cooperative governance

Department:
Cooperative Governance
REPUBLIC OF SOUTH AFRICA

LOCAL GOVERNMENT: MUNICIPAL PROPERTY RATES ACT NO.6 0F 2004
CIRCULAR NO. 06 (ISSUED ON 10 APRIL 2014)

TO ALL:

MUNICIPAL MANAGERS

MUNICIPAL CHIEF FINANCIAL OFFICERS

CIRCULAR ADVISING MUNICIPALITIES TO CORRECT NON-COMPLIANCE WITH SPECIFIC PROVISIONS OF THE ACT

The purpose of this Circular is to provide municipalities with practical advice in respect of how to comply with a number of key provisions of the Municipal Property Rates Act ("the Act") that have emerged as matters with which there has been persistent non-compliance over time.

This Circular will identify those key provisions of the Act, explain what, in terms of compliance contemplated in those provisions is expected, what in practice is done incorrectly by municipalities in attempting to comply with those provisions, as well as what the correct administrative actions that will result in compliance are in that regard.

This Circular will focus on the following areas of the Act: section 6 of the Act (read with section 13 of the Municipal Systems Act); section 14 of the Act; section 19 of the Act, specifically impermissible differentiation between residential properties and unreasonable discrimination between non-residential property categories; the

Regulations on the rate Ratios between residential and Non-Residential Categories of Property issued in terms of section 19 of the Act; section 9 of the Act; and the relationship between the contents of the rates policy and a municipality's actual rating practices.

1. Compliance with Section 6 of the Act read with Section 13 of the Municipal Systems Act: Adoption and Publication of By-Laws to Give Effect to the Rates Policy

It has been observed that municipal practice in terms of the contents of property rates by-laws, the adoption thereof and the publication of the property rates by-laws is quite varied across municipalities. There is not a consistent approach in the way in which municipalities approach compliance with section 6 of the Act. At the extreme end, there are municipalities that do not adopt a property rates by-law at all and hence they do not publish a property rates by-law in the provincial *gazette*, while others "adopt" a property rates by-law, but the by-law is not published in the provincial gazette. The approach to what is contained in the property rates by-law is also mixed, with some municipalities opting for brief property rates by-laws that are no longer than three (3) pages, while some municipalities' property rates by-laws are lengthy to the extent of being over ten (10) pages long. It is observed that where property rates by-laws are lengthy, the property rates policy of the municipality is quoted at length and in certain instances the by-law is a replica of the property rates policy.

What does "adoption" of a property rates by-law mean?

The Act in section 6 stipulates that by-laws must be adopted to give effect to the municipality's rates policy. By definition, a by-law is a piece of legislation passed by the Council of a municipality which is binding on all persons to whom it applies. Therefore,

the Council of the municipality must adopt the property rates by-law. A by-law that is not adopted by the Council of the municipality cannot be deemed to be a valid legislation of the municipality, and it can therefore not be deemed to be binding on the property owners of the municipality who are liable for property rates. This is because the property rates by-law gives effect to the municipality's property rates policy. In other words, the property rates by-law legalises the property rates policy and makes it enforceable on those to whom it applies. It therefore means that failure by a municipality to adopt a property rates by-law may result in the municipality's rates policy being null and void because there is not a law that legalises and enforces the property rates policy. Adoption means that the **municipality's administration must present the property rates by-law to a meeting of the Council** and **the Council must adopt (or approve) the said by-law**.

Publication of the property rates by-law in the provincial gazette

The property rates by-law must be published in the provincial *gazette*. Section 162(1) of the Constitution of the Republic of South Africa states that "***a municipal by-law may be enforced only after it has been published in the official gazette of the relevant province***". Further to that, section 13(a) of the Municipal Systems Act, 2000, requires that a by-law **passed** by a municipal council **must** be published promptly in the provincial *gazette*. To that end, whether the Municipal Property Rates Act makes cross-reference to the Municipal Systems Act regarding publishing the property rates by-law in the provincial *gazette* or not, this must be done. This is because the Municipal Property Rates Act must not be read and interpreted in isolation; it must be read with the Constitution and the Municipal Systems Act as the provisions of the three laws are interrelated.

It must always be borne in mind that the Constitution is the supreme law of the Republic, and in that regard its provisions takes precedence over provisions of any law (including a municipal by-law). Therefore, failure to publish the property rates by-law in

the provincial *gazette* will, render the by-law legally unenforceable. This means that even if the by-law is adopted by the Council of the municipality, unless it is published in the provincial *gazette* it would not be binding on those to whom it applies. Such a by-law could be set aside by a court of law if its legality and enforceability were to be taken up by any person with a court of law.

What should be contained in the property rates by-law?

In terms of section 6 of the Act, the property rates by-law may differentiate between different categories of properties and different categories of owners of properties liable for the payment of rates.

In practice, the contents of property rates by-laws vary from municipality to municipality. Despite the variation, a twin approach has been established in municipal practice; one in which the by-law is largely a mirror image of the property rates policy, resulting in a bulky property rates by-law. The other established approach is one in which the by-law is concise and to the point, making reference to salient aspects of the property rates policy.

Although the Department has not previously issued any guidelines in this regard **it is recommended that property rates by-laws be as concise as possible rather than being lengthy**. Because the by-law gives effect to the property rates policy, it is important that this fact be stated upfront in the property rates by-law amongst important matters such as the Act and the relevant section of the Act in terms of which the property rates by-law is issued. Reference (not necessarily a verbatim copy) must also be made to **salient aspects** of the property rates policy to which the by-law gives effect. These include, the matters referred to in section 6(2) of the Act, the adoption and implementation of the rates policy as well as how the property rates by-law will be affected by significant changes that are made to the rates policy, matters related to the enforcement of the property rates policy as well as the effective date of the property rates by-law. It is advised that only reference be made to matters in the rates policy, that

these matters should not be copied and pasted or reproduced in the property rates by-law.

Municipalities are advised that lengthy property rates by-laws are not only unnecessary and superfluous; they are also costly to publish in the provincial *gazette* because publication is charged per page and on the basis of the urgency of publishing the document. The more pages in the by-law, the more costly publication will be. In addition, if the rates policy is replicated verbatim in the by-law, any review of the rates policy undertaken in terms of section 5 of the Act which results in a change to the rates policy will very likely necessitate an amendment of the by-law, a further expense. This does not in any way suggest that the property rates by-law need never be changed if it is concise; it is merely more likely in the case of a property rates by-law that is a replica of the rates policy that amendments to the rates policy will require that the by-law also be amended while in the case of a by-law that is concise as proposed in this Circular, amendments to the rates policy are less likely to require revisions to the by-law, since the by-law would contain high level principles and broad contents of the rates policy rather than details of the rates policy.

A copy of the property rates by-law as published in the provincial *gazette* must be placed on the municipality's website so that it is accessible to those to whom it applies.

The implications of non-compliance with section 6 of the Act, read with section 13 of the Municipal Systems Act and section 162(1) of the Constitution are that if the matter is taken up with a Court by an interested party, may have negative implications for a municipality's property rates budget and income for a particular financial year.

A specimen property rates by-law is appended to this Circular for reference purposes.

2. Compliance with Section 14 of the Act: Promulgation of the resolutions levying rates

As with municipal practice relating to the adoption and publication of property rates by-laws, municipal practice as far as compliance with section 14 of the Act is varied. A significant number of municipalities do not promulgate the resolution levying rates in the provincial *gazette*, while others publish it, yet it is incorrect in its substance. Quite a significant number of municipalities publish (either in the provincial *gazette* or on their website) the cent in the Rand rates that are to be levied for a particular financial year with their budget documents in terms of the Municipal Finance Management Act, 2003. This is not the correct way to publish the resolution levying rates as contemplated in section 14 of the Act. The resolution levying property rates must be published separately in terms of section14 of the Act.

In terms of section 14(1) of the Act *"a rate is levied by a municipality by resolution passed by the municipal council with a supporting vote of a majority of its members"*. Furthermore, section 14(2) of the Act states that *"a resolution levying rates in a municipality must be promulgated by publishing the resolution in the provincial gazette"* (amongst other media in terms of section 14(3) of the Act). The provisions contained in the Act are specific to the levying of property rates and they were inserted purposefully, making publication for public record a requirement. The resolution levying rates must be taken by the municipal council every year and it must be published in the provincial *gazette* every year. This is because a municipal budget is passed annually and cent in the Rand property rates which form part of the municipal budget are determined every year.

The correct way to comply with the provisions of section 14 of the Act, in particular section 14(1) and (2) is for the municipal administration to, when submitting all documentation related to the budget of a particular financial year, **include specific documentation that explicitly sets out the proposed cent in the Rand rates to be**

levied in a particular financial year in respect of each category of property and any rebates of a general application to a category of property. This documentation must be presented to and approved by the Council of the municipality and after approval, be published in the provincial *gazette* in terms of section 14(2).

Section 14(3) of the Act further provides that the resolution levying rates should be conspicuously displayed on the municipality's website and at the municipality's head and satellite offices and libraries. In addition, section 14(3) provides that it must be advertised in the media that the resolution levying rates is available on the municipality's website and the said locations. There are two things that municipalities must be mindful of in this regard. One is that when the resolution is approved, it is the version of the resolution that was published in the provincial *gazette* that ought to be placed on the municipality's website, immediately after it is published in the provincial gazette. It is also advisable that the draft resolution levying property rates be placed on the municipality's website during public participation processes and be replaced with the copy of the promulgated resolution afterwards.

The implications of non-compliance with section 14 of the Act, particularly section 14(1) and (2) are that if the matter is taken up with a Court by an interested party, there is a possibility that a municipality's property rates budget and income for a particular financial year could be set aside.

A specimen resolution levying rates is appended to this Circular for reference purposes.

3. Compliance with Section 19 of the Act: Impermissible Differentiation

This section of the Circular addresses the following matters:

(i) Prohibition on imposing different rates on residential property ((19(1a)); and

(ii) The Regulations on the Rate Ratios Between residential and Non-Residential Categories of Property ((19(1)(b)).

(i) Prohibition on imposing different rates on residential property

In terms of section 19(1)(a) of the Act, a municipality may not levy different rates on residential properties except for specific deviations outlined in that section. This means that under no circumstances or justification outside the specific deviations outlined in that section can a municipality impose different rates on residential property as such an action would amount to impermissible differentiation (that it, it is an illegal action). It has been found that some municipalities flout the provisions of section 19(1)(a) and thereby exposing themselves to litigious action should any interested party take such municipalities on in court in that respect.

The cent in the Rand rate for all residential properties must, except with respect to the specific deviations explicitly outlined in section 19(1)(a) of the Act, therefore be uniform because any other differentiation (regardless of any motivation thereof) is not allowed. This does not mean that categories of owners of residential property (for example, indigents) cannot be granted rebates or reductions; however this must be done on the basis of criteria set out in the rates policy and should be consistent with section 15(2) of the Act. With respect to any other rebates or reductions that are not applicable to categories of owners of property these should be of a general application as no relief measure should have the consequence of circumventing the provisions of section 19(1)(a) of the Act.

(ii) The Regulations on the Rate Ratios Between residential and Non-Residential Categories of Property ((19(1)(b))

Section 19(1)(b) of the Act provides that ratios between residential and non-residential categories of property may be prescribed with the concurrence of the Minister of Finance. Where such ratios are prescribed, a municipality may not levy a rate on non-

residential property that exceeds the prescribed ratio should that ratio indeed be prescribed. As of 2009 the Minister acting with the concurrence of the Minister of Finance promulgated the Regulations on the Rate Ratios Between Residential and Non-Residential Categories of Property which prescribed ratios between residential property and agricultural property, public service infrastructure property and public benefit organisation property of 1:0.25 respectively. The Regulations are binding on all municipalities and they supersede the provisions of any municipal property rates policy or by-law.

It has been observed that there are municipalities that do not comply with the Regulations, rating one or more of the categories of property that have a prescribed ratio applicable at more than 25% of the rate imposed on residential property. There are a number of observed cases where municipalities depart from the definition(s) of the property categories that have ratios applicable to them, using definitions that allow for certain of these properties that fall within the regulated property categories to be rated at a different rate to that which is prescribed in the Regulations; thereby subjecting them to a higher cent in the Rand rate than that which is contemplated by the ratio.

To make the annual determination of cent in the Rand rates more manageable and to avoid such non-compliance it is recommended that municipalities create a simple spreadsheet for the determination of cent in the Rand rates on property that is subject to the Rate Ratios Regulations. Each property category should be entered in the spreadsheet. Formulae should also be entered in the cells that represent the cent amount in the Rand rate applicable to those categories of property that are subject to regulation through ratios, these being agricultural public service infrastructure and public benefit organisation properties. The formula that should be contained in the applicable cells should be:

Cell=c/R(res)*0.25, where c/R(res) is the cent in the Rand rate determined for residential property.

[NOTE: It is important that depending on the spreadsheet software used, that the formulae be entered using the correct formula language and applying the required constraints, as incorrect application is likely to affect the results]

This simple approach will ensure that the cent in the Rand rate for the said property categories is no more than 25% of the cent in the Rand rate determined for residential property thus ensuring that the municipality complies with the Regulations.

4. Compliance with Section 9 of the Act: Properties used for multiple purposes

Section 9 of the Act effectively prescribes the manner in which properties used for multiple purposes must be assigned to a property category and how they must be rated subsequently be rated. It must be stated that the provisions of section 9 do not amount to guidelines but they are prescriptive. Failure to follow the provisions of section 9 amounts to non-compliance with the Act. They prescribe that a municipality is must apply any of the three category assignments to properties used for multiple purposes. Section 9(1) reads as follows:

"A property used for multiple purposes must, for rates purposes, be assigned to a category determined by the municipality for properties used for-

(a) a purpose corresponding with the permitted use of the property;
(b) a purpose corresponding with the dominant use of the property; or
(c) multiple purposes in terms of section 8(2)(r)"

The section goes further to provide that if a rate is levied on property categorised in terms of section 9(1)(c), then the rate levied on that property must be determined by

apportioning the market value of the property to the different purposes for which the property is used and applying the rates applicable to the categories determined by the municipality for properties used for those purposes corresponding to the different market value apportionments.

A municipality must in its rates policy indicate the basis in terms of which properties used for multiple purposes will be categorised for rates purposes, in a manner that makes it clear and unambiguous to property owners. A municipality can apply any one or a combination of the category assignments (listed in section 9(1) of the Act) to properties used for multiple purposes. Where a municipality applies "dominant use" to categorise such property, the criteria or basis for such assignment must be stated in the rates policy. Furthermore, a municipality **may not apply a combination of approaches listed in section 9(1) to one specific property.** For example, a municipality may not apply the apportionment of market value approach (section 9(1)(c) and combine it with the dominant use approach (section 9(2))on one property.

The application of a category assignment for properties into 9(1)(c) is dependent on the nature of the combination of uses on the property. For example, on certain properties such as a property on which a national park or a nature reserve is proclaimed, the dominant use approach may not be appropriate because once the nature reserve is proclaimed, the remainder of the rateable portions (refer to section 17(1)(e) of the Act) may be made up of structures that are used for a number purposes, including residential, commercial and other uses which in their own right may constitute separate property categories. In such a case the values would be apportioned to their different uses and rates would be applied to the different uses. A different example where the dominant use approach may be appropriate is the case of a high-rise building. If most of the building is used for residential purposes the municipality must apply the specific criteria for determining dominant use that must be stated in the rates policy, and categorise that property as residential property. Alternatively, if most of the building is used for business or commercial purposes, the municipality must apply the specific

criteria for determining dominant use that must be stated in the rates policy, and categorise that property as business or commercial property.

CONTACT PERSON

Should municipalities require any further information on matters dealt with in this Circular, request for such information should be directed to the Department of Cooperative Governance for the attention of:

The Senior Manager: Municipal Finance and Viability

Postal address: Private Bag X804 Pretoria, 0001

Telephone: 012-334-4933

Facsimile: 012-334-4811

Email: mpra@cogta.gov.za

Website: www.cogta.gov.za