



# Report



## City Powers to Regulate Generation and Reticulation of Electricity: Scope for Bylaws

16 November 2018





## TABLE OF CONTENTS

1	How buildings are regulated in South Africa .....	1
2	The Constitution and Building Regulations .....	2
3	Scope for municipal bylaws regulating buildings .....	3
4	Next steps .....	6

## LIST OF TABLES

Table 1: Schedule 4 Built Environment competences.....	2
--	---



# 1 How buildings are regulated in South Africa

Traditionally the regulation and control of building standards have been achieved through national legislation, the National Building Regulations and Building Standards Act, 103 of 1977 ('the Act'). The Act relies on national standards published by the South African Bureau of Standards (SABS) that provide a code of practice (also known as deemed-to-satisfy rules) for the application of the Act.

The Constitution of the Republic of South Africa, 1996, introduces changes to the allocation of law-making powers across three spheres of government: national, provincial and local. This report explores the question whether the inclusion of the term 'building regulations in Schedule 4, Part B of the Constitution materially affects the national government's power to regulate buildings and building standards and, to the extent that it does affect that power, does it give a power to regulate buildings to local government, i.e. municipalities?

Prior to the system introduced by the Act in 1977, buildings were regulated by a range of provincial and municipal laws, each specific to a particular province or municipality. The effect of the Act was to standardise all of them in line with norms established by the SA Bureau of Standards ('SABS'). Although buildings are regulated by national law, the day to day decision-making as to whether or not a new building, or a change to a building, complies with the law is made by a municipal official through the process commonly known as building plan approval. Section 7 of the Act requires that a municipality, once it is 'satisfied that the [building plan approval] application in question complies with the requirements of this Act and any other applicable law, ... shall grant its approval in respect thereof.'

Where a person is unhappy with the decision of a municipal official made in terms of the Act he or she may lodge an appeal with the review board created in terms of section 9 of the Act. The national Minister of Trade and Industry appoints the chairperson of the review board and the chairperson appoints two further members. The review board has the power to overturn the decision of a municipality in relation to the approval or rejection of a building plan submitted to it. This aspect of the Act however, the power of the National Review Board to overturn a municipal decision, has been set aside by the Constitutional Court in the recent decision *City of Johannesburg Metropolitan Municipality v Chairman of the National Building Review Board*<sup>1</sup>. There is thus no appeal to a national structure against the decision of a municipal official.

---

<sup>1</sup> [2018] ZACC 15.



## 2 The Constitution and Building Regulations

The 1996 Constitution sets out the different areas of competence relating to the built environment (as well as many other matters) in Schedules 4 and 5. Each of the two schedules is divided into a Part A and a Part B, with each Part B containing the areas of law-making that are particularly important for local government. Table 1 below sets out the key areas of law-making competence relating to the built environment, which are primarily set out in Schedule 4, which sets out the areas of concurrent national and provincial law-making competence.

Schedule 4	
Part A	Part B
Environment	Air pollution
Housing	Electricity reticulation
Urban and rural development	Building regulations
	Municipal planning

*Table 1: Schedule 4 Built Environment competences*

Concurrent competence means that both national and provincial legislatures can make laws on these matters, but that where there is a conflict between a national and provincial law dealing with the same area of competence then specific rules set out in the Constitution, section 146, will determine which one prevails. This means that, in theory, provinces could enact their own building regulations and standards. In practice, however, this is unlikely to arise as a serious prospect.

'Building regulations' fall into Part B of Schedule 4. This means that in addition to it being a concurrent area of national and provincial law-making competence it is also a 'local government matter'. In terms of section 156(1) of the Constitution, this means that it is a matter that a municipality has the 'right to administer'. Then, section 156(2) confirms that where a municipality has this right to administer it also has the power to 'make and administer bylaws for the effective administration' of that matter. The Constitution is thus clear that a municipality is fully empowered to make bylaws on building regulations. The question that arises now though is where and how does the municipal power to enact building regulation bylaws intersect with the power of the national government to also make law in this area? How do we deal with a situation where two spheres of government are both permitted to make laws relating to the same issue?



### 3 Scope for municipal bylaws regulating buildings

What happens when a municipal bylaw conflicts with a national law such as, in this case, the National Building Regulations and Building Standards Act? The simple answer, given in section 156(3) is that the bylaw is invalid.

However, section 156(5) goes on to confirm that a ‘municipality has the right to exercise any power concerning a matter reasonably necessary for, or incidental to, the effective performance of its functions’. This raises the question whether a national legal framework that prescribes in great detail the manner in which buildings must be regulated interferes with a municipality’s right to exercise its powers to administer and make laws relating to building regulations. If a municipality wishes to add further aspects to the regulation of building in its area, may it enact a bylaw in addition to those operating in terms of the Act?

Section 155(7) of the Constitution empowers national government (and provincial government) to ‘regulat[e] the exercise by municipalities of their executive authority referred to in section 156(1)’. At face value this raises a question: if municipalities can make bylaws in areas that they have the power to administer and national government can ‘regulate’, through legislation, the way in which they do so, how can we avoid conflict and contradiction between the national legislation and municipal bylaws? This question was raised before the Constitutional Court in the 2014 *Habitat* case, in relation to municipal planning (also a Schedule 4, Part B legislative competence). In that case, Judge Cameron ruled that “... “regulating” in section 155(7) means creating norms and guidelines for the exercise of a power or the performance of a function. It does not mean the usurpation of the power or the performance of the function itself. This is because the power of regulation is afforded to national and provincial government in order “to see to the effective performance by municipalities of their functions”. In this decision, the Constitutional Court confirmed that the power afforded to the national government in terms of section 155(7) is a “hands off” power, not one that enables it to prescribe in minute detail what decisions a municipality must take in matters in Schedules 4 and 5.

Of course, this raises the further question of what constitute ‘norms and guidelines’ in the context of building regulations. The National Building Regulations were intended to be binding rules, not norms or guidelines. The effect of the *Habitat* ruling however, is that they must be applied as norms and/or guidelines and that the power to prescribe rules, through municipal bylaws, is now held by local government.

#### Box 1: Example of Building Control Officers

The National Building Regulations and Building Standards Act empowers municipalities to appoint Building Control Officers (BCOs). The regulations stipulate the qualifications that a person must hold to be a BCO and the Act requires that the Minister’s consent be obtained where a BCO does not hold those qualifications. This reflects well the Constitutional scheme: the BCO is employed by the municipality, but the national Minister regulates BCO’s necessary qualifications, i.e. the norms and standards that must be complied with before the municipality exercises its executive power to approve or reject a building plan.



Prescribing norms and standards for building regulation is a core function of national legislation in our system of co-operative governance. However, every municipality has different local conditions and there are many different socio-economic scenarios that arise across the country. With climate change, the way in which buildings are regulated is key to ensuring that they are adapted to meet the new pressures that more intense weather events, for example, impose. Similarly, as we become more aware of the need to emit fewer greenhouse gasses, and hence be more energy efficient, so there is a growing need to regulate buildings in a way that promotes energy efficiency. These are all ways in which local government may **add** to the norms and guidelines set out in the National Building Regulations with regulations – in municipal bylaws – that prescribe additional standards or requirements. This does not mean that a municipal bylaw may remove or weaken a requirement of the National Building Regulations, but it may regulate **additional** aspects of building construction where the need arises.

#### Box 2: Alternative to a Green Building Bylaw

Another way that a City can use its municipal law-making power to achieve energy saving is through its Municipal Planning Bylaws. These laws can be used to require a particular orientation of certain types of building, for example, which will lead to lower consumption of energy for heating or cooling purposes.

For example, the City of Tshwane has had a Green Building Bylaw in place since 2013 (although not implemented yet), that supplements the National Building Regulations. The Tshwane Bylaw sets out two sets of standards, the first is a set of **mandatory standards** with which all new buildings have to comply and the second is a set of **promoted standards**. The City undertakes to explore incentives that it might create to encourage compliance with the promoted standards. These incentives might include:

- Fast tracked application procedures
- Reduced application costs
- Reduced bulk services contribution
- Relaxation of specific planning requirements such as parking provision
- Access to reduced cost or free green building technical training and seminars
- Access to municipal negotiated discounts for energy efficient / sustainable technologies
- Access to municipal negotiated finance interest rate reductions from banks and financial institutions
- Assistance in applying for grants or tax incentives for investments in energy efficient / sustainable technologies
- Formal recognition of performance through certification.

A good example of how the Tshwane Bylaw demonstrates the role of municipal law in creating an additional level of energy efficiency is the mandatory standard related to water heating. In the SANS 10400-XA Regulations (applicable in terms of the National Building Regulations & Building Standards Act) new buildings have to supply at least **50%** of their hot water with sources other than electricity. In the City of Tshwane this requirement is substantially increased; in that city new buildings must meet **all** of their hot water requirements through solar water heating. This is a clear case of the municipal bylaw enhancing the



energy effectiveness standard required under national law, by increasing the amount of hot water that must be supplied from renewable energy<sup>2</sup>.

---

<sup>2</sup> The City of Tshwane's Bylaw is not yet operational, and this example is provided purely to demonstrate the relationship between municipal and national law; it does not purport necessarily to endorse or promote the approach or wording of these provisions of the Tshwane Policy (given legal effect by the City's Bylaw).



## 4 Next steps

### THE TIME DIMENSION

Once a law is in place it is hard to change. Municipal bylaws are easier to change than national legislation but even in that case the process of changing a bylaw is lengthy and institutionally complex. The technology available to promote energy efficiency and to generate energy from renewable sources is changing very fast. It is hard to predict now what technology will be available even a few years ahead. So, it is very important to be careful when deciding what needs to be included in new law (whether a municipal bylaw or a national Act). If a new law is too detailed and prescriptive it can lock a city (or a country) into a pattern of development that rapidly becomes obsolete or redundant. The emphasis needs to be on securing fundamental principles and then ensuring that there is enough discretion permitted to decision makers to accommodate future technological changes.

### NEW MUNICIPAL BYLAW

Where a municipality wishes to improve energy efficiency in buildings constructed in its area of jurisdiction and wishes to do so by way of a mandatory requirement, the establishment of a new standard that has to be met by new buildings, then it may do so through the enactment of a building regulation bylaw. This bylaw should not contradict or oppose the requirements of the National Building Regulations and should rather complement, add to and enhance those rules with new ones. If we return to section 7(1) of the Act, we see that a municipality has to approve a building plan 'once it is 'satisfied that the [building plan approval] application in question complies with the requirements of this Act **and any other applicable law**' (emphasis added). In the case where a municipality enacts an additional bylaw requiring compliance with, for example, a new energy-saving measure, then that bylaw constitutes 'any other applicable law' in terms of section 7(1).

### CHANGING THE NATIONAL BUILDING REGULATIONS

However, where a City or Cities want to see new building regulations that are fundamentally different from and inconsistent with the current, National Building Regulations and thus require that they are amended or improved to achieve greater energy efficiency this requires a different approach. In this case there has to be direct engagement with the Department of Trade and Industry and the SABS in order to motivate and lobby for the desired changes. This is only necessary though where the change required is fundamentally incompatible with that of the National Building Regulations, where the addition of a higher threshold of energy efficiency performance, for example, would not be effective but where the underlying basis of an existing regulation has to change.