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23 April 2021

To: **Schalk de Jager**  
City of Cape Town

Per email: [lums@capetown.gov.za](mailto:lums@capetown.gov.za)

C/O: [schalk.dejager@capetown.gov.za](mailto:schalk.dejager@capetown.gov.za)

Dear Schalk de Jager

**RE: NDIFUNA UKWAZI COMMENT ON REVIEW OF THE CITY OF CAPE TOWN DEVELOPMENT MANAGEMENT SCHEME**

1. Ndifuna Ukwazi is a non-profit activist organisation and law centre that combines research, organising and litigation in campaigns to advance urban land justice in Cape Town. Our primary mission is to expand and protect access to affordable housing and build an integrated and inclusive City.
2. We work to disrupt the reproduction of spatial apartheid and inequality by compelling government to meet its obligations to use well-located land to provide affordable housing, while simultaneously defending the rights and security of tenure of poor and working class people who live in rental housing and are being forced out of the city because of rising rents, gentrification and unfair rental practices.
3. Please see attached our comment on the forthcoming review of the City of Cape Town Development Management Scheme.

Yours faithfully,



**Per: Jonty Cogger**

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## NDIFUNA UKWAZI COMMENT

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### **INTRODUCTION**

1. The five year review of the City of Cape Town ('the City') Development Management Scheme (DMS) offers an opportunity to critically assess how it has performed since the inception of Spatial Planning and Land Use Management Act, 16 of 2013 (SPLUMA) and other statutory and constitutional provisions which require: redress of spatial apartheid, promotion of spatial justice, and the facilitation of equitable access to land.
2. The Constitution and SPLUMA clearly establish a firm mandate for local municipalities to address the legacy of racial spatial discrimination. This mandate stems from the acknowledgment that colonial segregation was cemented and effected through land use management schemes and other spatial planning mechanisms during apartheid.
3. The success of any municipal zoning scheme adopted pursuant to SPLUMA therefore needs to be measured against the City's obligations to: 'foster conditions which enable citizens to gain access to land on an equitable basis';<sup>1</sup> 'address the inclusion of persons and areas that were previously excluded, with an emphasis on informal settlements, former homeland areas and areas characterised by widespread poverty and deprivation';<sup>2</sup> 'incorporate provisions that enable redress in access to land by disadvantaged communities and persons';<sup>3</sup> include all areas of a municipality and specifically include provisions that are flexible and appropriate for the management of disadvantaged areas, informal settlements and former homeland areas';<sup>4</sup> and 'include provisions that accommodate access to secure tenure and the incremental upgrading of informal areas.'<sup>5</sup>
4. The above provisions envision planning instruments, like zoning schemes, playing an active role in addressing racial segregation. In our view, **the City's DMS fails to achieve the transformative and redistributive obligations of the Constitution and SPLUMA.** As will be shown below, a zoning scheme is more than just a technical and neutral planning instrument

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<sup>1</sup> Section 25(5) of the Constitution.

<sup>2</sup> Section 7(a)(ii) of SPLUMA.

<sup>3</sup> Section 7(a)(iii) of SPLUMA.

<sup>4</sup> Section 7(a)(iv) of SPLUMA.

<sup>5</sup> Section 7(a)(v) of SPLUMA.

that provides for various categories of zoning and permissible land uses. While SPLUMA does require previously excluded areas, like informal settlements and former homeland areas, to be brought into the zoning system, it also clearly envisions adopting measures that address the imbalance in access to land and resources that characterises our colonial and apartheid legacy.

5. As will be shown below, a land use scheme is required to balance four fundamental imperatives, namely, economic growth, social inclusion, efficient development, and minimal impact on public health, the environment and natural resources. The outcome of this five year review cannot be successful if any one of these imperatives is lacking in the DMS. We argue that the DMS fails entirely in terms of incorporating provisions aimed at promoting social inclusion. In fact, the DMS does the bare minimum in terms of spatial redress.
6. The City needs to revisit its spatial justice obligations and determine appropriate measures to comply with SPLUMA. We have suggested inclusionary housing as one of many measures the City can adopt to improve the DMS, but the reality is that the City needs to do more to address the spatial inequality brought about as a result of colonial and apartheid legacy in Cape Town.

### **THE COLONIAL AND APARTHEID SPATIAL PLANNING LEGACY**

7. The review of the DMS cannot be done in a vacuum. There is an historical nexus between land use management laws and segregation on the basis of race and class. At the heart of the colonial and apartheid orders, zoning and land use were the primary tools deployed to create and reinforce racial segregation. Zoning schemes during colonialism and apartheid were used to legitimate and effect systematic dispossession, racial segregation and socio-economic marginalisation of the majority Black population. It is therefore absolutely imperative to actively include measures to redress the spatial inequality brought about as a result of this discriminatory past.

#### **Early colonial segregation and land use practices (1652 – 1910)**

8. When the Dutch arrived in the Cape in 1652, they claimed all land inhabited by indigenous communities on the basis that it was *res nullius*. They subsequently introduced a system of land restriction and planning that separated White and 'Native' settlements.<sup>6</sup>
9. With British administrative control over the Cape in the late nineteenth century, further planning

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<sup>6</sup> J van Wyk. 2021. *Planning Law* 2 ed. Pg. 27-8.

administration practices were introduced to enforce racial segregation.<sup>7</sup> The Native Administration Act 3 of 1876 and the Native Locations, Lands and Commonages Act 40 of 1879 were enacted to exercise control over Black populations residing on private and public land. Furthermore, the Native Reserve Locations Act 40 of 1902 allowed British authorities to create Black residential areas on the periphery of the White urban areas. This resulted in the creation of Ndabeni in 1901 for Black residents forcibly removed from District Six and other parts of Cape Town.<sup>8</sup>

10. Early colonial planning laws during the late nineteenth and early twentieth century were enacted to address the rise of industrialisation, rapid urbanisation, and for “health and safety reasons” to counter the supposed threat of infectious diseases.<sup>9</sup> This last aspect was used as a powerful social metaphor to justify forced removals of inner city slums and urban Black townships to protect the interests of the White minority population from the spread of diseases, such as the bubonic plague and influenza.<sup>10</sup> The Public Health Act 36 of 1919 was used to authorise the displacement of Black people in the urban core to the periphery of the city under the pretence of public health and safety, to prevent the spread of diseases.<sup>11</sup> For instance, public health laws worked in tandem with the Slums Act 53 of 1934 to facilitate the building of housing on the Cape Flats.<sup>12</sup>
11. This contributed to class differentiation and racial and spatial segregation between White-only residential and business areas and Black ‘locations’, used as a source of cheap labour. It also enabled local municipalities to pass by-laws to administer influx controls.
12. Significantly different planning practices were applied to Black ‘locations’ compared with White residential areas. Colonial municipal officials regulated residential developments in overcrowded separate Black locations on the periphery of urban centres. In contrast, White-only areas were characterised by low-densities, public spaces, public parks, and access to superior developmental infrastructure and municipal services.<sup>13</sup>

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<sup>7</sup> R Faccio “The development of planning controls in Britain and South Africa” (1972) 14 *Planning and Building Developments* 33 at 35; and J van Wyk *Planning Law* 2 ed (2012) 21.

<sup>8</sup> M Swanson “The Sanitation syndrome: Bubonic plague and urban native policy in the Cape Colony, 1900-1909” (1977) 3 *Journal of African History* 387 at 392; and P Maylam “Explaining the apartheid city: 20 years of South African urban historiography” (1995) 21 *Journal of Southern African Studies* 19 at 24.

<sup>9</sup> S Parnell “Creating racial privilege: The origins of South African public health and town planning” (1993) 19 *Journal of Southern African Studies* 471 at 483.

<sup>10</sup> P Maylam “Explaining the apartheid city: 20 years of South African urban historiography” (1995) 21 *Journal of Southern African Studies* 19 at 24-25.

<sup>11</sup> Removals of Black people close to White areas were also affected through the Public Health Act 36 of 1919.

<sup>12</sup> P Maylam “Explaining the apartheid city: 20 years of South African urban historiography” (1995) 21 *Journal of Southern African Studies* 19 at 27; and P Harrison, A Todes & V Watson *Planning and Transformation: Learning from the Post-Apartheid Experience* (2008) 24.

<sup>13</sup> A Mabin “Dispossession, exploitation and struggle: An historical overview of South African urbanization” in D Smith (ed) *The Apartheid City and Beyond: Urbanization and Social Change in South Africa* (1992) 15-17.

Racial and spatial segregation in land use management (1910 – 1948)

13. After the Union of South Africa was established in 1910, racially motivated land use restriction intensified.
14. The Black Land Act 27 of 1913 ('the Black Land Act') prohibited the ownership of land by Black people outside of scheduled native areas.<sup>14</sup> Black people were only permitted to reside in urban areas as temporary labourers with valid labour tenant contracts.<sup>15</sup> This reduced the status of Black people living in White designated areas to either a transient worker or a criminal.<sup>16</sup> This significantly effected settlement patterns and limited the socio-economic livelihoods of Black people.
15. The Development Trust and Land Act 18 of 1936 limited land allocated for Black occupation to 13% of the country's total surface area and secured the remaining 87% of the land for the White minority's unfettered use and occupation.<sup>17</sup> Together with the Black Land Act, these laws were instrumental in depriving Black people of meaningful economic livelihoods in urban areas. Their presence was solely to serve the functional needs of the White economy.
16. The separate allocation of land gave rise to parallel systems of land use management and planning for Black areas.<sup>18</sup> In the urban areas, the Black (Urban Areas) Act 21 of 1923 authorised the establishment of separate Black areas "in or near" White urban centres.<sup>19</sup> It also allowed for the establishment of hostel accommodation for single African men working in urban areas.<sup>20</sup>
17. The conditions for Black people to lawfully purchase, rent, or occupy land in urban and rural areas were governed by the Regulations for the Administration and Control of Townships in Black Areas.
18. The Black Administration Act 38 of 1927 allowed the Governor-General to order the removal of Black people from White only areas, which resulted in widespread spatial displacement and control over black people in urban areas.<sup>21</sup> This Act also administered land tenure and land use in Black locations.<sup>22</sup>
19. In conclusion, colonial land use controls effected through land use management systems, town

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<sup>14</sup> Section 1 and 2 of Black Land Act 27 of 1913. These were the forerunners to apartheid buntustans.

<sup>15</sup> Section 6 read with s 2 of Black Land Act 27 of 1913. The Black Service Contract Act 24 of 1932 regulated labour tenancy in South Africa during the pre-apartheid period. J van Wyk *Planning Law* 2 ed (2012) 43.

<sup>16</sup> Section 5 read with s 2 of Black Land Act 27 of 1913.

<sup>17</sup> Section 10(1) of the Development Trust and Land Act 18 of 1936

<sup>18</sup> J van Wyk *Planning Law* 2 ed (2012) at 31-43.

<sup>19</sup> Section 1(1)(a) of the Black (Urban Areas) Act 21 of 1923.

<sup>20</sup> Section 1(1)(c) of the Black (Urban Areas) Act 21 of 1923.

<sup>21</sup> Section 5(1)(b) of the Black Administration Act 38 of 1927.

<sup>22</sup> Section 5-6 of the Black Administration Act 38 of 1927.

planning, housing, and public administration were fundamental in perpetuating racial and spatial segregation. These spatially unjust laws established the foundation for widespread spatial control and segregated urban development that epitomised the apartheid-era.

### Apartheid era spatial control (1948 – 1990)

20. During the apartheid era, planning legislation such as the Population Registration Act 30 of 1950, the Group Areas Act 41 of 1950, the Black Education Act 47 of 1953, the Reservation of Separate Amenities Act 49 of 1953, the Group Areas Act 36 of 1966, the Black Local Authorities Act 102 of 1982, the Community Development Act 3 of 1966, and the Black Communities Development Act 4 of 1984 were all used to regulate and develop separate Black areas to consolidate apartheid urban settlement.<sup>23</sup>
21. Modelled on the Black (Urban Areas) Act 21 of 1923, the Group Areas Act 41 of 1950 established land use zones for different racial groups.<sup>24</sup> The effect was to prohibit multi-race development of urban land. It also made it a criminal offense for a person to occupy a dwelling in another racially designated area.<sup>25</sup> This Act was used to implement state orchestrated mass evictions of thousands of Black and Coloured families living in well-located urban areas.
22. Spatial exclusion was also enforced through the Prevention of Illegal Squatting Act 52 of 1951, which regulated unlawful occupation of public and private land. This was part of a comprehensive legislative framework to regulate Black occupation of urban areas, including Black Laws Amendment Act 54 of 1952, the Blacks (Abolition of Passes and Co-ordination of Documents) Act 67 of 1952, the Black Service Levy Act 64 of 1952, the Slums Act 76 of 1979, the Trespass Act 6 of 1959, the Physical Planning Act 88 of 1967, and the Health Act 63 of 1977.<sup>26</sup>
23. Racially motivated planning laws ensured that urban housing for the Black population was insecure and poorly located. The arrangement of the apartheid city resulted in high concentrations of Black people living on the periphery of White urban centers. While these separate urban areas for different races had already been established during the pre-apartheid era, forced removals,

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<sup>23</sup> J van Wyk. 2021. Planning Law 2 ed. Pg. 25.

<sup>24</sup> Section 12(1) of the Group Areas Act 41 of 1950. See further A Mabin 'Comprehensive segregation: The origins of the Group Areas Act and its planning apparatuses' (1992) 18 Journal of Southern African Studies 405 at 407. See further H Trotter 'Trauma and memory: The impact of apartheid-era forced removals on coloured identity in Cape Town' in M Adhikari (ed) Burdened by Race: Coloured Identities in Southern Africa (2009) at 49-78.

<sup>25</sup> D Dyzenhaus Hard Cases in Wicked Legal Systems: South African law in the Perspective of Legal Philosophy (1991) at 71.

<sup>26</sup> The Physical Planning Act 88 of 1967, in particular, played a central role in entrenching racial segregation, by transferring the authority over planning administration from local municipalities to Administration Boards.

evictions and displacement were heightened by the apartheid government. This increased the density of peripheral Black townships.

24. Rapid urbanisation in the 1980s spurred on by the relaxation of influx-control regulation further increased the density of Black 'locations', making the administration of these areas extremely difficult for the apartheid government to control.<sup>27</sup> The untenable model of separate racial locations was one of the reasons for the demise of the apartheid government.
25. The history of racially segregated human settlements in South African cities shows that housing needs are inextricably linked to land use management systems. The colonial and apartheid-era legal system used a combination land, housing, urban planning and land use controls to establish spatially unjust human settlements.

#### Continued segregation and exclusion in post-apartheid era

26. While racial segregation was legislated and enforced throughout South Africa, Cape Town in particular is defined by extraordinary spatial inequality, in that the majority of poor and working-class households (the vast majority of whom are Black and Coloured) live on the urban periphery, far from employment opportunities, services, and amenities.<sup>28</sup>
27. This colonial and apartheid legacy lives on. Twenty-six years after the end of apartheid, the city remains highly segregated on race and class lines. Spatially, the city has what is known as an "*inverse pattern of densification*", in which a largely poor and working-class Coloured and Black majority live on the densely populated urban periphery, as backyarders in established townships, or in informal settlements with poor access to amenities and services, and the largely White middle-class and elite live in well-located central areas, close to employment opportunities, public services and amenities, which are characterised by low densities, extremely high rentals, and an acute shortage of affordable housing options.
28. Ultimately, the rate of delivery of state-assisted housing remains far below what is required to address this growing demand, let alone the housing backlog, and the City itself estimates it will take over 70 years to eradicate Cape Town's current housing backlog at the current rate.<sup>29</sup>

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<sup>27</sup> M Strauss 'A right to the city for South Africa's urban poor' (2017) LLD dissertation Stellenbosch University.

<sup>28</sup> Socio-Economic Rights Institute of South Africa 'Edged Out: Spatial Mismatch and Spatial Justice in South Africa's Main Urban Areas' (2016) [https://www.seri-sa.org/images/images/SERI\\_Edged\\_out\\_report\\_Final\\_high\\_res.pdf](https://www.seri-sa.org/images/images/SERI_Edged_out_report_Final_high_res.pdf)

<sup>29</sup> City of Cape Town. Municipal Spatial Development Framework. Pg. 220

29. To make matters worse, Cape Town has the highest property prices in South Africa and is facing an affordability crisis. In 2019, the average sale price for a home in Cape Town was R1 513 254 (the highest in South Africa) and the largest share of the Cape Town residential property market was aimed at developing *luxury* properties valued at over R1.2 million (41% of the market provides for the luxury property market).<sup>30</sup> The same year, the city also registered the seventeenth highest year-on-year property inflation *in the world* at 9.1% (higher than any other African city).<sup>31</sup>
30. The rising costs of market-rate housing, and the City's failures to implement social and affordable housing in well-located areas, have maintained and perpetuated the exclusion of poor, working and middle class families from economic and social centres.
31. This spatial arrangement has many detrimental effects, including long and costly commutes into the city. It is a major reason that Cape Town is the most congested city in the country. While the latest census showed that only 5 286 people live in the CBD,<sup>32</sup> as an indication of the high levels of influx into the CBD each day, 23 076 government employees work in the CBD, while 29 335 members of the general public use government facilities in the CBD daily.<sup>33</sup>
32. Quite clearly, therefore, where one lives determines the opportunities one can access, the quality of services one receives, and one's enjoyment of fundamental human rights.
33. The lasting effect of peripheral location is to trap the poor in a cycle of poverty, by reducing access to educational opportunities, and making jobs harder to find and keep.
34. The state's response to the need for affordable public housing has been to provide it on the urban periphery. Government-subsidised housing, which prioritises the *number* of units built over their *location*, has focused primarily on cheap land. And cheap land, generally, means poorly located land.
35. While it is understandable that the state would try to maximise the number of housing units it is able to provide, this approach has had the two problematic consequences.

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<sup>30</sup> CAHF, "Cape Town Housing Market Report" (2020), p. 1.

<sup>31</sup> Frank Knight, "Global Residential Cities Index: Q4 2019" (2019), p. 2:

<https://content.knightfrank.com/research/1026/documents/en/global-residential-cities-index-q4-2019-7111.pdf>.

<sup>32</sup> StatsSA, 2011 Census (2011)

<sup>33</sup> Central City Improvement District. 2020. State of Cape Town Central City 2019 Report. Available:

[https://issuu.com/capetowncentralcityimprovementdistrict/docs/the\\_state\\_of\\_cape\\_town\\_central\\_city\\_report\\_2019/1?ff](https://issuu.com/capetowncentralcityimprovementdistrict/docs/the_state_of_cape_town_central_city_report_2019/1?ff)

35.1. First, the provision of state-assisted housing alone is simply insufficient to meet the backlog. In 2019, the Western Cape provincial housing backlog stood at over 600 000 families, of which 365 000 are in the City of Cape Town alone<sup>34</sup> while the current rate of government subsidised housing delivery is roughly 6000 units per year.<sup>35</sup>

35.2. Second, because the delivery of housing is not in well-located areas, it entrenches spatial inequality. It puts more and more poor, working class Black and Coloured people on the urban periphery, away from access to opportunities. And it deepens the segregated nature of the city.

36. In sum, therefore, twenty-seven years after apartheid, racial and class exclusion remains a persistent barrier to access to equitable services. The legacy of spatial inequality in Cape Town means that the majority of Black and Coloured residents live in densely populated under-resourced townships, informal settlements on the periphery of the city; while wealthy mostly White residents live in well-resourced, low density well-located areas.

### **LEGAL, REGULATORY AND POLICY FRAMEWORK**

37. In this section, we lay out the legislative and policy framework that should be considered in the review of the DMS.

#### **The Constitution**

38. The Constitution expressly recognises South Africa's history of forced removals and landlessness in the property clause (section 25), and places obligations on the state to proactively redress past injustice in relation to land and housing.

39. Section 25(5) requires the state to take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis. Section 26(1) of the Constitution provides for the right to access to adequate housing. In terms of section 26(2), the state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.

40. The objectives of local government are set out in section 152(1) of the Constitution. They include:

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<sup>34</sup> Shamiela Fisher 'CITY OF CT COMMITTED TO TACKLING HOUSING BACKLOG' (2019) Eyewitness News, <https://ewn.co.za/2019/02/25/city-of-ct-housing-backlog-sits-at-365-000-continues-to-rise-mayor>

<sup>35</sup> Centre for Affordable Housing Finance in Africa 'Cape Town Housing Market Report 2020' (2020)

- 40.1. to ensure the provision of services to communities in a sustainable manner (section 152(1)(b));
  - 40.2. to “*promote social and economic development*” (section 152(1)(c)); and
  - 40.3. “*to encourage the involvement of communities and community organisations*” (section 152(1)(e)).
41. The City is obliged by section 153 of the Constitution to structure and manage its administration and budgeting in such a way as to “*give priority to the basic needs of the community*” and “*promote the social and economic development of the community.*”

*The Spatial Planning and Land Use Management Act 16 of 2013*

42. SPLUMA is enacted to give effect to the state’s constitutional imperative in section 25 to enable citizens to gain access to land on an equitable basis and, in terms of section 26, to provide access to adequate housing, “which includes an equitable spatial pattern and sustainable human settlements”.
43. Thus, among SPLUMA’s objects are to “ensure that the system of spatial planning and land use management promotes social and economic inclusion” (section 3(b)); and to “redress the imbalances of the past and to ensure that there is equity in the application of spatial development planning and land use management systems.” (section 3(f)).
44. Chapter 2 of SPLUMA sets out the development principles that must guide all organs of state engaged in spatial planning and land use management. Section 7 prescribes five “development principles”:
- 44.1. The principle of spatial justice, which means, inter alia, that:
    - 44.1.1. past spatial and other development imbalances must be redressed through improved access to and use of land;
    - 44.1.2. spatial development frameworks and policies at all spheres of government must address the inclusion of persons and areas that were previously excluded, with an emphasis on informal settlements, former homeland areas and areas characterised by widespread poverty and deprivation;

- 44.1.3. spatial planning mechanisms, including land use schemes, must incorporate provisions that enable redress in access to land by disadvantaged communities and persons; and
  - 44.1.4. land use management systems must include all areas of a municipality and specifically include provisions that are flexible and appropriate for the management of disadvantaged areas, informal settlements and former homeland areas.
- 44.2. The principle of spatial sustainability, which requires spatial planning and land use management systems to, inter alia:
- 44.2.1. promote and stimulate the effective and equitable functioning of land markets;
  - 44.2.2. consider all current and future costs to all parties for the provision of infrastructure and social services in land developments;
  - 44.2.3. promote land development in locations that are sustainable and limit urban sprawl; and
  - 44.2.4. result in communities that are viable.
- 44.3. The principle of spatial efficiency, which requires, inter alia, that
- 44.3.1. land development optimises the use of existing resources and infrastructure; and
  - 44.3.2. decision-making procedures are designed to minimise negative financial, social, economic or environmental impacts.
- 44.4. The principle of spatial resilience, which requires that flexibility in spatial plans, policies and land use management systems are accommodated to ensure sustainable livelihoods in communities most likely to suffer the impacts of economic and environmental shocks.
- 44.5. The principle of good administration, which requires:

44.5.1. an integrated approach by all spheres of government to land use and land development that is guided by the spatial planning and land use management systems;

44.5.2. any laws relating to land development and land use to be met timeously; and

44.5.3. policies, legislation and procedures to be clearly set in order to inform and empower members of the public.

45. These five development principles are central to the formulation and implementation of laws, policies and practices of spatial planning and land use management in South Africa. In terms of section 6(1), they are required to guide all decision- and policy-making, including:

45.1. the preparation, adoption and implementation of any spatial development framework, policy or by-law concerning spatial planning and development or use of land;

45.2. the consideration by a competent authority of any application that impacts or may impact upon the use and development of land; and

45.3. the performance of any function in terms of this Act or any other law regulating spatial planning and land use management.<sup>36</sup>

46. In terms of section 25(1)(a) –(d) of SPLUMA, the purpose of a land use scheme is to promote:

46.1. economic growth;

46.2. social inclusion;

46.3. efficient land development; and

46.4. minimal impact on public health, the environment and natural resources.

47. A land use scheme must also give effect to and be consistent with the municipal spatial development framework, which we describe below.

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<sup>36</sup> Section 6(1)(e), SPLUMA.

### The Spatial Development Frameworks

48. Section 35 of the Municipal Systems Act 32 of 2000 provides that an Integrated Development Plan (IDP) “is the principal strategic planning instrument which guides and informs all planning and development, and all decisions with regard to planning, management and development, in the municipality.”
49. An integral component of an IDP is the spatial development framework (“SDF”). In terms of section 12 of SPLUMA, each sphere of government must prepare an SDF.
50. In terms of section 12(a) and (b) of SPLUMA, the broad purposes of an SDF are to:
  - 50.1. provide a long-term spatial development vision statement and plan;
  - 50.2. guide provincial and municipal planning and development decisions and guide the exercise of discretion;
  - 50.3. contribute to a coherent, planned approach to spatial development at all spheres of government;
  - 50.4. provide clear and accessible information to public and private sector and provide direction for investment purposes;
  - 50.5. include previously disadvantaged areas, areas under traditional leadership, rural areas, informal settlements, slums and land holdings of state-owned enterprises and government agencies and address their inclusion and integration into the spatial, economic, social and environmental objectives;
  - 50.6. address historical spatial imbalances in development;
  - 50.7. identify the long-term risks of particular spatial patterns of growth and development and the policies and strategies necessary to mitigate those risks;
  - 50.8. provide direction for strategic developments, infrastructure investment, promote efficient, sustainable and planned investment by all sectors; and
  - 50.9. promote a rational and predictable land development environment to create trust and stimulate investment.

51. The Western Cape Government has adopted the Western Cape Provincial Spatial Development Framework (2014) (the “PSDF”), and the City has developed the City of Cape Town Municipal Development Framework (2018) (the “MSDF”).

### The PSDF

52. The PSDF recognises that town planning during the apartheid era played a central role in furthering racial and class segregation in the Western Cape. This resulted in a legacy of unequal access to social and economic assets and opportunities whereby “the disenfranchised generally located on the urban periphery and having to travel long distances to get to work, the hospital or to the shops”.

53. The underlying basis of the spatial vision for urban areas articulated in the PSDF is the need to address exclusionary and unsustainable forms of development by promoting inclusive economic growth. This is reflected in a new approach to “spatial transformation”, based on:

53.1. proactive spatial planning that reduces vulnerability to risks;

53.2. spatial planning that links transport and infrastructure investment programmes; and

53.3. mixed-use and compact settlements that promote inter alia competitiveness, social inclusion, quality of life, and efficient delivery of affordable services.

54. In relation to access to housing, the PSDF states that “[e]xclusionary land markets prevent spatial integration of socio-economic groups and limit affordable housing on well located land”.

55. The PSDF specifically calls for a new approach to housing which supports “inclusive and sustainable housing”. This new approach expressly involves:

55.1. acting in partnership with the private sector to assist in implementing its spatial vision by “leveraging private sector and community investment to restructure dysfunctional human settlements”;

55.2. “supporting municipalities manage urban informality, making urban land markets work for the poor, broadening access to accommodation options, and improving living conditions”;  
and

- 55.3. “less emphasis on delivering completed houses, and more emphasis on incrementally developing human settlements in partnership with other government departments, communities and the private sector.”
56. In order to achieve this, it recognises a shift in the housing focus towards “diversifying typologies delivered and aligning housing projects with economic opportunities, increasing the supply and management of affordable rental accommodation, and also addressing the formal and informal sectors in one market”.

### The MSDF

57. The MSDF sets out the spatial vision and development priorities to achieve a reconfigured, inclusive spatial form for Cape Town. Like the PSDF, spatial transformation is fundamental to the realisation of the vision of the MSDF. In the MSDF, the City has articulated its spatial transformation vision in the following manner:

“The City is intent on building – in partnership with the private and public sector – a more inclusive, integrated and vibrant city that addresses the legacies of apartheid, rectifies existing imbalances in the distribution of different types of residential development, and avoids the creation of new structural imbalances in the delivery of services. Key to achieving this spatial transformation is trans-oriented development (TOD) and the densification and diversification of land uses.”<sup>37</sup>

58. The MSDF expressly acknowledges that the burden of apartheid’s spatial pattern is disproportionately felt by the urban poor, who live in high densities, and in under-resourced, under-serviced and poorly located parts of the city. These are the people who must travel great distances, and at great cost, into predominantly white, sparsely populated, well-located areas of the city in order to access economic and job opportunities.<sup>38</sup> It also acknowledges the trend of high rentals and land prices exacerbating the pattern of racial and class segregation, noting that “[a]ffordability is a primary determinant of location and the interaction of people, activities and land uses.”<sup>39</sup>

59. In order to reverse the legacy of apartheid spatial planning, the City has committed in the MSDF to “creating more opportunities for people in highly connected areas. Further, it seeks to counter

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<sup>37</sup> City of Cape Town. Municipal Spatial Development Framework. Pg. 35

<sup>38</sup> City of Cape Town. Municipal Spatial Development Framework. Pg. 13-14

<sup>39</sup> City of Cape Town. Municipal Spatial Development Framework. Pg. 23

the creation of new low-income communities on the periphery of the city and the need for the poor to spend disproportionate amount of their income on transport.”<sup>40</sup>

60. In order to realise the City’s spatial transformation vision, the MSDF advances three spatial strategies, namely:

60.1. building an inclusive, integrated, vibrant city (spatial strategy 1), including by addressing existing imbalances in the distribution of different types of residential development, and avoiding the creation of new structural imbalances in the delivery of services;

60.2. managing urban growth, and creating a balance between urban development and environmental protection (spatial strategy 2); and

60.3. planning for employment, and improving access to economic opportunities (spatial strategy 3).

### **THE LOST TRANSFORMATIVE POTENTIAL OF ZONING SCHEMES**

61. Van Wyk defines ‘zoning’ as “comprising different categories of directions that set out the purpose for which land situated in the area covered by town planning scheme may be used and the land use restrictions applicable in each category as determined by relevant scheme regulations.”<sup>41</sup> The DMS defines ‘zoning’ along similar lines as the “base zoning and overlay zoning and means a land use category prescribed by the development management scheme regulating the use of and development of land and setting out – (a) the purposes for which land may be used; and (b) the development rules applicable to that land use category.”<sup>42</sup>

62. The traditional function of zoning schemes is to preserve consistent land uses to maintain ‘the character of an area’.<sup>43</sup> While this does serve a legitimate public purpose in safeguarding areas from drastically different land uses, like heavy industrial and residential, an over obsession with consistency can also preserve the inequality that was designed into our city.

63. As shown above, historically, different planning laws were applied to ‘White’ and ‘Black’, ‘Coloured’ and ‘Indian’ designated areas in the spatial design of racial segregation. If Cape Town’s spatial legacy is characterised by inverse densification, maintaining the character of any

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<sup>40</sup> City of Cape Town. Municipal Spatial Development Framework. Pg. 47

<sup>41</sup> J van Wyk *Planning Law* 2 ed (2012) at 248.

<sup>42</sup> See definition section of City of Cape Town Municipal Planning By-Law, 2019.

<sup>43</sup> J van Wyk *Planning Law* 2 ed (2012) at 332.

one White neighbourhood of predominantly single residence zoning means maintaining sparsely populated well-located areas for exclusive use.

64. Neighbourhoods are also able to resist more dense, inclusive developments on the basis that it is out of character for their neighbourhood without this coming across as racist or conservative. The phenomenon of ‘not-in-my-backyard-ism’ (NIMBYism), exemplifies how zoning schemes become sites of political contestation, often successfully used to resist big developments.
65. The true purpose of a zoning scheme is very clearly spelt out in 25(1)(a) –(d) of SPLUMA, in terms of the need to promote economic growth, social inclusion, efficient land development; and minimal impact on public health, the environment and natural resources.
66. The intended purpose of SPLUMA is to close the imbalance in planning practices across racially designated areas by **incorporating** previously excluded informal settlements and bantustans into the planning system and **redressing** the inequality in access to land-based opportunities. These two goals (namely inclusion and redistribution) are key to understanding the role of any municipal zoning scheme. It is also deniable that SPLUMA intends to adopt a transformative vision for spatial planning and land use management as a break from the past, and thus intends for local municipalities to dismantle systemic racism in the built environment.
67. This is also amplified by the definition of ‘public interest’ in section 25(4) of the Constitution which ‘includes the nation’s commitment to land reform, and to reforms to bring about equitable access to all South Africa’s natural resources.’<sup>44</sup> This expands the parameters of public purpose in zoning schemes that simply have not been acknowledged in the DMS.
68. The DMS only achieves one small part of this purpose by formally zoning previously excluded areas but failing to adopt any redistributing developmental land practices. The City’s limited understanding of the DMS is even reflected in section 26 of the Municipal Planning By-Law, 2019 that defines the DMS narrowly in terms of the following purposes:

*(a) regulation of use rights and control of the use of land;*

*(b) 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*

*(c) **facilitation of efficient, economic and sustainable use of land;***

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<sup>44</sup> section 25(4) of the Constitution.

*(d) protection of areas with an environment which could be substantially adversely affected by development;*

*(e) other purposes lawfully prescribed by national or provincial legislation.’*

69. It is curious how this definition excludes ‘social inclusion’ which section 25 of SPLUMA clearly mandates must be a purpose of a municipal land use scheme.
70. As explained in more detail below, the DMS is also deficient for failing to “include provisions to promote the inclusion of affordable housing in residential land development”<sup>45</sup> and to “incorporate provisions that enable redress in access to land by disadvantaged communities and persons.” All sections provide a clear mandate to adopt more inclusive and redistributive measures to address and promote social inclusion and redistribution.
71. The effect of omitting ‘social inclusion’ and ‘redress in access to land’ means that the DMS is, by design, upholding apartheid discrimination and segregation, i.e. the zoning scheme is upholding exclusionary land practices. It is, to state it differently, only balancing economic and environmental considerations in land use management, whereas SPLUMA requires zoning schemes to go one step further and actually redistribute towards equitable access.
72. The overwhelming result is that there is a gaping chasm between the transformative vision of forward-looking spatial policies (contained in the Constitution, SPLUMA and PSDF and MSDF) and the administration of the DMS. All these positive aspirational visions are lost if the DMS maintains the zoning distribution inherited from colonialism and apartheid.
73. The result of inaction and a failure to redistribute land is the maintenance and perpetuation of the unequal status quo.

### **INCLUSIONARY HOUSING / ZONING AS ONE FORM OF REDRESS**

74. NU submits that equitable access to land includes access to well-located land. We submit that the constitutional and statutory obligations of the City to progressively provide access to land and adequate housing encompasses an obligation to promote affordable housing in private developments, in order to address spatial inequality inherited from apartheid spatial planning. At the very least, the City is empowered to exercise its powers in order to achieve this.

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<sup>45</sup> Section 24(2)(d) of SPLUMA.

75. The inclusion of affordable housing in private developments advances sections 25(5) and 26 by redressing unequal access to well-located land and housing. It gives appropriate effect to the horizontal application of these rights.
76. It is also mandated in terms of section 24(d) of SPLUMA, which imposes a mandatory requirement for land use schemes to “include provisions to promote the inclusion of affordable housing in residential land development.”<sup>46</sup> This is also reflected in the Western Cape Land Use and Planning Act (“LUPA”)<sup>2</sup>, which states that the conditions may include but are not limited to “the provision of housing with the assistance of a state subsidy, social facilities or social infrastructure.”<sup>3</sup>
- 77. If the City is serious about its commitment to adopt an inclusionary housing policy as part of this review it must, as it has said, amend the Municipal Planning By-Law to include an Inclusionary Housing Overlay Zone, expressly authorise the imposing of inclusionary housing conditions.**
78. A question for the City to consider is to what degree the incentives needed to make inclusionary housing conditions fair and feasible must be embedded in the DMS. Incentives such as bulk bonuses, access to fast tracking of land use applications, relaxed parking requirements and other incentives are an essential part of making an inclusionary housing policy work for private developers while at the same time maximising the contribution to affordable housing. It may be necessary to include these incentives and under what conditions these incentives will apply within an inclusionary housing overlay zone for consistency with the forthcoming inclusionary housing policy and to ensure certainty.
79. In short, NU submits that inclusionary housing constitutes an appropriate and effective measure by which to redress unequal access to land, and to promote the fulfilment of the right of access to adequate housing.

### **RECOMMENDATIONS FOR FURTHERING THE SPATIAL JUSTICE MANDATE OF THE DMS**

80. While inclusionary housing (also known as inclusionary zoning) is already being put into place by the City, this is not sufficient to realise the constitutional and legislative mandate of land use regulation to advance redress. When looking at the segregationist history outlined above, it is essential to recognise the incredible degree of creativity and innovation used by colonial and

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<sup>46</sup> Section 24(2)(d) of SPLUMA.

apartheid spatial planners (and other agents) wielding land use management as a tool for racial oppression and segregation. In the post-apartheid era there has been a failure to meet this history with an equal degree of creativity, resources and commitment to redress, redistribution and spatial justice.

81. **The onus is on the City to reflect on this failure to push the DMS beyond a technical, seemingly 'neutral' tool into a tool for spatial justice**, however, we submit the following recommendations to consider for how the DMS could be used as a tool for positive change-making in the city.

#### Incremental densification

82. The DMS has the potential to be used as a tool for densification, however, in some ways land use management in Cape Town remains as a barrier for necessary inclusive densification. One example of this is remaining title deed restrictions in areas such as Camps Bay from the early 1900s that restrict subdivision or the development of second dwellings. These antiquated title deed restrictions are no longer appropriate in the context of the need for radically inclusive densification and transformation.

83. **The City should investigate ways of changing mechanisms such as this as a means of unlocking incremental densification while simultaneously unclogging the land use application processes as a means to reduce turnaround times in this process.** If the City does look into nullifying outdated title deed restrictions or other mechanisms blocking densification, it will also be necessary to investigate how to recoup some of the value that this will generate for private owners for public good.

#### Resisting Evictions and Displacement

84. Many historically working-class areas across Cape Town such as Woodstock, Salt River and Observatory have experienced rampant gentrification for years, with devastating impacts on the long-standing residents. This trend is set to continue across other areas of the city. **The City must interrogate what lessons it can learn from the waves of displacement that have already been seen in areas such as these and put forward-looking mechanisms in place within the DMS to protect against gentrification processes in other areas at risk of the same.**

85. This is specifically mandated by section 7(a)(v) of SPLUMA that states that 'land development procedures must include provisions that accommodate access to secure tenure and the incremental upgrading of informal areas.'<sup>47</sup>
86. The track record of the last 10 years of gentrification, especially in areas like Woodstock and Salt River, amongst others, have experienced surges in property prices, combined with the loss of income associated with a collapsed local textile industry. In 2013, the sale price for property here ranged between R100,000 to R300,000. By 2015, the average sale price was R1.6 million and the median price was R2.6 million.<sup>48</sup> Similar trends exist with old building stock that is being refurbished and sold on. In 2016, these suburbs experienced a 15.8% year-on-year growth in property value. Over a five year period, property prices have shot up by 72.7%.<sup>49</sup>
87. The area has a deep tradition of informal rental systems, often happening over multiple generations between tightly connected families and broader community networks. Woodstock has a much higher amount of renters around 50% than the City average of 15%.<sup>50</sup> Given the aforementioned property trends this has led to significant insecurity in terms of tenure.
88. Rent control is one mechanism that could protect working-class residents and preserve social inclusion in areas that are already experiencing gentrification or may experience gentrification in the future. We challenge the city to think creatively about the role that the DMS could play in protecting residents from evictions and displacement through, for example, overlay zones that identify areas at risk of this and put protection measures in place.

### Living Heritage

89. Closely related to the need to put mechanisms in place to protect against evictions and displacement, **the City must deal with the failure of the DMS to protect important living heritage specifically of poor and working class communities.** Protection of built environment heritage is prioritised in land use management through current Heritage Protection Overlay Zones ('HPOZ'), while the living heritage of *people* is left without protective measures. Considerations and criteria must be added into existing HPOZs that take into account the living heritage of people, and additional HPOZs may be needed to protect certain communities.

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<sup>47</sup> Section 7(a)(v) of SPLUMA.

<sup>48</sup> Property24, Woodstock Property Trends and Statistics, <https://www.property24.com/cape-town/woodstock/property-trends/10164>

<sup>49</sup> FNB, Subregional Housing Price Index 2017, 2017.

<sup>50</sup> Statistics South Africa, Census Data, 2011.

90. In the wake of the contestation around the River Club development, the City should interrogate mechanisms to protect First Nations living heritage. One form this could take is specific overlay zones in the context of land with specific ancestral and sacred significance with requirements to include First Nations groups collaboratively in any form of private development. In lieu of stolen land being given back, the City must interrogate how the DMS can be wielded to protect First Nation peoples inherent interest in what happens to ancestral land..

### **CONCLUSION**

91. Our history clearly shows that zoning was at the forefront of reinforcing racial exclusion and segregation. The question is how has the DMS performed based on the obligations set out in SPLUMA.

92. We have argued that the DMS has failed to incorporate measures aimed at redistribution, inclusion and integration. Without these measures, the DMS plays a value-neutral and technocratic role in upholding the apartheid racist legacy. A neutral approach to land-use planning (i.e. by merely specifying zoning required for certain areas) does not proactively disrupt the legacy of unequal development across different areas in the city that were subjected to discriminatory land practices.

93. In the final analysis, we submit that the DMS needs to be brought in line with SPLUMA so that zoning can start to play a role in spatial inclusion and transformation rather than buffering up the spatial faultlines of colonial and apartheid segregation.