

## ETHICS OF URBAN DEVELOPMENT IN THE WESTERN CAPE – T SLABBER

### 1. Ethics and the legal practitioner:

The maxim that you are not your brother's keeper also applies when giving advice to a client, as everyone is entitled to do what is lawful. However, a practitioner may, in certain circumstances, refuse to advise a client and this may be based on the fact that what is asked of him/her offends his/her personal code (ethics). However, in modern life it is inevitable that every lawyer must attend to matters of which he/she disapproves that is allowed in law and such a lawyer as a rule wisely restrains his/her disapproval from influencing his work unless what is involved is most abundantly distasteful to him/her and overriding the maxim that the lawyer is not the keeper of his/her client's conscience. (As per Lewis – "Legal Ethics") When acting for instance for local government I would imagine that one would have a professional duty to give advice on the basis that the spirit of a law should be adhered to and not only the letter of the law. If this advice is ignored then one will have to follow the client's instructions. A distinction should be drawn between what is lawful, professionally unethical and against the personal ethics of a practitioner. Perhaps this distinction could also be applied to those in Government Office.

### 2. Ethics, the Constitution and legal rights and duties of Local Government:

The test when it comes to ethics, legal rights and local government, is our constitution and particularly the bill of rights. The values embraced therein are the practice of human dignity and the achievement of equality. In my opinion it is not necessarily about individualism, but about the importance of each individual. It is about the human dignity of every person. Regarding the realization of socio economic rights the Constitution *inter alia* stipulates:

“26 Housing: (1) Everyone has the right to have access to adequate housing.

(2) The State must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.”

The way in which the State at national, provincial or local government level addresses these rights must depend on the circumstances that prevail as observed in the *Grootboom* case: *“The state's obligation to provide access to adequate housing depends on context, and may differ from province to province, from city to city, from rural to urban areas and from person to person. Some may need access to land and building*

*materials. Some may need access to services such as water, sewerage, electricity and roads. What might be appropriate in a rural area where people live together in communities engaging in subsistence farming might not be appropriate in an urban area where people are looking for employment and a place to live in.”*

These rights cannot be claimed on demand, but that the State must act in a rational way in devising programmes that effect progressive realisation. In these programmes the local authorities play a critical role in promoting social and economic development of the communities it serves. Where the State has in good faith embarked on such programmes, the courts should not readily interfere in such manner as to distort the financial affairs of the relevant institution. (As per LAWSA)

The Councillors and officials acting on behalf of the local government (municipalities) must perform their duties in good faith, honestly, in a transparent manner and in the best interest of the municipality, without compromising the municipality’s credibility and integrity.

### **3. Urban development on open public spaces; a case study – Erf 5652 Stellenbosch**

#### **3.1 Ethics and the process of Urban Development: Substance versus form:**

During August 2005 the local municipality invited by notice in the local newspaper developers to submit a proposal for development on *inter alia* Erf 5652 Die Boord, which is currently zoned as public open space. In the call for proposal documentation the municipality stated that housing is listed as a high priority, especially the provision of low and middle income housing needs and indicated that the emphasis should be placed on densification. In my mind these goals are in harmony with the goals set in the constitution although it may be in conflict with my interests as an owner of a property adjacent to the proposed development. To protect the interests of the inhabitants of the Boord, the residents formed “Die Boord Steering Committee” (DBSC). The Committee initially approached the municipality not on legal grounds as such, but with the intention to take part in the process and to indicate that some ways of addressing these issues may be more creative, sensible and equitable to all than others. Further steps in the process followed, however, it is my perception that the municipality ostensibly followed the legal process in form but no effort was made to give substance to the process. My reasons for this conclusion are:

- The published notice calling for proposals was ambiguous. It was couched as an invitation for the submission of proposals for development, without making it clear that the real intention was to dispose of the properties in question. At a meeting between

representatives of DBSC and officials the committee expressed its concern that the original notice was misleading. A verbal response from the municipality was that what were called for were development proposals only and not tenders for the sale of the property. It was only after the period for the submission of tenders had lapsed that the Municipality's true intention to alienate the properties in question was revealed which shows a lack of transparency.

- The DBSC delivered a questionnaire to all the owners in Die Boord requesting their comments about development on the public open space and also to ascertain - in the event that development thereon would be inevitable – the preferred portion on which development should take place. However, the municipality refused to take delivery of a letter with details of the outcome of the said questionnaire thereby clearly indicating that they were not interested to discuss any concerns or proposals by the residents with the Committee. Incidentally the “proposal” which was accepted proposes development in a manner and on a portion of the property least acceptable to the Boord residents.
- The Committee also approached the municipality to provide them with information regarding the proposals made by developers. Even after closure of the call for proposals the municipality refused to provide these details. Also the municipality negotiated with the developer and drafted a deed of alienation with the intention to sign same prior to advertising such sale. Although the sale is subject to rezoning, the municipality by following the approach by first granting a tender and then allowing for the rezoning does leave the impression that the “public participation process” allowed for re rezoning will be mere window-dressing as the municipality has already in principle decided to rezone the property. It is my perception that the further processes to follow will have little or no legitimacy.
- Initially at a meeting officials referred to the sale of units being priced at between R200 000.00 - R400 000.00. At a further meeting the sum of between R400 000.00 and R600 000.00 00 was mentioned. Is it more likely that units will be sold for between R800 000.00 to R1000 000.00. Will the housing needs of low and middle income groups be addressed? There are also issues surrounding the value of the land and the sale price.

### **3.2 Whose ethics? - A Resident's views:**

I It is my perception that the Municipality has not been honest with its citizens. On paper the proposed development should be to the advantage of low to middle income groups. This objective will not be obtained. (Although BEE objectives may be obtained) On paper the intention of the Municipality seems noble; however the legal framework provided to engage with, obtain input from and to truly inform the public has not been used as must have been intended by legislature. I acknowledge that my opinion may be biased and coloured by personal sentiment; as I do not want my view of the mountains to be obscured by bricks and mortar; I do not want to encounter more traffic on the road; I wish that open public spaces – especially in my own backyard - never be developed; etc. And, in all honesty I am not sure that I would feel better if the Municipality truly commit to their mission of providing housing to low income groups on the open space next to my property, as I am concerned about living next to a community who may not be able to afford the basic services in the area; concerned about economic and security consequences. In this regard it will truly be interesting to hear the views of those who are supposed to benefit from the development. Have discussion been had with local communities to discuss what they want, what they can afford, and where such development should take place? What about selling property at market value and developing affordable accommodation? Is there not an ethical duty to truly engage communities and hear what they really require also to ensure that projects are legitimised? (Therefore to engage in order to assess the needs discussed in the Grootboom case). If I feel marginalized the question arises what about others who do not have access to formal communications etc. Do the formal processes take these factors into account? Should the process not serve the people?

I have the perception that there has been no genuine effort to allow true participation and engagement. Why does the process fail us? I submit that one of the reasons for this is the manner in which the process is applied by politicians and officials; it may be that in terms of their ethics procedure is all and substance unimportant. It may be that legitimate input by affected owners is viewed with political skepticism. However in terms of professional ethics, even opposing views or political incorrect views must be considered. An official or politician must attend to matters of which he/she disapproves that is allowed in law and such an official/politician must restrain his/her disapproval from influencing his/her work unless that task/duty is in conflict with the Constitution. There is a duty on local government to provide housing but also to apply the process in good faith and with integrity and this entail that all should be afforded the dignity to be heard.