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Drakenstein Municipality Land Use Planning Penalty Policy

Reviewed / Approved By	Date	Signature of Executive Director/ City Manager
City Manager		
Council		

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DEFINITIONS

For purposes of this policy, unless otherwise stated, the following definitions shall apply:

Applicant	Means any person and/or business entity appointed to submit a land use application on behalf of the operator.
Authorised Employee	Means the employee authorised to make a decision on applications submitted in terms of the Bylaw, in terms of Council's system of delegations.
Bylaw	Refers to the Drakenstein Bylaw on Municipal Land Use Planning, 2018, as amended from time to time.
Contravening property owner	Means the owner of the land on which a contravening land use has been found.
Contravention	Relates to any property and/or building, or any part thereof that was erected or currently utilised in contravention with the prescriptions of the Drakenstein Bylaw on Municipal Land Use Planning, 2018 and/or the Drakenstein Zoning Scheme Bylaw, 2018.
Conditions of approval	Refers to the conditions to be complied with, imposed by the Municipality when granting approval of a land use application.
Council	Means the municipal Council of the Drakenstein Municipality.
Improved property value	Means the difference between the municipal value of a property and the value of the property after the contravening land use has been exercised.
Land Use Planning Appeal Authority	Refers to the Executive Mayor of the Drakenstein Municipality.
Land use planning application	Means an application contemplated in terms of the Drakenstein Bylaw on Municipal Land Use Planning, 2018 and/or the Drakenstein Zoning Scheme Bylaw, 2018.
Land Use Planning Penalty	Refers to a monetary amount determined, in terms of this policy, which is payable by a person who is in contravention with the Drakenstein Bylaw on Municipal Land Use Planning, 2018 and Drakenstein Zoning Scheme Bylaw, 2018.
Land use rights	Refers to the lawful utilisation of land imposed in terms of the zoning scheme and/or land use application approvals.
Municipality	Means the Drakenstein Municipality.
Registered property valuer	Means a person registered in terms of the Property Valuers Profession Act, 2000 (Act 47 of 2000).
Zoning scheme	Refers to the Drakenstein Zoning Scheme Bylaw, 2018, as amended from time to time.

1. INTRODUCTION

Land uses which were in contravention with the provisions of the applicable zoning scheme regulations were previously dealt with in terms of the repealed Land Use Planning Ordinance, 1985 (Ord. 15 of 1985) (LUPO) and, as prescribed by the Western Cape Department of Environmental Affairs and Development Planning (DEADP). Circular 4/2008 suggested that contravention levies be determined at a rate of 20% of the actual building costs.

It is important to mention that the above provisions allowed contravening property owners to rectify their contravening land uses by applying for the determination of a contravention levy, as opposed to following a formal land use application process. This was often considered as a means to circumvent the land use application process, by “purchasing” land use rights. In certain instances, this resulted in undesirable land uses being approved in particular areas.

With the repeal of LUPO and the implementation of the new suite of planning legislation in Drakenstein Municipality, contravening property owners can no longer apply for the determination of a contravention levy in order to rectify their illegalities. Instead, planning legislation now only makes provision for the payment of an administrative penalty as a condition of approval in respect of a land use application. Therefore, contravening property owners must follow a formal land use application process in order to regularize any contravening land use.

Whilst the legislation makes provision for the imposition of an administrative penalty as a condition of approval, the legislation does not set criteria or guidelines on how and when to determine the payment of an administrative penalty, hence the need for this policy.

2. PURPOSE OF THE POLICY

The purpose of the policy is to:

- 2.1 Provide a set of criteria that will assist the Municipality in determining when a contravening land use will be liable for the payment of a land use planning penalty;
- 2.2 Provide a set of criteria that will assist the Municipality in determining the amount payable to those persons guilty of a contravention; and
- 2.3 Outline the processes which should be followed when a person is found to have contravened the provisions of the zoning scheme.

3. STATUTORY FRAMEWORK

3.1 SPATIAL PLANNING AND LAND USE MANAGEMENT ACT, 2013 (ACT 16 OF 2013) (SPLUMA)

Section 26(2)(a) of SPLUMA states that land may be used only for the purposes permitted in a land use scheme (*read zoning scheme*). Section 32(1) of SPLUMA further states that a Municipality may pass Bylaws aimed at enforcing its land use scheme.

Section 58(1) of SPLUMA states that a person is guilty of an offence if that person uses land contrary to a permitted land uses as contemplated in terms of Section 26(2).

3.2 WESTERN CAPE LAND USE PLANNING ACT, 2014 (ACT 3 OF 2014) (LUPA)

Section 30 of LUPA states that no person may utilise or develop land unless the utilisation or land development is permitted in terms of a zoning scheme or an approval consistent with the Act and applicable Bylaws.

3.3 DRAKENSTEIN BYLAW ON MUNICIPAL LAND USE PLANNING, 2018, AS AMENDED (BYLAW)

Section 86(1)(a)-(b) of the Bylaw states that *“A person is guilty of an offence and is liable on conviction to a fine or imprisonment or to both a fine and such imprisonment if he or she-*
(a) *Contravenes or fails to comply with sections 15(1) and (4), 20(1), 21(4), 31(1), 59(3), 62(2) or 88(3); or*
(b) *Utilises land in a manner other than prescribed by the zoning scheme without the approval of the Municipality”.*

Section 86(2) also states that *“An owner who permits his or her land to be used in a manner set out in subsection (1)(b) and who does not cease that use or take reasonable steps to ensure that the use ceases, is guilty of an offence and liable upon conviction to a fine or imprisonment or to both a fine and such imprisonment”;*

Section 86(3) further states that *“Failure to comply with a notice, direction or instruction referred to in this Bylaw constitutes a continuing offence and in such case the offender is liable to a fine for every day such offence continues”;*

Section 86(4) of the said Bylaw further states that *“The municipality may adopt fines and administrative penalties to be imposed in the enforcement of the said Bylaw”;* and

Section 66(2) of the said Bylaw also stipulates that the payment of an administrative penalty in respect of the unlawful utilisation of land may be laid down as a condition of approval in respect of a land use application.

4. EXCLUSIONS FROM THIS POLICY

The provisions of this policy are not applicable in the following instances:

- 4.1. This policy does not supersede the fines/penalties imposed in terms of other law.
- 4.2. Unauthorized building work, where the land use is in line with the land uses permitted in terms of the zoning scheme and/or land use application approval.
- 4.3. Instances where applications to regularize existing land uses are submitted for approval, where no land use application approval or approved building plan exists, and where the land use in question is not defined in the zoning scheme.
- 4.4. Land use applications submitted in terms of the zoning scheme.
- 4.5. Applications for departure or relaxation of building development parameters, excluding applications to deviate from the necessary height restrictions.

5. CRITERIA FOR THE DETERMINATION OF A LAND USE PLANNING PENALTY

- 5.1. When a property and/ or building, or portions thereof are utilised for purposes other than what is permitted by the zoning scheme and/or land use application approval; and
- 5.2. When a property and/ or building, or portions thereof are utilised in contravention with the land use application conditions of approval, resulting in a new land use application.

6. PROCEDURE IN DETERMINING THE LAND USE PLANNING PENALTY

- 6.1. A land use planning penalty may only be determined with the subsequent submission of a land use planning application, which aims to rectify the contravening land use.
- 6.2. When an application triggers the need for a land use planning penalty, the applicant will be instructed to obtain the improved property value as determined by a registered property value, at the cost of the applicant.

- 6.3 Land use planning applications in order to rectify contravening land uses may be processed without the findings of the registered property valuer as mentioned in Paragraph 6.2 above, however the application will not be finalised until such findings are provided by the applicant.
- 6.4 The land use planning penalty amount is determined based on the findings received from the registered property valuer as stipulated in Paragraph 6.2.
- 6.5 The land use planning penalty amount determined must be stipulated as a condition of approval to the respective land use planning application.
- 6.6 A land use planning penalty cannot be determined in the event of the land use planning application being refused. The contravening owner will thus have to cease the illegal land use once a final decision has been made.

7. DETERMINATION OF LAND USE PLANNING PENALTIES

- 7.1 The land use planning penalty imposed in terms of Paragraph 6 above shall be calculated at a rate of 10% of the improved property value as determined by a registered property valuer, with a minimum amount of R1000-00 payable.
- 7.2 In instances when an improved property value cannot be determined by a registered property valuer, the Municipality may then determine an administrative penalty fee between the amounts of R1000-R5000, based on other motivating factors, such as the impact on infrastructure, character of the surrounding area, extent of the land use, amongst others.
- 7.3 Notwithstanding the calculation rate mentioned in Paragraph 7.1 above, applications in order to regularise contravening house shops, early childhood development centres, liquor outlets and taverns shall be determined at a nominal rate of R1000-00. In such instances, the applicant will not be required to obtain the improved property value as determined by a registered property valuer.
- 7.4 If an applicant submits an appeal against the land use planning penalty amount that has been calculated by the Municipality, the Land Use Planning Appeal Authority may decide to uphold the land use planning penalty as initially determined, waive the administrative penalty in its entirety, or provide a maximum reduction of up to 50% of the calculated amount.

8. PAYMENT OF LAND USE PLANNING PENALTIES

- 8.1 Land use planning penalties must be paid as a lump sum, and must be paid to the Municipality within three months of the final notification letter being issued.
- 8.2 Failure to make payment in full in respect of land use planning penalties may result in the following:
 - 8.2.1 The Municipality not granting clearances for the transfer of immovable property on which the contravening land use is located;
 - 8.2.2 The Municipality not granting approval of building plans related to the contravening land use; and
 - 8.2.3 The institution of legal proceedings in terms of the Drakenstein Bylaw on Municipal Land Use Planning, 2018.

9. CASES IN WHICH LAND USE PLANNING PENALTIES WILL NOT BE CONSIDERED

- 9.1 Land use planning penalties will not be determined or required in instances where the relevant land use planning application is either not supported from a land use planning point of view or refused by the decision-maker. The normal procedures in terms of the Criminal Procedure Act, 1977 (Act 51 of 1977) will therefore be applicable.
- 9.2 Land use planning penalties will not be determined or required, if proven that the contravening land use has only been operating for a period less than 3 months.

10. OTHER REGULATIONS

- 10.1 The payment of a land use planning penalty does not preclude the contravening property owner from receiving fines imposed in terms of other legislations.

11. EXISTING LAWFUL USES

- 11.1 All existing land uses that have been approved in terms of a former zoning scheme and subsequently acted on, which is in contravention with the zoning scheme and this policy, will not be considered an offence, but a lawful non-conforming use. Proof of the non-conforming use should be provided to the Land Use Planning and Surveying Section for confirmation.

12. COMMENCEMENT DATE

12.1 Unless otherwise specified, the commencement date of this policy will be the date of adoption by the Council, and shall remain in effect until it is reviewed, revoked or amended by Council.

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