SOUTH AFRICAN CITIES NETWORK

NEW PROVINCIAL PLANNING LEGISLATION FOR SOUTH AFRICAN CITIES: UNDERSTANDING AND LEARNING FROM THE REFORM PROCESS

Consolidated Report

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Acknowledgments

This report was written by Wendy Ovens and Felicity Kitchin

1. INTRODUCTION

1.1 Background

One of the major problems facing the newly elected government in 1994 was the distortion of urban space as a result of apartheid planning and development. Since then various measures have been adopted in order to address this, and transform our urban areas to reflect a developmental democratic state. These measures include planning and developmental policies, and revisions to legislation. This process has been bedevilled by old-order legislation and policies, much of it fragmented and not uniformly applicable. One of the initiatives at provincial level has been to develop new legislation which aims to simplify the provincial planning and development process and thereby bring about transformation in spatial development. Provincial planning and development legislation is therefore one of several tools that crafts developmental decision making processes around transforming spatial development.

The KwaZulu-Natal Province was one of the first provinces in the country to engage with the challenges presented by the fragmentation of the old order planning and related legislation. In 2008, the Province enacted the KwaZulu-Natal Rationalisation of Planning and Development Laws Act, 2008 (Act No. 2 of 2008). The Act allowed for the simplification and updating of the provincial planning and development laws by stretching the Town Planning Ordinance, 1949 (Ordinance No. 27 of 1949) to be applicable across the province, standardising scheme clauses in some areas, and repealing certain legislation[1]. This was part of a phased approach adopted by the province for supporting the introduction of the KwaZulu-Natal Planning and Development Act, 2008 (Act No. 6 of 2008) later in the same year.

The KwaZulu-Natal Planning and Development Act (KZNPDA) was watershed legislation within the Province as it shifted the responsibility for planning from provincial government to local government namely, the metropolitan and local municipalities. A problem with this,

[1] Legislation repealed included:
- (a) The Cape Townships Ordinance, 1934 (Ordinance No. 33 of 1934);
- (b) The Transvaal Town Planning and Townships Ordinance, 1986 (Ordinance No.15 of 1986);
- (c) The Regulations Relating to Township Establishment and Land Use, 1986 (R.1897 of 1986);
- (d) The Township Development Regulations for Towns, 1990 (R. 1886 of 1990);
- (e) The Land Use and Planning Regulations, 1990 (R. 1888 of 1990); and
- (f) The planning and development provisions of the KwaZulu Land Affairs Act, 1992(Act No. 11 of 1992).

however, is that outside of the metropolitan areas, capacity for undertaking the planning function at the local sphere of government is generally lacking, with the rural and smaller municipalities being more severely impacted. For example, in 2006, the eThekwini municipality employed 208 persons within their Development Planning Management Unit while some smaller municipalities within the province employed no planners and resorted to the function being outsourced to the private sector. This distortion is based on the variations in workload between the metro and smaller more rural municipalities. However, the need to employ services providers in order to support planning processes is also an indication of the lack of capacity within the latter locations.

The KZNPDA stipulates that planning processes such as the amendment to schemes, the removal of restrictions, subdivisions and consolidations, and rezoning must be reviewed by a professional planner who is also then required to sign a certificate prior to the municipality assessing the application. While good in intent, this further exacerbated the capacity constraints within the province with some areas having no or very few registered planners.

In support of the introduction of the KZNPDA, the Provincial Planning Directorate within the Department of Cooperative Governance and Traditional Affairs embarked on capacity building initiatives which included the drafting of a manual, leaflets and process wall charts. Extensive training programmes were rolled out for councillors and municipal officials on the content and implications of the KZNPDA.

The first revisions of the KZNPDA were enacted in 2009 with the department currently undertaking an extensive review of the legislation to include amendments for ensuring compliance with the proposed National Spatial Planning and Land Use Management Bill[2], and to address some of the challenges or loopholes within the current Act. The amendments have now become so extensive that the Department is seriously considering repealing the 2008 KZNPDA and replacing it with a shorter and simpler version.

1.2 Project Objectives

The South African Cities Network (SACN) wishes to use the experience of the KZN PDA as the lens through which to examine the implications and the lessons to be learnt from the introduction of provincial planning and development legislation across the country, focusing on the extent to which such legislation is able to contribute to spatial transformation. The

[2] Comment based on feedback received from the KwaZulu-Natal Department of Co-operative Governance and Traditional Affairs

core objectives for this study include assessing the impact of the introduction of the Act on the spatial transformation of municipal spaces, the decision making processes across the local and provincial sphere of government, and private and public sector development. This will involve a consideration of the resource and capacity requirements for the effective implementation of the Act and the functioning of the KZN PDA Forum. Key lessons learned will be highlighted to inform the process of formulating legislation in other provinces.

This entails assessing the functioning of the PDA at the provincial level and at least at the two major municipalities of Msunduzi and eThekwini, mapping planning processes including the structures, institutions and the related personnel requirements and capacity levels, assessing general perceptions of the impact and dynamics emerging from the introduction of the KZNPDA, consolidating available material in relation to the KZN PDA, conducting an assessment of the variation in provincial planning legislative models used, specifically examining the Western Cape, Gauteng, Free State and the Eastern Cape and preparing a set of key recommendations for further consideration.

1.3 Undertaking the research

In the first phase of the project, a review was undertaken of available documentation to develop an assessment framework for guiding an examination of the "bigger picture" in relation to planning and development at provincial level. This informed the development of key questions to be addressed in the field work to be conducted in Phase 3. In particular, it addressed the mechanism for assessing the spatial transformation imperatives in relation to the ability of the provincial planning legislation to support this transformation.

Significant information has been gathered by SACN related to land use planning and related matters. This includes the undertaking of numerous studies of the provincial land use reform process. This information was used in shaping the requirements for Phase 3 of the project. Other plans such as the National Development Plan were also reviewed to extract those aspects which could inform the assessment framework and guide our understanding of transformation requirements.

The assessment framework report was based on an examination of the KZN PDA, but included an evaluation of the recent Bill, and the Provincial Planning legislation in the Western Cape, Eastern Cape, Free State and Gauteng. The DFA judgement and SPLUMB have also impacted on the content of the PDA and as such an understanding of this was also used to inform the thinking contained in the assessment framework.

The third phase of the project included the administering of the interview questionnaires as prepared in phase 2 of the project. The questionnaire was sent to participants in advance of the interview. Some elected to submit a written response only; others were interviewed,

with some opting for both an interview and a written submission. All interview notes made were sent to the person interviewed for confirmation.

Information was obtained from the following persons:

- Provincial Department of Cooperative Governance and Traditional Affairs – Mr Gert Roos and Mr Martin de Lange
- eThekwini Metro – Ms Lekha Allopi and planning officials
- Msunduzi Local Municipality - Mr Atkins Khoali
- Provincial drafters in following provinces:
    - Western Cape – Mr Jaap de Visser
    - Free State – Ms Gemey Abrahams
    - Northern Cape – Mr Stephen Berrisford
    - Gauteng – Mr Les Oakenfall
- Representative from SAPOA – Mr John Lang

This report serves as a consolidation of the report prepared in phase 2 and the research findings.

1.4 Structure of the report

This report consists of six sections. Section 2 considers the overall legislative processes and how they have been managed. This includes managing old order legislation, an overview of the KZN PDA and the legislative process associated with its development and implementation, and a comparison between the situation in KZN with that in Gauteng and the Western Cape, both of which have also developed planning and development legislation. Section 3 looks at the need for the transformation of municipal spaces, particularly as this relates to the Constitution, the development of integrated development plans (IDPs) and the approaches adopted by KZN in addressing transformation. Section 4 considers the decision making process in some detail, while section 5 examines the impact of the PDA on private and public sector development. Section 6 provides concluding comments and the identification of key areas of learning arising from the introduction of the KZNPDA.

2. THE KWAZULU NATAL PLANNING REFORM PROCESS

2.1 The Management of the Old Order Legislation within the KZN Province

Previous research has identified the many overlapping planning procedures and systems in the manner in which all spheres of government play a role in urban land[3]. Often "several types of regulatory procedures are applied in a manner that demonstrates a predominantly ad hoc, opaque and unresolved approach to land management, which fails to reflect the goals of the integrated and sustainable city, and specifically mainstream the need to ensure access for the poor". This is frequently compounded by dysfunctional institutional land use management systems, "a lack of understanding of the differential and overlapping roles of legislation, regulation and enforcement and the onerous compliance requirements of land that stem from the parallel application of past and new legislation"[4].

The formation of the KwaZulu-Natal Province in 1994 saw the inclusion of the former Natal Province, the former KwaZulu, portions of the former Cape Province and small portions of the former Transvaal Province. Later the provincial boundary was amended to include the Umzimkulu area for the Eastern Cape Province. Each of these areas was subject to different planning and development legislation.

The table below demonstrates the extent of the old and new order planning and development related legislation which has, over time, been applicable within the KwaZulu-Natal Province. Some of this remains in force while others have been repealed.

Table 1: National and Provincial Planning and Development Statutes[5]

Planning and Development Legislation Applicable in KwaZulu-Natal		
Pre-1994		
National	Black Administration Act No. 38 of 1927 Section 30 Towns	Townships establishment in administrative Natal
National	Black Land Regulations R188 of 1969	KwaZulu
National	Annexure F of the Black Communities Development Act No. 4 of 1984	Townships in administrative Natal
National	Black Administration Township Development Regulations for Towns No. 1886 of 1990	Applicable to Self-Governing States - KwaZulu
National	Black Administration Land Use and Planning Regulations Act No. 1888 of 1990	Applicable to Self-Governing States

[3] Wendy Ovens and Associates, 2007
[4] Ibid
[5] Table extracted from South African Cities Network, "Provincial Land Use Legislative Reform KwaZulu-Natal: Status Report" September 2011

		KwaZulu
National	The Physical Planning Act No. 125 of 1991	Administrative Natal (though hardly used)
National	The Upgrading of Land Tenure Rights Act No.112 of 1991	Natal and KwaZulu
National	The Less Formal Townships Establishment Act No. 113 of 1991	Initially only administrative Natal and then made applicable in KwaZulu
National	*Removal of Restrictions Act No84 of 1967*	*Responsibility for implementation of the Act, delegated to Provinces*[6]
Provincial	The Natal Town Planning Ordinance No. 27 of1949	Administrative Natal
Provincial	Amakhosi and Iziphayaniswa Act No. 9 of 1990	Townships in Administrative KwaZulu
Provincial	The KwaZulu Land Affairs Act No. 11 of 1992	Administrative KwaZulu
Provincial	Ingonyama Trust Act No. 3 of 1994 TP[7] PT	Administrative KwaZulu
Post 1994		
National	The Physical Planning Act No. 125 of 1991	Administrative Natal (though hardly used)
National	The Upgrading of Land Tenure Rights Act No.112 of 1991	Natal and KwaZulu
National	The Less Formal Townships Establishment Act No. 113 of 1991	Initially only administrative Natal and then made applicable in KwaZulu
National	The Development Facilitation Act No. 67 of 1995	KwaZulu-Natal after adoption in 1997
National	Municipal Systems Act No. 32 of 2000– IDPs/SDFs;	KwaZulu-Natal
Province	The Natal Town Planning Ordinance No. 27 of1949 (as amended)	Former area of administrative Natal and R293 Towns
Province	Amakhosi and Iziphayaniswa Amendment Act No. 5 of 1994	Act extended into KwaZulu-Natal
Province	KwaZulu-Natal Planning and Development Act No. 5 of 1998	KwaZulu-Natal promulgated but never implemented due to the regulations not being completed
Province	KwaZulu-Natal Rationalisation of Planning and Development Act No. 2 of 2008	KwaZulu-Natal
Province	KwaZulu-Natal Planning and Development Act	KwaZulu-Natal

[6] Information added to the table by the authors of this report

[7] In essence, the Ingonyama Trust Act is concerned with conferring land rights however it is included here because there are procedural requirements that impact on land use and planning for land which falls within the administrative and spatial extent of the Trust.

	No. 6 of 2008	

The acknowledgement by the then Natal Province of the challenges arising from the old order legislation emerged as early as 1992 with the ordinance having already been amended 39 times.[8] In that year, the legislation was amended to include provision for land use planning with the implementation of land use planning regulations in 1994.

In 1998, the KwaZulu-Natal province passed the KwaZulu-Natal Planning and Development Act No 5 of 1998. The purpose of the legislation was aimed at facilitating the preparation of provincial and local integrated development plans and environmental management. The regulations were never passed and as such, the Act was not brought into operation. Given that the Municipal Systems Act, No 32 of 2000 addressed integrated development planning, the Province took a decision in 2002 not to proceed with the 1998 Act but rather to draft new legislation.

The fluidity of the political environment in KwaZulu-Natal made it necessary to consider an interim step in the formulation of new planning legislation:

> *"It was much easier to get consensus on extending existing legislation than to get consensus on new legislation."*[9]

In 2004, the KwaZulu-Natal Province commenced a process to rationalise its old order legislation. The aim of this project was to:

- ensure provincial legislation was in line with the Constitution
- address the needs of the Province in a coherent and comprehensive manner
- ensure the remaining legislation was free of obsolete and ideologically determined references and components
- ensure that the legislation was accessible, promoted legal certainty, smooth administration and enhanced service delivery

The rationalisation of the planning and development legislation formed part of this process with the enactment of the KwaZulu-Natal Rationalisation of Planning and Development Laws Act in 2008.

This Act repealed planning ordinances applicable to areas which were part of other provinces before they were incorporated in KwaZulu-Natal. The planning regulations which were applicable to the so called "Black" towns were repealed along with the KwaZulu Land Affairs Act, 1992. The Act also recognised that all planning done under the repealed

[8] Response received from Mr Gert Roos
[9] As above

legislation used the Town Planning Ordinance (Natal), 1949 (Ordinance No. 27 of1949). In addition, the Province passed the KwaZulu-Natal Town Planning Ordinance Amendment Act which, along with the "Rationalisation" Act, sought to "simplify and update existing provincial planning and development laws until the commencement of the KwaZulu-Natal Planning and Development Act, 2008"[10].

Initially, there was political resistance to the extension of the Ordinance to the former Kwa Zulu areas.

> *"At the time it was not considered politically acceptable to extend former Natal legislation to former KwaZulu, even though the Province of KwaZulu-Natal was structured more along the lines of an old order province than a national state. By the time that the Acts were with the legislature in 2008 sentiments had changed and the application of the Ordinance was extended to the whole province, including former KwaZulu."*[11]

While the Rationalisation Act and the KZNPDA were passed in the same year, they were promulgated 18 months apart. Historically the planning function had been managed and implemented at the provincial level. The Constitutional requirement for municipal planning required the function to be performed at the local sphere of government. Based on the response received from the Provincial Department:

> "*The timing of the two legislations allowed for the province to address the shift of the planning function from the provincial to the local level".*[12]

Other provinces in South Africa are yet to fully rationalise their old order legislation and/or undertake a process similar to that of the KwaZulu-Natal Province. As such the KZN experience provides an important learning opportunity especially for provinces such as the Eastern Cape, North West, Mpumalanga and Limpopo.

The Provincial Department recognises the value gained by taking the interim step of ensuring that a single old order piece of legislation, in the KZN case, the Natal Ordinance, applied throughout the province. The advantages included at least the following:

- It allows for simpler internal administration
- It removes the complications and time constraints which emerge due to out-dated legislation designed for a different and now disestablished institutional arrangement

[10] South African Cities Network, "Provincial Land Use Legislative Reform KwaZulu-Natal: Status Report" September 2011
[11] Response received from Mr Gert Roos
[12] As above

- It prevents possible legal challenges arising from the application of the incorrect legislation
- It overcomes the lack of institutional memory with respect to the old order boundaries and associated land use planning legislation[13]

The Provincial Department also noted a number of aspects that need to be carefully considered when preparing transitional arrangements such as:

- The need to be specific so as to remove any uncertainty in relation to the validity of the land use scheme
- The validity of an application which may have been submitted in terms of other legislation
- The validity of the development approval gained in terms of other legislation
- The equivalent of an old approval under the new legislation
- The process to be followed to amend rights that were originally granted under repealed legislation[14]

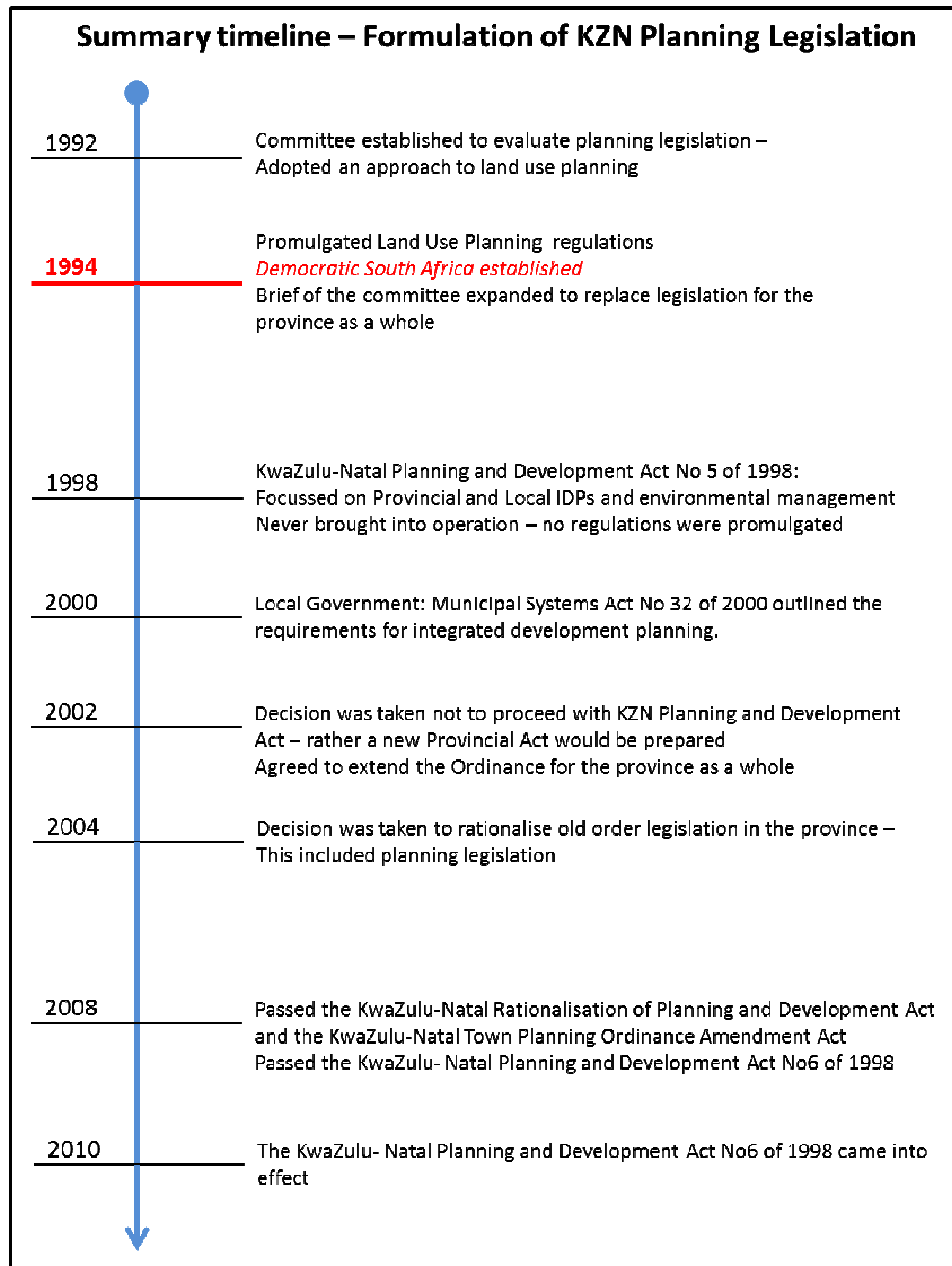
The Provincial Department also noted the conditions within a province which would lend itself to the introduction of an interim phase, such as the rationalisation of old order legislation, prior to the introduction of new planning and development legislation[15]. Key factors for this type of intervention would include for example the following:

- Little capacity at municipal level – in such cases "it may be wise to first extend the application of one of the existing land use planning laws and repeal the balance of the old order land use planning laws".[16]
- Provinces where there is evidence that it will be difficult to reach consensus on a new land use planning law due to a wide variation in stakeholder perceptions and need.[17]

The figure below tracks the timeframes associated with the development of the KZNPDA and the challenges faced by the Province in its formulation.

[13] As above
[14] Response received from Mr Gert Roos
[15] This may no longer be necessary given the DFA judgement
[16] This has been proposed as one of the Transitional Arrangements for supporting the Introduction of SPLUMB and new provincial legislation. It may be a quicker route to solving immediate challenges.
[17] As above

Figure 1: The summary timeline for the formulation of the KZN planning legislation.



2.2 The Introduction of the KwaZulu-Natal Planning and Development Act

The Drafting Committee

The MEC for Cooperative Development and Traditional Affairs established a committee with a mandate to draft a planning and development Act in order to replace the Natal Ordinance. The committee comprised the following members:

- Representatives from the Town Planning Commission
- Officials from the Provincial Department
- Officials from Local Government

The Structure and Content of the Act

The overall structure of the Act was mainly determined by the Province's interpretation of the roles and responsibilities for planning and development as outlined in the Constitutional schedules. As was noted by a department official:

> *"The structure of the 2008 Act was dictated by the interpretation of the 1996 Constitution at the time with urban and rural development[18] handled differently from the closing of municipal roads and public places".[19]*

Unlike other draft provincial planning legislation, the KZNPDA has included different chapters for the management of different planning processes, such as the amendment to a scheme, township establishment and the removal of restrictions. As was explained in the Department's response:

> *"Several attempts were made to deal with all applications in a single chapter, including by a specialist drafter, Advocate van Zyl. However, there were too many rules that applied only to particular applications and in the end a modular structure was preferred"[20].*

While the Act is fairly lengthy, the Province attempted to retain a simple structure. As such, the KZNPDA can be divided into three main components:

[18] Urban and rural development is listed as a concurrent National and Provincial function in terms of Schedule 4 Part A of the Constitution. This statement reflects the confusion which existed at the time in relation to the definition of the planning functions as they appear in the Constitution. This was prior to the so called "DFA judgement"

[19] As above

[20] As above

- Schedule 1 primarily used by the applicant
- Chapters 2 – 9 which provide guidance to municipalities
- Chapters 10 -11 which outline provincial responsibilities

The Province wanted to address a number of key aspects in the structure and content of the Act. These included at least the following:

- the broad regulation of the rights to develop land – replacement of the ordinance provisions
- "promote a planning and development system that redresses the historic injustices perpetuated by the old order fragmented planning and development system"[21] [22]
- the need for promoting certainty and practicality in the system
- the recognition that "development is a dynamic" process and as such the need to "provide for the creation of new development rights and the modification of the existing development rights"
- the rights to develop land in a reasonable and fair manner
- the facilitation of good planning linked to the matters to be assessed when considering an application
- to allow for accountability
- to be accessible and user friendly – this included the careful use of language

As was noted by the Department,

> *"The Act must be easy to understand. The Act is written in plain language and short sentences are used as far as possible. Legalese has been eliminated, for example "consider" is used instead of "give consideration to". Each sentence has a subject, a verb and an object. Items are tabulated etc. The objective of an Act that is intuitive and easy to understand has been achieved"[23].*

Based on the approach adopted by the Province, the objects of the KwaZulu-Natal Planning and Development Act No 8 of 2008 are outlined as being the following:

- provide for the adoption, replacement and amendment of schemes
- provide for consent in terms of schemes

[21] SACN, 2011
[22] This include inter alia the deracialisation of the planning legislation
[23]Gert Roos, Written response

- provide for the subdivision and consolidation of land
- provide for the development of land outside schemes
- provide for the phasing or cancellation of approved layout plans for the subdivision or development of land
- provide for the alteration, suspension and deletion of restrictions relating to land
- provide for the permanent closure of municipal roads or public places; to provide for enforcement measures
- provide for compensation in respect of matters regulated by the Act
- establish the KwaZulu-Natal Planning and Development Appeal Tribunal
- provide for provincial planning and development norms and standards
- any related matters

While the Province acknowledged that the innovation included in the Act may not have been "new" when compared to international examples, the provisions were certainly a first in many instances within the South African planning legal context. These included:

- wall to wall schemes within municipal areas
- the information gathering step in the application process in that all information necessary for deciding an application is obtained upfront
- the setting of norms and standards
- the outlining of criteria for all decisions
- clear time frames for all steps in the application approval process
- the compulsory disclosure of certain documents or facts
- the need for the compulsory professional evaluation of applications
- a right of appeal against all final decisions
- the accountability of the planner who evaluates an application
- the extensive enforcement measures
- detailed transitional measures
- the blanket removal of certain out-dated conditions of title by law, and
- processes for the cancellation of rights (voluntary and unilateral)

The repeal of old order legislation

The KZN PDA repealed the following legislation:

Number and year of law	Short title	Extent of repeal or amendment

Number and year of law	Short title	Extent of repeal or amendment
No. 14 of 1936	The Pietermaritzburg Extended Powers Ordinance, 1936	Section 18
No. 27 of 1949	The Town Planning Ordinance, 1949	The whole
No. 22 of 1951	The Town Planning Amendment Ordinance, 1951	The whole
No. 5 of 1953	The Town Planning Amendment Ordinance, 1953	The whole
No. 6 of 1954	The Town Planning Amendment Ordinance, 1954	The whole
No. 8 of 1955	The Town Planning Amendment Ordinance, 1955	The whole
No. 19 of 1959	The Town Planning Amendment Ordinance, 1959	The whole
No. 9 of 1961	The Town Planning Amendment Ordinance, 1961	The whole
No. 27 of 1961	The Town Planning Further Amendment Ordinance, 1961	The whole
No. 27 of 1962	The Town Planning Amendment Ordinance, 1962	The whole
No. 33 of 1963	The Town Planning Amendment Ordinance, 1963	The whole
No. 11 of 1964	The Town Planning Amendment Ordinance, 1964	The whole
No. 37 of 1964	The Town Planning Further Amendment Ordinance, 1964	The whole
No. 13 of 1967	The Town Planning Amendment Ordinance, 1967	The whole
No. 84 of 1967	Removal of Restrictions Act, 1967	Section 3 and 4
No. 53 of 1969	The Town Planning Amendment Ordinance, 1969	The whole
No. 9 of 1970	The Town Planning Amendment Ordinance, 1970	The whole
No. 30 of 1970	The Town Planning Further Amendment Ordinance, 1970	The whole
No. 42 of 1971	The Town Planning Amendment Ordinance, 1971	The whole
No. 56 of 1971	The Town Planning Further Amendment Ordinance, 1971	The whole
No. 23 of 1972	The Town Planning Amendment Ordinance, 1972	The whole
No. 25 of 1973	The Town Planning Amendment Ordinance, 1973	The whole
No. 29 of 1974	The Town Planning Amendment Ordinance, 1974	The whole
No. 8 of 1975	The Town Planning Amendment Ordinance, 1975	The whole
No. 13 of 1976	The Town Planning Amendment Ordinance, 1976	The whole
No. 18 of 1976	Durban Extended Powers Consolidated Ordinance, 1976	Chapter XVI
No. 29 of 1976	The Town Planning Second Amendment Ordinance, 1976	The whole
No. 28 of 1978	The Town Planning Amendment Ordinance, 1978	The whole

Number and year of law	Short title	Extent of repeal or amendment
No. 41 of 1978	The Town Planning Second Amendment Ordinance, 1978	The whole
No. 10 of 1979	The Town Planning Amendment Ordinance, 1979	The whole
No. 29 of 1980	The Town Planning Amendment Ordinance, 1980	The whole
No. 22 of 1983	The Town Planning Amendment Ordinance, 1983	The whole
No. 28 of 1983	The Town Planning Second Amendment Ordinance, 1983	The whole
No. 21 of 1985	The Town Planning Amendment Ordinance, 1985	The whole
No. 22 of 1985	The Statutory Bodies (Period of Office) Ordinance, 1985	Section 2
No. 27 of 1985	The Second Town Planning Amendment Ordinance, 1985	The whole
No. 8 of 1986	The Town Planning Amendment Ordinance, 1986	The whole
No. 23 of 1986	The Town Planning Amendment Ordinance, 1986	The whole
No. 53 of 1988	Proclamation, 1988	Sections 2 and 3
No. 58 of 1988	Proclamation, 1988	The whole
No. 8 of 1990	Proclamation, 1990	The whole
No. 26 of 1992	Proclamation, 1992	The whole
No. 5 of 1998	KwaZulu-Natal Planning and Development Act, 1998	The whole
No. 4 of 1999	KwaZulu-Natal Planning and Development Amendment Act, 1999	The whole
No. 2 of 2008	KwaZulu-Natal Rationalisation of Planning and Development Laws Act, 2008	The whole
No. 3 of 2008	KwaZulu-Natal Town Planning Ordinance Amendment Act, 2008	The whole

Notwithstanding the extent of the legislation repealed in the KZN PDA, some core legislation has remained in place such as the Less Formal Township Establishment Act, parts of the Natal Ordinance and the Ingonyama Trust Act, No.3 of 1994, including the subsequent amendments.

In the case of the Less Formal Townships Act, the KwaZulu-Natal Department of Human Settlements argued that it was necessary to retain the provisions of the Act for facilitating housing development. While some aspects of the Act had been assigned to Provinces, the provincial powers were insufficient to adequately present an alternative in the KZNPDA. The 2012 draft of the PDA has made provision for the repeal of parts of the Less Formal Townships Act as has the National Spatial Planning and Land Use Management Bill. Moreover, the "DFA" judgement rendered portion of the Less Formal Township Establishment Act as invalid due to the description of "municipal planning".

The ability to repeal the Ingonyama Trust Act is a complex matter. As explained by a provincial representative:

> "*"Not all traditional authority areas in KwaZulu-Natal are subject to the Ingonyama Trust. There are isiZulu traditional authorities that are settled on state land that does not belong to the Ingonyama Trust and the isiXhosa traditional authorities of Umzimkulu are not subject to the Ingonyama Trust. From a consultation point of view, it is much easier to develop land that is administered by the Ingonyama Trust than land that isn't. The leadership of 168 of the 290 traditional authorities that reside on Ingonyama Trust land are currently formally in dispute. The Ingonyama Trust will facilitate all the negotiations between a developer and a traditional community. A developer only has to know how to contact the Ingonyama Trust not the details of the politics of a particular traditional community".*[24]

The KZN Act was never passed due to an intervention from National government in which it was acknowledged that the province did not have the constitutional mandate to legislate on these matters.

Moreover, the role and the functions of the Ingonyama Trust especially in relation to the management of land, is generally misunderstood. The Trust holds state land for a particular purpose in much the same way as the National Department of Public Works holds state land for police stations, courts and border posts and the provincial departments of public works hold state land for schools, clinics and hospitals. A school site for a public school will never be registered in the name of a school or a provincial department of education. It will be registered as RSA land and the property will appear in the asset register of the relevant provincial department of public works. The Ingonyama Trust Act that establishes the Ingonyama trust is therefore not a planning law any-more than the State land Disposal Act or provincial land administration laws are planning laws.

Notwithstanding, development within Ingonyama Trust Land appears to be easily managed. The provincial department commented that:

> *"Not all traditional authority areas in KwaZulu-Natal are subject to the Ingonyama Trust. There are isiZulu traditional authorities that are settled on state land that does not belong to the Ingonyama Trust and the isiXhosa traditional authorities of Umzimkulu are not subject to the Ingonyama Trust. From a consultation point of view, it is much easier to develop land that is administered by the Ingonyama Trust than land that isn't. There are more traditional leadership disputes in the Province than there are traditional authorities. The Ingonyama Trust will facilitate all the negotiations between a developer and a traditional community. A developer only has to know how to*

[24] Response received from Mr Gert Roos

> *contact the Ingonyama Trust not the details of the politics of a particular traditional community".*[25]

While development on traditional authority land can be facilitated within the KZN context, it does point to the challenges generally with the management of development within such areas. As was noted in the SACN report on planning law reform in South Africa, the inability to repeal these Acts "confirms how difficult it is to repeal all planning legislation in favour of one universally applicable Act".[26]

Since the passing of the PDA, the Department has found it necessary to make extensive changes to the Act. The first amendments were implemented in 2009 with a revised Bill published in 2012. The introduction of the SPLUMB will require even further amendments to be made.

More recently, the Department has conceded that the amendments are now so extensive, it may require an entire redraft of the Act. This may present an opportunity for it to become more streamlined (consolidation of processes), less prescriptive (especially in relation to enforcement) and to include more aspects for supporting transformation such as the inclusion of provisions for supporting an incremental approach to obtaining tenure security.

2.3 A brief comparison of the KZNPDA and the Gauteng and Western Cape proposed PDA Bills

A brief examination of the KZNPDA, the Western Cape Land Use Planning Bill and the Gauteng Planning and Development Bill reveals that each province has adopted a very different approach to planning and development legislation. For example, the KZNPDA addresses each of the land use management processes extensively as different chapters whereas the other provinces have managed similar aspects in a single chapter. The Western Cape for example, has focussed on aspects which they consider are impeding development such as the management of intergovernmental arrangements, cooperative governance and the allocation of powers and functions between spheres of government.

The Gauteng and Western Cape Bills place a greater emphasis on the development, preparation, content and adoption of spatial development frameworks. Moreover, the proposed legislation makes provision for a hierarchy of plans, namely provincial and local. The Western Cape has added a possible third layer with the introduction of regional spatial development frameworks. Both Bills are very clear on the status of these plans in relation to

[25] As above
[26] Ibid

land use management. The Western Cape and Gauteng therefore appear to have included more provisions for supporting and guiding spatial transformation of our municipal spaces. The effectiveness of the provisions is yet to be tested in practice.

Different approaches are adopted for decision making. Within KZN and the Western Cape, the municipality makes the decision on planning applications, with a provincial tribunal managing the appeals process. The KZN and Western Cape approach allows for planning and development related to decisions to be influenced by the political dynamics within a municipal area. The Gauteng Bill proposes the establishment of a municipal tribunal at each metropolitan and local municipality and a single appeals tribunal, appointed by the MEC but comprising of representatives from municipalities. Gauteng appears to have gone to great lengths to remove politics from land use decision making.

The KZNPDA provisions for enforcement are onerous and have been widely criticized for impacting negatively on municipal capacity. The Gauteng and Western Cape Bills address aspects relating to enforcement but require the municipality to pass the appropriate bylaws.

The Gauteng Province does not appear to require applications to be submitted and/or evaluated by registered planners. KZN and the Western Cape do make this provision but make no distinction between technical and professional planners. It is assumed in both cases that the reservation of work for planners would be guided by other National legislation or regulations. The legislative appropriateness of requiring comment from a professional planner requires further examination and debate especially given the lack of planning capacity between and within provinces.

A broad examination of the three pieces of legislation would suggest that the KZNPDA is too detailed and repetitive, to some extent reflecting the structure and content of the old Ordinance, whereas the Western Cape Bill is fairly light on the land use management aspects and does not make use of common and historically, used land use management terms. This was also a trend carried over into the proposed legislation from LUPO.

While each province in South Africa has its own specificities, the extent of the variations begs the question as to whether or not there should be greater oversight from national government in relation to the structure and content of the Provincial Planning and development legislation. For example, the cooperative governance, intergovernmental relations and the allocation of powers and functions contained in the Western Cape legislation should be part of National legislation as it is applicable to all provinces. It is possible that once enacted, the SPLUMA regulations will provide the necessary guidance especially in relation to the key processes and procedures required for land use management. Again, this is yet to be tested in practice.

The table below provides a high level summary of the legislation examined.

Table 2: Comparative analysis of the KZN, Gauteng and Western Cape PDAs

	KwaZulu-Natal Planning Development Act	Gauteng Planning and Development Bill	Western Cape Land Use Planning Bill
Clear articulation of the responsibilities of provincial government and municipalities	Implied[27]	Implied	Yes, Chapter 2, Section 2
Provincial Spatial Development Framework	No	Yes – sections 6 to 11	Yes – Section 3 - 7
Regional Spatial Development Frameworks	No	No	Yes – Section 8 - 11
Municipal Spatial Development Framework	No	Yes – Sections13 – not linked to a timeframe	Yes –may remain applicable for a 10 year period[28]
Provincial Integrated Development Plan	No	Yes – Section 12	No
Establishment of a Planning Commission	No	Yes – Section 14, an oversight and coordination committee on development matters within the province	No
Land use Schemes	Yes – Sections 3 - 20	Yes – Sections 15 - 21	Yes – linked to drafting of bylaws
Single or multiple schemes	A municipality could have more than one scheme applicable within its area of jurisdiction	Single scheme for municipal area	Single scheme for municipal area
Development of Land situated outside the area of a scheme	Yes – Sections 38 - 49	No	No
Linked schemes to IDP	Yes – Section 6.2 – IDP takes precedent over the scheme	No	No
Subdivision and consolidation of land	Yes – Chapter 3: Subdivision and consolidation of land, Sections 21 - 37	Yes – but included within a single chapter – Chapter 6: Development and Land Use	Yes – but include in a single Chapter, that is Chapter IV – terms of bylaws or scheme clauses
Phasing or cancellation of approved subdivision of land	Yes – Chapter 5: Subdivision and consolidation of land, Sections 50 - 59	Yes – but included within a single chapter – Chapter 6: Development and Land Use	Yes – but include in a single Chapter, that is Chapter IV – terms of bylaws or scheme clauses
Alteration, suspension and deletion of restrictions relating to land	Yes – Chapter 6, Sections 60 - 70	Yes – but included within a single chapter – Chapter 6: Development and Land Use	Yes – but include in a single Chapter, that is Chapter IV – terms of bylaws or scheme clauses
Permanent closure of municipal roads for public places	Yes – Chapter 7, Sections 71 - 74	Yes – but included within a single chapter – Chapter 6: Development and Land	Yes – but include in a single Chapter, that is Chapter IV – terms of

[27] The Act does not specifically state, in a single section, the role of provincial and local government. Rather, the roles and responsibilities of the different spheres are outlined in the requirements for the decision making processes.

[28] It would appear that provinces in the process of drafting planning legislation are making every attempt to ensure alignment with SPLUMB and the proposed regulations. However the draft Bill, itself is undergoing a number of changes which in turn impacts on the provincial process. Once the National Act has been approved, all existing and draft provincial planning legislation will be to ensure compliance.

		Use	bylaws or scheme clauses
Provision for multiple processes to be included in a single application	Yes	Yes – see section 35(2)	Yes
Use of by-laws for the management of land use applications	No	No	Yes – see Chapter IX which outlines the minimum standards for municipal by-laws on land use applications
Enforcement	Yes – Chapter 8 sections 75 – 94 – onerous, capacity intensive	Yes – Section 82: Municipalities are required to pass by-laws to address the enforcement matters	Yes – Section 79 – 82, combination of general provisions and bylaws
Provision for a decision making body	No – indicates that the Municipality must make the decision on planning and development applications – hence, decision taken by the Council and as such is a political and not a technical decision	Yes – Section 22 – 33 Requires the Council to establish the tribunal – must be considered appropriate and should have knowledge or experience of planning and development. The municipal tribunal could be a political or and administrative structure and or may or may not include external expertise.	No – the municipality must make the decision on planning and development applications
Location and composition of the Appeal Tribunal	Chapter 10 – very clearly established at the provincial level – no stipulation that Appeal Tribunal members must be from municipalities – very much a provincial entity	Representatives from municipal level – but operates province wide – appointed by the MEC.	Located at the provincial level – See chapter VII, The land Use Planning Board: No more than 50 and no less than 25. The Board must be representative of the areas of jurisdiction of the district municipalities and the City of Cape Town in the Province
Use of registered planners	Yes – defined as registered professional or technical planner	No	Yes – registered in terms of the Planning Profession Act
Changing the apartheid spatial form	Linked to the IDP – 5 Years	Spatial Development Framework established in terms of the Bill – SDF may be applicable for 10 years. Linked to the functions of the Gauteng Planning Commission	Establishes SDFs at provincial, regional, and local level. Includes a chapter to ensure conformity of development management with the SDFs – see chapter V. Includes a Chapter on the development principles and objectives of land use planning
Makes provision for cooperative governance	No	No	Yes – Chapter VIII – Cooperative governance

			and assignment. Also the preparation of schemes maybe done within an intergovernmental framework or outside of such a framework
Ordinance repealed	Yes	Yes but not the entire Local Governance Ordinance 17 of 1939	Yes
Repeals Less Formal Township Establishment Act 113 of 1991	No	Yes	Yes
Repeals Removal of Restrictions Act – National or provincial	Yes - National	Yes - Provincial	Yes

2.4 Summary findings

The KZN Department of Cooperative Governance and Traditional Affairs demonstrated sufficient capacity in the planning and development sector given that the drafting of the 2008 KZNPDA was almost entirely completed internally. It could be argued that the internal ownership and the intellectual capital gained through the process has allowed for a rich understanding of the challenges experienced in the drafting and management of planning and development legislation. The key departmental observations include the following.

"The focus of a planning law should be development"

A number of provinces have included extensive provisions focussing on the distribution of the planning and development powers and functions between provincial and local government. He believes that legislation should rather focus on "troubleshooting" development imperatives with the distribution of powers being coincidental.

The Western Cape would certainly argue the converse. They suggest that the lack of clarity with respect to powers and functions has been an obstacle to development; hence the inclusion of the provisions in the legislation.

The two approaches would suggest however, that each province is different, including different histories in terms of the implementation of planning and development legislation. It would appear that in many instances the legislation being prepared addresses the areas of greatest concern within the province at the point at which the legislation is being drafted.

"Be as inclusive as possible"

The drafting of the KZNPDA was mainly undertaken by a steering committee which included representatives from the Town Planning Commission, Departmental officials and representatives from local government. In retrospect, it is possible that other stakeholders should have been more active in the process, such as the Office of the Surveyor General and Deeds Office and more importantly, planners and land surveyors who are directly involved in physical development and the preparation of planning applications.

> *"Persons who are actually on a site as it is developed have a wealth of essential experience that is simply absent in government"[29].*

Based on the experience gained toward the 2008 KZNPDA, the drafting of the 2012 PDA is being managed differently.

> *"The Act is divided into different topics and everyone is invited to participate directly in the drafting process. Because there can be up to 40 persons in a session, the session has to be managed cleverly so that everyone can make their input".*

It would appear this approach has resulted in extensive innovations being proposed in the 2012 PDA.

The KZNPDA experience should be reflected upon by other provinces currently in the process of drafting legislation, especially those which are being supported by the National Department of Rural Development and Land Affairs. Not only are the drafting teams fairly small but there is also a separation between the drafters and those who will be ultimately responsible for ensuring the proposed legislation is passed through the legislative processes.

"Accept that is not always possible to reach agreement or even consensus, especially not at a first attempt"

Based on the comments received, it would appear that the preparation and implementation of planning legislation should be seen as a process. Amendments to the legislation will be inevitable, especially given that the varying provincial approaches appear to be addressing the key provincial planning and development challenges.

Rather than attempting to gain agreement amongst all stakeholders prior to the finalisation of the legislation, it may be preferable to have legislation operational with the flexibility for amendments. As was commented:

[29] Written submission from Gert Roos, Legal Services Director, KZN Department of Cooperative Development and Traditional Affairs

> *"It is important to keep momentum. It is very easy to lose a year in an effort to please everyone. We often had to cut our losses along the way, like reducing the scope of the Act in order to make progress. If it takes more than two years to draft a new Act it is taking too long. The real work only starts when an Act is implemented. The drafting is the easy part because it only requires words on paper that are acceptable to the majority of people".*[30]

"Things don't work out like you were hoping"

Based on the KwaZulu-Natal experience, it would appear that provisions included in the Act may have intended or unintended consequences which may be positive or negative. For example, there was great stakeholder resistance to the inclusion of the role for professional planners in the application evaluation process. It was anticipated that there would be insufficient capacity and it would present significant challenges at the municipal level. However, with implementation, based on interview responses, this aspect appears to have been successful.

Conversely, other provisions which appeared simple at the time of drafting proved to be extremely difficult to manage in practice. For example:

> *"The requirement that personal notice must be given in writing to every land owner within 100m of a development is a dismal failure. Within the first month there was a proposed development near a 14 storey block of flats. The giving of notice to every flat owner was expensive and near impossible".*[31]

Again the KZN experience supports the idea that it may be preferable to draft legislation and move to implementation quickly rather than pondering over every provision. While much of what is included in the Act may seem appropriate, in many instances the problems with the Act will only emerge once it is being actively used by practitioners and municipalities.

Implementation takes a long time

The KZNPDA came into operation 18 months after it was enacted. It would appear that there is wide consensus within the province that this may have been too soon. Notwithstanding, the learning linked to implementation of the PDA continues.

> *"We are in our third year of running the monthly PDA Forum which is attended by approximately 100 people".* [32]

[30] As above
[31] As above
[32] As above

It would appear that the PDA Forum has provided a useful platform for peer to peer learning with important experience gained through implementation practice. Moreover, as the knowledge on the management of planning and development has grown in the province, the forums have become more nuanced and technical in nature, such as how to manage applications for telecommunication infrastructure rather than on the broad implementation requirements.

Be responsive

As illustrated in the comment below, the KwaZulu-Natal Province has certainly adopted a flexible approach to the drafting and implementation of the KZNPDA.

> *"If the Act needs to be changed, change it. If it will be more effective to replace the Act, replace it".*

The time that it will take to draft new land use planning legislation is very unpredictable

The KwaZulu-Natal experience has demonstrated the challenges drafting planning and implementing planning legislation. Notwithstanding the experiences gained with the 2008 KZNPDA, it should be remembered that the process can be traced back to 1992. Development imperatives of the province can change significantly from one political term to another. What may not be acceptable in the current term may well be acceptable in the next. The experience has also proved that no assumptions can be made, especially in managing the legislative process. An illustrative anecdote highlights this point:

> *"A case in point, in KwaZulu-Natal, (a staff member) was asked to cut short her maternity leave because the passing of the Kwazulu-Natal Planning Act was imminent. That was in 1995. The Act was only passed in 1998. It was replaced and only promulgated in 2010. (The baby) was 15 years old by then".*

3. TRANSFORMATION IN THE SOUTH AFRICAN CONTEXT

3.1 South Africa's Spatial Historical Legacy

The spatial consequences of apartheid are well documented not only for our urban spaces but also the rural. Our inherited cities and towns demonstrate a fragmented urban form with sprawling underserved low density settlements which are some distance from economic opportunities. As the National Development Plan notes "Apartheid planning consigned the majority of South Africans to places far away from work, where services could not be sustained, and where it was difficult to access the benefits of society and participate in the economy."[33]

Apartheid policies also prevented predominantly Africans from easily gaining access to cities and towns by requiring people to live in peripheral homelands or self-governing territories, again with little or no economic base, infrastructure and social services. Harrison and Todes comment that "Although homeland areas were predominately rural, urban settlements and dense semi-urban settlements were created through policies of forced resettlement from "white" areas, as well as through the creation of administrative homeland capitals and industrial decentralization policies".[34]

Spatial transformation in South Africa is thus complex, requiring change to occur at the national, regional, local and indeed even at the neighbourhood level. Notwithstanding the legislative frameworks, extensive policies and strategies for supporting the reversal of the apartheid spatial structure, little progress has been made. Rather, the roll-out of low income development has continued to occur on large tracts of peripheral land, further reinforcing the past spatial patterns. The dominance of the land markets has limited extensive development from taking place on well-located land, close to urban infrastructure and economic opportunities. The insistence of the state-owned enterprises to release non-core land at market related prices has also prevented such land from being used for affordable development.

The National Development Plan notes that the "fundamental reshaping of the colonial and apartheid geography may take decades". In addition, it comments that "there are no quick fixes for transforming the functioning of human settlements and the working of the space economy".[35]

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[33] National Development Plan – 2030, page 260

[34] Harrison and Todes, "The Use of Spatial Frameworks in Regional Development in South Africa" Regional Studies, Vol 35.1 (2001)

[35] National Development Plan – 2030, page 260

It is within this context that the KwaZulu-Natal Planning and Development Act is required to support and promote transformation.

3.2 The Requirement of the National Development Plan

The transformation of human settlements in order to achieve the Vision for 2030 is a very clear goal of the National Development Plan[36]. The objectives in this regard are to have a *strong and efficient spatial planning system*, which is well integrated across the spheres of government. In addition, all informal settlements should be located on suitable, well-located land, with more people living closer to their places of work, more jobs in or close to dense, urban townships and better public transport. This means that towns and cities will become more inclusive and that poor people will have access to well-located land where they are able to live and work in dignity.

This requires several actions. Those directly related to planning include reforms to the current planning system for improved coordination, introducing spatial development frameworks and norms, including improving the balance between location of jobs and people, developing a strategy for densification of cities, resource allocation to promote better located housing and settlements, and implementing mechanisms that would make land markets work more effectively for the poor and support rural and urban livelihoods. In addition, substantial investment to improve public transport is needed, a national spatial restructuring fund, integrating currently defused funding is proposed, as is the establishment of a national observatory for spatial data and analysis.

The NDP also singles out the need to transform rural economies, with some of the proposed actions in this regard requiring a *transformed spatial planning system*. These include activating rural economies through improved infrastructure and service delivery, a review of land tenure, service to small and micro-farmers, a review of mining industry commitments to social investment, and tourism investments.

The need to transform human settlements reflected in the NDP in order to achieve a just and equitable society, requires decisive action in terms of ensuring that new planning and development legislation is able to overcome the spatially unjust legislation of the past. To date, new order legislation has not been particularly effective in achieving this.

It is important to assess if the planning legislation such as the KZNPDA will be able to support the aims and objectives of the National Development Plan.

[36] National Planning Commission, 2012

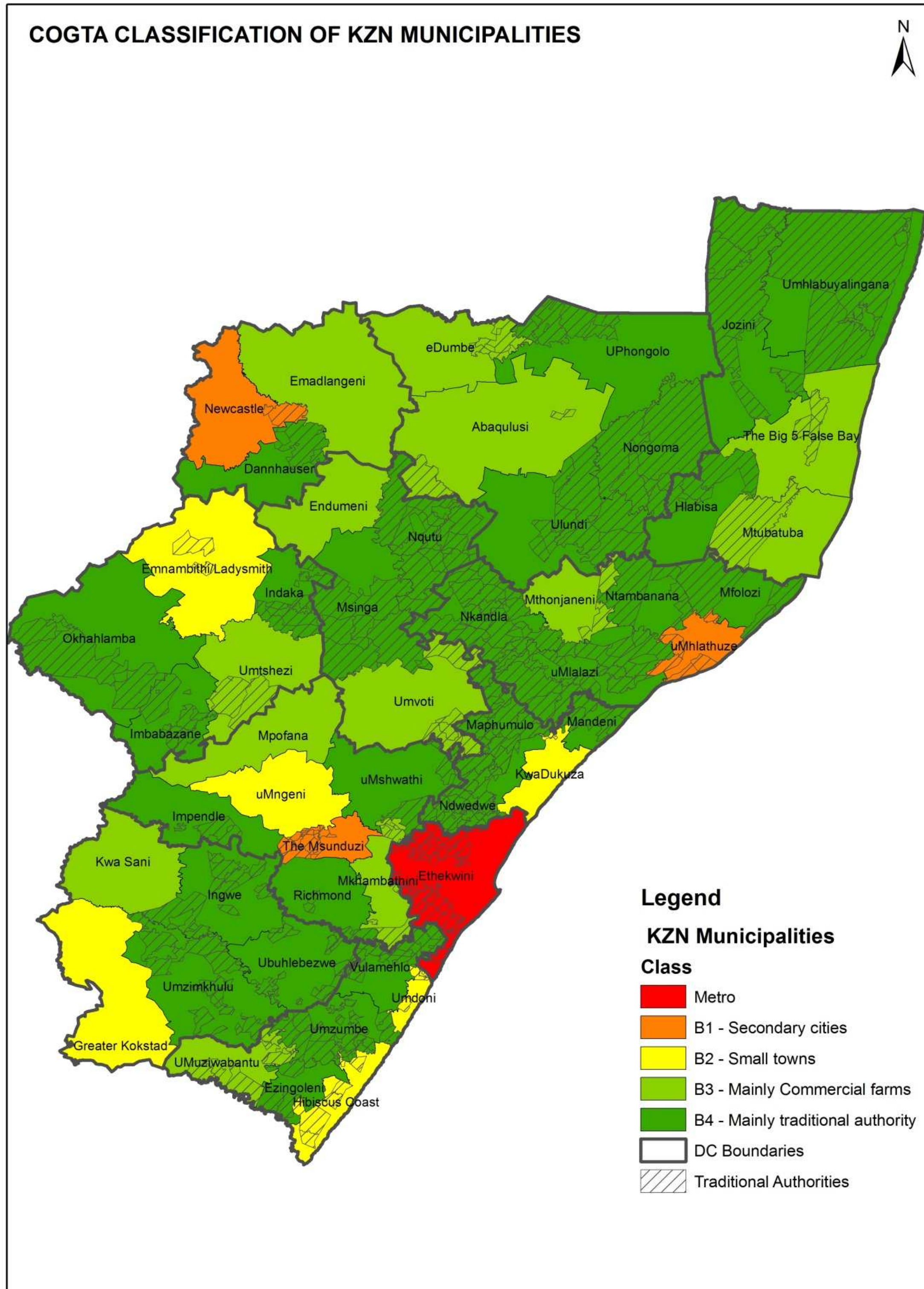
3.3 Our Municipal Spaces

In 2000, South Africa implemented wall to wall municipalities throughout the country. These comprised of Category A or metropolitan municipalities, Category B or local municipalities, and Category C or district municipalities which included two or more local municipalities. At that time, only 284 municipalities were declared nationwide, which has subsequently been reduced to 278. The province of KwaZulu-Natal contains one metropolitan municipality (eThekwini), 50 local municipalities and 10 districts. The metro covers 2291.31 km^2 whereas the average size of a local municipality is 1841 km^2. Approximately, 56% of the local municipalities are regarded as B4, which are mainly rural, traditional authority areas with little or no urban infrastructure. In addition to the Metro, three local municipalities have significant urban areas. As such, the broad characteristics of the municipalities vary considerably across the province.

Table 3: KwaZulu-Natal Municipal Classifications : Metro and Local Municipalities

Classification	Number	% of Local Municipalities
METRO	1	
B1 – Secondary cities	3	6
B2 - Small towns	6	12
B3 – Mainly commercial farming areas	13	26
B4 – Mainly traditional authorities, limited urban infrastructure.	28	56

The map below shows the distribution of municipalities according to type across KZN.



Not only are South Africa's municipal spaces geographically large and varied but they now contain both urban and rural areas with vastly different development imperatives. Some

areas have been subjected to a long history of planning legislation with others having little or none. This is the case even within the most significant municipality within the province, namely the eThekwini Metropolitan Municipality, which contains large traditional authority areas on the periphery.

As the only provincial planning legislation now applicable, the KZN PDA has to embrace the complex and varied spatial dynamics within the province and must therefore support the associated transformation and developmental requirements.

3.4 The Constitution

Constitutionally, the responsibility for the spatial transformation of South Africa is that of all three spheres of government. Regional planning and development and urban and rural planning are listed in Schedule 4 Part A as concurrent National and Provincial functions while municipal planning is listed as a local government function in terms of Schedule 4 Part B. The complexity in relation to the roles and responsibility of each sphere of government and the dynamics of concurrency will be addressed later in this report. However, it should be noted that the responsibility for spatial transformation is not the sole responsibility of local government notwithstanding the influence that this sphere has for affecting change.

The more recent Constitutional Court judgement has provided clarity with respect to defining "municipal planning". This has led to significant changes in provincial and local government practices in relation to the planning function.

3.5 Integrated Development Planning

A key tool for supporting the transformation of our municipal spaces has been the introduction of the integrated development plan. Section 23 of the Municipal Systems Act No 32 of 2000 requires municipal planning to be to be developmentally oriented. In so doing a municipality must:

(a) *strive to achieve the objects of local government set out in section 152 of the Constitution*

(b) *give effect to its developmental duties as required by section 153 of the Constitution*

(c) *together with other organs of state contribute to the progressive realisation of the fundamental rights contained in sections 24, 25, 26, 27 and 29 of the Constitution*

The Municipal Systems Act also requires that planning undertaken by a municipality must be aligned with the development plans and strategies of other affected municipalities and spheres of government. Besides the need for extensive coordination and cooperation, it is an acknowledgement that the transformation of a municipal space is not an isolated activity but requires extensive input from a multitude of role-players.

Section 26 of the Municipal Structures Act outlines the following core components to be included in an integrated development plan:

(a) *the municipal council's vision for the long term development of the municipality with **special emphasis on the municipality's most critical development and internal transformation needs***

(b) *an assessment of the existing level of development in the municipality, which must include an identification of communities which do not have access to basic municipal services*

(c) *the council's **development priorities and objectives for its elected term**, including its local economic development aims and its internal transformation needs*

(d) *the council's development strategies which must be aligned with any national or provincial sectoral plans and planning requirements binding on the municipality in terms of legislation*

(e) ***a spatial development framework** which **must include the provision of basic guidelines for a land use management system** for the municipality*

(f) *the council's operational strategies*

(g) *applicable disaster management plans*

(h) *a financial plan, which must include a budget projection for at least the next three years*

(i) *the key performance indicators and performance targets determined in terms of section 41*

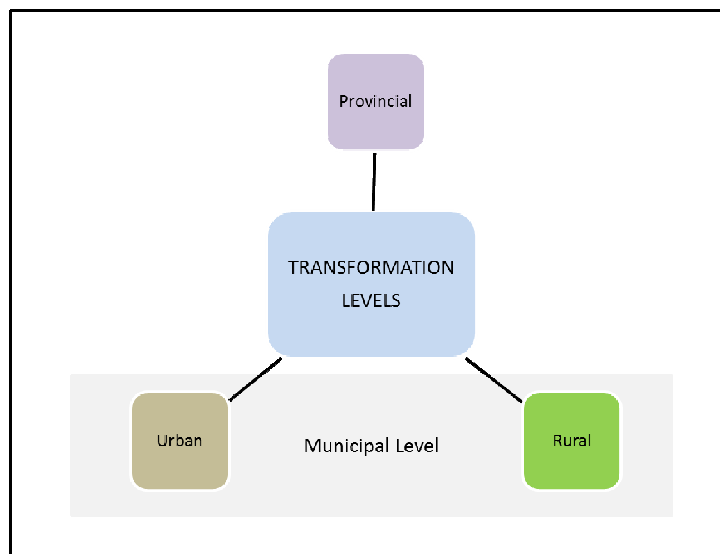
A key consideration is that the IDP is a plan which is intended to guide development within a municipal area for a *five year* period. During this period, the plan is updated annually with a new IDP being adopted at the commencement of an electoral period. The inclusion of the Spatial Development Framework is deemed to be the key instrument for informing land use

management within the IDP. While the latter plan is required to have a long term vision for the municipal area, all projects and programmes are intended for implementation and budgeted for within the 5 year time frame. As such the IDP should be viewed as little more than a short term intervention.

3.6 Tackling Transformation – The KZN PDA

Transformation and redress needs to occur at two levels namely provincial and local. The requirement of each level needs to be understood in order to ensure an appropriate response is developed. The response may need to be directly or indirectly spatial or aspatial in nature depending on the level and/or the transformation need being addressed. Moreover, macro rural challenges need to be addressed by the province while within municipalities, urban and rural transformation also needs to be considered but within the local specificities.

Figure 2: Levels for Transformation Intervention



Provincial Wide Transformation Considerations

The introduction of a single planning law for the KwaZulu-Natal Province replaced the fragmented, racially based old order legislation. While wide variations in context are found throughout the province, it opted for the adoption and implementation of uniform planning and development legislation for the province as a whole. As was noted by a provincial official:

> *"The same rules and procedures are followed by all municipalities in the province. An applicant, member of the public, organs of state and municipalities have the same rights and obligations everywhere in the Province. There was a deliberate move away from the situation under the Ordinance where applicants, members of the public, organs of state and municipalities had different rights and obligations in different municipalities. For example, in the smaller municipalities persons that objected to an application for an amendment to a land use scheme had a right of appeal to an independent tribunal but not in the bigger municipalities. The variations were confusing, unfair and unnecessary".*[37]

A key aspect for ensuring uniformity is the introduction of "wall to wall" schemes throughout the municipality. The challenges experienced with the implementation thereof are outlined in greater detail below.

When questioning the validity of this approach, a municipal official commented that the uniform approach is the correct one. However, as was noted there is a *"…need for regulations that allow for more leeway in the former disadvantaged areas."*[38]As such, the province needs to be more flexible in the preparation of regulations to manage differences between the former advantaged and disadvantaged areas. In particular, at least a different scale of fees should be considered to allow for development applications to be more affordable in the latter areas. Moreover, the rationale for the application of fees needs to be questioned such as where and why are they necessary.

Another key aspect which could be deemed as supporting transformation within the province was the municipal planning capacity building strategy undertaken at local level. As was noted by the Province;

> *"The lowest common denominator is that every municipality has access to a technical planner or a professional planner that can evaluate an application and make a recommendation on the application. The PDA was not brought into operation before every municipality in the Province had access to a technical planner or a professional planner."*

The Ingonyama Trust Land and other traditional authority land remains a thorny issue. It is questionable if planning and development legislation on its own would be sufficient to address the level of poverty and deprivation in the KwaZulu-Natal deep rural areas. The

[37] As above
[38] Atkins Nyakane Khoali

existing provisions appear to be sufficient to facilitate development at a very local level. However, the larger considerations will need to be addressed firstly in national legislation and interventions, secondly by provincial initiatives and thirdly through the preparation of credible IDPs at the local and district level. Importantly, the limitation of planning law in realising change must be acknowledged. The law cannot address the challenges of poverty. Rather, these aspects are impacted by for example, the provision of infrastructure and financial and human resources.

Local Level Transformation Considerations

A number of requirements were introduced in the legislation to support transformation at a local level. Broadly these included the provision for wall to wall schemes which supports the deracialisation of land use management, the imperative to link the scheme to the IDP and the process outlined for the submission of applications for development purposes. It must be assumed that the IDP is the primary municipal tool for affecting change and growth and development within its municipal area.

Wall to wall schemes

The KZNPDA notes that the purpose of a scheme is:

> *"to regulate land use and to promote orderly development in accordance with the municipality's integrated development plan"[39].*

Moreover, a municipality must ensure that the scheme is amended every five years to ensure alignment with its IDP. Section 7 of the KZNPDA states that:

> *"A municipality must review a scheme within six months after it has adopted an integrated development plan for its elected term as contemplated in section 25 of the Municipal Systems Act"*.

The KZNPDA also requires that the IDP takes precedence over the scheme in the case of a conflict between the two plans.

As noted by a provincial official:

[39] Parnell, Pieterse, Swilling, Wooldridge, "Democratising Local Government, The South African Experiment", UCT Press 2002

> *"The need for wall-to-wall schemes will encourage transformation. The PDA also requires that the principles of the DFA be a consideration in the assessment of an application. It is believed that this will support transformation. This will include densification, avoiding urban sprawl, etc"*[40].

In part, this presupposes that the adherence to DFA principles has resulted in spatial transformation and negates the existence of contradictory or poorly considered national policy.

Section 12 of the KZNPDA outlines the matters which must be considered when proposing the adoption, replacement or amendment of a scheme. Section 12(l) requires that:

> *"the general principles for land development as stated in section 3 of the Development Facilitation Act, 1995 (act No.67 of 1995) and other norms and standards, frameworks and policies as contemplated in section 146(2)(b) of the Constitution"*[41]

The same requirement applies for determining the merits for the following applications:

- Consent
- Subdivision and consolidation of land
- Land situated outside the area of a scheme
- An application for the phasing or cancellation of an approved layout plan
- The permanent closure of a municipal road or public place

In considering the merits of a scheme, a municipality would at least need to apply section 3(1)(a) of the DFA which states that:

> "*Policy, administrative practice and laws should provide for urban and rural land development and should facilitate the development of formal and informal, existing and new settlements"*[42]

In terms of section 4 of the KZNPDA, municipalities are required to have a single scheme for their entire area of jurisdiction by 2014. It would appear that a number of municipalities are struggling to meet this deadline and intend requesting the Province for an extension in terms of section 4(3). The Act makes no provision for the number of times a municipality

[40] Written response from Martin DeLanga, KwaZulu Natal Department of Cooperative Governance and Traditional Affairs
[41] See section 12 of the KZN PDA
[42] See section 3 of the DFA

may request an extension. It could be assumed that as long as a municipality is able to demonstrate "good cause", more than one request may be granted. Moreover, if the MEC grants an extension, there is no limit placed on the amount of time which may be given to the municipality. It therefore may be possible that some municipalities within the province will still be functioning with the current fragmented system of schemes within their areas of jurisdictions for far longer than five years post the enactment of the KZNPDA. In some areas, this may indeed not be a problem.

The research suggests that while there is an acknowledgement that a municipality requires a single scheme, there appears to be no urgency in the preparation thereof. By way of example, the Msunduzi Local Municipality currently manages three town planning schemes for the areas of Pietermaritzburg, Ashburton and Plessislaer. The municipality is in the process of extending schemes to Edenvale and other suburbs but is yet to commence the process of preparing a single scheme for the municipality as a whole. An Msunduzi official mentioned that as long as the municipality has commenced the process prior to the 5 year deadline, it should be granted an extension by the MEC. The Provincial Department also acknowledged that the impact of the scheme approach is yet to be fully realised. As was noted in the responses received:

> *"At this stage, the KZN PDA is more favoured in the urban areas…*
> *The focus of the schemes in the new dispensation is still on the urban areas…*
> *Rural areas are therefore still not given the required attention……"*[43]

The key challenge appears to be within the traditional authority areas and to some extent the so called "disadvantaged areas" where the take up of the provisions contained in the KZN PDA are slow. The Act does acknowledge the historical context of areas such as Traditional Authorities by allowing for development applications to be submitted for areas which currently fall outside of the existing schemes. In addition, "housing exemptions" have been included for the traditional authority areas.

> *"Section 38 allows for housing development within the "uMuzi" concept within a traditional setting to be exempt from an application".*[44]

Applications are required for all other developments which may take place within the tribal areas. Traditional leaders have received training on the requirements of the PDA and generally appear to be satisfied with the provisions contained in the Act.

Notwithstanding, it was noted by a provincial official that:

[43] Written response from Martin DeLanga, KwaZulu Natal Department of Cooperative Governance and Traditional Affairs
[44] As above

> *"Past practices of separate development and different laws are still being applied. The PDA is still not effectively applied in Traditional authority areas"*[45].

In addition, it would appear that the introduction of wall to wall schemes is also being hampered by old order national legislation, namely the Subdivision of Agricultural Land Act No 70 of 1970. The National Department of Agriculture is currently preventing the extension of or the introduction of schemes over land designated as "agricultural".

The responses would suggest that the implementation of the KZN PDA appears to be highlighting the transformation challenges inherent in the wide variations found within the province as a whole as well as within the municipal areas.

Aligning to the IDP

National government has been active in defining a role for local government in meeting sector requirements. As noted by Parnell et al, these include "housing plans under the Housing Act; water services plans under water legislation; environmental plans under new environmental law; and a variety of other potentially sophisticated instruments. The issue that made its way to the fore of many debates on local government planning was that of *how* to integrate the many different sectors requiring or implying local action".

As outlined in Section 26 of the MSA, the development priorities outlined in the IDP must also align to national and provincial sector priorities which may or may not have spatial implications for the municipal area. It is thus assumed then that any sector alignment will take place within the IDP. The PDA states that in determining the merits of any application and/or the preparation or amendment of a scheme, "the impact of the proposal on the national, provincial and municipal road networks, public transport, municipal services, sewage, water and electricity supply, waste management and removal, policing and security"[46] must be considered.

The difficulty with intersectoral planning is the management and coordination of the intergovernmental relations. Political structures change as do development imperatives. Administrations wax and wane with levels of capacity and the ability to prepare credible IDPs. As the Isandla Institute noted "One of the biggest challenges at local government level is the lack of skills and capacity to develop an IDP that is representative of all the developmental concerns in the municipality and that was developed through an effective process of bottom-up as well as top-down engagement amongst the different spheres of

[45] As above
[46] See section 25 of the KZN PDA

government as well as community participation”[47]. In 2005 the then DPLG found “that more than 60% of municipalities required some kind of support to develop effective IDPs with at least 28% unable to develop effective plans even with some kind of support (cited in Harrison 2008)”[48]. Given the extent to which apartheid spatial structures dominate our municipal landscapes and the difficulties experienced in preparing IDPs, it should be questioned whether as an instrument, it is sufficient to inform large scale and sustained transformation of such spaces.

The IDP is thus a central structuring element for a municipality’s scheme which in turn is the key instrument for land use management. Schemes are intended to be “stable” long term instruments. The manner in which they are anticipated in the Act, schemes are thus subject to the same level of fluidity as IDPs, short term transformation interventions for short term transformation goals.

The Provincial Department acknowledged limitations and challenges inherent in the alignment of the schemes with the municipal IDP.

> *“The IDP is a strategic planning document which should give strategic direction to a municipality just like a constitution gives strategic direction to a country’s government. Some municipalities will also require spatial policies and plans which should not form part of the IDP. For example, a municipality may need a policy on overnight accommodation and holiday resorts or a local area plan for its business district. Incorporating these policies and plans in an IDP will dilute its strategic focus. The IDP process is also inappropriate for the adoption and amendment of these policies and plans. Likewise, a land use scheme is a law which makes it an inappropriate instrument for the incorporation of policies and plans that require the inclusion of research findings and other background information. It may be wise not to try to capture all policies and plans of municipalities in legislation because of the limiting nature of legal drafting conventions, like that law consist in essence only of rights and obligations”.*

The eThekwini Municipality makes use of a package of plans for supporting “detailed planning at different stages and levels of planning”[49]. The Metro considers the IDP as being too broad for guiding the municipality’s scheme. Unlike the IDP, the latter is a site specific management tool.

> *“All development applications lodged are assessed against the Spatial Development Plans, the Local Area Plans and the Schemes. These plans and Regulations contain*

[47] Isandla Institute “The Challenges and Dilemmas of Intergovernmental and Intersectoral Coordination” http://www.halogen.org.za/documents/Input_Paper_Challenges_of_IGR.pdf
[48] Ibid
[49] Written response received from eThekwini Metropolitan municipality from Ms Lekha Allopi

far more detail and allow us to make more informed decisions. Clearly these plans align with the broad intention of the IDP…

It must be noted that the Schemes are the only legal instrument and challenges with alignment do arise – an example would be the introduction of the split zoning in the Outer West and the legal challenge arising there from…….

The IDP is a planning tool that guides Spatial Development. This package of plans is the Council's transformation instrument….

The PDA is a piece of legislation that allows for statutory processes; in other words it is a legal instrument that is used to guide transformation. These two items don't align but the PDA is a statutory tool that realises the Vision of the IDP". [50]

3.7 Tackling Transformation – Other Provincial Approaches

Northern Cape

The Northern Cape was one of the first provinces to amend its planning and development legislation. However, based on the requirements of SPLUMB, the province is in the process of redrafting its legislation.

Based on an interview with a representative from the drafting team, the proposed planning and development legislation gives legal status to the Provincial Spatial Development Framework. The Bill proposes ground rules for development by giving planning authorities the power to override the influence of the "Not in my backyard" syndrome.

While the PSDF is reviewed every five years, the link to the municipality's IDP still needs to be cemented. It would appear that the integration of the planning processes in the Northern Cape is yet to be adequately realised. As was noted in the interview

> *"It is a fundamental failing of the planning legal framework that local planning is regulated in the Municipal Systems Act and spatial planning laws. This entrenches duplication and confusion, especially as there is no scope for amending, updating the MSA"*[51].

[50] As above

[51] Interview with Stephen Berrisford, part of the Northern Cape Legislation drafting team

Berrisford questioned whether planning and development legislation is able to directly impact spatial transformation. Rather, he commented that land values are the key drivers for impacting transformation. This is "supported by the planning system through the introduction of urban edges, schemes[52]" which may be regarded as constraining the supply side. Conversely, the demand side is driven by the need for land to be released for development. As was acknowledged:

> *"This is difficult when constrained supply is driving up the cost of land. Development is more constrained when land process are high. If these matters are not addressed, planning legislation then becomes a way of propping up the elite"[53].*

Gauteng

Based on the interview with Les Oakenfall[54], the key element included in the legislation for managing transformation are the principles associated with spatial planning. He noted that historically, planning was used by the apartheid government to retain control over land use specifically through the use of zoning. The emphasis then was placed on development control and not development facilitation which is currently the practice.

He argues that "*we have gone far as we can[55]*" to facilitate change within the legislative frameworks. However, for this to be effective, it requires a change in practice. Oakenfall argues that *"the mind-set is so ingrained"*[56] and that it is difficult for practitioners to *"see beyond development control"*[57]. He suggests that there is still a problem in the education of planners with planning schools failing to produce graduates with the necessary training to address the needs of the new planning legislation.

A comment was made that transformation is slow especially given the wide variations found between the so called developed and poorly developed areas. Consequently, the planning system needs to recognise and accommodate differentiation while also allowing for simplicity.

Free State

In the Free State, transformation is being addressed in the Draft Planning and Development Bill through the inclusion of the need to prepare spatial plans at the provincial, regional,

[52] As above
[53] As above
[54] Interview with Les Oakenfall, part of the Gauteng legislation drafting team
[55] Interview with Les Oakenfall
[56] As above
[57] As above

district, local and in some instances, at sub-local level. Tools for the managing of spatial integration and restructuring such as the use of development corridors and the incremental upgrading of informal settlements have also been included in the Bill.

A member of the drafting team, Abrahams, commented that the drafters have attempted to keep the legislation simple. However, she noted that the Province has a sophisticated Geographical Information System. As a result, the Bill has included provisions for the drafting of regulations which will rely on the use of such systems in the planning process. The reason for this is to ensure that plans are data rich thereby supporting informed decision making.

Western Cape

The Western Cape legislative process has resulted in the inclusion of development principles which address issues relating to spatial justice such as:

- redressing past spatial imbalances
- the creation of liveable neighbourhoods
- specific provisions for subsidised housing
- mechanisms for the upgrading of informal areas
- improved security of tenure

Interestingly, the Western Cape Bill largely transfers the responsibility for the management of transformation onto the municipality. One of the key instruments will be the manner and the content of the bylaws drafted for supporting land use management. Municipalities may for example, include extensive provisions for the incremental or progressive realisation of tenure security. As DeVisser comments:

> *"The manner in which the Bill is structured in the Western Cape requires that municipalities will need to address aspects relating to innovation in the way in which the by-laws are drafted. The bylaws will need to be detailed and will need to include exceptions for the upgrading of informal settlements".*[58]

3.8 Summary remarks

The comparison of planning legislation across different provinces demonstrates wide variations which tend to reflect the key imperatives within the province concerned.

[58] Interview with Jalap deviser, part of the Western Cape drafting team

With regard to the potential to transform spaces, planning legislation is merely a tool and cannot, in itself bring about transformation. It can support the process by for example, creating the conditions which are fair and transparent, support a range of tenure and settlement types and removes unnecessary restrictions. However, linking the scheme to the IDP is problematic, as they are very different types of plans for managing and promoting development.

Given that KZN is still in the process of implementing the Act it is yet too early to assess the actual impact on transformation. Notwithstanding, it would appear that there is a need to include regulations to allow greater flexibility in previously disadvantaged areas.

4. UNPACKING THE DECISION MAKING PROCESS

4.1 The timeframe requirements

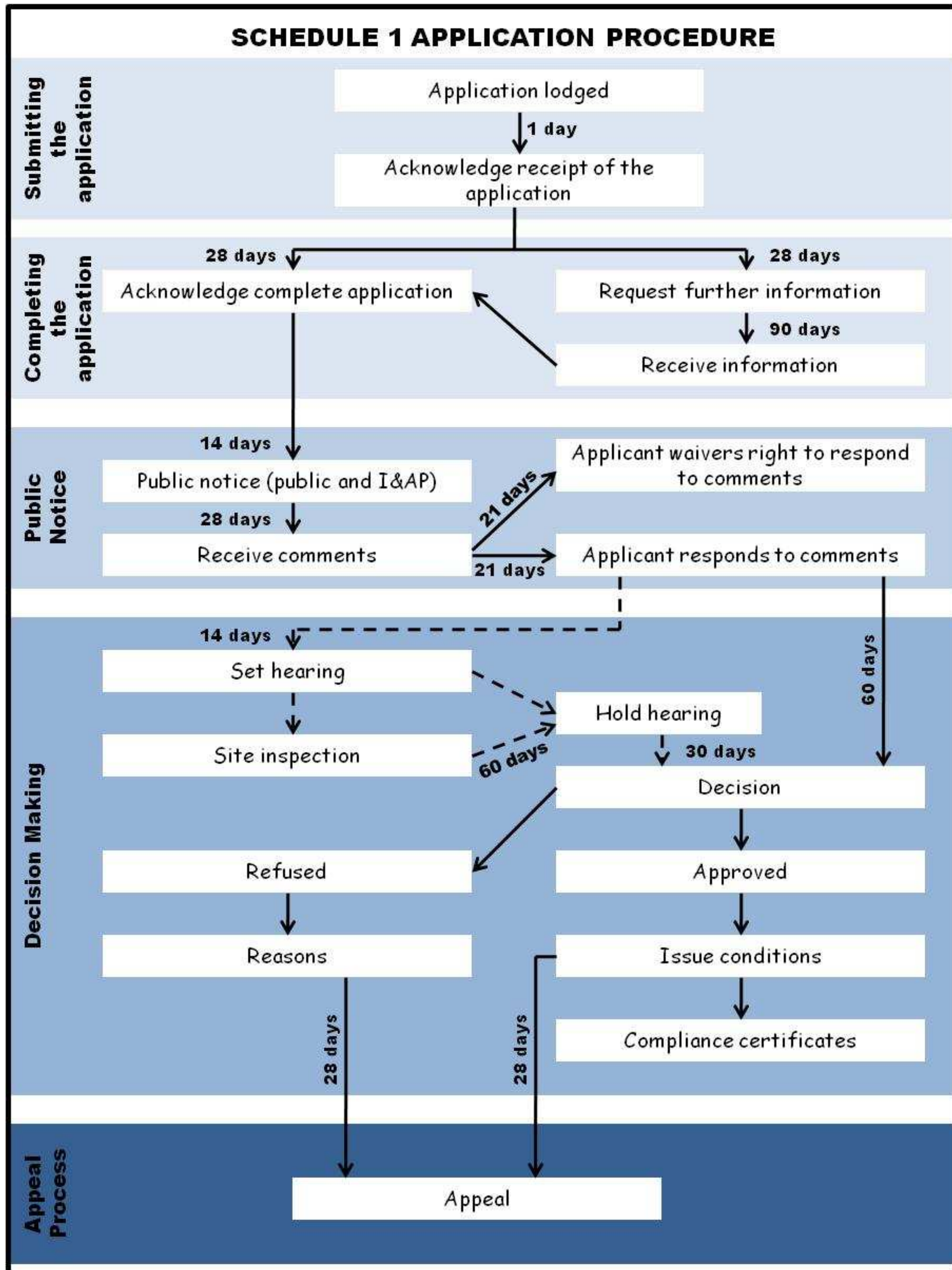
The KZN PDA provides a very clear timeframe for the management of planning and development applications. This approach was adopted by the province to ensure that applications were dealt with promptly and that no unnecessary delays were experienced in the development process.

The broad application procedure is separated into four phases with a fifth for the management of the appeal process. The phases include the following:

- Submitting the application
- Completing the application
- Public notice period
- Decision making

An application made which is uncontested and requires no additional information to be provided by the applicant should be completed within a 5 month timeframe or within an estimated 152 days. An application which does not require additional information from the applicant but includes a site inspection and hearing should be processed within 226 days or approximately 7.5 months. The worst case scenario, that is additional information required, including a hearing and site visit, should be completed within 316 days or 10.5 months. The diagram below provides the outline of the broad application procedure.

Figure 3: Broad application procedure



As noted in the SACN report on Legislative Reform in KZN, the introduction of the timeframe has been useful. However, this advantage has been "offset by the lack of time limits for

sector inputs into the application preparation process which has the potential to create delays in the processing of applications and the development in the province".[59]

Generally, the Msunduzi Local Municipality have found the management of the timeframes as outlined in the legislation manageable. To date, this municipality has approved 27 applications in terms of the KZNPDA with two having been submitted for appeal.

The eThekwini Metropolitan Municipality has implemented an innovative Pre-scrutiny Process "in order to flag issues before the formal submission".[60] This required the Municipality to reorganise itself to manage the inflow of applications. This included making sufficient staff available at public counters and the reengineering of internal processes. Based on the municipality's written response, the municipality put in place the following:

- A tailor-made electronic system available to staff on their "L" drives which facilitates staff manage the application procedures
- The colour coding of the process which is linked to posts and functions
- Pro-forma forms and letters have been prepared and are available to all staff
- Staff received extensive training managed internally in addition to the training received from KZN CoGTA

It would appear that the approach adopted by eThekwini has allowed the municipality to manage not only the application process but more importantly to adhere to the timeframes as specified in the Act.

Both Msunduzi and eThekwini note that it is the responsibility of the applicant to ensure that all the necessary comments are received prior to the submission of an application. In the latter case, the Pre-scrutiny has assisted in identifying the type of comments necessary based on the extent and type of application. This has facilitated the municipality to adhere to the 30 day timeframe.

eThekwini noted that *"external stakeholders such as SANRAL, DOT, DAEA, AMAFA, ESKOM and the National Department of Fisheries and Forests, are the most difficult to extract comments from".*[61]The Provincial Department of Transport appears to be problematic in relation to obtaining comments in that the Department has made a single person available for providing a response to applications. As commented by eThekwini officials, *"to get written comment is impossible".*

The experience with external departments points to the challenge of managing the intergovernmental relations in relation to planning and development. These aspects do require careful consideration in any revision of the Act.

[59] SACN, "Provincial Land Use Legislative Reform KwaZulu-Natal: Status Report" September 2011. Pg.53
[60] Written submission from eThekwini Metropolitan Municipality
[61] As above

4.2 Responsibility for Decision Making

'Municipal planning' is included in Schedule 4 Part B of the Constitution (1996) which lists matters over which national Parliament and the provincial Legislature have concurrent legislative rights. However, under section 156, municipalities have executive authority and the right to administer the local government matters listed in Part B of both Schedules 4 and 5. In this regard, municipalities may make and administer by-laws for the effective administration of the matters allocated to them. What constitutes municipal planning has been actively debated for years. However, the Constitutional Court, City of Johannesburg DFA judgement has now provided some clarity. In paragraph 59, the judgement clearly stated that:

[59] "The legislative authority in respect of matters listed in Part B of Schedule 4 vests in the national and provincial spheres concurrently, while the legislative authority over matters listed in Part B of Schedule 5 vests in the provincial sphere exclusively. But the national and provincial spheres cannot, by legislation, give themselves the power to exercise executive municipal powers or the right to administer municipal affairs. The mandate of these two spheres is ordinarily limited to regulating the exercise of executive municipal powers and the administration of municipal affairs by municipalities".

Unlike the Natal Ordinance, the KZNPDA ensures that all "the procedural aspects of planning and development (are) fully and inclusively within the municipal sphere of governance"[62] and as such is in line with the Constitutional Court judgement.

The KZNPDA requires that applications are submitted to either the Planning Portfolio or the Executive Committee for recommendation to the full Council. The municipality is required to ensure that the decision taken on a planning application is clearly recorded in the Council minutes. While a registered planner is required to provide a written report on an application submitted to Council, the decision making remains squarely the responsibility of the Council and as such places all planning decisions within the province within the political realm. This is reflected in the following statement:

> *"Municipal councillors in KwaZulu-Natal do regard development as an important function and are becoming accustomed to making decisions on development. In the past provincial officials made many decisions on development by delegated authority from the MEC"[63].*

[62] Ibid, Pg.33
[63] Gert Roos, written submission

Councillors in both the Msunduzi Local Municipality and the eThekwini Metropolitan Municipality received training in relation to the implementation and decision making linked to the KZNPDA. As was noted by eThekwini officials:

> *"Councillors were firstly trained internally by the Department. Presentation packs containing a hard copy as well as an electronic copy of the PDA were presented. A slide presentation was included detailing and cautioning Councillors as to the important timeframes etc. Further training was undertaken by COGTA".*[64]

Atkins from the Msunduzi Municipality commented:

> "*The training has helped make better decisions. Councillors need to know and understand the implications of their decisions"*.[65]

Notwithstanding that an applicant or an objector may lodge an appeal to the KwaZulu-Natal Planning and Development Appeal Tribunal, it remains possible that with the current approach, ill-considered decisions could be made. As was noted by eThekwini officials:

> "*Officials guide the Planning Committee in arriving at informed decisions. However, Councillors do make political decisions that impact on the Scheme and the Package of Plans".*[66]

This sentiment was partially reinforced in the following statement:

> *"Development can be very technical. Many planners who hold a Masters degree in planning struggle to come to terms with complex applications. Very few councillors have any real knowledge of development. Councillors do rely heavily on the technical input from officials. Surprisingly few municipalities in KwaZulu-Natal have delegated the power to decide applications to development to officials. Generally, councillors and officials have a good relationship and the technical planner or professional planner's recommendation is adopted without any amendments. On the down side, the extra step delays decision making and there is potential for conflict, especially if a developer has canvassed councillors in advance on an application".*[67]

A measure put in place by the Province to try to circumvent this problem has been the establishment of a monitoring system. In 2010, the MEC published a gazette which required the following proposals and applications based on a classification of municipalities to be

[64] Written submission from eThekwini Metropolitan Municipality, Ms Lekha Allopi
[65] Atkins Khoali – interview and written submission from the Msunduzi Local Municipality
[66] Written submission from eThekwini Metropolitan Municipality, Ms Lekha Allopi
[67] Written submission, Gert Roos

submitted to the Deputy Manager: Development Administration in KZN COGTA for review and monitoring:

- Adoption of the scheme
- Replacement of the scheme
- Scheme amendments
- Consent in terms of the scheme
- Subdivision and consolidation of land
- Development outside the scheme
- The phasing of approved layouts
- The cancellation of approved layouts
- Alteration and suspension and deletion or restrictive conditions and
- The closure of public roads and public spaces[68]

The categorisation of municipalities linked to the monitoring system established is based on the Province's understanding of the levels of municipal capacity. However, the assessment of capacity is based on the administrative capacity of the municipality to process applications and not on the ability to make or take decisions. It is suggested that capacity is required for both aspects and not merely one if appropriate and sustainable development and transformation is to be achieved within the Province – good planning capacity can be offset by poor decision making at the political level.

Certainly, levels of municipal administrative capacity remain a challenge within the province. As was found in a report prepared for the KZN Planning Commission in 2006, limited planning capacity was found outside of the metro with many of the smaller municipalities making extensive use of external service providers.[69] Since the introduction of the KZNPDA, the province has undertaken an aggressive capacity building programme.

In order to assist municipalities and other interested parties, the PDA Municipal Forum was established by the KZN CoGTA. This was set up to provide new information related to the PDA, increase municipal understanding of the PDA, assist with training and with assessing the progress made by municipalities in implementing the PDA. A key aspect of the forum was to allow for a sharing of experiences, particularly in terms of problems that arose in implementation. Meetings of the forum enable better practices to be identified and procedural problems to be unblocked, as well as the need for the development of guidelines and explanations of procedures to be identified.

Examples of issues addressed in the forum include good practices for scheme development and schemes, examples of tariffs, a discussion of circulation of a PDA application and who

[68] Ibid, Pg.34

[69] See Wendy Ovens and Associates "An Assessment of Municipal Development Planning Capacity" Prepared for the Provincial Planning Commission, October 2006

should be consulted, the experiences of Ilembe, Hibiscus Coast, Kwadukuza, uMkhanyakude and uMngeni municipalities in implementing the PDA, a presentation of the PDA transitional measures, considerations of applications by other organs of state, and discussion on the liability of a municipality for developer acting on wrong scheme information.

It is clear that the forum is an invaluable mechanism for capacity building of municipalities with regard to the PDA although much work is still to be done. As was noted by eThekwini officials:

> *"The forum has been a learning platform for all municipalities. (It) has helped to an extent however, while there are ideas shared and solutions found, there are no directives that come out to assist municipalities. Communication is key, especially when we are all learning and this has been a gap. In the absence of this learning, planners, ratepayers and Council are left no wiser but more frustrated"[70].*

In addition, the Province has attempted to pre-empt the shortage in capacity by introducing the concept of the shared services centres. This approach was implemented in KZN in order to overcome serious capacity gaps in the planning function in municipalities and to ensure that municipalities would have sufficient capacity to perform the new functions devolved to them in terms of the Planning and Development Act. Operating effectively, a shared services approach should be more sustainable by being more cost effective, delivering services more efficiently and effectively, improving competitiveness, increasing compliance, and enhancing performance in key areas of operation and delivery. Underpinning such an approach is the notion of cooperative governance, coordinated planning and implementation and optimal use of scarce capacity.

A Shared Services approach means that a function currently effectively performed by one municipality, is shared across one or more other municipalities. It can be adopted for a number of different municipal functions, and can involve sharing personnel, resources, equipment etc. such as GIS, IT facilities etc. Not only can shared services centres maximise economies of scale, they can also facilitate the integration of planning-related activities, such as the IDP, SDF, environmental plans, LED etc., and can provide a threshold of skills and capacity which can assist in mentoring new graduates.

Between 2007 and 2009 the concept of District Wide Development Planning Shared Services (DPSS) was implemented in 10 district municipalities in KZN. This involved investigating planning capacity requirements, identifying appropriate institutional options, finalizing budgetary requirements, and entering into formal agreements to participate in the DPSS in terms of a specific business plan prepared for each district family of municipalities.

[70] Lekha Allopi, Written submission

In commenting on shared service centres, the following statement was made:

> *"A shared human resource works well in a situation where a full time dedicated human recourse is not required. Municipalities can then pool their financial resources to obtain the services of a technical planner or a professional planner that can serve them collectively. However, there is no point in attempting to burden a technical planner or a professional planner that is permanently employed by a municipality and struggling to cope with the existing workload with taking responsibility for another municipality"*[71].

4.3 Aligning the KZNPDA Decision Making and SPLUMB

Chapter 6 of the National Spatial Planning and Land Use Management Bill makes provision for the establishment of municipal tribunals. An option is included for the establishment of a single tribunal incorporating more than one municipal area. However, the composition of the tribunal is a departure from the current approach adopted in the KZNPDA. Section 36 of the SPLUMB requires that the municipal tribunal must consist of the following:

> *"(1) A Municipal Planning Tribunal must consist of—*
>
> *(a) officials in the full-time service of the municipality; and*
>
> *(b) persons appointed by the Municipal Council who are not municipal officials and who have knowledge and experience of spatial planning, land use management and land development or the law related thereto.*
>
> *(2)* ***Municipal councillors may not be appointed as members of a Municipal Planning Tribunal****".*

As such, the SPLUMB has adopted an approach which attempts to depoliticise planning and decision-making around development. The Council is still responsible for the appointment of the Chair and Deputy Chair of the tribunal and may determine the number of representatives. In so doing, it is possible that the Council will retain vicarious control over the outcomes of the tribunal decision making processes.

It would appear that the Provincial Department in KwaZulu-Natal are not convinced that the approach adopted in SPLUMB is the correct one. This is reflected in the following statement:

> *"There is quite a body of case law on what may and may not be delegated by the person or body responsible for the administration of a an organ of state. Mundane decisions like reading a water meter are obviously delegated.*

[71] Gert Roos, written submission

> *Technical decisions are often delegated. Policy decisions and other major decisions should not be delegated. The normal rules of delegations will apply. For example, a body can exercise the power itself, either once-off or permanently and the body remains accountable.*
>
> *SPLUMB goes against normal conventions because it devolves the power to decide development directly to officials (decentralisation instead of delegation). The Constitutionality of SPLUMB is questionable because the Constitution confers the power to decide applications for development on municipal councils. Municipalities are held accountable for decisions that they may not make"[72].*

Not only is the constitutionality of the SPLUMB decision making approach questioned in KZN, but there is growing concern that there will also be political resistance to amending the existing procedures. eThekwini officials commented that:

> *"It is going to be a bone of contention"[73].*

Once the National Spatial Planning and Land Use Management Act is comes into effect, it will however be necessary to amend the KZNPDA. It will be interesting to monitor if there is any political resistance to the change and how that is then reflected in the composition of the municipal tribunals established.

4.4 Decision making approaches adopted by other provinces

Northern Cape

Based on the interview with Berrisford, the decision making approach as outlined in the SPLUMB has been incorporated into the Northern Cape Bill. However, the Provincial Bill allows for an appeal to a provincial appeal body, on the condition that "the appeal body can only make a recommendation back to the municipality"[74]. It should be noted that the province may not take a decision in the place of the municipality's original decision.

Berrisford noted that the decision making process will still need to be tested in implementation.

> "*The NC has a very low level of applications for land use change, because of the low levels of economic activity. The best places to test the new approach are*

[72] As above – It should be noted that comment is based on the official's perceptions of the provision of the proposed Act.
[73] Allopi, written response for the eThekwini Metropolitan Municipality
[74] Interview with Berrisford

> *probably around the mining areas where there is a confluence of economic growth, in-migration from other areas and very weak planning and local government capacity".*[75]

Free State

The Free State draft planning and development legislation largely conforms to the requirements of SPLUMB with municipalities being the "first point of decision making in line with the definition of "municipal planning"[76].

Given that there is very limited capacity for planning at the municipal level, the proposed Bill has included some innovation in this regard. The legislation allows for

> *"an independent land use planning tribunal made up of municipal officials and experts, established by the MEC and supported by provincial administration".*

Appeals will be managed through an independent appeal body (in terms of Section 34 of Constitution) which will also be inter-municipal. Core functions such as the preparation and approval of schemes will be done by municipalities but will require comment from the MEC prior to finalisation.

Western Cape

While the Western Cape has largely conformed with the requirements as outlined in SPLUMB, it has included a provision that development applications which are in the provincial interest, must be submitted to the MEC for comment prior to a decision being taken. This appears to be the only province in which this approach has been adopted.

4.5 Summary Comments

The KwaZulu-Natal PDA has implemented an application procedure which is structured by timeframes. The motivation for this approach is to ensure that planning applications are managed effectively and efficiently which is viewed as being necessary for supporting development within the province.

Largely the approach appears to have been successful with any teething problems addressed. Much of this can be attributed to the fact that all comments on applications are

[75] As above
[76] Interview with Gemey Abrahams

obtained prior to submission. The approach adopted by eThekwini in terms of the establishment of the Pre-scrutiny process should be viewed as an example of "better practice" for possible implementation in other municipalities within the province and elsewhere.

Research is yet to unpack adequately the length of time it takes an applicant to get an application "submission" ready. It is already evident that obtaining comments from National Departments, State Owned Enterprises and some provincial departments such the Department of Transport is challenging. As was noted by John Lang, a SAPOA representative:

> *"One submission and zoning application with Mtubatuba Municipality, lodged in March 2011 remains unresolved while awaiting approval from the KZN Department of Transport that has now been outstanding for 15 months"*[77]

If the total "value chain" is examined which includes both the preparation and the processing, it may be possible that the application procedures are not as efficient as they appear.

The KZNPDA requires the Council to take the decision on planning applications with the appeal process being managed by the Province. This appears to be in contradiction with the requirements of SPLUMB and the Constitutional Court judgement with respect to the definition of municipal planning. However, the KZN argument that it is not possible to delegate a constitutional function of local government by way of legislation to a non-elected body, in this case municipal tribunal as envisaged by SPLUMB, may have some merit. Certainly, it would be useful to obtain senior legal opinion in this regard. Notwithstanding the outcome, the current decision making system in KZN is now settling and is likely to meet with some resistance should it change.

[77] Written submission, John Lang

5 UNDERSTANDING THE IMPACT ON PRIVATE AND PUBLIC SECTOR DEVELOPMENT

The recent SACN report on the Provincial Land Use Legislative Reform in KZN notes that the larger municipalities such as eThekwini and Msunduzi have taken some time to adjust to the changes required to the planning and development process as outlined in the PDA[78]. It has required the municipalities to re-orientate their institutional structures including their systems and procedures to meet those of the Act. The report found that larger organisations are generally slow to react and to facilitate the organisational amendment which includes convincing the political structures that the adjustments are necessary.

Conversely, smaller municipalities with similar structures such as uMhlathuze Municipality have been able to respond to the PDA requirements more effectively and indeed are becoming examples of better practice. The report notes that this municipality "is regarded as having competent institutional capacity and expertise which is considered to be a fundamental aspect of the ability of the municipalities to engage with the PDA".[79]

The private sector is now also making applications to the municipalities in terms of the PDA including those that previously made use of the DFA. The research found a planning firm which had submitted more than 25 applications to a range of municipalities within the province.[80]

John Lang who has submitted 7 applications in terms of the KZNPDA has had both positive and negative experiences in relation to the procedures and the requirements of the Act. Applications have been made to both urban (eThekwini) and rural (Mtubatuba) type municipalities. While he has managed with three low income rural housing projects outside of the two large municipalities within the Province, his negative experiences as outlined in more detail below do demonstrate some of the challenges:

> *"One with Ethekwini, being a simple rezoning/road closure to meet the conditions of a subdivision approval in terms of the extended powers ordinance, lodged in July 2011 remains unresolved with few statutory obligations of the municipality correctly observed.*
>
> *One subdivision and zoning application with Mtubatuba Municipality, lodged in March 2011 remains unresolved while awaiting approval from KZN Department of Transport that has now been outstanding for 15 months.*

[78] See SACN, "Provincial Land Use Legislative Reform KwaZulu-Natal: Status Report" September 2011. Pg.48
[79] Ibid See Pg.48
[80] Ibid See Pg.49

> *One PDA objection and appeal - appeal lodged with KZNCOGTA in March 2011 and remains unattended to because of there being no appeals tribunal appointed and with none of the statutory obligations vis-a-vis appeals processes and procedures having been observed ".*[81]

Lang suggests that the support structures implemented for the management of the DFA tribunal were significantly more than that for the implementation of the KZNPDA. As he noted:

> *"While KZNCOGTA allocated substantial resources to the DFA process and operation of the Tribunal in KZN, the same is lacking within all municipalities, almost without exception, regarding the implementation of the KZN PDA".*[82]

Lang further comments that most municipalities, especially those outside of the major urban areas, lack resources and "appropriately qualified and experienced personnel"[83]. He also notes:

> *"There is also significant political interference and manipulation in planning and development decisions"*[84]*.*

This comment was to some extent, also supported by the submission made by the eThekwini Municipality:

> *"Officials guide the Planning Committee in arriving at informed decisions. However, Councillors do make political decisions that impact on the Scheme and the Package of Plans"*[85]*.*

Municipalities are required to publish in the provincial gazette that they have accepted the delegation authority to process applications which have been submitted in terms of the Ordinance and or by another legislative route. A number of municipalities are yet to complete this process making the processing of some of their applications "illegal".

Notwithstanding the challenges experienced within the province, the absorption of the PDA into every day practice is starting to happen both within the public and private sector.

[81] Written submission from John Lang, a representative from the private sector
[82] As above
[83] As above
[84] As above
[85] Allopi, written submission

6 CONCLUDING COMMENTS AND LESSONS LEARNT

In this project the KZN PDA experience has been used as a means by which to examine the implications and the lessons to be learnt from the introduction of provincial planning and development legislation, particularly with regard to its effectiveness in promoting and achieving spatial transformation and equitable urban spaces. Available documentation has been reviewed to develop an assessment framework to guide the development of key questions to be asked of different affected groups during the research phase of the project. Thereafter all responses were analysed and incorporated into a consolidated report.

The KZN PDA represented a major milestone in the devolution of responsibility for planning and development to local government. By bringing planning and development closer to local government, and more directly linked to municipality's strategic and spatial planning, it was hoped that the goals of transforming municipal spaces, and speeding up planning processes would be accomplished. The introduction of the KZN PDA was accompanied with significant capacity building support from province to municipalities in order to address major capacity shortfalls in many municipalities which could well compromise the implementation of the PDA. This report has outlined the process followed by KZN in order to implement the PDA, including the rationalisation of planning laws and capacity interventions.

A comparison has been made between the new planning and development legislation in KZN, with that in other provinces. It is clear that very different approaches are possible, and have been used. This includes the approach adopted for the management of transformation and decision making processes.

The following key research findings and areas of key learning have emerged from the implementation of the KZN PDA

6.1 Legislation Development and Process

Timing and the Policy Framework for guiding the preparation of the Act

The KZNPDA was introduced prior to the finalisation of National legislation and guidelines with respect to the content, structure and requirements for provincial legislation. While there is now a process for supporting provinces, this was not the case during the preparation of the KZNPDA. Key old order National legislation needed to have been reviewed in support of the provincial legislative processes. Notwithstanding the framework provided in the 2001 White Paper on Spatial Development and Land Use Management, the

KZNPDA was largely drafted within a national policy vacuum in relation to planning and development legislation.

The implications of the mismatch are now significant for the Province. As was noted in the eThekwini submission:

> *"PDA jumped the National Legislation and there are now mismatches and alignment issues. This is hugely frustrating. It has been decided that rather than amend the PDA, it be re-written".*[86]

The Metro also voiced its frustration in relation to the approach adopted to introduce "new" legislation as opposed to merely retrofitting the provincial ordinance:

> *"While in the Province of Kwa Zulu-Natal, the Town Planning Ordinace, No 27 of 1949 (as amended) held the Province in good stead, that piece of legislation found itself to be out of sync with the Constitution, 1996. That piece of legislation until today, if amended could have been used as a foundation for planning today and could have held Local Government in a far safer planning environment that it is in today".*

When examining the contents of other provincial legislation, SPLUMB and the KZNPDA, it is apparent that as a country, we are still in the development phase of our thinking in relation to planning and development legislation. As such, approaches vary, content varies, decision making structures are different including the perceived roles and responsibilities for provincial and local government based on differing interpretations or understanding of the DFA judgement. Notwithstanding, there is no doubt that huge strides have been made on the conceptualising of provincial planning legislation especially within the last two years. This has partially been stimulated by the Constitutional Court and partially by the pending imperatives of SPLUMB.

KEY LESSON

The Province must have clear objectives and a coherent framework for preparing and structuring the Planning and Development Act

Before deciding to introduce provincial legislation, the Province should be cognisant of the following:

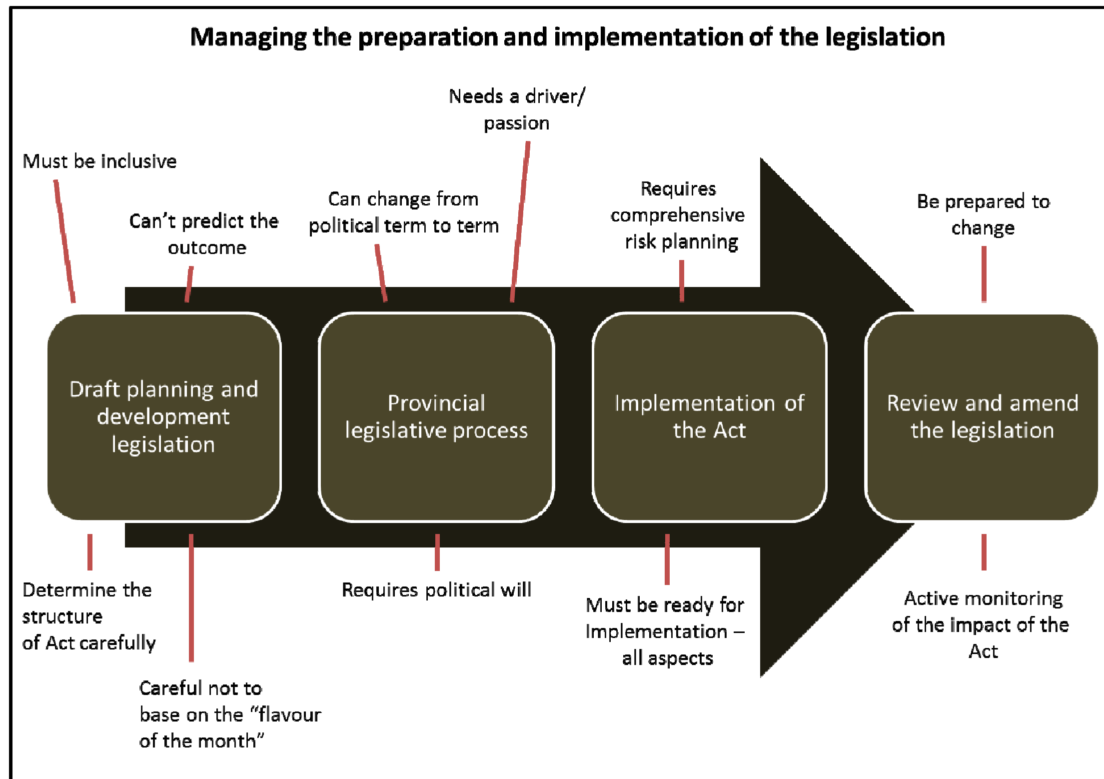
1. Why it wants to introduce provincial planning legislation
2. When is the appropriate time to introduce the Act and why
3. What are the current planning and development challenges which need to be addressed in the provincial legislation
4. Can existing legislation be modified to address the challenges or is new legislation required
5. What are the implications of introducing planning legislation in areas not yet subjected to and or have not adhered to existing planning frameworks
6. What are the implications of developing planning legislation in a fairly fluid policy environment?

[86] Allopi, written response for the eThekwini Metropolitan Municipality (This may not be entirely correct but it does indicate the perceptions in relation to the need for amending or redrafting the existing KZNPDA)

Introducing the PDA

The KZN experience adequately demonstrates that preparing provincial legislation is a slow and complicated process. There are many influencing factors. This is outlined in some detail in the diagram below.

Figure 4: Managing the preparation and implementation of the legislation



The process of drafting planning and development legislation needs to be inclusive. It is important to be careful to take a longer term view into account, and not to base the legislation on the "flavour of the month" at the time. It is also important to remember that it is not possible to predict the outcome of this process.

Key is to have someone who drives the process and is committed to this, and passionate about it. The provincial legislative process can change from political term to political term, and needs political will.

At the implementation stage it is important that all aspects of implementation are ready, including an appeals board. Implementation requires comprehensive risk planning.

KEY LESSON

The legislative process is long and complicated. It requires political will and motivation to ensure the legislation is put in place.

The process requires a strong and credible drafting team which is able to consult and engage a range of stakeholders.

Once the legislation is in place, it is important that it is seen as something that can change and be adapted to circumstances as they arise. It should not be regarded as something that is cast in stone, but more of a living document, changing over time. To do this, active monitoring of the impact of the Act, and engagement with practitioners on a regular basis is very important.

Despite initial challenges, KZN has succeeded in developing and implementing legislation from which the province is learning. Ironing out the challenges will take time, and should be expected in other provinces as they implement their legislation.

The fact that KZN has developed a new Bill does not mean that the 2008 PDA will be superseded very soon. There is no guarantee that the Bill will be passed by the province, or at least in the near future, and as a result we are likely to live the KZNPDA for some time to come[87].

Variations between Provinces

An examination of the KZNPDA and those prepared by the Western Cape and Gauteng demonstrated wide variations in approach. This was not only in structure and content but more importantly, the management of decision making processes. It is anticipated that once enacted, the SPLUMA will provide the necessary guidance on key aspects. This may require a revision of all the existing Provincial Planning and Development Bills and the KZNPDA.

While allowing for the provincial specificities to be accommodated in the legislation, it is also imperative that core

KEY LESSON

Not only did the KZNPDA omit a special consent application process but it elected to outline each application process in a separate chapter. As a result, the legislation is dense, repetitive and clumsy. More recent drafts of other provincial planning and development legislation have elected to manage the planning application process in a single chapter. This appears to be more expedient and as such this approach should be encouraged.

Managing Applications

KZN content challenges

A number of challenges relating to the content of the PDA in KZN were noted. The fact that the KZN PDA has not repealed all old order legislation, and that some planning processes require different pieces of legislation means that the process is still fragmented. For example, a planning official in eThekwini noted the following:

[87] This is based on a comment was also made by one the Provincial officials.

> *"It was great to have one process for all applications. But the Planning Ordinance, 1949 still exists for all Special Consent Uses. It would be great to have also collapsed this section of the Ordinance into the PDA. It is hugely frustrating and clumsy to use two pieces of planning legislation. Planners, practitioners and the public are hugely frustrated by the way planning is being administered in the Province."*

Another challenge relating to implementation includes the management of subdivision applications. eThekwini has voiced a concern about the need for unnecessary aspects being included in the application process.

> *"The implementation had little thought attached to it. Subdivisions applications required to be advertised! For the first time in the Province, such applications had to be advertised- with costs and time (implications). Adverts required locality plans to be included at huge costs to applicants".*

Challenges around enforcement were pointed out:

> *"Enforcement was not thought through completely. Notices are ambiguous and unnecessary; too many opportunities for the wrong reasons."*

A major problem with implementation which has led to delays has been the fact that Appeals Tribunals are only now coming into effect, resulting in a two year backlog for the Province.

KEY LESSON

Careful consideration needs to be given to the implications of introducing planning and development legislation that is universally applicable across the province.

A scale of fees should be considered especially for previously disadvantaged areas and traditional authorities areas.

More attention needs to be given to the implementation of the Act and creating awareness especially within those areas with limited or no history of applying planning legislation.

Staggering implementation and the progressive realisation of the provision contained in the Act should be considered.

The KZN PDA and the implications for Traditional Authority Areas and other Previously Disadvantaged Areas

The KZNPDA is applicable for all areas within the KwaZulu-Natal Province including all traditional authority areas. Most of such areas are managed by the Ingonyama Trust. However, there are some portions of the isiZulu traditional authorities and the Umzimkhulu area which fall outside of the Trust areas. Generally, it would appear that submitting planning applications for areas which fall under Ingonyama Trust are easier to manage as the Trust facilitates the negotiations between the developer and traditional authority.

Within the current legislative framework, traditional authorities need to be included in the municipality's "wall to wall" scheme.

> *"Wall to wall Schemes remains a planning fallacy due to existing institutional issues. In KZN, land outside urban areas is largely under the ownership of the Tribal Authority. Schemes in these areas have largely been unheard of in the past; and as at today, the inference of the Scheme in these areas remains an issue. Wall to wall schemes will become a reality when these issues are resolved and there is complete buy-in into the value of planning. That is the key to the matter"*[88].

The fees applicable to development proposals are applied universally across the province and as such no compensation is made for previously disadvantaged communities. Planning applications are simply not lodged in some areas due to the cost and the complexity of the process.

> *"The KZN PDA, on the other hand, prescribes one process for the entire Province, but without considering the implications of the same. The development process contained in the PDA is a highly specialised process and an expensive process. Issues of land ownership, cadastral information, details of surrounding properties; make the lodging of a planning application in rural areas difficult. Furthermore, this is compounded by the cost of adverts in the local press. Municipalities have been asking for a relaxation on these requirements so that applications may be considered against the high order plans".*[89]

Managing Intergovernmental Relations

Managing the comment process from other spheres of government

The management of intergovernmental relations needs careful attention. This includes ensuring that all departments have sufficient resources to manage the requirements of the legislation. The KZN case of one person in the Department of Transport providing comments on development applications results in significant backlogs and undermines transformation.

[88] Written submission received from eThekwini dated 24 January 2013
[89] IBID

The continued existence and application of the Subdivision of Agricultural Land Act 70 of 1970 have created a number of challenges in the implementation of the KZNPDA. For example, the National Department of Agriculture is resisting the introduction of "wall to wall" schemes within municipal areas claiming that the municipality has no authority to determine land use practice on land currently deemed agriculture.

As this is a matter that impacts all provinces, it should be addressed through intergovernmental forums with the support of the National Department of Co-operative Governance and the National Department of Rural Development and Land Reform.

KEY LESSON

IGR processes need to be established for addressing inhibiting old order national legislation such as the Subdivision of the Agricultural Act 70 of 70.

Managing the decentralisation of the planning function

The decentralisation of the function from province to 51 municipalities has been extremely challenging, with implementation being slow. Despite efforts at provincial level, and within some municipalities, there is still a need to build capacity which requires time and resources. Province was proactive in training municipal officials, councillors, establishing forums, drafting manuals, wall charts and leaflets; however, this was still not sufficient and there are several outstanding challenges.

It is important to have the fundamentals in place. For example, the appeals body is yet to be established and functioning, hence no appeals can be heard. This is a significant flaw in the implementation process.

KEY LESSON

A comprehensive strategy is required for the roll out of the planning and development Act. While more resources could have been made available, the KZN Province took a number of initiatives to support the development of capacity at the local level.

However, the delay in the establishment of the Appeals Board is concerning as this undermines the very intentions of the Act which included the efficient and effective management planning applications.

Planning and Development Legislation and Transformation

The report notes that transformation needs to occur at a number of levels which includes at least the following:

- Provincial
    - spatial and a spatial
    - management of the interrelationship between the urban and rural areas
- Rural areas
    - Service and development backlogs
    - limited history of formal land use planning
    - tenure rights and security
- Urban areas
    - city form and function
    - creation of inclusive urban spaces
    - rapid release of land for development purposes
    - etc.

Each level requires different interventions, considerations and strategic approaches. A single planning and development Act can merely lay the foundation for other processes for supporting and promoting transformation. The legislation is a tool which may be used in the implementation of for example, spatial development frameworks and land use management plans.

Aspects for supporting transformation have been included in all provincial legislation examined as part of this study. While there are some similarities, each province appears to have adopted province specific approaches. For example, the Northern Cape has included provisions for supporting the implementation of the Provincial Spatial Development Framework; the Western Cape has emphasized the roles and responsibilities of local and provincial government; the latter province and the Free State have included provision for the incremental upgrading of settlements.

The KZNPDA has included a provision for the introduction of a single scheme within a municipality, ensuring alignment between the IDP and the scheme, multiple processes but within a single application and strict timeframes for the management of applications. While the intention of the provisions may have been worthy, a number of challenges have been experienced in implementation. For example, the difficulty in aligning the municipality's scheme with the IDP, the challenge in the introduction of a single scheme especially in the traditional authority areas and over agricultural land and the poor management of the intergovernmental relations aspects relating to the processing of applications, more specifically, obtaining sector department comments. The scale of the plans is also different making alignment difficult. As was noted in the eThekwini submission:

> *"Clearly, there must be alignment with the IDP. The principles of the IDP must be promoted. However, at the level of Schemes issues such as infrastructure provision, environmental and traffic issues become huge show stoppers for development. These are not issues that can be addressed at the level of the IDP"*[90].

Notwithstanding the above, a deeper understanding and or appreciation of transformation timeframes are necessary. The KZNPDA has only been in operation for approximately 3 years. It could be argued that it is yet too early to assess the impact of the Act on transformation. The expectation that the KZNPDA would be the panacea for resolving the challenges with planning and development within the province is unrealistic. As is already evident, the transformation of the apartheid city is a complex, slow process and is influenced by a number of factors over which planning and development legislation can have limited or no impact such as:

- Land ownership
- Land acquisition and speculation
- Economic stability or lack thereof
- National and provincial policy such as the roll out of low income development and resultant spatial patterns.

It would appear that planning and development legislation is not the "silver bullet" for facilitating spatial transformation. Rather it is the interplay between a range of factors which is necessary for having a significant impact on our urban spaces.

LESSON LEARNT

There are a number of factors which impact the spatial transformation of our cities and towns which include inter alia, land markets and national and provincial policies which continue to reinforce apartheid spatial patterns.

A clear conceptualisation of what is meant by transformation and how this should be translated into planning and development legislation must be given careful consideration by the drafters.

A better understanding of what drives transformation is also required. Aligning schemes to IDPs is not sufficient.

[90] IBID

REFERENCES

Harrison and Todes, "The Use of Spatial Frameworks in Regional Development in South Africa" Regional Studies, Vol 35.1 (2001)

Isandla Institute "The Challenges and Dilemmas of Intergovernmental and Intersectoral Coordination" http://www.halogen.org.za/documents/Input_Paper_Challenges_of_IGR.pdf

National Planning Commission, 2012 National Development Plan - 2030

Parnell, Pieterse, Swilling, Wooldridge, "Democractising Local Government: The South African Experiment",UCT Press 2002

South African Cities Network, 2011 "Provincial Land Use Legislative Reform KwaZulu-Natal: Status Report" September 2011

Wendy Ovens and Associates, 2006 "An Assessment of Municipal Development Planning Capacity",prepared for the KZN Provincial Planning Commission

Wendy Ovens and Associates, 2007 Land Management and Democratic Governance in Five South African Major Urban Centres, research conducted for Urban LandMark

ANNEXURE A

DEVELOPMENT FACILITATION ACT 67 OF 1995

3 General principles for land development

(1) The following general principles apply, on the basis set out in section 2, to all land development:

(a) Policy, administrative practice and laws should provide for urban and rural land development and should facilitate the development of formal and informal, existing and new settlements.

(b) Policy, administrative practices and laws should discourage the illegal occupation of land, with due recognition of informal land development processes.

(c) Policy, administrative practice and laws should promote efficient and integrated land development in that they-

(i) promote the integration of the social, economic, institutional and physical aspects of land development;

(ii) promote integrated land development in rural and urban areas in support of each other;

(iii) promote the availability of residential and employment opportunities in close proximity to or integrated with each other;

(iv) optimise the use of existing resources including such resources relating to agriculture, land, minerals, bulk infrastructure, roads, transportation and social facilities;

(v) promote a diverse combination of land uses, also at the level of individual erven or subdivisions of land;

(vi) discourage the phenomenon of 'urban sprawl' in urban areas and contribute to the development of more compact towns and cities;

(vii) contribute to the correction of the historically distorted spatial patterns of settlement in the Republic and to the optimum use of existing infrastructure in excess of current needs; and

(viii) encourage environmentally sustainable land development practices and processes.

(d) Members of communities affected by land development should actively participate in the process of land development.

(e) The skills and capacities of disadvantaged persons involved in land development should be developed.

(f) Policy, administrative practice and laws should encourage and optimise the contributions of all sectors of the economy (government and non-government) to land development so as to maximise the Republic's capacity to undertake land development and to this end, and without derogating from the generality of this principle-

(i) national, provincial and local governments should strive clearly to define and make known the required functions and responsibilities of all sectors of the economy in relation to land development as well as the desired relationship between such sectors; and

(ii) a competent authority in national, provincial or local government responsible for the administration of any law relating to land development shall provide particulars of the identity of legislation administered by it, the posts and names of persons responsible for the administration of such legislation and the addresses and locality of the offices of such persons to any person who requires such information.

(g) Laws, procedures and administrative practice relating to land development should-

(i) be clear and generally available to those likely to be affected thereby;

(ii) in addition to serving as regulatory measures, also provide guidance and information to those affected thereby;

(iii) be calculated to promote trust and acceptance on the part of those likely to be affected thereby; and

(iv) give further content to the fundamental rights set out in the Constitution.

(h) Policy, administrative practice and laws should promote sustainable land development at the required scale in that they should-

(i) promote land development which is within the fiscal, institutional and administrative means of the Republic;

(ii) promote the establishment of viable communities;

(iii) promote sustained protection of the environment;

(iv) meet the basic needs of all citizens in an affordable way; and

(v) ensure the safe utilisation of land by taking into consideration factors such as geological formations and hazardous undermined areas.

(i) Policy, administrative practice and laws should promote speedy land development.

(j) Each proposed land development area should be judged on its own merits and no particular use of land, such as residential, commercial, conservational, industrial, community facility, mining, agricultural or public use, should in advance or in general be regarded as being less important or desirable than any other use of land.

(k) Land development should result in security of tenure, provide for the widest possible range of tenure alternatives, including individual and communal tenure, and in cases where land development takes the form of upgrading an existing settlement, not deprive beneficial occupiers of homes or land or, where it is necessary for land or homes occupied by them to be utilised for other purposes, their interests in such land or homes should be reasonably accommodated in some other manner.

(l) A competent authority at national, provincial and local government level should co-ordinate the interests of the various sectors involved in or affected by land development so as to minimise conflicting demands on scarce resources.

(m) Policy, administrative practice and laws relating to land development should stimulate the effective functioning of a land development market based on open competition between suppliers of goods and services.