Comments on the revisions needed to the Municipal Planning Bylaw, 22nd April 2020 **Observatory Civic Association** **60 Trill Rd, Observatory, 7925** email: info@obs.org.za	OBSERVATORY Civic Association

1. The MPBL and its processes.
    a. The City has twice previously amended the Municipal Planning bylaw, in November 2015 and in March 2019. On both occasions, the Bylaw amendments were copious (58 amendments in 2015 and 87 amendments in 2019) but communities were only given one month to comment on both occasions.
    b. The OCA and other civics in their comments on the amendment noted the lack of time and lack of engagement with communities when seeking comment on the amendment and made recommendations regarding how consultation and inputs could be done better. These included both allowing more time and providing for capacity building for communities to engage with the materials. On both occasions these recommendations were noted by the City but not acted upon.
    c. It seems this time around, the City is pursuing a different route by putting out the MPBL and first inviting comments on what needs to be changed. This is probably an improvement if it means that communities' comments will be taken seriously.
    d. However, our experience has been that comments from civics and community members are not given the same attention or importance when compared to practitioners who are in the built environment field. Our analysis of the 2015 MPBL amendments were that not one of the proposals made by the community organisations submitting comments were adopted while those comments that were accepted were predominantly from built environment professionals.
    e. It therefore seems there is an inbuilt bias in the way in which the MPBL is conceptualized which places greater store on comments coming from an architect, a planner or a land surveyor than they is given to comments by ordinary community members.
    f. This cannot be consistent with the requirements of the Municipal Services Act which requires Municipalities to create conditions for meaningful participation by communities in the decisions affecting them at Municipal level.

2. Time and process for Comment
    a. The periods for commenting on a development application or a rezoning are not specified in the bylaw but left to department practice. This leaves much to the discretion of the planning official, which is not wise. The time periods should be specified in the bylaw and be sufficiently long to allow adequate time for community consultation.

b. Section 94 leaves it to the discretion of the planning official as to whether to readvertise a development application, which is not wise and which disadvantages parties who have a direct interest in the matter as a result of the context of the application being different to that which pertained when the application was submitted. The Bylaw should remove the permissive arrangement and replace with a mandatory readvertising after two years.
c. Where there are complex legal changes to the Municipal Bylaws, the City must pro-actively undertake workshop with communities, if necessary drawing on the resources of communities and civics to effect such capacity building. In 2015, Civics submitted comment on the MPBL amendments then, arguing that the City should afford more time and invest more resource in capacity building to support participation. The response at the time from the City as to note the comments and to say that "Public participation processes were conducted as per formal requirements and the City ensured the proposals were distributed as widely as it could feasibly be done." This is not an adequate operationalization of the Municipal Services Act, not the Municipalities obligations as an organ of state under the Constitution. This is discussed further below under point 10.
d. We draw attention to Section 16 of the Municipal Services Act, which mandates municipalities "… to encourage, and create conditions for, the local community to participate in the affairs of the municipality ..." and "must … contribute to building the capacity of the local community …" for this purpose. The Act further points out that the municipality must, in order to meet these obligations "… use its resources, and annually allocate funds in its budget, as may be appropriate …". We do not believe the current MPBL is effective in that regard.

3. Duration of Validity of an approval
    a. Section 38 provides for a granted approval to last for 5 years. This was increased from 2 years in 2019. We do not believe this is warranted as in 5 years, many policies and other guidelines may have changed. A Spatial Development Plan may have been developed. The circumstances under which an approval is given 5 years later will be very different. Traffic patterns in an area might change, as might landscapes. We draw attention to the fact that the City introduced measures to ensure that all future buildings are fitted with water-saving devices. This is a positive regulatory change. However, an approval more than 2 prior to this change can continue to build developments that do not meet this change.
    b. Secondly, it will make it easier for developers to speculate by buying up property and choosing the most profitable time to redevelop. This will encourage problem buildings and running down of sites.

4. Section 71 deals with information required to be submitted with a development application. Any history of previous bylaw violations or violations of conditions in an MPT approval should be included in this list. Notably, the City released a draft Problem Building bylaw in 2019 which provided for issuing of compliance notices. Should the Problem Building bylaw ever be adopted (it is unclear what has happened to that bylaw), any history of compliance notices

issued to the owner for any city property should be included as history of their compliance with bylaws.

5. Section 95 deals with access to information. The MPBL does not deal with access to information consistent with our Constitution, which frames access to information as a right of all people in South Africa. What is contained in the MPBL is a limited right of access to information in the form of the public being able to 'view' information about an application but only if the file is "not being used by the Department." This is a wholly inadequate formulation of access to information in such an important area as development planning. Moreover, City officials do not always seem to be familiar with these provisions as our experience has been that City officials do always not make available information about an application. We propose that if a document is available for inspection and a copy can be obtained on payment of a fee, then this must extend to electronic access via the DMS. At present, members of the public do not have access to the DMS but must physically go to a BDM office to seek information. In the context of COVID-19 being with us for a number of years to come, it would be wise for the City to set up publicly accessible electronic systems where people could access information that they would otherwise have to find by physically attending an office. Such systems should be easy enough to set up.

6. To address this, firstly, the MPBL should recognize the question of access to information by communities as a constitutional obligation; The MPBL should routinely inform local civic associations about developments that the LUMS department is considering for approval irrespective of whether a departure is to be applied for or not. Lastly, the MPBL should be amended to permit electronic access to documents by the public where they currently are permitted physical access.

7. Section 99 was amended in 2017 to move the requirement that "the application must comply with the requirements of this By-Law" from a mandatory trigger to refuse an application to the discretional arrangement where the official must only consider such a fact. It is unclear how failure to comply with the requirements of the By-law could not trigger automatic disqualification. This is illogical in law and affords extensive latitude to officials and developers to simply take advantage of failure to enforce the bylaw, such as it is.

8. Penalties for unauthorized building are dealt within 129 as Administrative penalty. Section 7 notes that the penalty for illegal building work cannot be more than 100% of the value of the work. We do not believe this is an effective discouragement for contractor to ignore the law. Our experience has been that developers and builders frequently take the chance to construct illegally in the expectation that there will no enforcement and on the understanding that the heaviest penalty will not be a material disincentive to disobey the law. This section of the MPBL should be amended to allow for stronger penalties to be applied should the person responsible be deemed to have deliberately chosen to ignore the by law.

9. We also wish to note a number of existing problems with the bylaw which the City has not addressed through amendments. We believe this is an oversight and requires focused attention from the City to rectify serious problems in the Bylaw
    a. In contrast to the time given to community to comment on bylaws, a mere 30 days, there is no time deadline on City officials to respond to these comments. Members of the public are not given feedback on how their comments on bylaw amendments have been dealt with. This is not consistent with basic administrative justice requirements in terms of the Constitution.
    b. Sections 114 (3), (4) and and 121 (1), (7) set up the Mayor as decision maker on appeals. This arrangement is not consistent with requirements for appeal processes to be fair, transparent and independent. The bylaw should introduce amendment to set up a higher level of appeal that is not connected to political leaders, to officials who are part of an administration who have made a lower level decision nor to persons connected to the industry whose livelihoods are dependent on the outcomes of such appeal decisions. The constitution of an independent legally appointed and legally based appeal committee would meet such standards.
    c. The MPBL should better address questions of rental of rooms in private houses. The MPBL would do well to allow homeowners to develop an income stream by letting a room or a granny flat on their premises. However, it is not clear if the MPBL opens the provisions much more widely to allow non-residents to own a home and rent it for short-term rentals less than 30 consecutive days as a business – which is exactly the current AirBnB model. It is widely recognized that this kind of very short-term rental undermines solutions to the housing crisis in Cities where long-term family accommodation is needed. Empirical evidence suggests that AirBnB type rentals undermines availability of housing stock suitable for rental by a family with dependents. There is much evidence that short-term lets contribute to the Cape Town housing crisis, as these full-time short-term let apartments are not available for long-term rentals.
    d. The MPBL also needs to provide more guidance on the availability of affordable housing. For example, rather than leaving it to an MPT decision, it should be mandatory in the bylaw for all new developments that are larger than a certain size (e.g. 25 apartments) to provide affordable housing as a substantial component.

10. Participation
    a. We note that a group of Civic Associations met with the Mayor in 2019 to propose a Municipal By law to enhance community participation. Despite seeming receptiveness at the meeting, there has been no further movement on this proposal. We re-attach the draft by law developed by Civic Action for Public Participation (CAPP) to remind the City it need a serious look at its participation mechanisms.
    b. In addition, the MPBL should be strengthened with explicit provisions regard to participation. There should be a specific section which deals with participation in

general, not just limited to the minimal legal requirement imposed by national law on developing the Municipal Spatial Planning Framework.

c. The methods for achieving participation should be specified and should include at least:
   i. Notification of local Civic Associations and Interested and Affected parties registered with the City.
   ii. A pro-active process in which the City actively asks Civics for lists of relevant stakeholders to be included.
   iii. Placement of notices in rates/rent bills to alert residents.
   iv. Placement of notices in local newspapers to include placement in local community newspapers.
   v. Public meetings at venues accessible to people who do not have cars for transport.
   vi. Information must be made available at both local libraries and at the central city library [to provide access for those at work in the City].
   vii. Information to be placed online on the City's website
   viii. Information to be presented in plain language so that the material is understandable to all.
   ix. Capacity building on the issue at hand must be active and cannot rely on passive information provision alone. Workshops must have presenters who are able to give summaries of the issue and answer public questions.
   x. The City's Public Participation Unit should include local communities in deciding on appropriate consultants to run Public Participation processes in communities. Local experts may be far better in explaining complex documents to local communities than highly paid external consultants.

   Many of these methods are already stated in the City of Cape Town's Public Participation Policy but are not used in most participatory processes.

d. The timeline for any participatory process in which comments are sought from the public should reasonable. Where materials are complex, a longer timeline should be provided.
e. As indicated above, neither in relation to participation, nor in relation to access to information, does the City appear to have a consistent, transparent and understandable system for implementing these policies. We believe that (a) what constitutes an adequate participation process (e.g. what constitutes a method which makes the frameworks accessible to the public 'accessible') and (b) what constitutes an adequate access to information for communities should be benchmarked. There are a number of Constitutional Court Cases that have reflected on the nature and process of participation and the CoCT should be able to take guidance from these deliberations in the spirit of being a democratic local government.

11. The Municipal Planning Tribunal
    a. We believe the Municipal Planning Tribunal has a very important potential role to play in the planning process and could be an instrument for democratic governance.

However, we do have a number of concerns.

b. Firstly, we are extremely concerned that the Tribunal lacks any community voice. The Tribunal includes two categories of members being officials familiar with planning and persons who are not officials who are also expert/familiar with planning. The section implies that only people with technical 'skills' have anything relevant to say about such matters. This is in contradiction to the general ethos of participatory decision-making. As the Constitutional Court judgment on the Doctors for Life case illustrates, persons making decisions will make better decisions if they have the benefit of all inputs and perspectives that will enable them to make the best decisions. We are concerned that the exclusion of community voice from such a Tribunal would not result in the best decisions, and that the inclusion of a community voice would strengthen such decision without compromising confidentiality or efficiency. We have many examples in state and civil society processes where non-professionals play key roles in decision-making bodies.
c. We believe that 115(2) should be amended to accommodate community representatives on the Tribunal. This will be important for building trust and openness in the process.
d. Secondly, the MPBL provides for recusal of members of the Tribunal where there is a Conflict of Interest (Section 117). However, there are some serious flaws in this provision. Firstly, sub-section (e) allows for waiving of recusal from a decision if "…the personal or private business interest has been made a matter of public record, or his or her employer, if any, has given written approval, and the public official or structure within the City with jurisdiction to rule on ethical matters has expressly authorised his or her participation …". It is not clear why this should justify their participation. The fact that a private business interest is a matter of public record does not reduce the risk of a vested interest being exercised in a decision-making context. Secondly, the MPBL makes no reference to the fact that there may be a Conflict of Interest that is not a financial or business interest. If a complaint is brought to the Tribunal about an application in which the decision of an official is claimed to have been made incorrectly, then the same official who may be serving on the Tribunal has a clear conflict of interest.
e. We believe that Section 117 should be corrected to include non-financial Conflict of Interest and should not permit the waiver of the obligation to recuse oneself when one has a conflict of interest.

12. Heritage Protection Overlay Zones

a. Chapter 20, Part I deals with Heritage Protection Overlay Zones. Our experience has been that the designation of an HPOZ without a buffer zone has enabled the approval of developments just outside the HPOZ that adversely affect the heritage value and character of Observatory. The relevant officials appear completely disempowered by the legislative framework in applying any of the existing City policies with regard to heritage if the HPOZ has no buffer around it.

b. However, it is noted that the MPT has made decisions where it has taken account of the impact of a development on properties within an HPOZ where the development is on the edge of an MPOZ.
c. We therefore propose that the MPBL be amended to ensure that the MPBL recognize that an HPOZ should subject to a buffer zone outside the HPOZ. Such a buffer zone should not intrude on the HPOZ, but pertain to the periphery of the HPOZ. This will enable decision-making within the City to be more integrative of the different policies that have been approved by the City. At the moment, the MPBL leaves them as silos and reduces their relative contribution to creating a harmonious and well-designed city.

13. The purpose of a Development Management Scheme should be to provide guidelines that are contextually-informed and which have, as their aim, to facilitate a well-considered and positive outcome rather than a focus on being technically correct but resulting in negative impact.
    a. The system should be efficient and effective to enforce, so that applications should not proceed beyond the initial concept stage before being assessed. For example, in a HPOZ or where a development has potential Heritage or Environmental impact, that should be examined before the applicant proceeds on a proposal that does not have merit and that ends up wasting time all round. Applicants should be directed to where to find information to comply with Heritage and Environmental considerations well in advance of submission of an application so that applications are compliant in principle before plans are drawn up in any detail or developed.
    b. Authorities should not entertain non-compliance beyond a very limited degree unless it has been well supported as a concept first.
    c. Developers and their planners should follow, not disregard, guidance, expecting to attain massive departures that totally ignore the set guidelines.
    d. The DMS maxima are currently used as a default entitlement by developers and by planners in their decision-making. This needs to be changed to recognize, correctly, that the values in the DMS <u>are maxima</u>, meaning <u>they are not entitlements or minima</u> to be confused with development rights. Rather, where other policies and considerations are material to heights, distances and departures, the decision-maker must default to the limiting of adverse impacts on the urban environment, rather than defaulting to maximizing heights and bulks sought by developers. This should be explicitly unpacked in the revised MPBL.