. ibid s 25(8).
70. ibid s 25(5).
71. Woolman & Bishop op cit note 63 s 46.1.
72. See ibid; FNB supra note 63 para 49.
73. See Constitution supra note 7 s 25(8).
74. Daniels supra note 37, see also Mkotwana v Nelson Mandela Metropolitan Municipality and another 2005 (1) SA 530 (CC) at [32], 2005 (2) BCLR 150 (CC), Reflect-All supra note 6 para 34.
75. SPLUMA supra note 10 s 50.
76. FNB supra note 63 para 51.
77. See ibid para 54.
78. See Woolman & Bishop op cit note 63 s 46.3(b).
80. Mkotwana supra note 72 para 32.
81. Reflect-All supra note 6 para 32.
82. Constitution supra note 7 s 25(1).
83. See Reflect-All supra note 6 para 40.
84. See ibid para 49.
85. ibid para 52.
86. Constitution supra note 7 s 25(2).
88. Harksen v Lane NO and Others 1998 (1) SA 300 (CC). Compare Steinberg v South Peninsula Municipality 2001 (4) SA 1243 (SCA) (allowing that “there may be room for the development of a doctrinal akin to constructive expropriation in South Africa” but declining to rule as such).
89. Reflect-All supra note 6 at para 66, fn 74.
90. Nhlabati v Fick [2003] 2 All SA 232 (LCC) at para 32, Offit supra note 18 para 43, Reflect-All supra note 6 at para 84A.
91. See Offit para 43, Reflect-All para 67.
92. Reflect-All para 67.
93. See ibid.
94. Because we believe the determination of IH as expropriation is highly unlikely, we have not investigated the standard for compensation in sufficient detail to provide more analysis here. We merely point this out as a further basis for justifying the legality of an IH requirement in the event that it were determined to be expropriation.
95. Department of Housing op sit 22 at 16.
96. City of Cape Town v Da Cruz, 2018 2 All SA 36 (WCC).
97. ibid para 37.
98. ibid para 71.
99. SPLUMA supra note 10 s 111.
100. ibid s 26 (111c). See also, e.g. LUPA supra note 12 s 1, defining “land development”, “land use”, “land right”, in terms of restrictions provided under a zoning scheme, CoCT MPBL note 15 s 1, defining “land use” and “use right” in terms of zoning restrictions.
102. PAJA s 3(1).
103. Ibid s 6(2).
104. See SLC Property Group (Pty) Ltd and another v Minister of Environmental Affairs & Economic Development (Western Cape) and another [2008] 1 All SA 627 (C) para (43) (imposition of inclusionary housing requirement through land use approval process did not provide sufficient notice or opportunity to comment by the applicant, resulting in a violation of PAJA).
105. SPLUMA supra note 10 s 2.
106. Ibid s 5.
107. SPLUMA supra note 10 Preamble.
108. Ibid s 3(b).
109. Ibid s 3(f).
110. Ibid s 7.
111. Ibid s 7(a).
112. Ibid s 7(b).
113. Ibid s 7(c).
114. Ibid s 7(e).
115. SPLUMA supra note 10 s 2(1)(a).
116. Ibid s 2(1)(b).
117. Department of Housing op cit note 22.
118. SPLUMA supra note 10 s 22(1).
119. Ibid s 22(2).
121. SPLUMA supra note 10 s 24(1)(a).
122. Ibid s 24(2)(d). See also s 25 (purpose of LUS is to determine the use and development of land to promote economic growth, social inclusion, and efficient land development.).
123. Ibid s 26.
124. Ibid.
125. Ibid s 28.
126. Ibid s 27.
127. SPLUMA supra note 10 s 40.
128. See Groothoom supra note 56 para 41 (noting that “reasonable” does not require the most desirable or favourable option to be pursued).
129. See Bert Van Zyl (Pty) Ltd and Another v Minister for Safety and Security and Others 2010 (2) SA 181 (CC) para 44 (“It is an accepted canon of statutory interpretation that terms with a wide meaning may be restricted by terms with a narrower meaning with which they are connected.”).
130. SPLUMA supra note 10 s 49.
131. Ibid s 42(1)(a), (c).
132. Ibid s 42(1)(b).
133. Ibid s 8.
136. Department of Housing op cit 22 at 12.
138. SLC supra note 101.
139. LUPA supra note 12 s 40.
140. CoCT MPBL supra note 15 s 100.
141. LUPA supra note 12 s 40(2)(g).
142. Ibid s 40(2)(d).
143. See Extract Minutes of Mayoral Committee Re: ERF 129009 Cape Town at Newlands, 6 Thicket Street SMC 11/10/18 para xiv (available at https://www.capetown.gov.za/work%20and%20business/meet-the-city/city-council/meeting-calendar/mpt-meeting-detail?RecurrenceId=16631) (“Notwithstanding the principles contained in SPLUMA, the MPT is not in a position to delay decision-making in the absence of an appropriate Council policy framework and an agreed upon set of criteria and mechanisms to guide the implementation of inclusionary housing in private developments.”).
144. SPLUMA supra note 10 s 40.
145. De Kam, Needham & Buitelaar op cit note 1 at 395.
146. Ibid.
148. Ibid s 23.
149. Ibid 73(1).
150. Ibid 73(2).
152. Ibid 9.
153. See Blue Moonlight supra note 46.
154. SLC Property Group supra note 101 para 42.
155. Rental Housing Act No. 50 of 1999 s 2(1).
156. Ibid s 2(4).
158. Rental Housing Amendment Act No. 35 of 2014 s 15(1) (B).
159. See infra 4.4 for a brief discussion of why in-lieu fees should not be characterised as a fee for municipal service or a tax.
160. Constitution supra note 7 s 156(1).
161. Ibid s 229.
162. How such a requirement could be structured would depend on the specific urban context and is beyond the scope of this report.
163. Holmdel supra note 18 at 572-73.
164. San Jose supra note 5 at 476-77.
166. San Jose supra note 5 at 454.
168. See City of San Jose supra note 5 at 476 (“No developer is required to pay the in lieu fee and may always opt to satisfy the ordinance by providing on-site affordable housing units.”).
169. SPLUMA supra note 10 s 50.
172. See Juicio Investments supra note 162.
173. Ibid para 25.
175. See Laubscher et al. op cit note 163 p 265 (citing CSIR Guidelines for the provision of social facilities in South African settlements (2012)).
176. See, e.g., CoCT MPBL supra note 15 s 58.
177. See SPLUMA supra note 10 ss 40(7)(a) 49(4).
178. See City of Cape Town Development Charges Policy for Engineering Services for the City of Cape Town – (Policy Number 20037)(2014) at 3.
181. Ibid. Some observers have argued that inclusionary housing could be justified based on the benefit accrued to a particular property by less direct means, i.e. either through enabling housing for service workers who may provide direct or indirect services to properties burdened by IH, or, put slightly differently, as a contribution towards the continued vitality and viability of urban areas that are reliant on a lower income workforce. This position, while potentially compelling, cannot completely justify inclusionary housing or IH in-lieu fees. Ultimately, IH is focused on benefitting specific disadvantaged groups for the greater public good, which may be justified on the basis that everyone benefits from a society where access to urban economic and social opportunities are shared more equitably.
182. City of San Jose supra note 5 at 464 (differentiating impact fees from IH in-lieu fees, which “serve a constitutionally permissible public purpose other than mitigating the impact of the proposed development project.”).
183. Ibid at 474.
184. See Malumba op cit note 171.
185. See, e.g. City of Cape Town (2014) supra note 170.
186. See Department of Housing op cit note 22 at 19.
187. See Department of Housing op cit note 22.
188. LUPA supra note 12 s 40.
189. CoCT MPBL supra note 15 s 100.
191. Ibid s 1.
192. Ibid.
193. Ibid s 74.
194. See Dark Fibre Africa (Pty) Ltd v City of Cape Town 2019 (3) SA 425 (SCA).
197. Western Cape Government Western Cape Provincial Spatial Development Framework: Inclusionary Housing Discussion Document (March 2009) at 1. See also Department of Housing op cit note 22 at 19.
While it is a fraught exercise to predict future judicial determinations, especially in light of the relative dearth of legal precedent or clear national law and policy regarding the inclusionary housing as a land use planning mechanism, the current context of South Africa’s Constitutional and legislative goals and principles provide sufficient legal basis to support inclusionary housing mechanisms discussed in this report.