



CITY OF CAPE TOWN
ISIXEKO SASEKAPA
STAD KAAPSTAD

ENERGY, ENVIRONMENTAL & SPATIAL PLANNING

Japie Hugo
Executive Director

T: +27 21 400 2186 F: 086 202 8048
E: japie.hugo@capetown.gov.za

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To: Directors, Managers and EESP staff

CIRCULAR 3/2015

OPERATIONAL GUIDELINE 1 / 2015: ASSESSING MSDF CONSISTENCY AND DEVIATING FROM ITS PROVISIONS IN SITE-SPECIFIC CIRCUMSTANCES

The Municipal Planning By-Law (MPBL) in section 9 reflects the need to consider the consistency of development applications with the Metropolitan Spatial Development Framework (MSDF). In cases of inconsistency, applicants may motivate the presence of site-specific circumstances in relation to the application which could justify deviation from the provisions of the MSDF. Should this not be the case, the application must be refused.

Given the above, the attached operational guideline has been compiled to assist case officers in the PBDM Department and other officials in their assessment of an applicant's motivation for consistency with the MSDF and any motivation for the presence of site-specific circumstances that could justify deviation from the MSDF. You are requested to familiarise yourself with the contents of the guideline and apply it as appropriate from 1 July 2015.

You are further informed that Circular 1/2015 titled "Interim Procedure for Amendment of the Cape Town Spatial Development Framework (Pre-SPLUMA and Municipal Planning By-law)" and dated 3 February 2015 no longer applies and is hereby withdrawn. With the promulgation of the MPBL, the only process now available to amend the MSDF is referred to under section 5(1) of the MPBL, which in turn refers to section 34 of the Municipal Systems Act. From 1 July 2015, should a developer propose to amend the MSDF, he/she should be advised to direct such a request with motivation to the City's IDP office to be considered as part of the statutory annual IDP review public participation process. No provision thus remains for so-called 'composite applications' whereby an amendment to the MSDF is motivated as part of a development application.

Thank you for your prompt implementation hereof.

Yours faithfully



Japie Hugo
Executive Director: Energy, Environmental and Spatial Planning

CIVIC CENTRE IZIKO LOLUNTU BURGERSENTRUM
12 HERTZOG BOULEVARD CAPE TOWN 8000 P O BOX 298 CAPE TOWN 8000
www.capetown.gov.za

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OPERATIONAL GUIDELINE 1 / 2015

**ASSESSING MSDF CONSISTENCY AND DEVIATING FROM ITS
PROVISIONS IN SITE-SPECIFIC CIRCUMSTANCES**

ENERGY, ENVIRONMENTAL AND SPATIAL PLANNING DIRECTORATE

July 2015

Guide to assess consistency of development proposals / applications with the MSDF and in cases of inconsistency, whether circumstances may be present to justify deviations from it on site-specific grounds.

CONTENTS

1.	Introduction and legislative framework	1
2.	The need to clarify “site-specific” circumstances	1
3.	Scope and desired outcomes	2
4.	Operational guidelines	3
4.1	Note 1: Assessing consistency with the MSDF	3
4.2	Note 2: Initial assessment of circumstances that could justify deviations from the MSDF on site-specific grounds	5
5.	Implementation of the operational guideline	8
5.1	Commencement date and review	8
5.2	Responsibilities and dispute resolution	8
5.3	Timing and risk mitigation	8

1. Introduction and legislative framework

The coming into effect of the City of Cape Town Municipal Planning By-law, 2015 (MPB-L) and Spatial Planning and Land Use Management Act, 16 of 2013 (SPLUMA) has created a new regulatory environment within which land development decisions are administered and advice rendered.

In terms of section 9 of the City of Cape Town MPB-L, the following extract is of relevance.

"9. (1) Subject to Section 22, the City may deviate from the provisions of the municipal spatial development framework only if site-specific circumstances justify the deviation.

(2) In determining whether the site-specific circumstances exist, the City must have regard to the development application that has been submitted and any other relevant considerations."

In terms of SPLUMA, the following extracts are of relevance:

"22. (1) A Municipal Planning Tribunal or any other authority required or mandated to make a land development decision in terms of this Act or any other law relating to land development, may not make a decision which is inconsistent with a municipal spatial development framework.

(2) Subject to section 42, a Municipal Planning Tribunal or any other authority required or mandated to make a land development decision, may depart from the provisions of a municipal spatial development framework only if site-specific circumstances justify a departure from the provisions of such municipal spatial development framework."

2. The need to clarify "site-specific" circumstances

Within the new planning legislative context, the consistency of development applications with the MSDP is an important factor in planning regulatory processes. In particular, the mandate of relevant authorities (for example the Municipal Planning Tribunal or MPT) to take decisions on development applications is impacted. It is therefore important to clarify:

- development proposals or development applications' consistency (or not) with the MSDP¹ – typically in relation to the Spatial Planning Categories, Development Edges (Urban Edge and / or Coastal Edge) and policy provisions;
- where applications are deemed inconsistent with the MSDP, whether there are likely to be site-specific circumstances which may justify deviation from the provisions of the MSDP, or not.

In the absence of detailed regulations or guidelines providing further direction to the provisions of SPLUMA and the MPB-L around these matters, several administrative concerns exist:

- **Certainty and predictability:** Interpretation of the relevant sections of the by-law should be consistent to ensure certainty to interested parties and in respect of standard practice in the development process across the City;

¹ This does not detract from the need for evaluating consistency with other relevant Policy in the development application process, but is necessary for the MPT to determine if it may decide on the matter.

- **Process consistency and timing:** The routing of development applications through City regulatory processes should be consistently approached to support efficient processing of development applications (it may impact on the advertisement and on delegations);
- **Administratively sound process:** A consistent basis is required to inform the exercise of delegations to ensure administratively sound decisions are taken under the new planning legislation.

3. Scope and desired outcomes

This guideline seeks to address the requirements expressed above insofar as they relate to development applications' consistency with the MSDF, and clarifying what "site-specific circumstances are. In particular, it has been prepared to assist Planning and Building Development Management (PBDM) case officers to:

- Evaluate and advise on an applicant's motivation regarding the consistency of a development proposal or development application with the MSDF (typically in pre-submission consultative meeting/s);
- Indicate agreement or not with an applicant's identification of site-specific circumstances that may justify deviation from the provisions of the MSDF (where a proposal / application is deemed to be inconsistent with the MSDF);
- Linked to other relevant Circulars that may be issued, communicate the likely application process, correct routing for development applications, and relevant decision-maker to applicants.

It is important to note that:

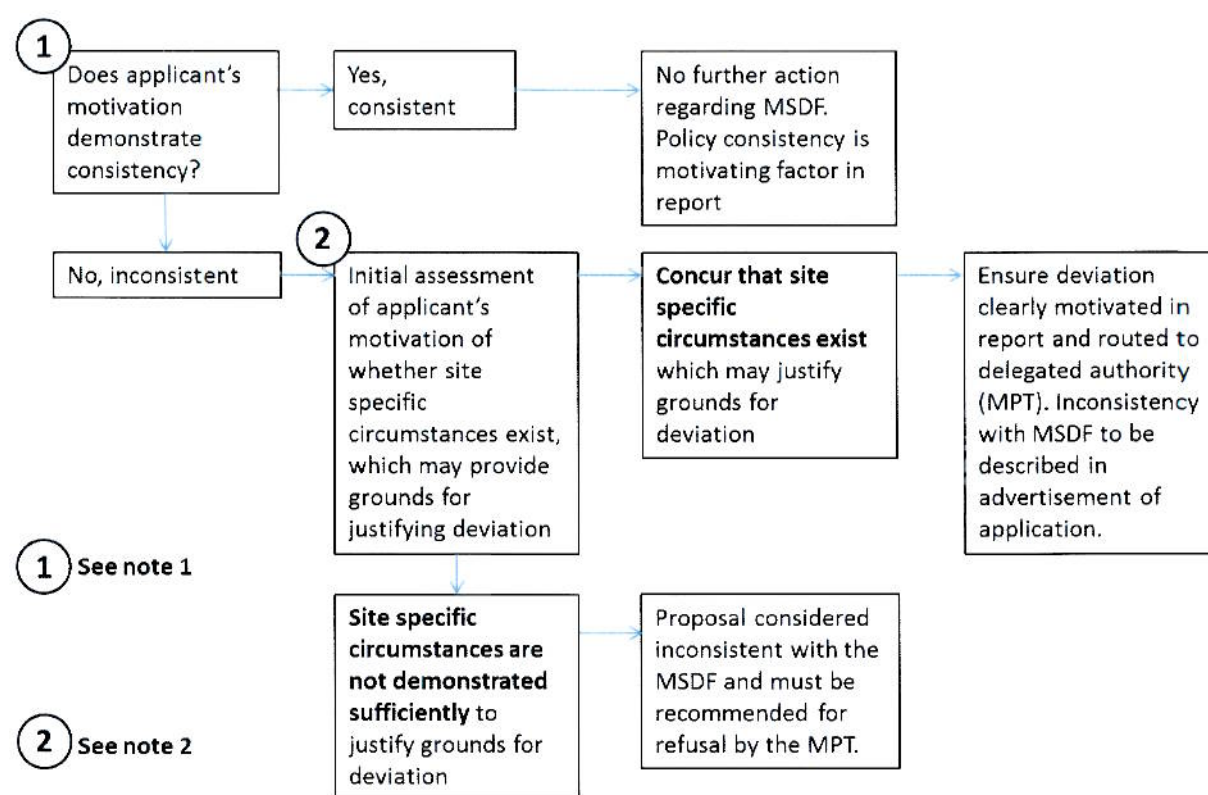
- Advice provided on the basis of this guideline would not constitute a "formal consistency ruling" but rather informed comment from the case officer. The final decision-maker (e.g. MPT) may differ from such advice; however the guideline aims to limit the possibility for this to occur.
- The guideline will provide appropriate guidance until the need is identified to further develop or formalise these guidelines after further practical experience.
- This guideline does not provide comprehensive guidance on processing of applications that deviate from or require amendment of the MSDF.

4. Operational guidelines

It is necessary for an applicant to address, motivate and demonstrate a development proposal or development application's consistency with the MSDF. Where such a motivation cannot be made, an applicant must motivate that site-specific circumstances exist that may justify deviation from the MSDF. The case officer will assess these submissions, which will form the point of departure for any advice provided to the applicant and the formulation of recommendations.

Figure 1 below indicates these processes and relevant actions.

FIGURE 1: MOTIVATION OF CONSISTENCY / DEVIATION OF DEVELOPMENT APPLICATIONS WITH / FROM THE MSDF



To assist with consideration around 1) consistency and 2) initial assessment on whether site-specific circumstances exist, this guideline provides the following guidance notes:

4.1 **Note 1:** Assessing consistency² with the MSDF

- a. A development proposal or development application can be considered consistent with the MSDF by virtue of the fact that:
 - i. the MSDF provides for the development through its proposals, or

² See also section 1.4 of the MSDF

- ii. it is deemed to be consistent with the MSDF, as it is not necessarily clearly in conflict with the intent and purpose of the MSDF map designation and/or text concerned.
- b. In deeming consistency of a development proposal or application with the MSDF, how the development proposal relates to the following components of the MSDF should be considered:
 - i. Its location in relation to spatial elements that are geographically mapped such as the urban and coastal edge lines (where consistency is likely to be self-evident).
 - ii. Its location in relation to spatial elements that are notional (where some degree of discretion is likely required in determining consistency).
 - iii. Policy guidance in the MSDF (where some degree of discretion is likely required in determining consistency).

Please note: Should there be discrepancies between the planning designation of the MSDF and existing land use rights (which have not yet lapsed), the latter takes precedence. In such cases, applications and / or proposals (e.g. departure) which retain the existing applicable zoning of the property should be regarded as consistent with the MSDF, unless impacts are clearly in contradiction with its provisions.

- c. Table 1 below provides guidelines to initial assessment of consistency through the use of selected examples.

Table 1: Supplementary reference to guide initial assessment of MSDF consistency

Development location	Considerations that would support motivation for consistency with MSDF	Application example/s where there is likely to be grounds for (deeming) consistency with MSDF.	Yes, consistent with MSDF	No, consider in terms of note 2
Development proposal / application outside of the Urban Edge	- The development does not constitute "urban development" as defined in the MSDF; and - The development aligns to / does not conflict with policy guidance of the SDF for uses beyond the urban edge; and - The development aligns to / does not conflict with the policy guidance for the designations of land outside of the urban edge	- Consent use application for tourist accommodation in core / agricultural area. - Spot rezoning to general business for the purposes of a restaurant in an agricultural area to support tourism activities. - Rezoning to community zone to allow for place of instruction / worship aimed at serving surrounding rural communities. - Application for the subdivision of erf into two portions, and the rezoning of Portion 1 from Limited Use Zone (LU) to Utility Zone (UT) to permit the use of this portion for a solid waste drop-off facility, wastewater treatment works, water reservoir, etc. .	Yes Yes Yes Yes	
Development inside the urban edge	- The development aligns to / does not conflict with the notional designation as per the MSDF; and - The development aligns to / does not conflict with policy guidance of the SDF	A development application where the general intent of the designation at a metropolitan scale is not compromised by the proposed development (e.g. a development proposal for a cell-phone mast may not be specifically made provision for in the MSDF, but it does not conflict with it).	Yes	

4.2 **Note 2:** Initial assessment of circumstances that could justify deviations from the MSDF on site-specific grounds³

An initial assessment of the applicant's motivation for consistency of the development application with the MSDF is required as per note 1 above.

- a. Should such a motivation by the applicant be considered wanting, the applicant can re-motivate or accept the departmental recommendation to the MPT that the application is inconsistent with the MSDF and therefore will have to be refused in terms of s9(1) of the MPB-L.
- b. However, the applicant may motivate a deviation from the MSDF based on site specific circumstances only. This should occur with due regard to applicable MSDF spatial elements / designations and policy guidance, but where the following relevant considerations are present and based on this may lead to a different justification regarding desirability as alternative from guidance expressed in the MSDF:
 - i. **Unique / exceptional circumstances related to the site:** Unique and exceptional circumstances, which are relevant in the context of the application in question, are deemed to be present at the level of the site. These render applicable MSDF spatial elements potentially inappropriate (i.e. Edge delineation / Spatial Planning Category and/or policy guidance etc.). In the context of the application, the attributes of the site (e.g. relative physical, locational attributes, etc.) should be motivated by the applicant to be noticeably different from surrounding sites as a means to support the intended deviation.
- c. It is important that assessment of relevant considerations under 4.2b is undertaken cautiously and is reliant on clear reference to the motivation regarding the specifics of the site in question. Justification should be drafted in a manner that avoids its extrapolation to the wider area in order to avoid future precedent based motivation of applications and possible resultant cumulative impacts. The applicant's motivation for the substantive differences between the site in question and adjacent sites would be important in this regard.
- d. Having a solid motivation for a deviation from the MSDF based on site-specific circumstances merely means that the MTP may consider the application in terms of s9(1) and s99(1)(b) of the MPB-L. The application itself must still comply with all the provisos of s99(1) and have merit in terms of the considerations under s99(2) and 99(3) of the MPB-L.
- e. Table 2 below provides further guidelines to the initial assessment of whether site-specific circumstances may exist. This is presented through the application of these relevant considerations in relation to selected examples.

³ For the purpose of this guideline "site" does not exclude two or more contiguous erven, or farm portions where multiple properties are affected. The site is the area to which the development application relates.

Table 2: Supplementary reference to guide initial assessment of circumstances that could merit deviations from the MSDF on site-specific grounds

Typical development location (example – not exhaustive listing)	Relevant considerations that together could justify deviations from the MSDF on site-specific circumstances (see 4.2b)	Example/s of how relevant considerations could be applied to motivate presence of site-specific circumstances in relation to typical development applications.	Yes	No (consider as amendment to MSDF)
Proclaimed nature areas and MSDF designated core area outside urban edge	i. Unique / exceptional circumstances related to the site.	E.g.: Application for rezoning for an art gallery, restaurant, delicatessen, function room, as well as 7 (4 000m ²) residential units. Justification motivating deviation due to site-specific circumstances: i. The site where the development is proposed is disturbed (as opposed to surrounding high quality nature areas) – detailed information as a result of specialist studies have indicated that critically endangered species will not suffer any significant negative impact.	Yes, proceed in terms of motivation for deviation from MSDF based on site-specific circumstances	
Agricultural land	i. Unique / exceptional circumstances related to the site.	E.g. Application for rezoning from Rural to Single Residential 1 and subdivision for 12 residential units. Justification motivating deviation due to site-specific circumstances: i. The portion of the site abuts the urban edge and may be regarded as infill / rounding off of the urban edge due to its geometry in this location. Investigations reflect that this portion of the site is of lowest agricultural value, and this is supported by the Dept. of Agriculture through official communication. More detailed studies indicate that the development of residential units in this location does not impact negatively on other protective considerations in relation to the urban edge delineation and the protective designation in this particular instance is thus motivated as not accurate.	Yes, proceed in terms of motivation for deviation from MSDF based on site-specific circumstances	
Industrial area	i. Unique / exceptional circumstances related to the site.	E.g. Application to rezone from industrial zone to general business zone and where consistency cannot be motivated for whatever reason (bearing in mind the notional designation of industrial areas in the MSDF). Justification motivating deviation due to site-specific circumstances: i. The proposed development is located on the edge of an industrial area and separated by a major road and power line servitude from surrounding	Yes, proceed in terms of motivation for deviation from MSDF based on site-specific circumstances	

Typical development location (example – not exhaustive listing)	Relevant considerations that together could justify deviations from the MSDF on site-specific circumstances (see 4.2b)	Example/s of how relevant considerations could be applied to motivate presence of site-specific circumstances in relation to typical development applications.	Yes	No (consider as amendment to MSDF)
		industrial uses and is not likely to be affected by negative externalities (e.g. noise, smell). It is considered different to sites abutting it due to its unique location on the edge of the area (as above) and level of accessibility being externalised and on the junction of two major routes.		

5. Implementation of the operational guideline

5.1 Commencement date and review

This guideline will apply once the MPB-L comes into effect (01 July 2015).

A periodic review of the guideline may be required with or without further directives.

5.2 Responsibilities and dispute resolution

The guideline is targeted primarily at the delegated Planning and Building Development Management officials to direct assessment of motivations by planning consultants.

The initial assessment of whether a motivation for a development application / proposal is sufficient to demonstrate:

- Consistency / Inconsistency with the MSDF; and
- whether site-specific circumstances exist to justify deviation.

is assigned to the Planning and Building Development Management: Land Use Management Branch (Case officers).

Initial assessment should occur in consultation with:

- Spatial Planning and Urban Design (SPUD) officials (Metropolitan and District Spatial Planning); and /or
- Any other relevant municipal official who may provide perspectives to inform the assessment, in particular ERMD where Core 1 and 2 and Buffer 1 and 2 Spatial Planning Categories are affected.

Should there be any conflicting opinions in terms of the assessment under Note 1 or 2, the Departmental commenting protocol (EESP Directorate Circular 2/2013, dated 11 Feb, 2013) will apply in order to resolve disputes.

5.3 Timing and risk mitigation

The initial assessment by the applicant's consultant should occur at an early point in the development applications process, prior to formal circulation and advertising of the land use application.

The case officer may choose to reserve an opinion on the assessment until such time as further information is made available. (e.g. via further specialist input requested via the 14-day letter).

It is possible that once the assessment has occurred and the development application has been processed (including advertising), and a recommendation submitted to the decision maker, that the decision maker disagrees with the initial assessment and refuses the development application.