HEEDING THE CALL FOR

Sustainable energy use

PUTTING SOLAR ENERGY TO WORK

Energy experts agree that the installation of domestic solar water heaters (SWHs) could significantly reduce the demand for electricity. The figures suggest that a roll-out of SWHs could eliminate the need for one large coal power station (and thus significantly reduce CO_2 emissions). This roll-out could be achieved through a variety of measures, ranging from financial incentives for the purchase of SWHs and the promotion of the SWH industry to regulation.

key points

- The Constitution instructs municipalities to deliver services in a sustainable way.
- Municipalities, being responsible for the reticulation of electricity, play a crucial role in managing the demand for electricity.
- Municipalities may use their power to prescribe building regulations to make solar water heaters compulsory.
- National law requires national approval of all municipal building regulations but it is argued that this is unconstitutional.

Municipalities, being responsible for the reticulation of electricity, play a crucial role in managing the demand for electricity. This article discusses the legal potential for municipalities to promote SWHs by regulation, namely by adopting by-laws that prescribe the installation of SWHs.

This case study is interesting for two reasons. Firstly, it may assist municipalities in exploring the potential for the adoption of SWH by-laws. Secondly, it highlights unnecessary legal impediments that prevent municipalities from pursuing local solutions to the energy crisis.

Building regulations

When a municipality prescribes the installation of SWHs in new dwellings, that is a building regulation. According to the National Building Regulations and Building Standards Act (Act 103 of 1977), building regulations deal with "the law relating to the erection of buildings in the areas of jurisdiction of local authorities". Schedule 4B of the Constitution lists "Building regulations" as a local government competency. This means that municipalities may administer and make by-laws on building regulations. Their power to deal with building regulations is limited by national and (if applicable) provincial laws on the subject.

Some argue that the prescription of SWHs is an environmental matter and therefore falls outside of a municipality's legislative mandate. This approach ignores the fact that building regulations exist to protect a variety of public interests, such as building safety, public health, fire safety, aesthetics and protection from noise pollution. Building regulations may also be used to pursue broader environmental interests. Moreover, the Constitution instructs municipalities to deliver services in a sustainable way. The delivery of electricity in a sustainable way requires demand-side management, which can be achieved through the prescription of SWHs.

The prescription of SWHs thus falls within the constitutional competency of "Building regulations". Municipalities may make by-laws on building regulations.

Building Regulations Act

There is national legislation on the subject that may put a spanner in the works. Building regulations are promulgated and enforced in terms of the National Building Regulations and Building Standards Act. The Act envisages a very limited role for municipalities in adopting building regulations. The Act provides, in section 29(8)(a):

> A local authority which intends to make any regulation or by-law which relates to the erection of a building, shall prior to the promulgation thereof submit a draft of the regulation or by-law in writing and by registered post to the Minister [of Trade and Industry] for approval.

The Act further provides that any by-law that is promulgated without the Minister's approval is void.

The question is whether a national law can be so prescriptive as to require prior approval of any building regulation that a municipality may wish to adopt. The Act, including all its amendments, predates the prevailing constitutional dispensation for local government. A court will always try to find harmony between a statute and the Constitution, even if the statute predates the Constitution, but it should not too readily be assumed that the Act is compatible with the current local government configuration. The best evidence of this is the fact that the Act is based on an appallingly outdated definition of 'local authority', namely:

> any institution, council or body contemplated in section 84(1)(f) of the Provincial Government Act, 1961

or

Just like the prior approval of property rates, the prior approval of building regulations is a specific product of the old-order constitutional scheme that is no longer tenable.

> any statutory body designated by the Minister, after consultation with the Administrator of the province in question, by notice in the *Gazette* as a local authority for the purposes of this Act or any provision thereof.

Since 5 December 2000, South Africa has only had municipalities established in terms of the Constitution and the Municipal Structures Act. All other forms of local government, including the local authorities that the Act refers to, ceased to exist more than seven years ago.

In a recent decision, the Supreme Court of Appeal was asked to assess the requirement in the Cape Municipal Ordinance (Ordinance 20 of 1974) that a municipality obtain the Premier's approval for the imposition of property rates. The imposition of property rates is another 'original' competency of local government, conferred on municipalities in section 229 of the Constitution, and the Cape Ordinance is also a statute that predates the current local government system and is inconsistent with it in many ways. The Court concluded that the requirement of prior approval for the setting of property rates had not survived the radical change to local government's powers brought about by the 1996 Constitution (see *LG Bulletin* Vol 9(4) pg 16).

The approach of the Court in this case is relevant to building regulations. The National Building Regulations and Building Standards Act is also outdated, and it is suggested that the requirement of prior approval of building regulations by the national government also did not survive the changes brought about by the 1996 Constitution. Just like the prior approval of property rates, the prior approval of building regulations is a specific product of the old-order constitutional scheme that is no longer tenable.

This does not mean that municipalities may adopt any building regulation. Their power to do so may still be limited by national and / or provincial legislation.

It is ,however, important to draw a distinction between two types of limitations. One type is a framework of minimum standards to which the by-law must adhere. The other type is the requirement of prior approval of building regulations. The first type is permitted; the Constitution allows the national government to subject municipal building regulations to a national framework of minimum standards.

However, the second type is not; the Constitution does not permit national law to subject individual building regulations to the approval of national government.

The consequence of this argument is the following: if the provision in the Act that requires prior approval for building regulations is unconstitutional, then a municipality may adopt a SWH by-law without requesting such approval. Should anyone challenge the by-law as not having been approved by the national government, the municipality can argue that the requirement is unconstitutional and does not need to be complied with.

In an interesting development at the beginning of the year, the national Department of Minerals and Energy (DME) published draft electricity regulations in terms of the Electricity Regulation Act (Act 4 of 2006) (discussed in *Local Government Bulletin* 10(1), February / March 2008). It is unclear if and when the regulations will be finalised. Interestingly, they include an instruction to municipalities to prescribe SWHs for certain dwellings. These regulations thus (correctly) assume that municipalities have the power to do so. However, it is not clear how the DME's instruction to municipalities relates to the insistence by the Department of Trade and Industry that municipal by-laws are subject to their approval. This may be yet another example of conflicting approaches to local government by different sector departments, to the detriment of the municipalities at the receiving end.

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From Parliament:

In earlier issues of the *Bulletin*, we reported on two important Bills in Parliament, i.e. the Single Public Service Bill and the Land Use Management Bill (see *LG Bulletin* 10(2) pg 4 and 10(3) pg 12). Neither of these Bills have been passed by Parliament. They are likely to be tabled again in Parliament after the 2009 elections.